No. 137, Original

In The Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING and
STATE OF NORTH DAKOTA,

Defendants.

WYOMING'S MOTION TO DISMISS BILL OF COMPLAINT

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MOTION TO DISMISS BILL OF COMPLAINT

The State of Wyoming ("Wyoming"), by and through its Attorney General, Bruce Salzburg, respectfully moves to dismiss the Bill of Complaint filed by the State of Montana ("Montana") on grounds that it fails to state a claim upon which relief may be granted under the terms of the Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (Appendix A to Montana's Proposed Bill of Complaint) ("the Compact," cited below as "YRC"). Wyoming more fully states the grounds for its motion in the accompanying Brief in Support of Motion to Dismiss Bill of Complaint.

BRIEF IN SUPPORT OF MOTION TO DISMISS BILL OF COMPLAINT

STATEMENT OF THE CASE

In January of 2007, Montana filed a Motion for Leave to File Bill of Complaint, Bill of Complaint ("complaint"), and Brief in Support. Wyoming filed a brief in opposition, to which Montana replied. Upon this Court's invitation, the Solicitor General of the United States filed a brief as amicus curiae. After receiving these briefs, this Court granted Montana's motion to file, but also allowed Wyoming to file "a motion to dismiss, in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure." Order List, 552 U.S. ___, 137 ORIG. (Feb. 19, 2008).

As between Montana and Wyoming, the Compact applies to the surface waters of four sub-basins of the Yellowstone River: the Clark's Fork, Big Horn, Tongue and Powder River Basins, which lie in both of those states. YRC art. II, § D (the "Interstate Tributaries").[1] Montana alleges that Wyoming has violated Article V of the Compact only as to the Tongue and Powder Rivers, their tributaries, and storage reservoirs in their two basins. (Compl. ¶¶ 2, 3, 5-17); YRC art. V. The Tongue and Powder Rivers originate in the Big Horn Mountains in Wyoming and join the Yellowstone River only after flowing many miles through Montana. (*See* Mont. Br. in Support of Motion to File Bill of Complaint 3-4 and Apps. A-1 and A-2 thereto (maps)).

Montana's claims under Article V of the Compact are based on two premises, both of which are outside the intent of the Compact's drafters.

First, Montana alleges that by building reservoirs, putting new acreage under irrigation, changing to more consumptive irrigation methods, and allowing groundwater pumping in the Tongue and Powder River Basins since January 1, 1950, Wyoming has depleted the two rivers more than it depleted them as of January 1, 1950. (Compl. ¶¶ 8-13). In short, Montana assumes that the Compact is a "depletion" type

[1] The Compact's provisions that regulate the Yellowstone River's allocation between Montana and North Dakota are not discussed in this motion. *E.g.,* YRC art. V, § D.

of compact that guarantees river flows at the state lines as those flows existed as of January 1, 1950. Wyoming contends that the drafters expressly rejected the depletion concept in favor of a divertible flow concept, so claims based on depletion or consumption must be dismissed.

Second, Montana alleges that Wyoming must shut off diversions along these rivers and their tributaries that serve post-1950 Wyoming water rights whenever the flow in Montana becomes too low for pre-1950 Montana water users to divert the amounts they used as of January 1, 1950. *Id.* ¶ 8. Montana thus asserts that the rule of interstate prior appropriation applies to post-1950 Wyoming diversions based on daily flow calculations. Wyoming contends that the drafters rejected any limitation on post-1950 Wyoming diversions calculated on a daily basis, but instead, allocated post-1950 diversions between the two states under a modified divertible flow system, which only limits Wyoming diversions through cumulative annual measurements. By adopting the modified divertible flow system, the drafters rejected any regulation of water diversions across state lines under the doctrine of prior appropriation. Since Montana has not claimed that Wyoming has allowed, or will allow, diverters with post-1950 water rights to exceed the cumulative annual measurements set by the Compact, it has failed to state a claim on which relief can be granted.

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STATEMENT OF FACTS MATERIAL TO THE QUESTIONS PRESENTED

To resolve these basic disagreements, the Court should review Article V, the drafting history of the Compact, and the manner in which the states have interpreted the Compact since 1951. Before analyzing this history, however, three foundations of the states' negotiations must be reviewed – how Wyoming and Montana regulated water use in their own states, how this Court had decided disputes between western states over interstate rivers and streams, and the types of compacting schemes Wyoming had entered into on other rivers.

A. The Prior Appropriation Doctrine in Wyoming and Montana

When representatives of Wyoming and Montana met in the 1930s to make a first attempt to draft a compact for the Yellowstone River, both states based their intrastate water laws on the prior appropriation doctrine – first in time, first in right. WYO. CONST. art. 8, § 3; *See Murray v. Tingley,* 50 P. 723, 725 (Mont. 1897). In its very first legislative session in 1890, the Wyoming Legislature codified a sophisticated prior appropriation law based on recorded paper permits and certificates of appropriation. 1890-1891 Wyo. Sess. Laws 100-01. After 1890, a Wyoming irrigator had to obtain a permit from the state engineer before diverting water from a stream. WYO. STAT. ANN. § 41-4-501 (2007). The permit would specify the land to be irrigated, the diversion point, and the

source of the water. *Id.*; WYO. STAT. ANN. § 41-4-502 (2007).

To perfect a water right, the irrigator had to put the water to beneficial use as specified in the permit, and then prove that use in a formal adjudication by the Wyoming Board of Control.[2] WYO. STAT. ANN. §§ 41-4-201, 41-4-511 (2007); *See* Mark Squillace, *A Critical Look at Wyoming Water Law*, 24 LAND & WATER L. REV. 307, 309-10, 321-23 (1989). Wyoming's system continues today with little change. *Compare* 1890-1891 Wyo. Sess. Laws 100-01 *with* WYO. STAT. ANN. § 41-4-511 (2007).

