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Texas' Interstate Water Compacts.

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TEXAS' INTERSTATE WATER COMPACTS

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I. INTRODUCTION

Texas is a member of five interstate compacts which apportion the waters of rivers and streams that flow through Texas and other states. These five compacts are the Rio Grande Compact;[1] the Pecos River Compact;[2] the Canadian River Compact;[3] the Sabine River Compact;[4] and the Red River Compact.[5]

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1. *See* Act of May 31, 1939, ch. 155, Pub. L. No. 76-96, 53 Stat. 785 (1939) (congressional consent and Rio Grande Compact text); TEX. WATER CODE ANN. § 41.009 (Vernon 1972) (text of Rio Grande Compact).

2. *See* Act of June 9, 1949, ch. 184, Pub. L. No. 81-91, 63 Stat. 159 (1949) (congressional consent and text of Pecos River Compact); TEX. WATER CODE ANN. § 42.010 (Vernon 1972) (text of Pecos River Compact).

3. *See* Act of May 17, 1952, ch. 306, Pub. L. No. 82-345, 66 Stat. 74 (1952) (congressional consent and text of Canadian River Compact); TEX. WATER CODE ANN. § 43.006 (Vernon 1972) (text of Canadian River Compact); *see also* Act of April 29, 1950, ch. 135, Pub. L. No. 81-491, 64 Stat. 93 (1950) (congressional consent for Oklahoma, Texas, and New Mexico to negotiate Canadian River Compact).

4. *See* Act of Aug. 10, 1954, ch. 668, Pub. L. No. 83-578, 68 Stat. 690 (1954) (congressional consent and text of Sabine River Compact); TEX. WATER CODE ANN. § 44.010 (Vernon

Despite a growing awareness in Texas of the importance of limited water resources, few people realize the impact that these compacts have on the surface water supply and use in those areas of the state subject to the compacts.[6] The compacts determine not only the amount of water which may be diverted and used from the subject rivers and their tributaries,[7] but they may also restrict the number, size, and location of storage reservoirs, as well as the purpose and place of use of the waters diverted.[8] In addition, water rights in a state may be suspended or otherwise impaired if necessary for the state to comply with its obligations under a compact.[9]

This article will examine our interstate water compacts, with emphasis on the more significant and unique provisions. The events giving rise to the compacts will be briefly reviewed in order to offer a better understanding of the need for the compacts. The article will also explore some of the controversies which have arisen under the compacts, thus providing some insight into the effectiveness of the compacts, and the willingness of the signatory states to comply with them.

II. BACKGROUND AND AUTHORITY FOR COMPACTS

It has long been recognized that an upstream state may not divert all of the waters of an interstate stream to the detriment of a down-

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1972) (text of Sabine River Compact); *see also* Act of Nov. 1, 1951, ch. 663, Pub. L. No. 82-252, 65 Stat. 736 (1951) (congressional consent to negotiate Sabine River Compact given to Texas and Louisiana).

5. *See* Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305 (1980) (congressional consent and text of Red River Compact); TEX. WATER CODE ANN. § 46.013 (Vernon Supp. 1986) (text of Red River Compact); *see also* Act of Aug. 11, 1955, ch. 784, Pub. L. No. 84-346, 69 Stat. 654 (1955) (congressional consent for Arkansas, Louisiana, Oklahoma, and Texas to negotiate apportionment of Red River).

6. *See* TEX. WATER CODE ANN. §§ 41.009, 42.010, 43.006, 44.010 (Vernon 1972); *see also id.* § 46.013 (Vernon Supp. 1986) (text of five river compacts restricting use and defining obligations to other states).

7. *See* TEX. WATER CODE ANN. §§ 41.009, 42.010, 43.006, 44.010 (Vernon 1972); *see also id.* § 46.013 (Vernon Supp. 1986) (terms in all five compacts limit use and diversion).

8. *See id.* § 41.009, art. I (k), (n) (definition of project storage in Red River Compact) (Vernon 1972); *id.* § 42.010, art. II (e) (defining depletion by man's activities in Pecos River Basin); *id.* § 43.006, art. V (a), (b) (limits on uses and conservation storage under Canadian River Compact); *id.* § 44.010, art. I (f), (g), (h), (i), (j) (defining domestic, stock, and consumptive uses and reservoirs); *id.* § 46.013, art. III (m) (Vernon Supp. 1986) (defining conservation storage capacity in Red River Compact).

9. *See id.* §§ 41.009, 42.010, 43.006, 44.010 (Vernon 1972); *see also id.* § 46.013 (Vernon Supp. 1986) (limiting storage and use of water to meet compact obligations).

stream state, but the waters must be equitably apportioned between the states.[10] Such equitable apportionment may be accomplished by petition to the United States Supreme Court or by adoption of an interstate compact.[11] Furthermore, Congress may allocate interstate waters which have not been apportioned by a compact.[12]

An interstate compact is an agreement signed by representatives of the states involved, and often a federal representative, and ratified by the legislature of each state and Congress.[13] The compact, as the United States Supreme Court has stated, "adapts to our Union of sovereign states the age-old treaty-making power of independent sovereign nations."[14] The compact clause of the United States Constitution provides:

> No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power. . . .[15]

Except for the single limitation that the consent of Congress must be obtained, the original sovereign rights of the states to make compacts with each other were not surrendered under the Constitution.[16]

A compact is similar to a treaty in that it may validly affect private rights within the member states, including water rights existing prior to the compact.[17] A compact is not a treaty, however, but a contract which is binding on the signatory states and their citizens.[18] It is protected by the contract clause of the United States Constitution from

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10. *See* Kansas v. Colorado, 206 U.S. 46, 103-05 (1907) (discussing rights of riparian proprietors).

11. *See* Hinderlider v. La Plata Co., 304 U.S. 92, 104-05 (1938) (Constitution provides adjustment of interstate controversies by compact or judicial remedy when states unable to agree).

12. *See* Arizona v. California, 373 U.S. 546, 579 (1963), *decree entered,* 376 U.S. 340 (1964) (Congress may apportion interstate waters).

13. *See* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 23 (1951) (Constitution guaranteed continuation of power to make compacts subject only to congressional consent); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92-93 (1823) (contract defined as compact which state has no power to impair).

14. Green v. Biddle, 21 U.S. (8 Wheat.) 1, 104 (1823) (adjustment by compact practiced by colonies and states before Constitution adopted).

15. U.S. CONST. art. I, § 10, cl. 3.

16. *See* Poole v. Fleeger, 36 U.S. (11 Pet.) 185, 209 (1837) (boundaries established by compact become conclusive and bind all subjects and citizens).

17. *See* Hinderlider v. La Plata Co., 304 U.S. 92, 104-05 (1938) (apportionment by compact binding upon all citizens and water claimants).

18. *See* Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92 (1823) (terms compact and contract synonymous).

impairment by subsequent state statutes.[19] Consequently, a state may not unilaterally nullify, revoke, or amend a compact, unless the terms of the compact so provide.[20]

An interstate compact will be transformed into federal law where Congress has given its consent to the compact and the subject matter is appropriate for congressional legislation.[21] Under this rule, a compact which apportions the waters of an interstate stream is a law of the United States.[22] Interpretation of such a compact therefore presents a federal question for determination by the federal judiciary rather than by state courts.[23]

As in other disputes between states, the United States Supreme Court has original jurisdiction over lawsuits filed by one state against another for breach of a compact.[24] Typically, the Court will appoint a special master to investigate and hold hearings on the dispute and then file a report with the Court.[25] After hearing any exceptions to the report, the Court may adopt or modify the report or decline to adopt the report.[26]

The judgment of the Supreme Court is entitled to enforcement

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19. U.S. CONST. art. I, § 10, cl. 1.

20. *See* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 28 (1951) (state cannot be own judge in controversy with sister state by unilaterally nullifying agreement between states); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 13 (1823) (Kentucky law diminishing interests violation of compact therefore unconstitutional). This inflexibility is desirable for finality in water apportionment compacts. P. HARDY, INTERSTATE COMPACTS: THE TIES THAT BIND 21 (1982).

21. *See* Couchman v. Nash, ___ U.S. ___, ___, 105 S. Ct. 3401, 3403, ___ L. Ed. 2d ___, ___ (1985) (congressionally sanctioned detainer agreement within compact clause subject to federal construction); Cuyler v. Adams, 449 U.S. 433, 438 (1981) (interstate detainer agreement to transfer provisions sanctioned by Congress presents federal question).

22. *See* Texas v. New Mexico, 462 U.S. 554, 564 (1983) (metamorphosis occurs and compact becomes federal law once Congress consents).

23. *See* Couchman v. Nash, ___ U.S. ___, ___, 105 S. Ct. 3401, 3403, ___ L. Ed.2d ___, ___ (1985) (federal construction of detainer compact among states and territories required by compact clause); Cuyler v. Adams, 449 U.S. 433, 442 (1981) (congressional sanctions detainer agreement presents federal question).

24. U.S. CONST. art. III, § 2, cl. 2. Congress also has the authority to compel compliance with a compact. *See* Virginia v. West Virginia, 246 U.S. 565, 601 (1918).

25. *See* Texas v. New Mexico, 462 U.S. 554, 562 (1983) (Court appointed special master after complaint filed to resolve dispute over Pecos River Compact).

26. *See* Texas v. New Mexico, 446 U.S. 540, 540 (1980) (first report of special master appointed in Pecos River Compact dispute approved in full by Court); *see also* Texas v. New Mexico, 462 U.S. 554, 558 (1983) (Court sustained in part and overruled in part exceptions to special master's report filed by Texas and New Mexico).

against the states.[27] If necessary, injunctions may be issued against state officials charged with administering the compact, followed by contempt proceedings and, ultimately, armed intervention by the executive branch of the federal government.[28] Fortunately, no state has ever persisted in its refusal to obey a Supreme Court decision in an interstate compact suit.[29]

It should be noted that not all interstate agreements or compacts require congressional consent.[30] The Supreme Court has limited the compact clause to "agreements that are directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[31] Interstate compacts as to the apportionment and use of interstate waters are included within the scope of the compact clause.[32]

III. TEXAS' INTERSTATE WATER COMPACTS

A. *Rio Grande Compact*

The Rio Grande Compact[33] is the oldest, and perhaps the most unique, of all Texas' interstate water compacts. The compact, signed in 1938 by Colorado, New Mexico, and Texas, apportions the waters of the Rio Grande and its tributaries down to Fort Quitman, Texas.[34] The Rio Grande River begins in the mountains of southern Colorado, flows southward for more than 400 miles through New Mexico, then forms the boundary between Texas and the Republic of Mexico for

27. *See* Virginia v. West Virginia, 246 U.S. 565, 601 (1918) (power to render and enforce judgment arise from Constitution).

28. *See* V. THURSBY, INTERSTATE COOPERATION—A SURVEY OF THE INTERSTATE COMPACT 79 (1953).

29. *See id.* at 137.

30. *See* New Hampshire v. Maine, 426 U.S. 363, 369 (1976) (congressional consent not required for interstate agreement locating ancient boundary).

31. United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 471 (1978); New Hampshire v. Maine, 426 U.S. 363, 369 (1976); Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

32. *See* Hinderlider v. La Plata Co., 304 U.S. 92, 106 (1938) (apportionment of water from interstate stream by compact binding valid).

33. *See* Act of May 31, 1939, ch. 155, Pub. L. No. 76-96, 53 Stat. 785 (1939) (congressional consent and text of Rio Grande Compact); TEX. WATER CODE ANN. § 41.009 (Vernon 1972) (text of Rio Grande Compact).

34. *See* TEX. WATER CODE ANN. § 41.001 (Vernon 1972) (compact signed March 18, 1938 in Santa Fe, New Mexico); *see also id.* § 41.009 (governs use of Rio Grande above Fort Quitman, Texas).

about 1,250 miles to the Gulf of Mexico.[35] The compact does not address any part of the Rio Grande River below Fort Quitman, which is located about 80 miles below El Paso, Texas.[36]

The Rio Grande Compact is administered by the Rio Grande Compact Commission.[37] The commission is composed of a commissioner from each state and a non-voting federal commissioner appointed by the President.[38] The Governor of Texas appoints the Texas commissioner, while the state engineers of New Mexico and Colorado serve as the commissioners for those states.[39] Commission action requires unanimous consent of the three state commissioners, and each state is given "veto power" on any matter.[40]

The compact allocates water on an "inflow/outflow" basis.[41] This means that Colorado is required to annually deliver to the New Mexico state line an amount of water which varies with the flows past certain stream gauges in the Rio Grande Basin in Colorado.[42] Similarly, the amount of water which New Mexico is required to deliver to Texas depends upon gauged flows in the Rio Grande River in north central New Mexico.[43] Colorado is prohibited from accruing a debit, or underdelivery to the downstream states, of more than 100,000 acre-feet, while New Mexico's accrued debit to Texas is limited to 200,000 acre-feet.[44] These limits may be exceeded if caused by holdover storage in certain reservoirs, but water must be retained in the reservoirs to the extent of the accrued debit.[45]

Significantly, New Mexico's obligation is not to deliver water to the Texas state line, but to Elephant Butte Reservoir, located near Truth or Consequences, New Mexico, about 100 miles north of El Paso and

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35. *See* Taylor, *Water for Texas,* 30 TEX. B.J. 343, 344 (1967) (description of Rio Grande system); *see also* II THE HANDBOOK OF TEXAS 474-75 (W. Webb. ed. 1952) (geographical description of Rio Grande); Appendix I (map of area covered by Rio Grande Compact).

