No. 109, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF OKLAHOMA and
STATE OF TEXAS,

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

NEW MEXICO'S PETITION FOR REHEARING

THOMAS S. UDALL
Attorney General of New Mexico

MARIAN MATTHEWS
Deputy Attorney General

ERIC RICHARD BIGGS
Counsel of Record

New Mexico Interstate Stream Commission
Post Office Box 25102
Room 101, Bataan Memorial Bldg.
Santa Fe, NM 87504-5102
(505) 827-6150

Of Counsel

RICHARD A. SIMMS
SIMMS & STEIN, P.A.
446 W. San Francisco St.
Santa Fe, NM 87501
(505) 983-3880

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PETITION FOR REHEARING

New Mexico respectfully petitions the Court to rehear Part III of the majority's opinion, determining that the use of the word "originating" in Article IV(a) of the Canadian River Compact, Act of May 17, 1952, 66 Stat. 74, is ambiguous. Clear and undisputed legislative history clarifies the supposed ambiguity which the majority found to exist and used as the basis to reinterpret the plain meaning of Articles IV(a) and IV(b).[1]

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[1] Article IV(a) of the Canadian River Compact reads as follows: "New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam." Article IV(b) reads: "New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage available for impounding these waters which originate . . . below Conchas Dam shall be limited to an aggregate of 200,000 acre-feet."

I

Based on the supposed ambiguity mentioned above, the majority opinion redefines the word "originating" to mean, in effect, "located," thereby giving Texas and Oklahoma the use of all waters originating in the Canadian River basin above Conchas Dam except those New Mexico can store, divert, or use at or above Conchas. The effect is to deny New Mexico a critical share of its apportionment.[2]

The majority finds ambiguity in Article IV(a) of the Compact because:

> . . . a literal reading of the language of Article IV(a) could not have been intended since such a reading would include all of the waters originating in the drainage basin of the Ca-

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[2] Factually, the majority incorrectly states that there is no evidence that the compact negotiators contemplated that Conchas Dam might be enlarged. However, the record demonstrates that the compact negotiators knew that Conchas Dam could be enlarged. Conchas Dam was built in 1937 with specific structural accommodations for the installation of crest gates to increase the capacity of the reservoir by about 100,000 acre feet. The engineering plans for Conchas Dam were well known matters of public record in 1949 and 1950, when the Compact was negotiated. *See* N.M. Ex. No. 61 at 26; N.M. Ex. No. 62 at 26 (drawings of original designs of "Conchas Dam and Crest Gate Sections" in Tucumcari Project reports). The negotiators clearly contemplated that New Mexico could increase the capacity of Conchas Reservoir and would not hesitate to do so in appropriate circumstances. *Id.*; Tr. at 159 (Nov. 1, 1989) (argument on summary judgment motions before Special Master). Despite knowing that Conchas could be enlarged, the negotiators still did not put any restrictions on above-Conchas waters. Moreover, there was no suggestion that enlarging Conchas would be economically infeasible until the 1970s. *See* Agreed Material Fact #B9.

> nadian River above Conchas Dam, including all of the tributaries that arise in Colorado, such as the Vermejo River, and would purport to foreclose any claim that Colorado had in the waters arising in that State. This would be an extremely implausible reading in light of the fact that Colorado was not a party to the Compact.

Slip op. at 9-10.

The legislative history does not support the majority's view. At the time Congress authorized the compact negotiations, it considered S. Rep. No. 1319, 81st Cong., 2d Sess. (1950), which accompanied H. R. 3482, 81st Cong., 2d Sess. (1950), the bill authorizing the negotiations. Insofar as Colorado's interest was concerned, S. Rep. No. 1319 adopted the report of the Secretary of the Interior to the Senate Committee on Interior and Insular Affairs:

> Although the headwaters of the main Canadian and two or three of its minor tributaries originate in mountainous areas just north of the Colorado-New Mexico line, the State of Colorado's interest in the waters involved is so slight that it would probably not care to become a party to the compact. Your committee may wish, however, to consider whether the terms of this bill should be broadened to include Colorado.