Although Montana also follows the prior appropriation doctrine, as of 1950 it lacked a centralized permit system like the Wyoming system. Most Montana water rights were "use rights," which irrigators obtained by simply putting water to use, without any permits of public record. *Dep't of State Lands v. Pettibone*, 702 P.2d 948, 951 (Mont. 1985). The Montana Legislature reformed this ad hoc system in 1973, when it established water courts to conduct general adjudications of water rights on Montana's rivers. *See id.* A Montana water court has completed an adjudication of rights on the Powder under the 1973 Act,

[2] The Wyoming Board of Control is comprised of the division superintendents from each of Wyoming's four water divisions and the Wyoming State Engineer. WYO. CONST. art. 8, §§ 2, 4. The state engineer presides at Board meetings, and also has general supervisory authority over the waters of the state. *Id.* art. 8, §§ 2, 5.

and has issued a preliminary decree of adjudication for the Tongue. YELLOWSTONE RIVER COMPACT COMM'N, FIFTY-FIFTH ANNUAL REPORT viii (2006); Montana Department of Natural Resources and Conservation, http://dnrc.mt.gov/wrd/default.asp (follow "adjudication" hyperlink under "Water Rights").

In a mass adjudication of rights, a water court accepts proof of historical irrigation and other uses in a river basin. After providing notice and a process that allows objections by other users, the court declares all the rights on the river in a written decree. MONT. CODE ANN. §§ 85-2-212 through 85-2-250 (2005). The decree provides state regulators with the type of documentation of rights that would approach the documentation Wyoming has had since 1890 for its rivers as a result of its system of filed water rights. MONT. CODE ANN. §§ 85-2-234, 85-2-236 (2005); WYO. STAT. ANN. § 41-4-511 (2007).

B. Judicial Apportionment of Interstate Streams

As representatives of Montana and Wyoming entered into negotiations in the 1930s, there existed two general theories of how interstate streams should be regulated between prior appropriation states in the absence of a compact – interstate prior appropriation, and equitable apportionment. In *Bean v. Morris*, this Court held that under federal common law the rule of prior appropriation applied across state lines if both states followed the prior appropriation doctrine.

Bean v. Morris, 221 U.S. 485, 487-88 (1911), *aff'g Morris v. Bean,* 159 F. 651 (9th Cir. 1908), *aff'g Morris v. Bean,* 146 F. 423 (C.C. Mont. 1906). Thus, a senior user in one state could theoretically make an interstate call to shut off a diversion by a junior user in another state. *Id.* However, the Court did not state how such a call could be administered across state lines, an especially difficult problem when the two states have different administration systems, as do Wyoming and Montana.

In 1922, this Court applied the *Bean* rule to a great extent in the equitable apportionment case of *Wyoming v. Colorado,* 259 U.S. 419, 458, 471, 484, (1922). This Court held that division of an interstate stream should be based on equitable considerations, and imposed a duty on states sharing an interstate stream to exercise their water rights reasonably and in a manner calculated to conserve supply. *Id.* However, the Court's allocation generally supported senior use in Wyoming, the downstream state. A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated and Restated,* 56 U. COLO. L. REV. 381, 395 (1985).

In 1945, this Court's decision in *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945), cast doubt on whether the prior appropriation rule would be the predominant factor when the Court determined how interstate waters should be judicially apportioned among several states, even when those states followed that rule within their own boundaries. *See* Tarlock, *supra*, at 400-02. After *Nebraska*, western

states faced significant uncertainty as to how the judiciary would equitably apportion a river in a particular case.

For Wyoming and Montana to establish a practical system to share the interstate tributaries of the Yellowstone in a manner they both considered equitable, they needed a compact. *See* YRC preamble (Montana, North Dakota and Wyoming entered into the Compact "desiring to provide for an equitable division and apportionment" of "the waters of the Yellowstone River and its tributaries.").

C. Interstate Apportionment Compacts Before the Yellowstone River Compact

The Yellowstone River Compact was the first and only water apportionment compact that Montana has entered into with another state. 4 DOUGLAS L. GRANT, WATERS AND WATER RIGHTS, § 46.01, at 46-2 (Robert E. Beck ed., 1991). Wyoming, however, began Yellowstone River Compact negotiations in 1932 after it had already entered into the Colorado River Compact of 1922 with six other states. *Id.* at 46-3. Also, during the course of the Yellowstone River Compact negotiations from 1932 through 1950, Wyoming was negotiating the Snake River Compact with Idaho, the Belle Fourche River Compact with South Dakota, and the Upper Colorado River Basin Compact with Arizona, Colorado, New Mexico and Utah. *Id.;* Snake River Compact, 64 Stat. 29 (1950); Belle Fourche River

Compact, 58 Stat. 94 (1944); Upper Colorado River Basin Compact, 63 Stat. 31 (1949).

Wyoming has entered into three types of compacts – compacts based on prior appropriation, depletion, and divertible flow.[3] The Colorado River Compact is a depletion compact, which allocates water based on "specified quantities of water measured in terms of beneficial consumptive use." Richard A. Simms, Leland E. Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment,* 34 ROCKY MTN. MIN. LAW FOUND. INST. § 23.02[2] (1988); *see also* JEROME C. MUYS, INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT 11-12 (National Water Comm'n 1971). Under the Colorado River Compact, Wyoming and the states of Colorado, New Mexico and Utah are restricted from depleting the flow of the Colorado River below a fixed amount of water at a dividing line between the upper and lower basins of the river at Lee Ferry, Arizona. Sections (a) and (d) of Article III of that compact state:

> (a) There is hereby apportioned from the Colorado River System in perpetuity to

[3] In the Upper Niobrara River Compact of 1969, Wyoming agreed to a compact with Nebraska that employs the rule of prior appropriation under which certain direct flow rights in Wyoming and Nebraska are regulated based on their priority dates as if the state line did not exist. Richard A. Simms, Leland E. Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment,* 34 ROCKY MTN. MIN. LAW FOUND. INST. § 23.02[2] (1988).

> the Upper Basin and Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.
>
> . . .
>
> (d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

Colorado River Compact of 1922, *approved by Congress,* Boulder Canyon Project Act of 1928, 43 U.S.C. § 617*l*.

Thus, a depletion compact restricts an upstream state from depleting a river below a certain quantity of flow at the state line, even in low flow periods. In such periods, the upstream state may have to reduce its consumptive use of water. Each state's percentage of the total yield of the basin may vary, but the downstream state's quantity is preserved.

In contrast to the Colorado River Compact, the Yellowstone River Compact, Snake River Compact, and Belle Fourche River Compact are based on the

divertible flow principle, rather than depletion.[4] Under the divertible flow concept, stream flow is apportioned "in terms of specified diversion rights measured in fixed percentages of the available flow." MUYS, *supra,* at 11-12; *see also* R. Simms et al., *supra,* § 23.02[2]. The upstream state is not limited as to how much it can deplete the flow at the state line, and its own consumption or depletion of the river is not the measure of compliance. Rather, both states agree to limit certain diversions to a fixed percentage of the available flow, so the percentages to each state remain the same, while the amount of water actually diverted by each state varies with the size of the runoff.