36. *See* TEX. WATER CODE ANN. § 41.009 (Vernon 1972) (only use of water above Fort Quitman affected by compact).

37. *See id.* § 41.009, art. XII.

38. *See id.* § 41.009, art. XII.

39. *See id.* § 41.009, art. XII.

40. *See id.* § 41.009, art. XII.

41. *See id.* § 41.009, art. III; *see also* Texas v. New Mexico, 462 U.S. 554, 558 (1983) (describing inflow-outflow compilation of Pecos River).

42. *See* TEX. WATER CODE ANN. § 41.009, art. II (stream gauging station); *id.* § 41.009, art. III (obligation of Colorado to deliver at Colorado-New Mexico state line).

43. *See id.* § 41.009, art. IV (obligation of New Mexico to deliver at San Marcial).

44. *See id.* § 41.009, art. VI.

45. *See id.* § 41.009, art. VI.

the Texas state line.[46] Elephant Butte Reservoir, named after a large hill resembling a kneeling elephant which rises out of the waters of the lake, was constructed from 1911 to 1916 by the United States Bureau of Reclamation as part of the Rio Grande Reclamation Project of 1905.[47] Elephant Butte Reservoir provides water for the irrigation of 155,000 acres of project land below the reservoir.[48] Since 57% of this land is in New Mexico and only 43% in Texas, the Rio Grande Compact Commissioner for Texas is in the unusual position of representing the interests of many New Mexico farmers, as well as Texas farmers, in compact matters.[49]

A principal reason for the construction of Elephant Butte Reservoir was to ensure an annual supply of water to the Republic of Mexico.[50] Under the Treaty of 1906,[51] the United States is obligated to deliver 60,000 acre-feet of Rio Grande water each year to a diversion canal above the city of Juarez, Mexico, which is across the river from El Paso. The treaty provides that this amount may be reduced in case of "extraordinary drought or serious accident to the irrigation system in the United States," but only in the same proportion as water delivered to United States irrigators.[52]

The Treaty of 1906 grew out of years of protest by Mexico over diminishing flows in the Rio Grande.[53] These protests were heightened when United States Attorney General Judson Harmon ruled in 1895 that each nation had complete sovereignty over any portion of

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46. *See id.* § 41.009, art. IV; *see also* Taylor, *Water for Texas,* 30 TEX. B.J. 343, 344 (1967) (describing Elephant Butte Reservoir).

47. *See* Act of Feb. 25, 1905, ch. 798, Pub. L. No. 58-104, 33 Stat. 814 (1905) (authorizing construction of dam on Rio Grande for irrigation).

48. *See* Taylor, *Water for Texas,* 30 TEX. B.J. 343, 344 (1967) (describing area served by reservoir).

49. *See* TEX. WATER CODE ANN. § 41.009, art. IV (Vernon 1972) (New Mexico obligation to deliver water at San Marcial); *see also* Taylor, *Water for Texas,* 30 TEX. B.J. 343, 382 (1967) (New Mexico's obligation to deliver at San Marcial defined in compact).

50. *See* Taylor, *Water for Texas,* 30 TEX. B.J. 343, 344 (1967) (in 1890 farmers in Mesilla, El Paso, and people in Juarez, Mexico, complained of water shortages caused by diversion in Colorado and New Mexico); *see also* II THE HANDBOOK OF TEXAS 476 (W. Webb. ed. 1952) (Elephant Butte Reservoir to protect El Paso-Juarez Valley).

51. *See* Convention-Mexico, May 21, 1906, United States-Mexico, art. I, 34 Stat. 2953 (1906) (60,000 acre-feet to be delivered annually to Old Mexican Canal above Juarez).

52. *See id.* art. II (schedule alloting acre-feet per month and reduction during drought).

53. *See* Taylor, *Water for Texas,* 30 TEX. B.J. 343, 344 (1967) (1890 Mexico filed complaint alleging water shortages in Juarez caused by diversion of Rio Grande); *see also* II THE HANDBOOK OF TEXAS 476 (W. Webb. ed. 1952) (construction of Elephant Butte Reservoir outcome of 1906 treaty with Mexico).

international rivers flowing through that nation and was not obligated to share that portion with any other county.[54] Although the treaty expressly rejects any claims by Mexico to the waters of the Rio Grande, it has been concluded that the "Harmon Doctrine" was not embodied in the treaty since the waters were apportioned.[55]

Despite the construction of Elephant Butte Reservoir, increased demands on the Rio Grande in the 1920s prompted the states to try to allocate the river.[56] In 1929, a compact was implemented which had as its purpose the maintenance of the status quo while requiring the appointment of a commissioner from each state to negotiate an equitable apportionment of the Rio Grande.[57] Many of the provisions of this 1929 compact were incorporated in the Rio Grande Compact of 1938.[58]

In 1935, during the negotiations leading up to the 1938 compact, Texas filed suit for violation of the Rio Grande Compact of 1929.[59] Texas sued the State of New Mexico and the Middle Rio Grande Conservancy District claiming that excessive diversions upstream of Elephant Butte Reservoir had impaired the water supply in the reservoir and increased the salt content of the waters.[60] A special master appointed by the United States Supreme Court held hearings and made inspections of the irrigation and drainage systems involved.[61] In 1937, as compact negotiations were nearing completion, the court granted a request of the parties to postpone the proceeding.[62] The

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54. *See* 21 Op. Atty. Gen. 279 (1895).

55. *See* Waite, *International Law Affecting Water Rights in the Western States,* 4 LAND & WATER L. REV. 86, 89 (1969) (apportionment of water inconsistent with complete control over portion within boundaries).

56. *See* Taylor, *Water for Texas,* 30 TEX. B.J. 343, 344 (1967) (Colorado and New Mexico considered allocating waters of Upper Rio Grande in 1923).

57. *See* Act of June 17, 1930, ch. 506, Pub. L. No. 71-370, 46 Stat. 767 (1930) (congressional consent to Rio Grande Compact signed February 12, 1929 at Santa Fe).

58. *See* Act of May 31, 1939, ch. 155, Pub. L. No. 76-96, 53 Stat. 785 (1939) (incorporating definitions, gauging provisions, and commission of 1929 Compact).

59. *See* Texas v. New Mexico, 296 U.S. 547, 547 (1935) (motion for leave to file bill of complaint granted).

60. *See* Hill, *Development of the Rio Grande Compact of 1938,* 14 NAT. RESOURCES J. 163, 168 (1974) (water stored in El Vado Reservoir in 1935 when deficiency existed at Elephant Butte precipitated suit).

61. *See* Texas v. New Mexico, 298 U.S. 644, 644 (1935) (Charles Warren appointed special master); *see also* Hill, Development of the Rio Grande Compact of 1938, 13 NAT. RESOURCES J. 163, 168 (1974) (1936 program measuring streamflow, diversion, waste, discharge and quality conducted).

62. *See* Texas v. New Mexico, 302 U.S. 658, 659 (1937) (continuance granted to complete

signing of the Rio Grande Compact of 1938 ended the controversy and the suit was dismissed.[63]

The 1935 lawsuit had a positive impact on negotiation of the 1938 compact because it prompted President Franklin D. Roosevelt to "embargo" any additional water projects on the Rio Grande until a compact was concluded.[64] The embargo resulted in the Rio Grande Joint Investigation, a joint study of the Rio Grande Basin by the National Resources Committee and several federal agencies, in cooperation with the Rio Grande Compact Commission.[65] The report from this investigation provided the foundation for the final negotiation of the 1938 compact.[66]

The positions of the states in concluding the compact were clear.[67] Colorado wanted more federally sponsored storage reservoirs which could not be constructed because of the presidential "embargo."[68] New Mexico wanted to deliver Texas' share to Elephant Butte Reservoir so that New Mexico irrigators in the Rio Grande Project would benefit.[69] Texas agreed with New Mexico's position so long as Texas would be guaranteed an annual release of 800,000 acre-feet of water from the reservoir.[70] With the exception of the guaranteed annual release from the Elephant Butte Reservoir being set at 790,000 acre-feet per year instead of the 800,000 acre-feet Texas requested, the 1938 compact incorporated provisions reflecting the positions the

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investigations begun in 1936 study); *see also* Hill, *Development of the Rio Grande Compact of 1938,* 14 NAT. RESOURCES J. 163, 168 (1974) (action suspended to complete investigation).

63. *See* Texas v. New Mexico, 308 U.S. 510, 510 (1939) (special master's report confirmed); *see also* Act of May 31, 1939, ch. 155, Pub. L. No. 76-96, 53 Stat. 785 (1939) (congressional consent to Rio Grande Compact signed March 18, 1938).

64. *See* Hill, *Development of the Rio Grande Compact of 1938,* 14 NAT. RESOURCES J. 163, 168-69 (1974) (copy of executive memorandum by Roosevelt ordering federal agencies not to approve applications for projects involving Rio Grande).

65. *See id.* at 169-71 (Natural Resources Committee proposed conference with commissioners of each state).

66. *See id.* at 169 (copy of resolution adopted by Rio Grande Compact Commission).

67. *See id.* at 171 (statements made by commission during Santa Fe meeting on September 27, 1937).

68. *See id.* at 171-72 (written statement submitted by Colorado commissioner defining state's position).

69. *See id.* at 172-73 (Elephant Butte proposed as dividing line between Texas and New Mexico).

70. *See id.* at 173-74 (Texas to forego benefits of new works provided annual release from Elephant Butte set at 800,000 acre-feet).

states had taken during negotiations.[71]

The states began operating under the compact on January 1, 1940.[72] In 1952, Texas filed suit against New Mexico alleging that New Mexico had accrued a debit of 331,800 acre-feet as of the end of 1951.[73] A special master was appointed to conduct hearings in the case. In 1957, the Supreme Court dismissed the suit because of the absence of the United States as an indispensable party.[74] At the time of the dismissal, New Mexico's accrued debit had reached 529,400 acre-feet of water.[75]

After the drought of the 1950s ended, New Mexico's accrued debit began to diminish. However, Colorado's uses increased dramatically, resulting in a debit of almost 940,000 acre-feet by the end of 1965.[76] In 1966, Texas and New Mexico filed an original action against Colorado for violation of the compact.[77] Colorado answered that the United States was an indispensable party to the suit.[78] The United States Solicitor General, Thurgood Marshall, also took the position that the United States was an indispensable party.[79] In 1968, the states moved the Court for a continuance of the lawsuit pursuant to an agreement by Colorado to meet its annual delivery obligations.[80] The Supreme Court granted the motion.[81]

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71. *See* Act of May 31, 1939, ch. 155, Pub. L. No. 76-96, 53 Stat. 785, 790 (1939) (Rio Grande Compact of 1938, article VIII, setting release at 790,000 acre-feet).

72. *See* Reynolds & Mutz, *Water Deliveries Under the Rio Grande Compact,* 14 NAT. RESOURCES J. 201, 202 (1974) (1940 first full year after effective date requiring first accounting).

73. *See* Texas v. New Mexico, 343 U.S. 932, 932 (1952) (motion for leave to file complaint granted).

74. *See* Texas v. New Mexico, 352 U.S. 991, 991 (1957) (motion to amend complaint denied; motion to dismiss granted since United States indispensable party).

75. *See* Reynolds & Mutz, *Water Deliveries Under the Rio Grande Compact,* 14 NAT. RESOURCES J. 201, 202 (1974) (New Mexico had assumed risk in compact that channel conditions below Otowi gauge would not deteriorate).

76. *See* Taylor, *Water for Texas,* 30 TEX. B.J. 343, 384 (1967) (while deliveries by New Mexico improved, Colorado's deliveries progressively decreased).

77. *See* Texas & New Mexico v. Colorado, 389 U.S. 1000, 1000 (1967) (motion for leave to file complaint granted).

78. *See* Answer of State of Colorado filed February 9, 1968, in Texas & New Mexico v. Colorado, 389 U.S. 1000, 1000 (1967) (motion for leave to file complaint granted).