S. Rep. No. 1319 at 2. While the Secretary's comments were adopted as part of S. Rep. No. 1319, Congress did not include Colorado in the authorizing legislation.

Despite Colorado's presence on the committee (Senator Milliken), Colorado did not participate in the ensuing negotiations and was not a party to the Compact. Colorado could afford not to participate because, without its presence, nothing done by New Mexico, Texas, or Oklahoma in the Compact could affect Colorado's legal rights.[3]

This was clearly understood. As Senator Lyndon Johnson stated when the bill to authorize negotiations was submitted to the full Senate:

> Mr. President, this bill is noncontroversial. The bill affects only three States—New Mexico, Texas, and Oklahoma—and interested officials of these three States unanimously agree on the desirability of this legislation.

96 Cong. Rec. 5338 (1950).[4]

In fact, the relative water rights between Colorado and New Mexico to waters originating in a Canadian River tributary in Colorado, the Vermejo River, were addressed in subsequent litigation before this Court,

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[3] Congress could not have meant to apportion waters to Colorado when it ratified the Compact. Thus Colorado's *legal* interests were not affected by the Compact when Article IV(a) was described as referring to New Mexico's right to use the waters "originating in that State above Conchas Dam" in S. Rep. No. 1192, 82d Cong., 2d Sess. (1952) (cited in Slip op. at 10).

[4] It is fundamental that the States of Oklahoma, Texas, and New Mexico had no power to usurp the Commerce Clause by going beyond the statutory authority given to the three of them in the congressional consent to the compact negotiations. Act of April 29, 1950, 64 Stat. 93 (in Statutory Appendix hereto); *see Sporhase v. Nebraska*, 458 U.S. 941 (1982).

resulting in two opinions. *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Colorado v. New Mexico*, 467 U. S. 310 (1984). New Mexico did not argue in either of those cases that Colorado's rights were affected by the Compact, because the Compact could not have affected the legal rights of Colorado in those waters.[5] Nor did Colorado complain in that litigation that its rights had been foreclosed by the Compact. Finally, this Court did not base its decisions in those cases on the provisions of the Compact.

II

The issue in this litigation is not whether the literal language of the Compact purported to affect Colorado's rights, because it could not and did not do so. The real issue is whether Article IV(a) has more than one reasonable meaning. This is the key to the case.

The only reasonable meaning of Article IV(a) is the plain and obvious one: *Vis a vis* Texas and Oklahoma, New Mexico was given the free and unrestricted use of all Canadian River waters originating above Conchas Dam, including those waters originating in tri-

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[5] It is not and never has been New Mexico's position that Article II(a) of the Compact defied gravity and physically excluded waters originating in Canadian River tributaries in Colorado. On the contrary, New Mexico's position has been that the *legal* scope of the Compact did not affect Colorado's *legal* rights. New Mexico considered asserting the Compact provisions in the Vermejo River cases and purposely chose not to do so because the legislative history made it clear that Colorado's *legal* rights in the Vermejo River were not affected, much less foreclosed, by Article IV(a). *See Colorado v. New Mexico*, 459 U.S. 176 (1982). Retired Justice Marshall, who joined the majority opinion in this case, wrote the opinion for the Court in the first *Colorado v. New Mexico*.

butaries in Colorado.[6] This is precisely what Article IV(a) says. To the extent that Colorado did not have legal rights to the use of the waters after they flow into New Mexico, the Compact drafters had to determine whether New Mexico or Texas and Oklahoma would be entitled to the use of that water. Article IV(a) gives the use of that water to New Mexico, plainly and unambiguously.