Under most compacts, whether based on depletion or divertible flow, water rights established in each state before the compact is completed are excluded from the allocation. MUYS, *supra,* at 12 and n.22. As will be explained below, this is true of the Yellowstone River Compact.

Wyoming's State Engineer L.C. Bishop acted as Wyoming's lead commissioner in the negotiation of the Upper Colorado River Basin Compact, Snake River Compact, and Yellowstone River Compact. WYO.

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[4] Simms et al., *supra*, § 23.02 n.25 (identifying Yellowstone, Snake and Belle Fourche River Compacts as divertible flow compacts); *see also* MUYS, *supra* 11-12 n.19 (identifying Yellowstone, and Snake River Compacts as divertible flow compacts); Belle Fouche River Compact, 58 Stat. 94 (1944); Snake River Compact, 64 Stat. 29 (1950).

STAT. ANN. §§ 41-12-601, 41-12-501, 41-12-401 (2007). Mr. Bishop and the other drafters of the Yellowstone River Compact were well aware of the alternative compacting methods available to them. *See* Appendix 86 ("App."); App. 59, 61-62.

D. Yellowstone River Compact Negotiations: 1932-1950

1. The 1935 Draft

Under the Compact Clause of the United States Constitution, states are not free to enter into compacts without the consent of Congress. U.S. CONST. art. I, § 10, cl. 3. Montana and Wyoming first received such consent to negotiate a compact for the Yellowstone River on June 14, 1932. Pub. L. 178, 47 Stat. 306 (1932).[5] Compact commissioners from Wyoming, Montana, and the federal government met twice between 1933 and 1935 and signed a nine-article draft compact on February 6, 1935. App. 1-2, 7-8.

With the following language, the draft generally incorporated the theory of interstate prior appropriation established in *Bean v. Morris*, 221 U.S. 485 (1911): "[T]he use of such waters [the waters of the Yellowstone River and tributaries] is subject to

[5] Although the Yellowstone River enters North Dakota for a short distance before joining the Missouri, this first statute did not authorize North Dakota's participation. Pub. L. 178, 47 Stat. 306 (1932). Congress eventually authorized North Dakota to join the negotiations. App. 11, 80; Pub. L. 632, 54 Stat. 399 (1940).

appropriation for beneficial use under the laws of the separate states and under general water-right law as interpreted by the Courts." App. 7. Under this language, a downstream irrigator in one state could presumably force an upstream irrigator in another state with a later water right to curtail a diversion in times of shortage. However, the draft compact lacked terms to define how this priority would be administered under "general water-right law as interpreted by the Courts," leaving such essentials to a commission. App. 8. Although signed by the commissioners, the draft was never presented to either the Montana or the Wyoming Legislatures for approval. App. 80.

2. The 1942 Draft

After receiving Congress's approval to restart negotiations, Pub. L. No. 237, 50 Stat. 551 (1937), Wyoming, Montana and the federal government formed a new nine-member compact commission. App. 2. This commission issued a preliminary report noting that Yellowstone River Basin runoff was sufficient to "meet all existing and potential consumptive uses if and when a comprehensive plan of storage has been developed and put into effect." App. 10. It found it to be "essential that additional storage be constructed at strategic points at the earliest possible date." App. 11.

In 1940, Congress extended the deadline to conclude a compact, and added a North Dakota delegation. The commission expanded from 9 to 21

members, met in 1941 and 1942, and signed a draft compact on December 31, 1942. Pub. L. No. 632, 54 Stat. 399 (1940); App. 5, 16-19.

The 1942 draft fundamentally diverged from the 1935 draft. It jettisoned the concept of interstate prior appropriation and replaced it with the divertible flow principle. App. 18. The commissioners defined "divertible flow," as:

> [T]he quantity of water that could be diverted from the streamflow above a designated point of measurement during a specified period of time. It is comprised of three elements: (a) the total net inflow to storage; (b) the total diversions; and (c) the remaining flow in the stream at the designated point of measurement for which the divertible flow is being determined[.]

App. 17, art. II, § I.

The 1942 draft employed the *daily* divertible flow method. On any specific date during the irrigation season, the draft would have allocated to each state by percentages, *all* divertible flows. App. 18-19. It did not exclude diversions to irrigators with existing rights. App. 18-19.

To implement the compact in a river basin, Montana and Wyoming regulators would have had to determine the "mean divertible daily flow" in that basin on each day of the irrigation season. App. 18-19. "Mean divertible daily flow" was defined as "the

average divertible flow occurring during a twenty-four hour period, beginning at 12:00 midnight." App. 17. The regulators would have had to measure the surface water diverted by each of their users through headgates or pumps from the river and its tributaries.[6] *See* App. 17, art. II, § I(b). To that total, they would have added net gains, or subtracted net losses, in storage reservoirs in the basin. *See* App. 17, art. II, § I(a). Finally, they would have added the quantity of water that flowed past a point of measurement on the river. *See* App. 17, art. II, § I(c).

The administrators would then have applied percentages to the total mean divertible daily flow to determine how much should be diverted in each state on a particular day. App. 18-19. The drafters awarded small allocation percentages to Montana in the Tongue and Powder Basins because Wyoming had most of the senior irrigation rights in those basins at that time (Montana received 28% of the first 2,200 acre-feet of mean divertible daily flow from the Tongue, and received 3.5% of the first 2,000 acre-feet from the Powder). App. 12, 14, 18-19.

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[6] A headgate is a diversion structure, often made of concrete, which allows an irrigator to control the flow from a stream or canal into a ditch through an adjustable gate. Because of the measurable opening, a headgate allows the irrigator or local hydrographer to accurately estimate the flow rate. An irrigation pump is a mechanical pump, usually powered by diesel fuel or electricity, that allows irrigators to divert water directly from the channel of a stream through a pipe in measurable amounts.

After the commissioners of the three states signed the 1942 draft, it was presented to the Wyoming Legislature in 1943. However, the Wyoming Legislature amended the draft to remove the Tongue and Powder Rivers from its coverage, and the Montana and North Dakota Legislatures would not accept it as amended. App. 28-29.