79. *See* Memorandum for the United States filed April 13, 1967, in Texas & New Mexico v. Colorado, 389 U.S. 1000, 1000 (1967) (motion for leave to file complaint granted).

80. *See* Taylor, *Water for Texas,* 30 TEX. B.J. 343, 384 (1967) (Colorado shut head gates and delivered 14,200 acre-feet in excess of formula after suit filed).

81. *See* Texas & New Mexico v. Colorado, 391 U.S. 901 (1968) (motion of United States to intervene granted; joint motion for continuance granted).

After 1968, Colorado steadily, if slowly, decreased its accrued debit to a little over 600,000 acre-feet by the end of 1984.[82] In June of 1985, an extraordinary event occurred which totally eliminated the debit.[83] The previous winter had produced unusually heavy snow accumulations in the mountains of northern New Mexico. Elephant Butte Reservoir, which was nearly full due to several relatively wet years, was unable to contain the large runoff from the spring and summer snow melt. As a result, water spilled from the reservoir for only the second time in its sixty-nine year history. Under the terms of the Rio Grande Compact, this spill eliminated all accrued debits of Colorado and New Mexico[84] and on December 9, 1985, the Supreme Court dismissed the 1966 lawsuit at the request of the states.[85]

The elimination of the accrued debit has had an enormous impact on Colorado irrigators in the Rio Grande Basin who are now able to use their storage facilities for their own diversions rather than retain water in their reservoirs for the benefit of New Mexico and Texas.[86] New Mexico also benefited from the elimination of its accrued debit of about 115,000 acre-feet. Texas, while losing its claims against Colorado and New Mexico for more than 700,000 acre-feet, now has a full reservoir which will provide several years of water supply for the farmers in the Rio Grande Project.

Despite its age and litigious history, the Rio Grande Compact has worked fairly well.[87] For the past twenty years, Colorado generally has been meeting its annual delivery obligations. While New Mexico has been less compliant in this regard, it has not again amassed the

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82. The Rio Grande Compact Commissioners were not in agreement as to the exact amount of debit accrued by Colorado and New Mexico. *See* Transcript of Proceedings, 46th Annual Meeting, March 28, 1985 (copy available through the Attorney General's Office in Austin, Texas).

83. *See* TEX. WATER CODE ANN. § 41.009, art. VI (Vernon 1972) (provision cancelling accrued debits of Colorado or New Mexico should spill occur); *see also* Reynolds & Mutz, *Water Deliveries Under the Rio Grande Compact,* 14 NAT. RESOURCES J. 201, 204 (1974) (describing effects of abundant snowpack and high run off on delivery obligation).

84. *See* Act of May 31, 1939, ch. 155, Pub. L. No. 76-96, 53 Stat. 785, 788 (1939) (Rio Grande Compact of 1938, article VI provides actual spill of usable water cancels debits); TEX. WATER CODE ANN. § 41.009, art. VI (Vernon 1972) (text of Rio Grande Compact).

85. *See* Texas & New Mexico v. Colorado, ___ U.S. ___, ___, 106 S. Ct. 563, 563, ___ L. Ed. 2d ___, ___ (1985).

86. *See* Tex. Water Code Ann. § 41.009, art. VI (Vernon 1972) (Colorado must retain water in storage to extent of accured debit).

87. *See* Address by Jesse B. Gilmer, 29th Annual New Mexico Water Conference, Las Cruces, New Mexico (April 26-27, 1984).

deficits that it did in the 1950s.[88] Texas is understandably concerned that the upper states will view the elimination of their deficits as a license to accrue new debits and must therefore be prepared to move swiftly into the courthouse if future violations occur.

B. *The Pecos River Compact*

The Pecos River Compact of 1948[89] provides Texas and New Mexico with an equitable apportionment of the Pecos River and its tributarites. The Pecos River rises in north central New Mexico and flows southward into Texas where it joins the Rio Grande River in the backwaters of Amistad Reservoir.[90] The Pecos was once a major river which provided a formidable obstacle for settlers and cattle drivers heading west.[91] Today, however, the construction of dams across the river and extensive groundwater pumping in the basin near Roswell, New Mexico, have reduced the Pecos River to one percent of its flow of only 50 years ago.[92] It is now just a small creek along most of its length, drying up completely for weeks at a time in certain reaches.[93] In addition, the quality of the water reaching Texas is impaired by salts, a problem greatly aggravated by the reduced flows.[94]

Like the Rio Grande Compact, the Pecos River Compact was born out of controversy and antagonism. Texas had long desired a reservoir on the Pecos River at the state line to regulate water for develop-

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88. *See* Reynolds & Mutz, *Water Deliveries Under the Rio Grande Compact,* 14 NAT. RESOURCES J. 201, 205 (1974) (for thirty-three years Colorado and New Mexico in debit status); *see also id.* at 200 (graphic chart of accrued credits and debits under Rio Grande Compact).

89. *See* Act of June 9, 1949, ch. 184, Pub. L. No. 81-91, 63 Stat. 159 (1949) (congressional consent and text of Pecos River Compact); TEX. WATER CODE ANN. § 42.010 (Vernon 1972) (text of Pecos River Compact).

90. *See* Texas v. New Mexico, 462 U.S. 554, 557 n.1 (1983) (description of Pecos River); *see also* II THE HANDBOOK OF TEXAS 355 (W. Webb ed. 1952) (describing the 800 mile course of Pecos River); Appendix II (map of area covered by Pecos River Compact).

91. *See* II THE HANDBOOK OF TEXAS 355 (W. Webb 1952) (upper Pecos Valley chief cattle trail to north).

92. *See* Dallas Times Herald, Oct. 16, 1983, at 1 (copy available through the Attorney General's Office in Austin, Texas).

93. *See* Texas v. New Mexico, 462 U.S. 554, 557 n.2 (1983) (most of annual flow from flash floods).

94. *See id.* at 557 n.2. In the eighteenth century, the river was called Rio Salado, Salty River. *See* M. WELSH, A MISSION IN THE DESERT; THE ALBUQUERQUE DISTRICT, 1935-1985, at 173 (1985).

ment in Texas.[95] Encouraged by the successful negotiation of the Colorado River Compact in 1922, the legislatures of Texas and New Mexico created a commission in 1923 to negotiate a compact for the Pecos River.[96] A compact was signed in 1925 and ratified by the legislatures of both states.[97] The governor of New Mexico, however, believed that Texas got the better deal and vetoed the New Mexico ratification.[98] In response to the New Mexico veto, Texas passed an act authorizing the filing of a lawsuit against New Mexico over the waters of the Pecos.[99] This suit was never filed, however, and Red Bluff Reservoir was eventually constructed in 1936 as a Works Progress Administration project.[100]

A similar controversy arose in connection with the construction of Alamogordo Reservoir, currently known as the Lake Summer Reservoir, on the upper reach of the Pecos River in New Mexico. The reservoir, which was to be built by the United States Bureau of Reclamation, was strongly opposed by Texas.[101] In 1935, an agreement was signed by representatives of the two states in which Texas agreed to withdraw its opposition to Alamogordo Reservoir and New Mexico agreed to ensure that operation of the reservoir would not reduce flows to Texas.[102] The Texas Legislature ratified the agreement in 1937 and the reservoir was constructed, but New Mexico never ratified the agreement.[103]

In 1941, Texas again passed an act authorizing the Texas Attorney General to file suit against New Mexico in order to protect Texas'

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95. *See* II THE HANDBOOK OF TEXAS 355 (W. Webb ed. 1952) (deep gorge below Sheffield barrier to irrigation and transportation).

96. *See* S. Doc. 109, 81st. Cong., 1st Sess. 5 (1949); *see also* Texas v. New Mexico, 462 U.S. 554, 557 (1983) (twenty years of false starts before 1945 negotiations between Texas and New Mexico).

97. *See* Texas v. New Mexico, 462 U.S. 554, 557 n.3 (1983) (1925 compact approved by both legislatures).

98. *See* S. Doc. 109, 81st Cong., 1st Sess. 4-5 (1949). The New Mexico governor believed that prior appropriations in Texas would jeopardize future development along the Pecos in New Mexico. *See id.* at 4-5; *see also* M. WELSH, A MISSION IN THE DESERT; THE ALBUQUERQUE DISTRICT, 1935-1985, at 175 (1985).

99. *See* Act of May 31, 1931, ch. 188, 1931 Tex. Gen. Laws 317 (Attorney General authorized to protect Texas interest in Pecos River).

100. *See* S. Doc. 109, 81st Cong., 1st Sess. 5 (1949).

101. *See* Texas v. New Mexico, 462 U.S. 554, 557 n.3 (1983) (Texas congressional delegation opposed federal funds for construction of Alamogordo Dam).

102. *See id.* at 557 n.3 (agreement signed by Secretary of Interior, senators from Texas and New Mexico and ratified by Texas Legislature).

103. *See* S. Doc. 109, 81st Cong., 1st Sess. 5 (1949).

interest in the waters of the Pecos River and to compel compliance with the 1935 agreement.[104] The act also provided for the appointment of a commissioner for the purpose of negotiating a compact with New Mexico.[105] No suit was ever filed under this act and in 1943 the Pecos River Compact Commission met to negotiate a compact.[106]

As in the Rio Grande Basin, the catalyst for the successful negotiation of the compact came from a cooperative study under the leadership of the Natural Resources Committee.[107] In this study, the Pecos River Joint Investigation of 1942 concluded that "[f]or its size, the basin of the Pecos River probably represents a greater aggregation of problems associated with land and water use than any other irrigated basin in the western United States."[108]

In 1947, the commission instructed its Engineering Advisory Committee to study the Pecos River Basin and the report of the Pecos River Joint Investigation.[109] The committee's report, known as the "1947 Study," included a description of the actual conditions in the basin as of the beginning of 1947.[110] The committee also produced an inflow/outflow manual to determine the amounts of water Texas should receive in the future under the 1947 condition.[111] On the basis of these documents, the compact was signed in December, 1948 and ratified by the legislatures of both states and by Congress in 1949.[112]

Under the compact, Texas is to receive each year a share of the flows in the Pecos River in the same proportion as it received in 1947. Specifically the compact states:

New Mexico shall not deplete by man's activities the flow of the Pecos

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104. *See id.* at 5.

105. Act of July 23, 1941, ch. 632, § 1, 1941 Tex. Gen. Laws 1395, 1397 (Attorney General authorized to investigate and institute legal proceeding to protect interest of Texas in Pecos River).

106. *See* M. WELSH, A MISSION IN THE DESERT; THE ALBUQUERQUE DISTRICT, 1935-1985, at 175 (1985).

107. *See* S. Doc. 109, 81st Cong., 1st Sess. 6 (1949).

108. *See* M. WELSH, A MISSION IN THE DESERT; THE ALBURQUERQUE DISTRICT, 1935-1985, at 174 (1985).

109. *See* Texas v. New Mexico, 462 U.S. 554, 558-59 (1983) (1947 study compiled inflow and outflow for 41 years).

110. *See id.* at 558.

111. *See id.* at 558-59 (prediction based on 1947 consumption in New Mexico at particular levels of precipitation).

112. *See* Act of June 9, 1949, ch. 184, Pub. L. No. 81-91, 63 Stat. 159 (1949) (consent and text of Pecos River Compact); *see also* Texas v. New Mexico, 462 U.S. 554, 559 (1983) (1947 study and charts basis of congressional consent to compact).

> River at the New Mexico — Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition. Art. III(a). The term 'deplete by man's activities' means to diminish the stream flow of the Pecos River at any given point as a result of beneficial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this compact it does not include the diminution of such flow by encroachment of salt cedars or other like growth, or by deterioration of the channel of the stream. Art. II(e). The term '1947 condition' means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. . . . Art. II(g).[113]

The compact is administered by the Pecos River Commission.[114] Each state has one representative appointed by the governor of the state.[115] The federal representative, who is appointed by the President, presides over commission meetings but cannot vote.[116] All commission action, therefore, requires the agreement of both states which has proven a great obstacle to effective administration of the compact.[117]

Within a year after the compact became effective, the Pecos River Commission found that it was unable to determine annual stream flows and delivery obligations under article III(a).[118] In 1960, the commission's engineering advisory committee presented a "Review of

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113. *See* Act of June 9, 1949, ch. 184, Pub. L. No. 81-91, 63 Stat. 159, 160 (1949) (1947 condition defined by report of engineering committee); TEX. WATER CODE ANN. § 42.010, art. II (f) (Vernon 1972) (defining report of engineering committee used to determine 1947 condition).

114. *See* TEX. WATER CODE ANN. § 42.010, art. V (Vernon 1972) (establishes commission, salaries, powers, and duties).

115. *See id.* § 42.010, art. V (a) (one commissioner appointed according to laws of each state).

116. *See id.* § 42.010, art. V (a) (commissioner appointed by President presiding officer without vote).