The negotiating history shows that the only reasonable reading of the Compact is the plain meaning of its language. Contrary to the majority opinion, *none* of the early drafts of Article IV included the phrase " 'originating' in New Mexico" in regard to the waters originating above Conchas Dam. Slip op. at 10. The phrase "in New Mexico" did appear in the first four drafts of the Compact to describe the waters to which New Mexico would have rights. *See* N.M. Ex. 30. That phrase was meant to include all waters physically in New Mexico above and below Conchas Dam, including waters flowing from Colorado. In the Compact as it was adopted, the word "originating"was inserted in Article IV(a). This change required the drafters *to remove the phrase "in New Mexico"* so that Article IV(a) did not literally refer to waters *physically originating* in New Mexico. If the drafters had not used

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[6] New Mexico has taken the position in this case that Article IV(a) should include "waters originating in the drainage basin in New Mexico," Slip op. at 9, only with respect to the legal application of the Compact, *viz.*, that it does not reach into Colorado. If the Compact had reflected the position described by the majority with respect to the waters physically flowing from Colorado, the consequence would have been an apportionment of those waters, *i.e.*, the gaged stateline flows, to Colorado. Had this occurred, the Court would not have exercised jurisdiction in *Colorado v. New Mexico*, 459 U.S. 176 (1982).

the phrase "originating . . . above Conchas Dam," the only way the Compact could have worked would have been to gage the tributary flows at the Colorado/New Mexico state line and then subtract that amount from the waters entering Conchas Reservoir, implicitly apportioning those waters to Colorado. The drafters accomplished this by removing the phrase "in New Mexico" and inserting the word "originating" in Article IV(a). This gave New Mexico, rather than Texas and Oklahoma, the right to freely use the waters of the Canadian River originating above Conchas Dam, including inflows from Colorado, while protecting Colorado's legal right to assert its interests in that water.[7]

III

The majority concluded that its decision relative to the question of ambiguity was "not free from doubt." Slip op. at 12. New Mexico believes that the complete legislative and negotiating history set forth above removes any doubt that there is only one plain and clear meaning of Articles IV(a) and IV(b) of the Compact. Consequently, the principle that should control the majority's decision should be the one that has controlled it in the past. In the words of Justice Brennan, "unless [a] compact to which Congress has con-

[7] The treatment of Canadian River water originating above Conchas Dam in Article IV(a) cannot be compared to the treatment of water originating below Conchas Dam in Article IV(b), because no tributaries originating above Conchas Dam—including Colorado tributaries—enter the river below Conchas. *See* Tr. at 9 (Apr. 16, 1991). Thus, "originating . . . in New Mexico" is appropriate for Article IV(b). But because of the interstate tributaries above Conchas Dam, the negotiators had to remove the phrase "in New Mexico" from their description of waters originating above Conchas Dam in the final Compact.

sented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

CONCLUSION

This petition for rehearing should be granted, and the majority opinion should be revised to give Article IV(a) of the Canadian River Compact its ordinary and literal meaning.

July 12, 1991.

Respectfully submitted,

THOMAS S. UDALL
Attorney General of New Mexico

MARIAN MATTHEWS
Deputy Attorney General

ERIC RICHARD BIGGS
Counsel of Record
New Mexico Interstate Stream Commission
Post Office Box 25102
Bataan Memorial Building Room 101
Santa Fe, NM 87504-5102

(505) 827-6150

Of Counsel

RICHARD A. SIMMS
SIMMS & STEIN, P.A.
446 West San Francisco Street
Santa Fe, New Mexico 87501
(505) 983-3880

STATUTORY APPENDIX

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Act of April 29, 1950, Ch. 135, 64 Stat. 93

AN ACT

Granting the consent of the congress to the negotiation of a compact relating to the waters of the Canadian River by the States of Oklahoma, Texas, and New Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress is hereby given to the States of Oklahoma, Texas and New Mexico to negotiate and enter into a compact not later than June 30, 1953, providing for an equitable apportionment among the said States of the waters of the Canadian River and its tributaries, upon the condition that one suitable person, who shall be appointed by the President of the United States, shall participate in said negotiations as the representative of the United States and shall make report to the Congress of the proceedings and of any compact entered into. Said compact shall not be binding or obligatory upon any of the parties thereto unless and until the same shall have been ratified by the legislature of each of the States aforesaid and approved by the Congress of the United States.

Certificate of Counsel

I, Eric Richard Biggs, certify that this petition is presented in good faith and not for delay, and that in my judgment it is well founded.

/s/ Eric Richard Biggs

Eric Richard Biggs
Counsel of Record

July 12, 1991.