While there are important distinctions between the 1942 draft and the final Compact enacted in 1951, the 1942 draft established several core principles that appeared again in the final Compact: (1) the 1942 draft allocated water based on divertible flow, not depletion or consumption schemes that prevailed in other compacts; (2) the 1942 draft rejected an interstate prior appropriation scheme under which diversions in one state would be shut down to satisfy particular diversions in another state under the command of a single regulatory body; and (3) the 1942 draft only allocated surface water. App. 16-19.

3. The 1944 Draft

In 1944, Congress renewed its authorization for compact negotiations, Pub. L. No. 257, 58 Stat. 117 (1944), and the commission reformed with 29 members, many of whom were veterans of the 1942 attempt. App. 22-23. On December 18, 1944, the commissioners signed a new draft compact. App. 25.

The 1944 draft was similar to the 1942 draft, retaining a daily divertible flow allocation method based on mean divertible daily flow. App. 23. Once

again, depletion, interstate prior appropriation through individual calls, and groundwater concepts, were absent. App. 22-25.

A minor change provided that the divertible flow allocation scheme would remain inoperative on the Tongue for a period of ten years after compact passage, or until Tongue River Reservoir began storing sufficient water to supplement natural flow, whichever came first. App. 24, art. V, ¶ 3(b).

The signed 1944 compact was presented to the legislatures of the three states in early 1945. App. 80. This time, the Wyoming Legislature joined the Montana and North Dakota Legislatures in passing it. However, Wyoming Governor Lester Hunt vetoed the bill, killing the 1944 draft. App. 80.

4. Negotiation of the 1951 Compact

On June 2, 1949, Congress again authorized compact negotiations. Pub. L. No. 83, 63 Stat. 152 (1949). The new federal representative to the commission was R.J. Newell, a recently retired Regional Director of the Bureau of Reclamation. App. 33. The commission expanded from 30 to 38 members. YRC Preamble.

The full commission held four meetings over a period of 13 months in 1949 and 1950 before reaching unanimous agreement on the Compact on December 8, 1950. App. 68. The legislatures of the three states approved it in early 1951, and Mr. Newell submitted

it to Congress on March 16, 1951, together with his report recommending its passage. WYO. STAT. ANN. § 41-12-601 (2007); MONT. CODE ANN. § 85-20-101 (2005); N.D. CENT. CODE § 61-23-01 (2005); App. 78-85. Both the Senate and House took up bills for approval of the Compact, and referred them to their respective committees for interior and insular affairs. The bills passed both houses, and the Compact became the law of the United States in October, 1951. YRC.

Sections A, B, and C of Article V of the Compact are the sections at issue in this case. The overall intent of Article V, and the specific intent of its three components, is best shown by tracing the history of each component. Section A covers the drafters' treatment of diversions or storage serving water rights that were established in each state on or before January 1, 1950. The first clause of Section B covers the drafters' treatment of diversions begun after January 1, 1950 to provide supplemental water to existing pre-1950 water rights. Finally, the second clause of Section B, and Section C, cover the drafters' treatment of water diverted or stored for the satisfaction of water rights established in each state after January 1, 1950.

a. History of Article V, Section A: Pre-1950 Diversions and Reservoir Storage

Section A of Article V of the Compact, which provides that pre-1950 diversions will be managed by

each state under its own water laws, was one of the easiest parts of Article V for the commissioners to draft. It states:

> A. Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

YRC art. V, § A.

At its second meeting, on February 1 and 2, 1950, the commission discussed basic principles it wished to establish before assigning drafting to the drafting committee. App. 37-38. During this discussion, the commission considered whether it should rely on the 1944 draft, as the 1944 commission had relied on the 1942 draft. The commission chose to make a clean break, however, and asked federal attorney W.J. Burke to prepare a draft that "should be a completely new start, built from the ground up." App. 39.

The commission instructed Mr. Burke to create a new draft ("Burke's draft") on two foundations. He should: (1) recognize existing water rights in Montana and Wyoming and provide that they remain unimpaired by the compact; and (2) allocate water by percentages to each state to serve future water uses. App. 38. The commissioners gave Mr. Burke tentative language for each of the four interstate tributaries to use as a model. The Tongue River clause stated:

TONGUE RIVER

1. Appropriative rights to the beneficial uses of the water of the Tongue River system existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

2. Wyoming and Montana agree that the unappropriated waters of the Tongue River system subsequent to January 1, 1950, shall be allocated to each state as follows;

   60% to Montana
   40% to Wyoming

App. 40.

Though it considered several alternative drafts over the ensuing ten months, the commission ultimately based Article V of the final Compact on the structure of the Tongue River clause that it had given to Mr. Burke at the February, 1950 meeting. The only change to Part 1 of the commission's tentative language before it became Section A of the final Compact was the replacement of "Tongue River system," with "Yellowstone River System," so that it covered all the interstate tributaries and their tributaries. YRC art. V, § A.

The intent of Section A is to preserve existing water rights in each state "unimpaired" by the Compact. App. 38. This answered the concerns of the

Wyoming delegation who had opposed the percentage allocation of all diversions because senior Wyoming rights on the Tongue River might suffer from enforcement of the allocations. App. 26.

At the commission's October, 1950 meeting, Montana proposed language that would have resurrected a concept from the 1935 draft to regulate existing diversions. App. 60, 63-64, 65. Montana proposed that existing diversions on the rivers be managed by interstate prior appropriation, dividing them "on the basis of priorities thereunder as single streams and regardless of state lines." App. 65. This would have meant that a Montana irrigator diverting water to satisfy a pre-1950 right, could, through an interstate call, shut down an upstream irrigator with a later priority date, even if that upstream irrigator was across the state line in Wyoming. Montana fought to include this concept in the compact at the October, 1950 commission meeting, but failed to overcome Wyoming's objection. App. 63, 65; YRC art. V, § A. The first part of the Tongue River Clause from Burke's draft, remained in the Compact. App. 43; YRC art. V § A.

In summary, the negotiating history confirms that Section A of Article V had a simple purpose – to carve diversions and storage for pre-1950 rights out of the rest of the Compact so that such diversions and storage could be regulated by each state just as they had been regulated within each state before 1950.

The simple purpose of Section A is also confirmed in Wyoming Senator Joseph O'Mahoney's committee report to the United States Senate, in which he emphasized the ease of administering the compact compared to earlier drafts. He wrote: "The compact provisions are easily administered, and require no elaborate organization. In all respects, it presents an unusually practicable solution to the problems which, during the early years of negotiations, seemed highly complicated and difficult." App.76.