117. *See* Texas v. New Mexico, 462 U.S. 554, 565 (1983) (judicial decree cannot alter compact despite impasse of Pecos River Commission); Texas v. New Mexico, 421 U.S. 927 (1975); Breitenstein, *Report of the Special Master* 24-26 (1982) (special master recommended United States commissioner vote as tie-breaker) (copy available through the Attorney General's Office in Austin, Texas).

118. *See* Texas v. New Mexico, 462 U.S. 554, 560 (1983) (soon after Pecos Compact in effect apparent that inflow-outflow tables did not describe actual state of river); *see also id.* at 554-55 (appendix to opinion of inflow-outflow plate and tables); Breitenstein, *Report of the Special Master* 42 (1979) (copy available through the Attorney General's Office in Austin, Texas).

Basic Data" which revised the 1947 Study.[119] Based on this new study, the commission found a cumulative shortfall to Texas of 53,000 acre-feet during the period 1950-1961, but did not determine whether this was due to "man's activities" in New Mexico.[120] This amount was substantially less than the shortfall calculated under the 1947 inflow/outflow manual.[121]

In 1970, the Texas commissioner rejected the Review of Basic Data as "incomplete and replete with errors."[122] Four years later, Texas filed suit in the United States Supreme Court alleging a cumulative departure, or shortfall, of over 1.2 million acre-feet.[123] The special master appointed by the Court made his first report in 1979, which defined the 1947 condition as "that situation in the Pecos River Basin which produced in New Mexico the man-made depletions resulting from the stage of development existing at the beginning of the year 1947"[124] and recommended that a new inflow/outflow manual be developed. The Supreme Court approved the report in full.[125]

In 1982, the special master filed another report which was considered by the Supreme Court in 1983.[126] The Court rejected his recommendation that the federal representative to the commission be allowed to cast tie-breaking votes since this would "alter fundamentally the structure of the commission."[127] The Court also rejected a contention by New Mexico that the Court could only review official actions of the commission.[128] This would be untenable, the Court ruled, since New Mexico could prevent commission action to enforce

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119. *See* Texas v. New Mexico, 462 U.S. 554, 560-61 (1983) (review of data retracing 1947 Study using different assumptions and procedures authorized in 1957).

120. *See id.* at 561 n.8 (1983) (new study showed cumulative shortfall of 53,000 acre-feet).

121. *See id.* at 561 n.8.

122. *See id.* at 562.

123. *See* Texas v. New Mexico, 421 U.S. 927, 927 (1975) (motion for leave to file complaint granted).

124. *See* Texas v. New Mexico, 462 U.S. 554, 563 (1983); *see also* Texas v. New Mexico, 446 U.S. 540, 540 (1980) (Court approval of special master's first report).

125. *See* Texas v. New Mexico, 446 U.S. 540, 541 (1980) (Texas' exceptions to special master's October 15, 1979 report overruled and report approved).

126. *See* Texas v. New Mexico, 462 U.S. 554, 563 (1983) (special master considered evidence on corrections to 1947 Study for two years prior 1982 report).

127. *See id.* at 565 (Court not free to rewrite compact).

128. *See id.* at 570 (New Mexico contended Court may only review decisions based on votes of each state's commissioner); *see also* TEX. WATER CODE ANN. § 42.010, art. V (f) (Vernon 1972) (findings made by commission not conclusive in any court but prima facie evidence).

its compact obligations.[129]

The Court also rejected a proposal by Texas to use a "double mass analysis," a relatively simple method of determining shortfalls.[130] The double mass analysis would merely measure cumulative inflows at one point, Alamogordo Dam, against the cumulative flows at the state line.[131] While recognizing that simplification was desirable and that the question was "close," the Court ruled that the compact contemplated the use of more inflow information than a single point on the river.[132]

After admonishing the states to try to reach a settlement, the Court returned the case to the special master.[133] In 1984, the special master issued another report which resolved several minor issues and which was approved in full by the Court.[134]

With the resolution of the preliminary questions, it has finally been possible to address the fundamental issues in the suit: the amount of the shortfall to Texas and the extent to which this shortfall was due to man's activities in New Mexico.[135] A major breakthrough occurred in July of 1985, when Texas and New Mexico, with the strong encouragement of the special master, entered into a stipulation on several disputed technical issues as to the calculation of the accumulated

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129. *See* Texas v. New Mexico, 462 U.S. 554, 568-69 (1983) (New Mexico could veto commission action and as upstream state deny water to Texas); *see also* TEX. WATER CODE ANN. § 42.010, art. XIV (Vernon 1972) (Texas withdrawal from compact requires approval of New Mexico Legislature).

130. *See* Texas v. New Mexico, 462 U.S. 554, 571 (1983) (special master recommended Texas' motion be denied and Texas exception to recommendation overruled).

131. *See id.* at 573 (proposal reduced index of inflow to one point measuring flow past to provide benchmark for compact obligations of New Mexico).

132. *See id.* at 574 (compact framers intended using as much information as possible to determine inflow); *see also* TEX. WATER CODE ANN. § 42.010, art. III (c) (Vernon 1972) (inflow-outflow described in Report of Engineering Committee adopted until commission adopts more feasible method).

133. *See* Texas v. New Mexico, 462 U.S. 554, 575-76 (1983) (expense and time to obtain judicial resolution not justified). Upon submittal of this report, Jean S. Breintenstein resigned as special master and Charles J. Mayers was appointed to replace him. *See* Texas v. New Mexico, 465 U.S. 1063, 1063 (1984).

134. *See* Texas v. New Mexico, ___ U.S. ___, ___, 104 S. Ct. 3505, 3505, ___ L. Ed. 2d ___, ___ (1984) (motion of New Mexico to remand to special master overruled and report approved).

135. *See* Texas v. New Mexico, 462 U.S. 554, 574-76 (1983) (extent of shortfall and extent due to man's activities remaining issues).

shortfall.[136] Trial on the remaining issues was completed on December 4, 1985.[137] After the case is briefed and argued, the special master will submit the final report to the Supreme Court. There will likely be exceptions to the special master's report. If so, the matter will have to be ultimately resolved by the Supreme Court, perhaps before the end of 1986.

C. *The Canadian River Compact*

The Canadian River Compact of 1950[138] was signed by representatives of New Mexico, Texas, and Oklahoma on December 6, 1950, and became effective in 1952. The compact equitably apportions the waters of the Canadian River Basin to each of the signatory states.[139]

The Canadian River has its source in the Cimarron Mountains west of Raton, New Mexico, and flows in an easterly direction through the Texas Panhandle above Amarillo, then into Oklahoma where it joins the Arkansas River a few miles below Muskogee.[140] The principal tributary to the Canadian River is the North Canadian River, which begins in New Mexico just west of the Oklahoma Panhandle, then flows through the Oklahoma Panhandle to its confluence with the Canadian River in central Oklahoma.[141] Although only a few miles of the North Canadian River dip down into the Texas Panhandle, several tributaries of the river originate in Texas, including Palo Duro and Wolf Creeks.[142]

The compact is unique in that it allocates the waters in the basin by limiting the amount of conservation storage in New Mexico and

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136. *See* Special Master's Order of July 8, 1985, adopting stipulation in Texas v. New Mexico, 421 U.S. 927, 927 (1975) (motion for leave to file complaint granted).

137. *See* Transcript of Proceeding of December 4, 1985, before special master in Texas v. New Mexico, 421 U.S. 927, 927 (1975) (motion for leave to file complaint granted).

138. *See* Act of May 17, 1952, ch. 306, Pub. L. No. 82-345, 66 Stat. 74 (1952) (congressional consent and text of Canadian River Compact); TEX. WATER CODE ANN. § 43.006 (Vernon 1972); *see also* Act of April 29, 1950, ch. 135, Pub. L. No. 81-491, 64 Stat. 93 (1950) (consent of Congress for Oklahoma, Texas, and New Mexico to negotiate Canadian River Compact); TEX. WATER CODE ANN. § 43.001 (Vernon 1972) (ratification dates).

139. *See* TEX. WATER CODE ANN. § 43.006, art. I (Vernon 1972) (purposes of compact).

140. *See* I THE HANDBOOK OF TEXAS 288 (W. Webb ed. 1952) (describing course of Canadian River); Appendix III (map of area included in Canadian River Compact).

141. *See* TEX. WATER CODE ANN. § 43.006, art. II (b) (Vernon 1972) (defining North Canadian River); *see also* II THE HANDBOOK OF TEXAS 285 (W. Webb ed. 1952) (description of North Canadian River); Appendix III (map of area included in Canadian River Compact).

142. *See* II THE HANDBOOK OF TEXAS 328, 927 (W. Webb ed. 1952) (describing Palo Duro and Wolf Creeks); Appendix III (map of area covered by Canadian River Compact).

Texas.[143] The compact defines conservation storage as:

> [T]hat portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.[144]

New Mexico is given all of the waters in the basin above Conchas Dam, which forms a large, pre-compact reservoir on the upper Canadian River about 100 miles above the Texas state line.[145] In the drainage basin of the Canadian River below Conchas Dam, New Mexico is limited to 200,000 acre-feet of conservation storage.[146] New Mexico's right to store water in the basin of the North Canadian River is limited to waters unappropriated under the laws of New Mexico or Oklahoma.[147]

Texas is currently limited to 500,000 acre-feet of water in conservation storage in the Canadian River Basin, exclusive of the North Canadian River Basin.[148] However, the limitation on Texas changes when and if Oklahoma constructs more than 300,000 acre-feet of conservation storage in the Canadian River Basin, exclusive of the North Canadian River Basin, west of the 97th meridian, which runs north and south through the center of Oklahoma.[149] Upon this occurrence, Texas' share is changed to 200,000 acre-feet of water in conservation storage plus the amount of water in conservation storage in Oklahoma's reservoirs.[150] Any water stored by Texas in excess of its allotment must be released upon demand by Oklahoma.[151] Otherwise, Texas must retain the excess water in storage until the storage is reduced to the allowed limit.[152]

Texas is not limited in the amount of water that it may store in the

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143. This type of allocation is considered the easiest to administer. *See* Chapman, *Where East Meets West in Water Law: The Formulation of an Interstate Compact to Address to Diverse Problems of the Red River Basin,* 38 OKLA. L. REV. 1, 90 n.565 (1985).

144. TEX. WATER CODE ANN. § 43.006, art. II (d) (Vernon 1972).

145. *See id.* § 43.006, art. IV (a).

146. *See id.* § 43.006, art. IV (b).

147. *See id.* § 43.006, art. IV (c).

148. *See id.* § 43.006, art. V (b).

149. *See id.* § 43.006, art. V (b).

150. *See id.* § 43.006, art. V (b).

151. *See id.* § 43.006, art. V (c).

152. *See id.* § 43.006, art. V (c).

North Canadian River Basin.[153] The use of such stored water, however, is limited to a municipal, domestic, livestock, and "the irrigation of lands which are cultivated solely for the purpose of providing food and feed for the householders and domestic livestock actually living or kept on the property."[154] The compact authorizes the Canadian River Commission to allow Texas and New Mexico to impound more water than the specified amounts for up to one year so long as no state will be deprived of water needed for beneficial use.[155]

The Canadian River Commission administers the compact.[156] It is composed of a commissioner from each of the states, designated under the laws of each state.[157] The governors of Texas and Oklahoma appoint their respective commissioners while New Mexico is represented by its state engineer.[158] If a federal commissioner is appointed by the President, he presides over meetings but does not vote.[159] A unanimous vote of the three state commissioners is required for commission action.[160] The commission has the usual powers and duties associated with such compacts.[161]

The Canadian River Compact was negotiated with "unprecedented speed."[162] Strong interstate interest in an equitable apportionment compact surfaced in the late 1940s.[163] Congress gave its consent to negotiate a compact on April 18, 1950.[164] The compact was signed on December 6, 1950, and ratified by the states early the following year.

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153. *See id.* § 43.006, art. V (b).

154. *See id.* § 43.006, art. V (a).

155. *See id.* § 43.006, art. VII.

156. *See id.* § 43.006, art. IX (a).

157. *See id.* § 43.006, art. IX (a).

158. *See id.* § 43.003 (governor appoints Texas commissioner).

159. *See id.* § 43.003.

160. *See id.* § 43.003, art. IX (a) (all members constitute quorum and unanimous vote required for action).

161. *See id.* § 43.003, art. IX (c) (commission may employ personnel, enter contracts, perform necessary functions, and must operate gauging stations, annual report to respective governors and make information available to governors).

162. *See* Amarillo Daily News Oct. 19, 1950, at 1 (copy available through the Attorney General's Office in Austin, Texas).

163. Earlier agreements among the states had focused primarily on flood control as well as water allocation. In 1926, representatives of New Mexico, Texas, Oklahoma, and Arkansas signed a compact for control "Canadian River Unit in the Interstate control of the Arkansas River System," but it was not ratified by all of the state legislatures. *See* W. Hutchins, THE TEXAS LAW OF WATER RIGHTS 501 (1961).

164. *See* Act of April 29, 1950, ch. 135, Pub. L. No. 81-491, 64 Stat 49 (1953) (permission to negotiate and enter compact no later than June 23, 1953).

Congressional approval of the compact was secured in 1952.[165]

Texas wanted a compact to obtain a proposed reservoir, Lake Meredith, on the Canadian River to serve Amarillo, Borger, and other Panhandle communities.[166] New Mexico wanted the compact to protect its existing water rights against prior appropriations in Texas[167] and to avoid downstream objections to Ute Reservoir, which was to be constructed in 1963 at the confluence of the Canadian River and Ute Creek near Tucumcari, New Mexico.[168] Oklahoma was interested in securing its water supply for its existing and future developments in the basin.[169]

During the negotiations in 1950, New Mexico Senator Dennis Chavez blocked congressional authorization and funding for Lake Meredith until a compact was concluded.[170] This prompted threats in the Texas Panhandle of retaliation against New Mexico water projects.[171] New Mexico water officials, fearing such retaliation, were critical of the senator's position.[172] In any event, compact negotiations were hastily concluded and Lake Meredith was subsequently authorized and constructed. The haste in negotiating and drafting the compact may have been responsible for several interpretation problems which subsequently arose. However, other Texas compacts that required many years to negotiate have also had significant interpretation problems.[173]

The first Canadian River Compact interpretation problem arose over article V(b) which restricts the amount of conservation storage in

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165. *See* Act of May 17, 1952, ch. 306, Pub. L. No. 82-345, 66 Stat. 74 (1952).

166. *See* Letter from Rex B. Baxter to E. V. Spence (October 22, 1947) (copy available through the Attorney General's Office in Austin, Texas).

167. *See* Alamagordo Daily News, June 10, 1983 (quoting Steve E. Reynolds) (copy available through the Attorney General's Office in Austin, Texas).

168. *See id.*

169. *See* Memorandum from Charles Stevens to Texas Board of Water Engineers (July 10, 1950) (copy available through the Attorney General's Office in Austin, Texas).

170. *See* Amarillo Daily News September 29, 1950 (copy available through the Attorney General's Office in Austin, Texas).

171. *See* Amarillo Daily News, October 19, 1950 (copy available through the Attorney General's Office in Austin, Texas).

172. *See id.*

173. *See* Texas v. New Mexico, 462 U.S. 554, 562-66 (1983) (controversy over meaning of 1947 condition in Pecos River Compact); Texas & New Mexico v. Colorado, 389 U.S. 1000, 1000 (1967) (motion to file complaint in Rio Grande Compact dispute); Texas v. New Mexico, 343 U.S. 932, 932 (1952) (motion to file complaint to resolve Rio Grande Compact). *See generally* Taylor, *Water for Texas* 30 TEX. B.J. 343, 382-84 (1967) (discussing litigation involving Rio Grande Compact).

Texas.[174] In 1953, a question arose as to whether the 300,000 acre feet of storage capacity in Oklahoma included reservoirs in the basin west of the 97th meridian which drained into the Canadian River east of that line.[175] The question remained unanswered for twenty-eight years since the commissioners could not agree. The issue was finally resolved in 1981 when the commission entered a resolution interpreting the compact so as to exclude the reservoirs from the 300,000 acre-feet calculation.[176]

The 1981 resolution was a compromise which addressed another problem with article V(b).[177] The issue was whether Texas could be restricted to less than 500,000 acre-feet in conservation storage, if Oklahoma had 300,000 acre-feet of conservation storage capacity but less than 300,000 acre-feet of water in such storage capacity.[178] The 1981 commission resolution excluding Oklahoma's reservoirs was made contingent upon the execution of a bilateral agreement between Texas and Oklahoma interpreting the compact to recognize a minimum of 500,000 acre-feet in conservation storage to Texas under all circumstances.[179] This agreement was subsequently executed.

The most recent interpretation dispute regarding the compact is still unresolved. This dispute concerns the proper treatment of uses of water which are not expressly mentioned under the compact's definition of conservation storage; in this case, recreation use.[180] New Mexico contends that the compact restricts reservoir capacity only for water stored for subsequent release and beneficial use.[181] Texas and Oklahoma believe storage capacity for any beneficial use is to be changed as conservation in storage unless specifically exempted by the

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174. *See* TEX. WATER CODE ANN. § 43.006, art. V (b) (Vernon 1972) (Texas limited to 500,000 acre-feet exclusive of North Canadian River waters).

175. *See* Letter from H. E. Robbins to Commissioners (May 6, 1953) (copy available through the Attorney General's Office in Austin, Texas).

176. *See* Minutes of 23rd Annual Meeting of Canadian River Commission (Oct. 8, 1981) (copy available through the Attorney General's Office in Austin, Texas).

177. *See* TEX. WATER CODE ANN. § 43.006, art. V (b) (Vernon 1972) (until more than 300,000 acre-feet of storage provided in Oklahoma, Texas restricted to 500,000 acre-feet).

178. *See id.* § 43.006, art. V (b).

179. *See* Minutes of 23rd Annual Meeting of Canadian River Commission (Oct. 8, 1981) (copy available through the Attorney General's Office in Austin, Texas).

180. *See* TEX. WATER CODE ANN. § 43.006, art. II (d) (Vernon 1972) (conservation storage definition includes domestic, municipal, irrigation, and industrial uses).

181. *See* Transcript of 26th Annual Meeting of Canadian River Commission 61-62 (March 6, 1984) (copy available through the Attorney General's Office in Austin, Texas).

compact or the commission.[182]

It is hoped that the commission will be able to resolve this latest conflict as it has resolved the previous ones. If not, the Canadian River Compact may become the third Texas interstate water compact requiring judicial construction.

D. *The Sabine River Compact*

The Sabine River Compact of 1953[183] apportions the Sabine River and its tributaries from the headwaters to Sabine Lake to Texas and Louisiana. The river begins east of Dallas, Texas, and flows southeasterly to the Louisiana state line, then south between the states to Sabine Lake and the Gulf of Mexico.[184]

The compact required less than one year to negotiate after Congress granted its consent in 1951.[185] The first meeting of the Sabine River Compact Commission was on February 5, 1952, and the compact was signed on January 26, 1953.[186] It was approved by the Texas Legislature in April of that year and by the Louisiana Legislature in July of 1954. Congress quickly ratified the compact on August 10, 1954.[187]

The impetus for the compact arose from competiting claims to the river by local water users in both states.[188] These claims included a dispute over the political boundary between the states.[189] The controversy peaked in 1949 when a former Louisiana governor claimed that Louisiana owned the Sabine River along its entire length between the

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182. *See* Minutes of 27th Annual Meeting of Canadian River Commission 4-5 (April 2, 1985) (copy available through the Attorney General's Office in Austin, Texas).

183. *See* Act of Aug. 10, 1954, ch. 668, Pub. L. No. 83-578, 68 Stat. 690 (1954) (congressional consent and text of Sabine River Compact); TEX. WATER CODE ANN. § 44.010 (Vernon 1972) (text of Sabine River Compact); *see also* Act of Nov. 1, 1951, ch. 663, Pub. L. No. 82-252, 65 Stat. 736 (1951) (congressional consent to negotiate compact given to Texas and Louisiana).

184. *See* II THE HANDBOOK OF TEXAS 525 (W. Webb ed. 1952) (description of 360 mile course of Sabine River); Appendix IV (map of area included in Sabine river compact).

185. *See* Act of Nov. 1, 1951, ch. 663, Pub. L. No. 82-252, 65 Stat. 736 (1951) (congressional consent to negotiate).

186. *See* TEX. WATER CODE ANN. § 44.001 (Vernon 1972) (compact signed at Logansport, Louisiana, on January 26, 1953).

187. *See* Act of Aug. 10, 1954, ch. 668, Pub. L. No. 83-578, 68 Stat. 690 (1954).

188. *See* Dallas Morning News December 1, 1949 (copy available through the Attorney General's Office in Austin, Texas).

189. *See* Memorandum from Robert B. Tyler, Jr. to Texas Board of Water Engineers (Dec. 6, 1949) (copy available through the Attorney General's Office in Austin, Texas).

states.[190] The local water users finally agreed on the need for a compact to apportion the waters.[191] The compact, however, expressly disclaims any determination as to the political boundary between the states.[192]

The principal purpose of the compact is to assure minimum flows in the "state line reach," which is the Sabine River from the "state line" to Sabine Lake.[193] The state line is defined as the point on the Sabine River where its waters in downstream flow first touch both states.[194] This is the eastern boundary between Panola and Shelby Counties, Texas, and is now at the tailwaters of Toledo Bend Reservoir.[195]

Exempt from the compact is the use of water for "domestic" or "stock water" purposes.[196] Domestic use includes the usual household uses as well as the irrigation of up to one acre of land with water diverted by the user.[197] Stock water use means any use for livestock and poultry.[198] Reservoirs of 50 acre-feet or less for either or both of these purposes are also exempt.[199]

Above the state line, water rights and reservoirs existing prior to January 1, 1953 are exempt.[200] Additional water uses may not be authorized after that date if they would reduce the flow of the river at

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190. *See* Dallas Morning News, December 1, 1949 (copy available through the Attorney General's Office in Austin, Texas).

191. *See id.*

192. *See* TEX. WATER CODE ANN. § 44.010, art. XI (Vernon 1972). This article was included at the insistence of the Louisiana Attorney General. *See* Letter from Bryon R. Tinsley to David Irons (Sept. 22, 1952) (copy available through the Attorney General's Office in Austin, Texas).

193. *See* TEX. WATER CODE ANN. § 44.010, art. I (d) (Vernon 1972).

194. *See id.* § 44.010, art. I (a).

195. *See* II THE HANDBOOK OF TEXAS 525 (W. Webb ed. 1952) (Sabine River boundary between Texas and Louisiana beginning at thirty-second parallel in southeastern corner of Panola County).

196. *See* TEX. WATER CODE ANN. § 44.010, art. V (j) (Vernon 1972); *see also id.* § 44.010, art. I (i) (defininig domestic and stock water reservoir).

197. *See id.* § 44.010, art. I (f). In Texas, domestic use normally includes unlimited irrigation for non-commercial purposes. *See* Rules of the Texas Water Commission, 31 TEXAS ADMIN. CODE § 297.1 (1986).

198. *See* TEX. WATER CODE ANN. § 44.010, art. I (g) (Vernon 1972).

199. *See id.* § 44.010, arts. I (i), V (j). Texas law currently recognizes a permit exemption for domestic and livestock reservoirs of up to 200 acre-free capacity. *See id.* § 11.142 (Vernon Supp. 1986).

200. *See id.* § 44.010, art. VI (b) (1) (Vernon 1972).

the state line to less than 36 cubic feet per second (cfs).[201] Reservoirs which were constructed after that date are also liable to maintain the 36 cfs, up to a maxium release which depends on the size of the drainage area of the reservoir.[202]

In the state line reach, the states share equally all "free water" which is all water not stored in reservoirs or released from reservoirs for specific uses.[203] All tributary reservoirs constructed in a state after January 1, 1953, reduce that state's share by the amount of any reduction in flow due to the operation of the reservoir and increase that state's share by any increase in flow due to operation of the reservoir.[204] In the state line reach, construction of a dam requires agreement of both states, who will jointly share the stored waters.[205] Toledo Bend Reservoir is the only such state line reach reservoir.[206] It was constructed in the 1960s by the Sabine River Authorities of Texas and Louisiana and impounds about 4½ million acre-feet of water.[207]

The Sabine River Compact Administration is the agency charged with administering the compact.[208] There are two members from each state and one non-voting member representing the United States.[209] Each state member has one vote and three votes are required for any action.[210] Mandatory arbitration is provided for tie votes.[211] The Governor of Texas appoints two members for six year terms.[212] The Louisiana Governor appoints one member who must be

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201. *See id.* § 44.010, art. V (b) (2).

202. *See id.* § 44.010, art. VI (b) (3).

203. *See id.* § 44.010, arts. I (j), (k) (definitions of stored water and free water).

204. *See id.* § 44.010, art. V (d).

205. *See id.* § 44.010, arts. V (g), (h) (mutual consent for dam construction); *see also id.* § 44.010, arts. VI (a), (b) (joint construction of works on state line reach and division of revenues).

206. *See* II THE HANDBOOK OF TEXAS 1017 (E. Branda ed. 1976) (reservoir located fourteen miles northeast of Burkeville, Texas, and extends into Newton, Sabine, Shelby, and Panola Counties); Appendix IV (map of area covered by Sabine River Compact).