The commission's removal of pre-1950 water rights from the Compact's percentage allocations was one of these simplifications that eased administration and obviated the need for elaborate organization, such as an interstate regulatory body. Compact Commission Chairman Newell, the lead federal representative on the commission, explained the advantage of excluding pre-1950 diversions from Compact regulation in his report to Congress:

> *In earlier attempts to arrive at a compact and in the early meetings here reported, there was searching discussion as to whether the agreement sought on division of waters should include the water now appropriated and in use or should apply only to the unappropriated and unused balance which is available for further development. The latter principle was decided on (art. V-A) for several reasons.* First, it would be a huge and time-consuming task to determine and fix comparable values for existing rights in three States with differing water laws and

> practices in establishing water rights. Second, the basic fact that there is enough water if properly conserved by storage to take care of all existing and all feasible future developments points up the importance of arriving promptly at the simplest workable agreement that would permit such storage projects to proceed. When these are built, even the operation provisions of the compact are expected to become easy of administration.

App. 83-84 (emphasis added).

Congressman Clair Engle of California, who drafted the House committee report on the Compact, reiterated this point: "Extensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little could be gained, from a water-supply standpoint by attempting, in the compact, the regulation and administration of existing appropriative rights in the signatory States." App. 71.

In 1953, the Montana Legislature passed an act that further confirms the Compact's exclusion of pre-1950 rights from interstate regulation. 1953 Mont. Laws 173. While part of the Montana act required Montana irrigators to measure and report *post-1950* diversions so that those diversions could be administered under the percentage allocation scheme in Sections B and C of Article V, another clause of the act specifically exempted Montana irrigators from measuring or reporting their diversions to serve *pre-1950* rights. MONT. CODE ANN. §§ 85-20-102, 85-20-104 through 85-20-106 (2005). This section of the

Montana law, entitled "Status of prior rights," states: "The rights to the beneficial use of any water of any interstate tributary of the Yellowstone River acquired prior to and including January 1, 1950, shall not be impaired by or subject to this part." MONT. CODE ANN. § 85-20-107 (2005). Thus, the 1953 Montana Legislature confirmed the Compact's basic structure that excluded pre-1950 rights from regulation. There was no reason to identify or measure diversions that served those pre-1950 water rights.

b. History of the First Clause of Article V, Section B: Supplementation of Pre-1950 Water Rights

The first clause of Section B of Article V of the Compact addresses diversions commenced after 1950 that supplement pre-1950 water rights. It states:

> B. Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation[.]

YRC art. V, § B.

As explained above, federal attorney Burke's draft had two essential provisions – it grandfathered existing rights, and it allocated water to serve future rights. At the commission's third meeting in October, 1950, the commission asked the engineering committee to provide for a third category of diversions – those established after January 1, 1950, that would provide supplemental water to existing (pre-January 1, 1950) rights. App. 49, 62. As the commission explained in its minutes: "Some consideration must be given to supplemental water supply and since such water is for use on existing projects, it is felt that such allocation should be made under the category of existing irrigation works rather than potential." App. 62. Consistent with this charge, the engineering committee included in its draft a paragraph that excluded from the compact future diversions of water that would supplement pre-1950 rights. This paragraph was located in Section E, 2 of Article V. App. 49.

When considering the engineering committee draft at its final meeting in December of 1950, the commission decided to move the clause excluding supplemental rights from Section E to Section B of Article V. App. 66-67. This occurred because Mr. Burke believed that there existed an "ambiguous situation in the language of paragraph B respecting supplemental water rights[.]" App. 66. He therefore suggested rewriting Section B to include what is now the first clause of Section B that deals with supplemental water for pre-1950 rights. App. 67. The commission agreed to move the supplemental water

clause out of the exclusions and into Section B, and to accept Mr. Burke's new draft of the clause. During the discussion leading to this vote, Mr. Burke explained the general structure of the compact which justified placing the discussion of supplemental water for pre-1950 rights in Section B, immediately after Section A, where the commission treated pre-1950 rights. App. 66.

> Mr. Burke discussed the basis on which the Compact was drafted and the general theory of the Compact. Yields of the basin are to be burdened by (1) existing appropriative rights and (2) supplemental water for existing developments. The remainder, the unappropriated and unused water, or residual water, is to be compacted.

App. 66.

It is clear from the commission's minutes, that the drafters did not intend by this move to alter their treatment of supplemental supply, but still intended that water supplementing existing rights would be treated in the same manner as existing rights. Diversions for existing rights, and to supplement existing rights, should both be enjoyed under each state's prior appropriation laws, and excluded from the diversions allocated by percentage under clause 2 of Section B and Section C of Article V. App. 66.

c. History of the Second Clause of Article V, Section B and Article V, Section C: Allocation of Post-1950 Diversions and Storage by Cumulative Annual Percentage

Beginning with the Tongue River Clause it discussed in its meeting of February, 1950, the commission separated water diversions and reservoir storage for post-1950 water rights from diversions and storage relating to pre-1950 rights. It allocated these post-1950 rights by percentages between the states. This concept now appears in the second clause of Section B, and Section C, of Article V of the Compact, which state:

> B. . . . and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:
>
> . . .
>
> 3. Tongue River
>
> a. To Wyoming _ _ _ _ _ _ _ _ _ 40%
>
> To Montana _ _ _ _ _ _ _ _ _ 60%
>
> b. The point of measurement shall be below the last diversion from the Tongue River above its junction with the Yellowstone River.

4. Powder (including the Little Powder River)

a. To Wyoming _ _ _ _ _ _ _ _ _ 42%

To Montana _ _ _ _ _ _ _ _ _ 58%

b. The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

C. The quantity of water subject to the percentage allocations, in Paragraph B 1, 2, 3 and 4 of this Article V, shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The total diversions, in acre-feet, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana developed after January 1, 1950, during the period from October 1st to that given date;

2. The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

> 3. The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date;
>
> 4. The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

YRC art. V.

As instructed by the commission in February of 1950, Mr. Burke completed a draft compact and submitted it to the drafting and engineering committees on August 22 and 23, 1950. App. 45. Burke's draft provided in Article V that existing water rights established under state law would remain unimpaired by the compact, and that unappropriated waters would be allocated by percentages to new uses. App. 42-44. As in the 1942 and 1944 drafts, Burke's draft measured allocations of "divertible flow" for new uses based on "mean daily divertible flow." App. 41, 42.

During the commission's discussions at the October, 1950 meeting, the engineering committee recommended that if the divertible flow principle was adopted for post-1950 rights, it should be modified "to make the apportionment operative on other than a daily basis so that allocation could be in terms of

cumulative volumes of water through an entire year, or portion thereof rather than by daily stream flow." App. 62. The commission accepted this recommendation, and passed a formal motion to adopt the modified divertible flow method, which eliminated the 1942 and 1944 daily divertible flow constructions. App. 64. Montana's State Engineer and commissioner, Fred Buck, specifically agreed to this modified method at that meeting. App. 64. His agreement in 1950 was consistent with his earlier misgivings about daily divertible flow under the 1942 draft due to the practical difficulty of measuring all diversions along a river during a single 24-hour period. App. 20. *See also* App. 29-30 (Wyoming commissioner E.C. Gwillim's similar concerns about the impracticality of daily divertible flow).

Between the October meeting, and the final commission meeting on December 7 and 8, 1950, Mr. Burke and the engineering committee fleshed out the new compact as instructed ("the engineering committee's draft"), and presented it to the commission at its final meeting. App. 47, 66. Sections B and C of Article V in the engineering committee's draft adopted the modified divertible flow method. App. 47-49. These two sections allocated, by percentages to each state, diversions and storage that would serve any future water rights established after January 1, 1950. App. 47-49. Since the allocations were to be made on the "modified" cumulative annual basis, the engineering committee removed definitions for "mean daily divertible flow," and "mean daily flow," from its draft, and

the final Compact reflects these deletions. YRC art. II.

In Sections B and C of Article V of its draft, the engineering committee established how, as of any given date in a water year, water diverted to post-1950 uses would be allocated under the modified divertible flow method. App. 47-49. In Section C, the committee specified how the cumulative total divertible flows in each river basin would be measured. App. 48-49. In Section B, it stated the percentages of those divertible flows to be allocated to each state. App. 47-48.

At its final meeting, the full commission added the supplemental water clause to the beginning of Section B of Article V, without changing the substance of the clause establishing the allocation percentages for post-1950 diversions. App. 66-67. Also, at its final meeting, the commission approved the engineering committee's draft of Section C, with only a minor cosmetic adjustment. App. 67.

In his committee report, Congressman Engle of California summarized the Compact's adoption of the modified divertible flow concept:

> In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water year, fixed as

> October 1 of any year through September 30 of the succeeding year[.]

App. 72.

The actions of Wyoming and Montana since 1951 confirm that they agreed to the modified divertible flow principle. Wyoming's L.C. Bishop and Earl Lloyd, and Montana's Fred Buck, all of whom participated in drafting the Compact, represented their states on the Yellowstone River Compact Commission continuously from 1951 through 1962. In each of those 11 years, through water surplus and drought, including one of the worst droughts in the basin's history in 1954, these commissioners reported in their official annual reports that the states declined to measure cumulative divertible flows, because they agreed that Wyoming had not exceeded its percentages under the modified divertible flow principle embodied in the Compact. App. 87, 88. If Montana thought then that the Compact provided for daily divertible flow comparisons, or interstate calls by pre-1950 Montana irrigators to shut off individual Wyoming irrigators, Montana never made such claim.

d. The Drafters' Explicit Rejection of the Depletion Principle

As an alternative to the modified divertible flow principle, the 1949/1950 commission considered the depletion principle contained in many other western water compacts, but rejected it. Engineering Committee Chairman Myers, an employee of the federal

Bureau of Reclamation, proposed the depletion principle at the August 1950 joint meeting of the commission's engineering and drafting committees. App. 45-46. He stated that the simplest kind of compact, which was most practical and easy to administer, would be a depletion compact that puts "a ceiling on the depletion to take place upstream[.]" App. 45-46. Mr. Myers drafted a depletion compact that he circulated to the engineering committee at its September 27, 1950 meeting. App. 51. He incorporated the depletion concept in Article V of his draft through his use of the phrases "consumptive use," "depletions," and "inflow-outflow method" as follows:

> A. There is hereby apportioned from the Yellowstone River System in perpetuity to the States of North Dakota, Montana, and Wyoming, respectively, exclusive of established rights and other uses coming within the provisions of paragraph D of this Article V, the consumptive use per annum of water, as follows:
>
> [here, Myers had blanks for percentage allocations to Montana and Wyoming on the four interstate tributaries and to Montana and North Dakota on the Yellowstone River proper]
>
> B. The apportionment made to the respective States by paragraph A hereof shall be determined on an annual water year basis measured from October 1 of any year through September 30 of the succeeding year.

> C. The consumptive use of water, which use is apportioned in paragraph A hereof, shall be determined for each State by the inflow-outflow method in terms of man made depletions in addition to existing depletions as of January 1, 1951.
>
> D. There are hereby excluded from the provisions of this Compact:
>
> 1. Existing and future domestic and stock water uses of water: *Provided*, That the capacity of any reservoir for stock water so excluded shall not exceed 10 acre-feet.
>
> 2. Established rights to the beneficial use of water in each signatating [sic] State existing on January 1, 1951, including losses from reservoirs constructed prior to January 1, 1951.

App. 55-56.

The engineering committee recommended rejection of the Myers depletion draft in a letter to Commission Chairman Newell. App. 58. At its October 1950 meeting, the full commission considered the depletion concept but rejected it by formal vote. App. 61-62. During discussion of the motion, Montana stated that it favored the divertible flow approach over the depletion concept. App. 62.

In his 1951 report to Congress accompanying the final Compact, Chairman Newell emphasized the commission's choice of divertible flow over depletion:

> In determining the amount of water subject to the allocation, the "divertible flow" principle was chosen over the "depletion" principle, because the former had been used in earlier negotiations and was more familiar to the commissioners, who were assured by the consultants that the latter had no outstanding advantages even though it had been selected on the upper Colorado.