207. *See* II THE HANDBOOK OF TEXAS 1017 (E. Branda ed. 1976) (reservoir has 4,661,000 acre-feet capacity and 186,500 acre surface area).

208. *See* TEX. WATER CODE ANN. § 44.010, art. VII (a) (Vernon 1972).

209. *See id.* § 44.010, art. VII (b) (United States member shall not be domicillary of either state).

210. *See id.* § 44.010, art. VII (e).

211. *See id.* § 44.010, art. VII (j) (arbitration condition precedent to right of legal action).

212. The compact originally provided for two year terms for the Texas members but was amended in 1962 to provide for six year terms. *See* Act of March 16, 1962, Pub. L. No. 87-418, 76 Stat. 34 (1962) (congressional consent to amend article VII (c) of compact changing

a resident of the Sabine River Basin.[213] The other Louisiana member is the Director of the Louisiana Department of Public Works.[214]

The compact gives the administration the usual powers and duties plus a few unique ones.[215] It must approve all diversion points and changes to diversion points in the basin below the state line, after approval by the appropriate state agency, which in Texas is the Texas Water Commission.[216] The administration may also require diverters in the basin below the state line to install measuring devices.[217] Violations of the compact may be determined and reported to the head of the appropriate water agency or the governor of the state in which the violation occurred.[218] The water rights agencies in each state are charged with enforcing the administration's orders.[219]

When the compact was being negotiated, some public health officials sought to have the compact address water pollution problems in the basin.[220] The compact drafters, however, maneuvered to avoid addressing water quality by including a paragraph in the compact preamble which expressly limited the compact to equitable apportionment and not pollution abatement and salt water intrusion problems.[221] In 1977, the compact was amended to delete this paragraph and the administration has since been considering pollution problems.[222]

Texas' members terms to six years); TEX. WATER CODE ANN. § 44.010, art. VII (c) (Vernon 1972) (six-year appointed term for Texas members).

213. *See* Act of August 10, 1954, ch. 668, Pub. L. No. 83-578, 68 Stat. 690 (1954); TEX. WATER CODE ANN. § 44.010, art. VII (c) (Vernon 1972).

214. *See* Act of August 10, 1954, ch. 668, Pub. L. No. 83-578, 68 Stat. 690 (1954); TEX. WATER CODE ANN. § 44.010, art. VII (c) (Vernon 1972).

215. *See* TEX. WATER CODE ANN. § 44.010, art. VII (g) (1)-(9) (Vernon 1972) (power to compile data, designate official gauging stations, make findings of deliveries and storage, approve points of diversion, require users to install gauges, investigate violations of compact, and acquire real property).

216. *See id.* § 44.010, art. VII (g) (5) (once approved point of diversion not changed without joint approval).

217. *See id.* § 44.010, art. VII (g) (6) (measuring devices installed and maintained at user's expense).

218. *See id.* § 44.010, art. VII (g) (7).

219. *See id.* § 44.010, art. VII (h).

220. *See* Letter from George W. Cox to Maurice A. Roe (May 7, 1952) (copy available through the Attorney General's Office in Austin, Texas).

221. *See* TEX. WATER CODE ANN. § 44.010 (Vernon 1972) (concerns of pollution and salt water recognized but not undertaken by compact), *amended by* Act of June 12, 1973, ch. 374, § 1, 1973 Tex. Gen. Laws 824 (deleting section 44.010 paragraph preceding art. I).

222. *See* Act of July 23, 1977, Pub. L. No. 95-71, 91 Stat. 281 (1977) (consent to strike last paragraph of preamble to Sabine River Compact).

Because of the relative abundance of water in the Sabine River Basin, the compact has functioned with little controversy.[223] In order to prepare for future shortages, the administration has recently adopted rules for determining and rectifying violations of the compact.[224] Should the need arise, therefore, the administration may avoid the enforcement problems that have plagued other Texas interstate water compacts.

E. *The Red River Compact*

The last Texas interstate river compact to be concluded was the Red River Compact,[225] which was signed on May 12, 1978 after twenty-two years of formal negotiations. The compact, which went into effect on December 22, 1980, equitably apportions the waters of the Red River and its tributaries in Texas, Oklahoma, Arkansas, and Louisiana.[226]

The Red River Basin begins in New Mexico, which declined to participate in the compact since only five percent of the watershed is within her borders.[227] The basin extends across the Texas Panhandle below Amarillo and the Canadian River Basin along far north Texas and southern Oklahoma into southern Arkansas and northern Louisiana.[228] The basin also includes the Sulphur and Cypress River Basins in northeastern Texas.[229] The Red River forms the boundary between Oklahoma and Texas, transverses the southwest corner of Arkansas into the northwest corner of Louisiana, and then flows in a southwest-

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223. *See* Cook, *The First Twenty-Five Years of the Sabine River Compact Administration,* 11 (May, 1977) (unpublished manuscript) (copy available through the Attorney General's Office in Austin, Texas).

224. See minutes of 65th meeting of Sabine Compact Administration 4 (June 14, 1985) (copy available through the Attorney General's Office in Austin, Texas).

225. *See* Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305 (1980) (congressional consent and text of Red River Compact); TEX. WATER CODE ANN. § 46.013 (Vernon Supp. 1986) (text of Red River Compact); *see also* Act of Aug. 11, 1955, ch. 784, Pub. L. No. 84-346, 69 Stat. 654 (1955) (congressional consent to negotiate Red River Compact).

226. *See* TEX. WATER CODE ANN. § 46.013, art. I, sec. 1.01 (b) (Vernon Supp. 1986) (purpose to provide equitable apportionment).

227. *See* Red River Compact with Supplemental Interpretive Comments of Legal Advisory Committee, at 2 (Sept. 1979).

228. *See* II THE HANDBOOK OF TEXAS 449-51 (W. Webb ed. 1952) (describing 1,360 mile Red River and four main branches); Appendix V (map of area covered by Red River Compact).

229. *See* II THE HANDBOOK OF TEXAS 686 (W. Webb ed. 1952) (Sulphur River description).

erly direction across central Louisiana to join the Atchafalaya and Old Rivers below Alexandria, Louisiana, near the Louisiana-Mississippi state line.[230]

The Red River is the sixth longest river in the United States and flows from the semi-arid plains of Texas and western Oklahoma to the humid regions of central Louisiana.[231] For this reason, the compact divides the basin into five reaches, as follows:

> Reach I — the Red River and tributaries from the New Mexico-Texas state boundary to Denison Dam;
> Reach II — the Red River from Denison Dam to the point where it crosses the Arkansas-Louisiana state boundary and all tributaries which contribute to the flow of the river within this reach;
> Reach III — the tributaries west of the Red River which cross the Texas-Louisiana state boundary, the Arkansas-Louisiana state boundary, and those which cross both the Texas-Arkansas state boundary and the Arkansas-Louisiana state boundary;
> Reach IV — the tributaries east of the Red River in Arkansas which cross the Arkansas-Louisiana state boundary;
> Reach V — that portion of the Red River and tributaries in Louisiana not included in Reach III and Reach IV.[232]

Topographical subbasins are further identified for all reaches except Reach V.[233]

Interstate tributaries are apportioned by the compact on a percentage of flow method, with the upstream states generally receiving 60% and the lower states receiving 40% of the available flows.[234] Tributaries located entirely within one state are generally allocated to that state. Use of water for domestic or livestock purposes, including impoundments of up to 200 acre-feet, is exempt from the compact.[235]

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230. *See id.* at 449-51 (description of 1,360 mile river course through Oklahoma, Texas, Arkansas, and Louisiana); Appendix V (map of area by Red River Compact).

231. *See* Chapman, *Where East Meets in Water Law: The Formulation of an Interstate Compact to Address the Diverse Problems of the Red River Basin,* 38 OKLA. L. REV. 1, 2-3, 5 (1985).

232. TEX. WATER CODE ANN. § 46.013, art. II, sec. 2.12 (Vernon Supp. 1986).

233. *See id.* § 46.013, arts. IV, V, VI, VII (apportionment of water in Reach I, II, III, IV).

234. *See, e.g., id.* § 46.013, art. IV, sec. 4.01 (b) (Reach I interstate streams in Texas apportioned 60% to Texas and 40% to Oklahoma); *id.* § 46.013, art. VI, sec. 6.01 (b) (Reach III, subbasin 1 interstate streams in Arkansas and Texas apportioned 60% to Texas and 40% to Arkansas); *id.* § 46.013, art. VI, section 6.02 (b) (Reach II, Subbasin 2 interstate streams apportioned 60% to Arkansas and 40% to Louisiana).

235. *See id.* § 46.013, art. II, sec. 2.08.

Texas is included in Reaches I, II, and III. Reach I is divided into four subbasins.[236] Subbasin I consists of the tributaries in the Texas Panhandle which flow to Oklahoma before joining the main stem of the Red River on the Texas-Oklahoma state line.[237] The compact gives 60% of these waters to Texas, 40% to Oklahoma.[238] Oklahoma receives all of the waters in subbasin 2, which consists of the tributaries wholly in Oklahoma.[239] Similarly, Texas is allocated subbasin III, consisting of the tributaries entirely in Texas.[240] Subbasin IV is the main stem of the Red River to Denison Dam.[241] Each state is given 200,000 acre feet of storage in Lake Texoma and 50% of the remaining flow.[242]

Although the basin in Oklahoma contributes much more than 50% of the flow in subbasin IV, Oklahoma agreed to an equal division since it expected to increase development and thereby reduce flows in that subbasin.[243] Moreover, the division was a part of a compromise with Texas regarding allocation of waters in subbasin I since Texas is prohibited from issuing permits for dams on the North Fork Red River and its tributaries for any purpose other than domestic, municipal or industrial use.[244] This restriction lasts until the year 2000, or until sufficient water is imported into western Oklahoma to meet its municipal and irrigation needs.[245]

Reach II was the most complex reach to negotiate since it involved all four states and was extensively developed with reservoirs. In Texas, Reach II consists of the Red River and its tributaries from Denison Dam to the Arkansas state line and includes the Sulphur River basin.[246] Oklahoma is apportioned subbasin I, which is the

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236. *See id.* § 46.013, arts. IV, V, VI (apportionment of water in Reaches I, II, III).

237. *See id.* § 46.013, art. IV, sec. 4.01 (a) (includes Texas portion of Buck Creek, Sand Creek, Salt Fork Red River, Elm Creek, North Fork Red River, Sweetwater Creek, Washita River and all tributaries).

238. *See id.* § 46.013, art. IV, sec. 4.01 (b).

239. *See id.* § 46.013, art. IV, sec. 4.02.

240. *See id.* § 46.013, art. IV, sec. 4.03 (a) (includes tributaries of Red River from Denison Dam to Praire Dog Town Fork Red River).

241. *See id.* § 46.013, art. IV, sec. 4.04 (a).

242. *See id.* § 46,013, art. IV, sec. 4.04 (b).

243. *See id.* § 46.013, art. IV, sec. 4.04 (b).

244. *See id.* § 46.013, art. IV, sec. 4.05 (b).

245. *See id.* § 46.013, art. IV, sec. 4.04 (b).

246. *See* Red River Compact with Supplemental Interpretive Comments of Legal Advisory Committee, at 2 (Sept. 1979) (copy available through the Attorney General's Office in Austin, Texas).

Oklahoma tributaries to the Red River down to the last major dam on each tributary.[247] Subbasin II, consisting of the Texas tributaries down to the last major dams, was apportioned to Texas.[248] Subbasin III is the interstate tributaries of Oklahoma and Arkansas, which are apportioned to the state in which they are located, except that the portion of the tributaries below the last major dams in Oklahoma are apportioned 60% to Oklahoma and 40% to Arkansas.[249] Texas has all the waters in subbasin IV, which is the Sulphur River Basin in Texas.[250]

Subbasin V of Reach II is the most complicated subbasin. It consists of the tributaries from Denison Dam to the Arkansas-Louisiana state line, excluding the other subbasins.[251] The obligations of the upstream states are keyed to the flow of the river at the Arkansas-Louisiana boundary. When the flow is above 3,000 cfs, use is unrestricted, with each state entitled to 25% of the flows above 3,000 cfs.[252] Between 1,000 cfs and 3,000 cfs, Texas, Oklahoma, and Arkansas must pass 40% of the flows in the subbasin.[253] Below 1,000 cfs, all flows in the basin must be passed by the upstream states.[254] Arkansas is also protected in subbasin V. When the flow at the Oklahoma-Arkansas state line is less than 526 cfs, Texas and Oklahoma are obligated to pass 40% of the flows to Arkansas, if Arkansas so requests and if Arkansas has ceased all diversions from the Red River.[255]

It is clear that the minimum flow obligations of the upstream states in subbasin V could result in severe curtailment of water use in those states during dry periods. However, low flows at the Arkansas-Louisiana state line have been very rare.[256] Moreover, the states are not required to make releases from storage or to pass water from other

247. *See* TEX. WATER CODE ANN. § 46.013, art. V, sec. 5.01 (Vernon Supp. 1986).

248. *See id.* § 46.013, art. V, sec. 5.02.

249. *See id.* § 46.013, art. V, sec. 5.03.

250. *See id.* § 46.013, art. V, sec. 5.04.

251. *See id.* § 46.013, art. V, sec. 5.05 (a).

252. *See id.* § 46.013, art. V, sec. 5.05 (b) (1).

253. *See id.* § 46.013, art. V, sec. 5.05 (b) (2).

254. *See id.* § 46.013, art. V, sec. 5.05 (b) (3).

255. *See id.* § 46.013, art. V, sec. 5.05 (c).

256. Historic records show flows under 3000 cfs only 4.2% of the time and flows of 1000 cfs or less only 0.2% of the time. *See* Red River Compact with Supplemental Interpretive Comments of Legal Advisory Committee, at 2 (Sept. 1979) (copy availabe through the Attorney General's Office in Austin, Texas).

subbasins.[257] In addition, on-channel reservoirs of 1,000 acre-feet or less, in existence or authorized on the date of the compact, are exempt from these requirements.[258]

Reach III concerns Texas, Arkansas, and Louisiana. Reach III consists of the tributaries west of the Red River that cross the Texas-Arkansas state boundary (subbasin I), the Arkansas-Louisiana state boundary (subbasin II), or the Texas-Louisiana state boundary (subbasin III). Subbasin I is the northeast corner of the Cypress River Basin in Texas, and is apportioned 60% to Texas and 40% to Arkansas.[259] Subbasin II is the southwest corner of Arkansas and is apportioned 60% to Arkansas and 40% to Louisiana.[260] Subbasin III includes all of the Cypress River Basin in Texas, except for the small portion in subbasin I, as well as the Louisiana portion of this basin.[261] With certain restrictions, Texas is given all of the water in the Cypress River Basin in Texas except for Caddo lake.[262] Since Caddo Lake is located on the Texas-Louisiana state line, each state is given 50% of the conservation storage in the Lake, including any future enlargements.[263] Texas is prohibited from reducing the run-off into Caddo Lake by diversions, other than for domestic or livestock use, beyond those caused by existing or authorized reservoirs or existing water rights.[264] The interstate streams in the subbasin III which are not tributaries of Caddo Lake or of Cross Lake in Louisiana are divided 60% to Texas and 40% to Louisiana.[265] Subbasin IV gives the intrastate waters in Louisiana in Reach III to Louisiana.[266]

Reach IV allocates the interstate tributaries east of the Red River 60% to Arkansas and 40% to Louisiana.[267] Reach V allocates the Red River and its tributaries which are wholly in Louisiana to that state.[268]

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257. *See* TEX. WATER CODE ANN. § 46.013, art. V, sec. 5.05 (Vernon Supp. 1986).

258. *See id.* § 46.013, art. V, sec. 5.06.

259. *See id.* § 46.013, art. VI, sec. 6.01.

260. *See id.* § 46.013, art. VI, sec. 6.02.

261. *See id.* § 46.013, art. VI, sec. 6.03.

262. *See id.* § 46.013, art. VI, sec. 6.03 (b).

263. *See id.* § 46.013, art. VI, sec. 6.03 (b) (2). A separate compact for Caddo Lake was ratified by both states but failed to secure congressional approval. *See id.* § 47.001.

264. *See id.* § 46.013, art. VI, sec. 6.03 (b) (1) (4).

265. *See id.* § 46.013, art. VI, sec. 6.03 (c).

266. *See id.* § 46.013, art. VI, sec. 6.04.

267. *See id.* § 46.013, art. VII.

268. *See id.* § 46.013, art. VIII.

Unlike other Texas interstate water compacts, annual accountings are not made under the Red River Compact.[269] Such an accounting would require extensive gauging and recordkeeping and would pose a significant financial burden on the signatory states.[270] For this reason, the compact provides that an accounting for apportionment purposes need not made until one of the states demands it.[271]

The compact is administered by the Red River Compact Commission.[272] The commission is composed of two representatives from each signatory state and one non-voting federal representative appointed by the President.[273] In Texas, the governor appoints one representative while the executive director of the Texas Water Commission serves as the other.[274] Each state representative to the compact has one vote, although one state representative can vote for an absent representative from that state.[275] Eight votes are necessary for any commission action that affects existing water rights, while only six votes are required for all other commission action.[276]

The compact also gives the commission limited authority over water pollution in the basin.[277] The states agreed to work together and with the federal government to alleviate natural salt pollution which is a significant problem in the basin.[278] The commission can also institute suit under the Federal Water Pollution Control Act against a polluter after 60 days notice to the governor of the state in which the source of the pollution is located.[279]

Two important provisions were placed in the compact to avoid problems experienced in lawsuits involving the interpretation and application of other compacts. The federal district courts are given concurrent jurisdiction with the United States Supreme Court over suits

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269. *See id.* § 46.013, art. XI, sec. 2.11

270. *See* Red River Compact with Supplemental Interpretive Comments of Legal Advisory Committee, at 2 (Sept. 1979) (copy available through the Attorney General's Office in Austin, Texas).

271. *See* TEX. WATER CODE ANN. § 46.031, art. XI, sec. 2.11 (Vernon Supp. 1986).

272. *See id.* § 46.031, art. IX.

273. *See id.* § 46.031, art. IX, sec. 9.01.

274. *See id.* §§ 46.003, 46.008 (Vernon Supp. 1986).

275. *See id.* § 46.013, art. IX, sec. 9.03.

276. *See id.* § 46.013, art. IX, sec. 9.03.

277. *See id.* § 46.013, art. XI, sec. 11.02.

278. *See id.* § 46.013, art. XI, sec. 11.02; *see also* Red River Compact with Supplemental Interpretive Comments of Legal Advisory Committee, at 2 (Sept. 1979) (copy available through the Attorney General's Office in Austin, Texas).

279. *See* TEX. WATER CODE ANN. § 46.031, art. XI, sec. 11.07 (Vernon Supp. 1986).

involving the application or construction of the compact, including suits between signatory states.[280] In addition, the Compact requires that the congressional act giving consent to the Compact must waive sovereign immunity of the United States in such lawsuits where the United States is an indispensable party.[281]

Negotiation of the Red River compact began with the first meeting of the Red River compact Negotiating Committee in 1956. Although the states had shown some interest in negotiating a compact as early as 1948, it was primarily the drought of the 1950s that prompted the states to act.[282] Texas was concerned about the proposed Lugert-Altus Reservoir on the Salt Fork of the Red River in southwestern Oklahoma.[283] Oklahoma was worried about the threat of diversions from the river in Texas to serve industries which were establishing near Lake Texoma.[284] Arkansas was experiencing shortages of water for industries in the basin.[285] Louisiana was primarily interested in preserving its flood control programs.[286]

The primary obstacle in the negotiation of the compact was the dispute between Texas and Oklahoma over the apportionment of water in Reach I, the watershed above Denison Dam. Oklahoma objected to the construction of Greenbelt Reservoir on the Salt Fork in Donley County, Texas.[287] Oklahoma also objected to the size of reservoirs proposed in Texas on Sweetwater Creek and the North Fork of the Red River, tributaries which provide some of the water supply for Lugert-Altus Reservoir in Oklahoma.[288] In 1970, the Oklahoma congressional delegation succeeded in putting a "hold" on a Soil Conservation Service project to construct McClellan Creek Reservoir in Texas. The hold was not released until Texas agreed to count the

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280. *See id.* § 46.031, art. XIII, sec. 13.03.

281. *See id.* § 46.031, art. XIII, sec. 13.02.

282. *See* Chapman, *Where East Meets West in Water Law:—The Formation of an Interstate Compact to Address the Diverse Problems of the Red River Basin,* 38 OKLA. L. REV. 1, 62-63 (1985) (drought severely affected Oklahoma and Louisiana).

283. *See id.* at 63 (large portion of Salt Fork watershed in Texas).

284. *See id.* at 62 (railroad advertised delivery of fifty million dollars per day to industries near Lake Texoma).

285. *See id.* at 60-61 (small Arkansas towns affected by shortage).

286. *See id.* at 61.

287. *See id.* at 75-76 (two-thirds of water flowing into Oklahoma would be intercepted).

288. *See id.* at 80, nn.511 & 513 (Texas' permit application for 90,000 acre-feet storage which Oklahoma felt should be limited to 35,000 acre-feet).

impoundment against its allotment under any future compact.[289]

The disputes between Texas and Oklahoma over Reach I continued into the 1970s. It appeared that the states would have to look to the Supreme Court for an equitable apportionment of that reach.[290] In 1976, the states compromised on an apportionment of the Reach I, and the remainder of the compact was quickly concluded.[291]

On a whole, the Red River Compact represents an ambitious and admirable attempt to resolve serious interstate water problems through compromise and cooperation for the benefit of each state. It contains many unique and well conceived provisions, such as those facilitating litigation of the compact. It is to be hoped that these particular provisions will never be invoked.

IV. CONCLUSION

The Texas interstate water compacts all have the same principal purpose — the equitable apportionment of interstate waters. The compacts have varied greatly in their effectiveness in accomplishing this purpose. Only the Sabine River Compact, with its apportionment of abundant waters, and the newly-created Red River Compact have escaped the interpretation and enforcement problems which have plagued the other compacts.

The compacts have a great impact on present and future use of water in the watersheds they cover. State agencies that regulate water use, such as the Texas Water Commission, must give first consideration to the state's compact obligations when issuing and regulating water rights. Water users in the compact-covered areas of the state may find their uses prohibited or restricted if necessary for compliance with a compact.

Texas must continue to fulfill its compact responsibilities as it attempts to satisfy the growing demand for water in the state. At the same time, Texas must continue to insist that the other signatory states honor their obligations under these compacts.

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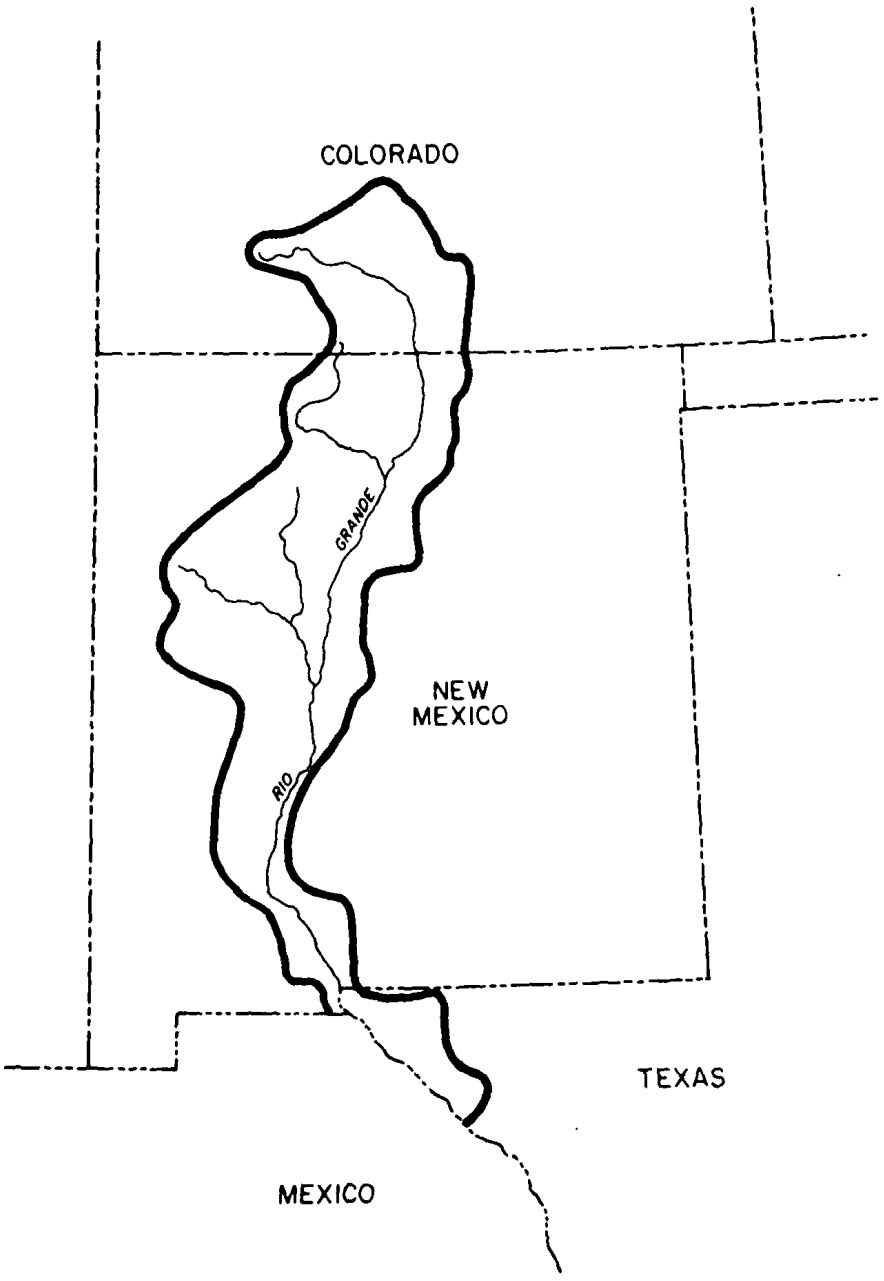
289. *See id.* at 81-82 (Oklahoma conditionally approved McClellan project in Spring 1970).