App. 84. In 1976, 1983, and 1989, a later generation of Montana water managers reaffirmed that the Compact is based on divertible flow, not depletion.[7]

Since the 1970s, water managers from both states have discussed methods of data collection to monitor compliance with the cumulative divertible flow allocation of post-1950 rights. However, Wyoming commissioners disagreed when Montana began to raise the new interpretations it now asserts in its complaint. Apps. C and D to Wyoming's Brief in

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[7] App. A to Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint at A-5 (Letter and white paper from Orrin Ferris, Administrator of the Water Resources Division of the Montana DNRC to Wyoming State Engineer (1976) ("The compact is explicit in allocating waters based on diversions rather than depletions, in fact, return flows are never mentioned.")); App. 90 (DAN ASHENBERG, A COOPERATIVE PLAN TO ADMINISTER THE YELLOWSTONE RIVER COMPACT, (Water Resources Division, Montana DNRC Draft report Nov. 1983) (the Compact "apportions flow based on diversions, not on depletions.")); App. 91 (MONTANA DNRC, YELLOWSTONE RIVER COMPACT 32 (Nov. 29, 1989) ("The apportionment formula in Article V is based on diversions and not depletions.").

Opposition to Motion for Leave to File Bill of Complaint.

SUMMARY OF ARGUMENT

This Court should dismiss all of Montana's claims. The language of the Compact, and its drafting history, establish that the commissioners intended to create a divertible flow compact, not a depletion compact. There is no basis for Montana's claim that the Compact restricts Wyoming's ability to deplete flows of the Tongue or Powder River in order to protect water levels at the state line as they existed on January 1, 1950. Montana's other allegations based on the depletion principle – that Wyoming has improperly increased irrigated acreage, built new reservoirs, replaced flood irrigation with more efficient sprinkler irrigation, and drilled groundwater wells – are also based on a theory that the drafters rejected.

The drafters intended that the Compact's percentage allocations would only apply to water diverted, stored, or divertible from the interstate streams and their tributaries for the satisfaction of post-1950 water rights. Diversions to serve pre-1950 water rights, and to supplement pre-1950 rights, are not to be counted for the percentage allocation, but instead regulated by each state under its own water laws. In October of 1950, the drafters rejected for good Montana's proposal that pre-1950 rights be

regulated based on a prior appropriation scheme that ignored state lines. Therefore, the drafters intentionally withheld from the Compact any directive or mechanism by which a water user in Montana could make an interstate "call" to shut down the diversion of a Wyoming water user whose rights were junior to a Montana user's right.

In determining how to allocate divertible flow among post-1950 water rights in each state, the drafters could have selected the daily divertible flow concept that had appeared in the 1942 and 1944 draft compacts. Instead, the drafters expressly rejected the daily concept and selected a "modified" divertible flow method for this allocation. Under this method, water diversions serving post-1950 rights are to be counted on an annual *cumulative* basis. Wyoming can violate its allocation only if its cumulative post-1950 diversions and net gains in storage exceed Wyoming's percentage of the cumulative divertible flow from October 1 through a given date.

Montana does not allege such a violation. Montana's claims are an attempt to have this Court create a hybrid of a depletion compact, pure prior appropriation compact, and daily divertible flow compact, each of which the drafters expressly rejected. This Court should dismiss the complaint.

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ARGUMENT

A. Standard of Review

In deciding this motion in the nature of a motion to dismiss, this Court must focus on Montana's allegations in paragraphs 8-13 of its complaint where Montana states how it believes Wyoming violated, or will violate, the Compact. FED. R. CIV. PRO. 12(b)(6), SUP. CT. RULE 17.2. If Montana has failed to state a claim upon which relief can be granted under the Compact as a matter of law, this Court should dismiss this case. FED. R. CIV. PRO. 12(b)(6). A compact is a contract, as well as a law of the United States. *Oklahoma v. New Mexico,* 501 U.S. 221, 235 n.5 (1991). In order to interpret a compact, the Court must examine the text and move on to review other reliable documentary evidence if it finds ambiguity. *Id.* The Court's goal is to discern the intent of the drafters. *Id.*

In previous original cases, this Court has relied on historical documents to decide motions to dismiss. *New Hampshire v. Maine,* 532 U.S. 742 (2001); *United States v. Louisiana,* 363 U.S. 1, 12-13 (1960); *Arizona v. California,* 292 U.S. 341, 359-60, (1934). In *Louisiana,* this Court took judicial notice of "a massive array of historical documents," in deciding a motion to dismiss on the pleadings. *United States v. Louisiana*, 363 U.S. at 12-13. The Court stated that it agreed with the parties that "all the issues tendered can properly be disposed of on the basis of the pleadings and such documents." *Id*. In this case, the historical documents that provide context and confirm

the intent of the Compact drafters and Congress are not massive. The Court should consider them to fulfill its objective of reaching the merits of this original case as early as possible. *See Ohio v. Kentucky,* 410 U.S. 641, 644 (1973).

B. Montana's Interpretation of the Compact is Fundamentally Flawed

Montana alleges in paragraphs 8 through 13 of its complaint how it believes Wyoming has violated, or will violate, the Compact. Analysis of the first and the last of these six paragraphs reveals the fundamental flaws in all of Montana's claims.

Montana alleges that:

> Wyoming refuses to *curtail consumption* of the waters of the Tongue and Powder Rivers in excess of Wyoming's consumption of such waters existing as of January 1, 1950, *whenever the amount of water necessary to satisfy Montana's uses of such waters existing as of that date is not passing the Wyoming-Montana stateline*, in violation of Montana's rights under Article V of the Compact.

(Compl. ¶ 8) (emphasis added).

Montana further alleges that: "By undertaking and allowing the aforementioned actions, the State of Wyoming has *depleted and is threatening further to deplete* the waters of the Tongue and Powder Rivers allocated to the State of Montana under Article V of the Compact." (Compl. ¶ 13) (emphasis added).

Montana thus asserts that the Compact is a combination of: (1) a depletion compact, which restricts Wyoming water consumption to levels of consumption "as of January 1, 1950"; (2) an interstate prior appropriation compact that subjects individual diverters in Wyoming to an interstate call to satisfy individual diverters across the state line in Montana; and (3) a compact whose allocations to post-1950 diversions are based on a daily comparison of particular diversions on the river, rather than percentages of cumulative total divertible flows. The drafters intended none of these features.