290. *See id.* at 82 (voluntary agreement urged by federal representatives and chairman of committee in 1973).

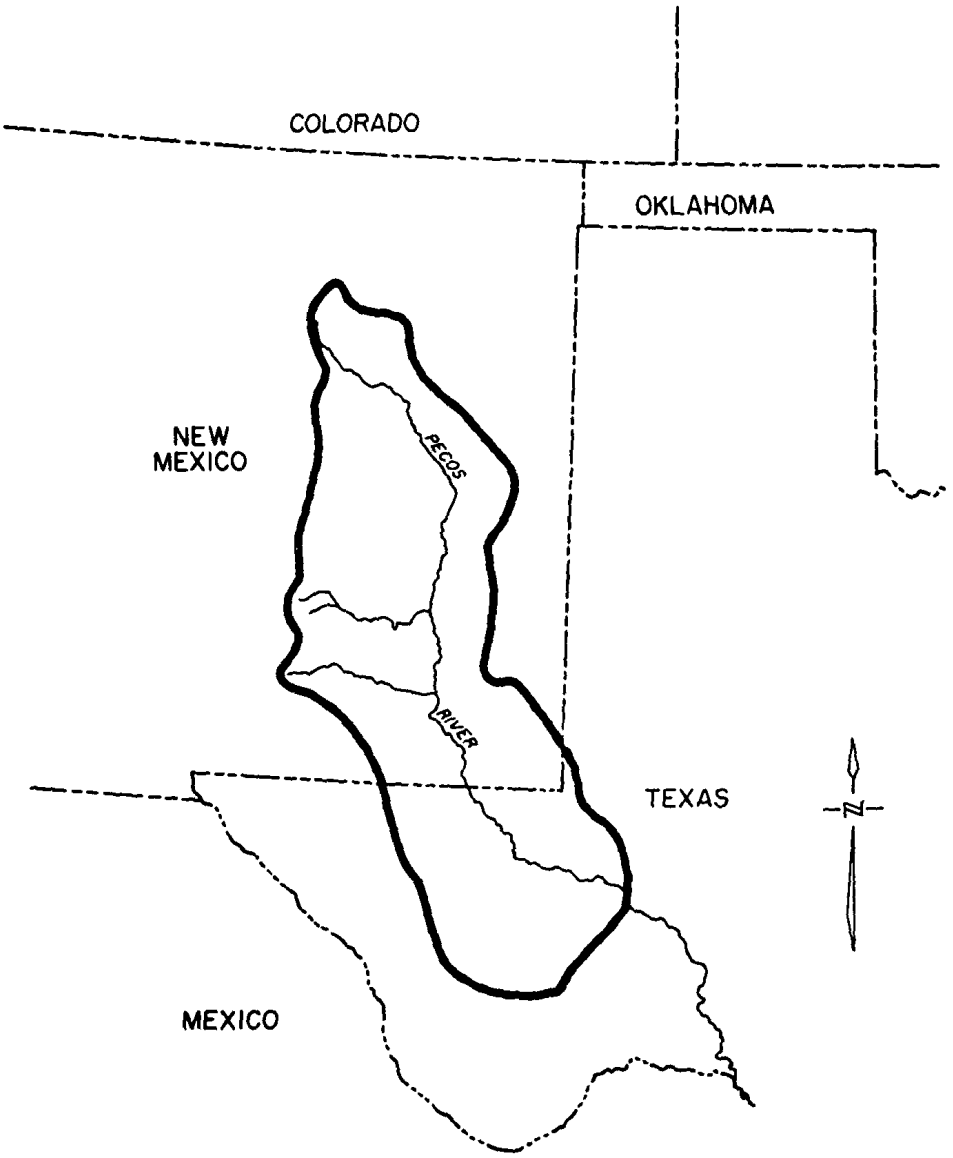
291. *See id.* at 83 (article apportioning water of Reach I approved September 1976).

Appendix One



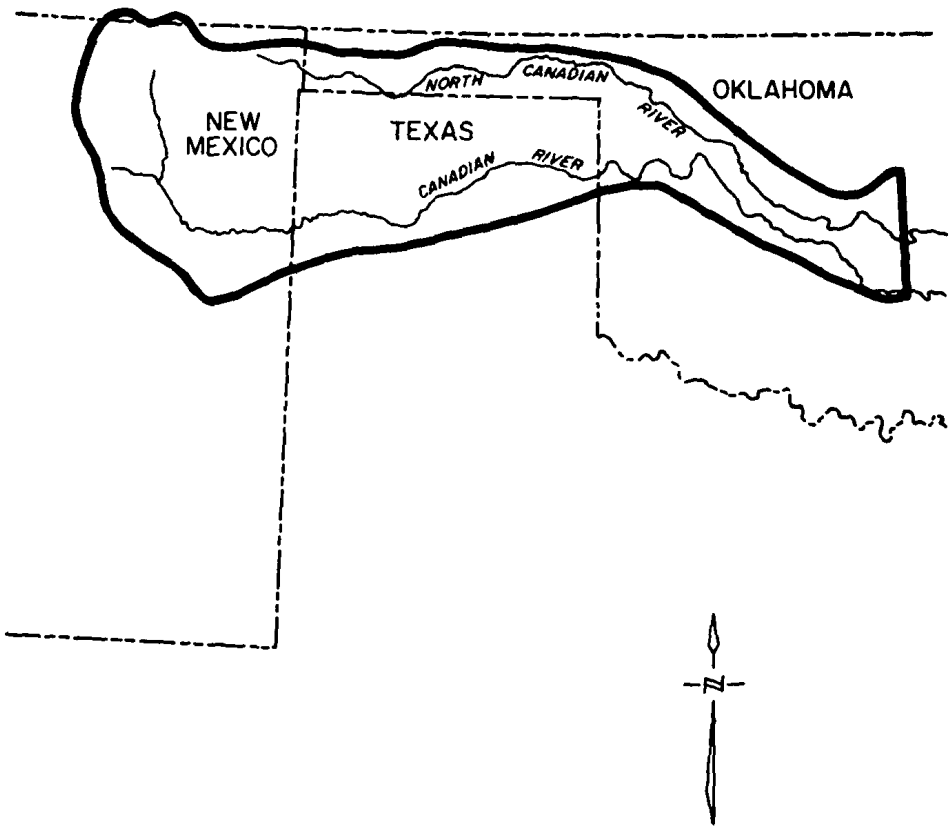
RIO GRANDE COMPACT
Colorado-New Mexico-Texas

Appendix Two



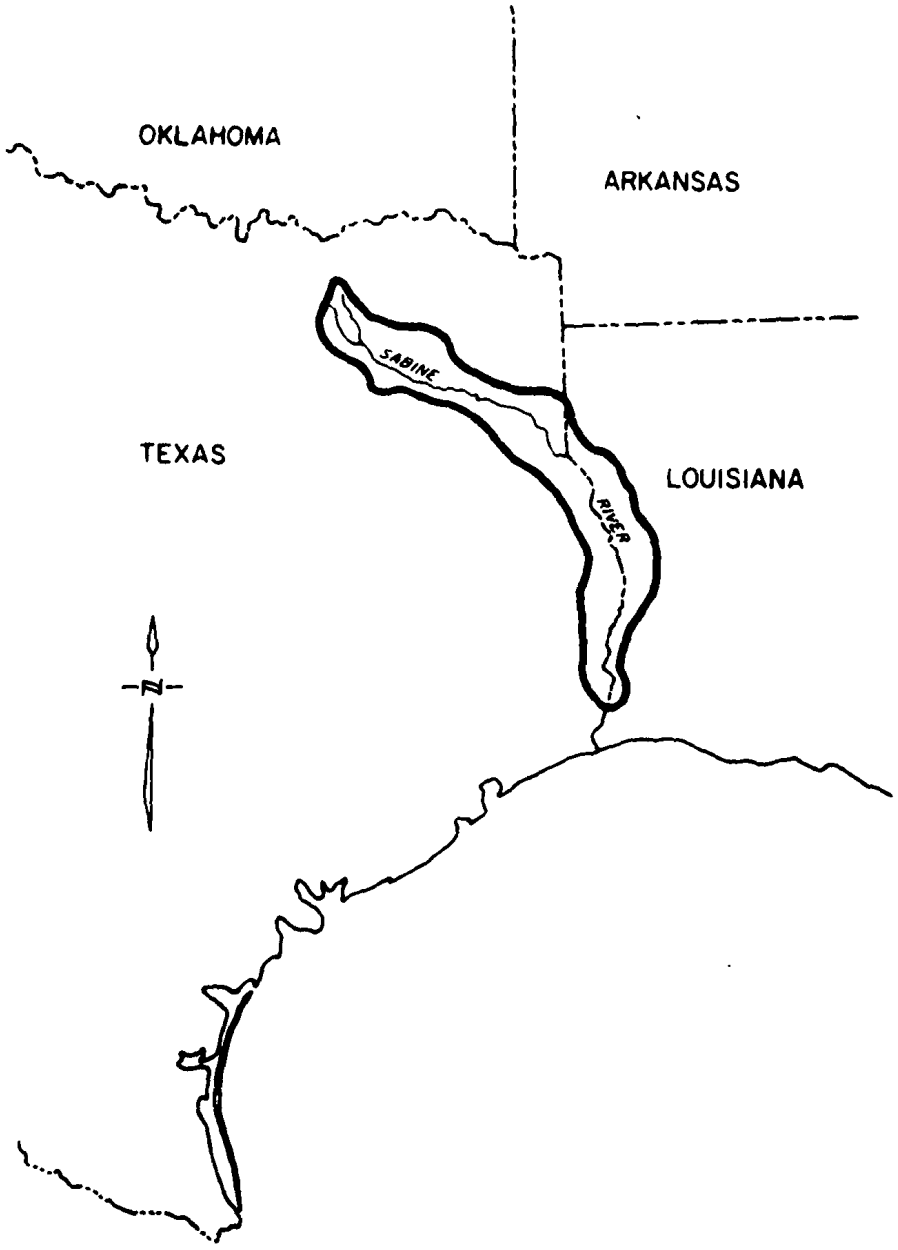
PECOS RIVER COMPACT
New Mexico-Texas

Appendix Three



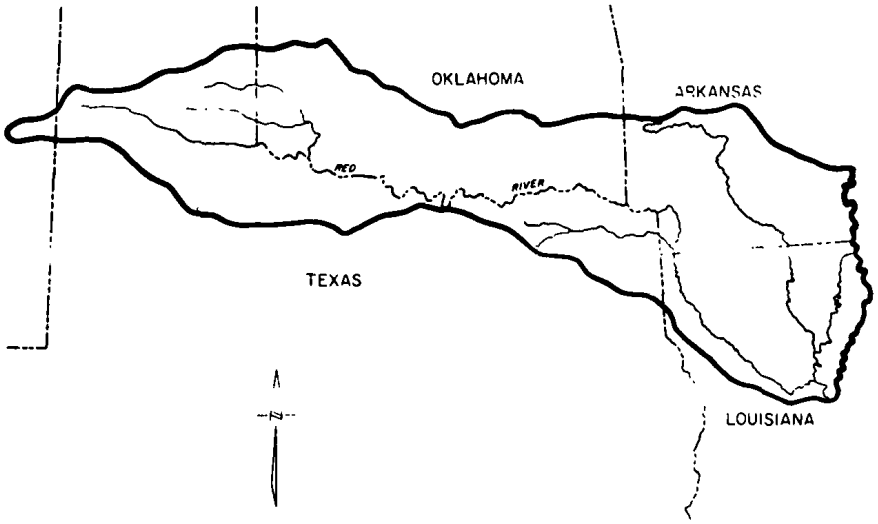
CANADIAN RIVER COMPACT
New Mexico-Texas-Oklahoma

Appendix Four



SABINE RIVER COMPACT
Louisiana-Texas

Appendix Five



RED RIVER COMPACT
Arkansas-Louisiana-Oklahoma-Texas