1. The Drafters Rejected the Depletion Principle

The history of the negotiation of the Yellowstone River Compact confirms that the drafters chose a modified divertible flow compact and rejected the depletion principle. Through their experience with other compacts, the drafters were aware that the interstate tributaries of the Yellowstone River could be regulated in various ways, including based on the depletion principle. App. 84. Mr. Myers of the Bureau of Reclamation offered his depletion draft at the October, 1950 commission meeting, but the commission rejected it by formal vote. App. 61-62. Commission minutes reveal that the engineering committee expressly considered the two compact types and explained the differences to the full commission before the commission voted:

> Two principles were considered for use in the preparation of the draft. The first is the depletion theory used in the Upper Colorado River Compact, which places a ceiling on the beneficial consumptive use of water permitted in each state. The second is the divertible flow theory which limits the amount or percentage of total amount of water which can be diverted in a state. The Committee believed that a modification of the divertible flow principle was most appropriate in this case, this being the principle considered in all previous compact negotiations on the Yellowstone.

App. 59.

The commission's choice of modified divertible flow over the depletion concept has been reiterated by federal representative Newell, representatives of the states, and many commentators ever since.[8]

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[8] App. 84. (Commissioner Newell's report to Congress); App. A to Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint at A-5 (Orrin Ferris, Administrator of the Water Resources Division of the Montana DNRC to Wyoming State Engineer (1976)); App. 90 (DAN ASHENBERG, A COOPERATIVE PLAN TO ADMINISTER THE YELLOWSTONE RIVER COMPACT, (Water Resources Division, Montana DNRC Draft report Nov. 1983)); App. 91 (MONTANA DNRC, YELLOWSTONE RIVER COMPACT 32 (Nov. 29, 1989); Floyd A. Bishop, *Interstate Water Compacts and Mineral Development* (Administrative Aspects), 21 ROCKY MTN. MIN. LAW INST. 801, 802 (1975); Richard A. Simms, Leland E. Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment,* 34 ROCKY MTN. MIN. LAW FOUND. INST. § 23.02[2] n.25 (1988).

Thus, Wyoming's diversions of water from the interstate tributaries and their tributaries cannot violate the Compact by depleting an interstate tributary below some mythical daily delivery guaranteed at the state line. The final Compact makes no provision for measuring flows at a state line gauge, which would be necessary to enforce a depletion compact that makes such a guarantee. Also, the Compact does not provide for an accounting of depletions or consumptive use in either state as is required in other depletion compacts. *See, e.g.,* Upper Colorado River Basin Compact art. VI, WYO. STAT. ANN. § 41-12-401 (2007). Montana did not get a depletion compact, and its many allegations about Wyoming's depletion or consumption of water lack any legal basis.

2. The Drafters Rejected the Interstate Prior Appropriation Model

The Compact does not create a system of prior appropriation that would rely on interstate calls administered by an interstate body that would apply some sort of general law of prior appropriation. Wyoming and Montana had several chances to base the compact on interstate prior appropriation, but declined. The 1935 draft, based entirely on interstate prior appropriation theory, failed. And Montana's attempt to insert interstate prior appropriation language in Section A of Article V failed in 1950. App. 65; YRC art. V, § A.

As to diversions supplementing pre-1950 rights, the drafters intended these diversions to be excluded from percentage allocation, and to be regulated the same as pre-1950 rights, that is, under each state's own laws. The Commission explained in its minutes: "Some consideration must be given to supplemental water supply and since such water is for use on existing projects, it is felt that such allocation should be made under the category of existing irrigation works rather than potential." App. 49, 62; *see also* 66-67 (Mr. Burke's discussion of how the supplementation clause fits in the Compact's structure). The final Compact is consistent with these deliberations, the commission's rejection of the 1935 draft, and the commission's 1950 rejection of Montana's interstate prior appropriation clause. The Compact contains no provision under which supplemental supply is restricted or allocated across state lines. The drafters intended the states to regulate both pre-1950 diversions, and supplementation of those diversions, under their own laws, unimpaired by the Compact.

3. The Drafters Rejected Daily Divertible Flow in Favor of Modified Divertible Flow

As Mr. Burke explained during the commission's last edits to the final Compact, the water not serving pre-1950 rights "is to be compacted." App. 66. The drafters expressly selected the modified divertible flow principle to allocate this water. YRC art. V, § B, clause 2, § C. This principle relies on *cumulative*

measurement and percentage allocation. Wyoming cannot violate the Compact based on some daily comparison of rights on either side of the state line. The states discarded any provision for the daily summation of diversions when the 1944 draft died. As noted in the minutes of the commission's third meeting on the final Compact:

> Mr. Myers asked specifically whether the Commission wanted to operate on a daily basis or on an annual basis, subject to check as required. Mr. Bower moved to have operations on an annual basis with provisions to make a check at any time desirable, but not required on a daily basis. The motion was seconded. In respect to the question, Mr. Buck [Montana's lead commissioner] stated he agreed to the annual basis with provision to check as required. The motion was passed.

App. 64.

Montana had several good reasons not to fear the Compact's modified divertible flow principle. Wyoming can violate this allocation method if its total diversions and net gains to storage for post-1950 water rights, from October 1 through a given date in the water year, exceed its percentage of the total cumulative divertible flow in a basin. On the other hand, if, from October 1 through any given day, all of Wyoming's post-1950 diversions and storage gains do not exceed its percentage allocations of 40% on the Tongue River or 42% on the Powder River, then that must be because Montana has diverted to post-1950

water rights, and allowed to flow out the bottom of each river, at least 60% of the cumulative total divertible flow on the Tongue River, and 58% on the Powder River. The cumulative divertible flow, by definition, equals 100% of the combined cumulative divertible flows of the two states. If Wyoming is not in violation because it has not exceeded its cumulative percentage, the modified divertible flow method ensures that Montana has, at a minimum, of the total divertible flow to work with to satisfy its irrigators.

Properly managed by Montana, the expected new Bureau of Reclamation reservoirs (at Moorhead on the Powder, Yellowtail on the Big Horn), and expected expansion of Montana's Tongue River Reservoir on the Tongue, would allow Montana to make use of its percentage share of the cumulative divertible flows in dry summer months to satisfy both its pre-1950 rights and its post-1950 rights. It is no surprise that much of the expected storage has been erected – Yellowtail Reservoir astride the Wyoming and Montana border in 1961, and the Tongue River Reservoir expansion in 1999. United States Bureau of Reclamation, http://www.usbr.gov/dataweb/html/yellowtail.html; HYDRO SOLUTIONS, INC., TONGUE RIVER HYDROLOGY REPORT, 28 (2007), http://bogc.dnrc.state.mt.us (follow "Reports" hyperlink; then follow "2007 Tongue River Hydrology Report" hyperlink). Compact Commissioner Newell reported to Congress in 1951 that the satisfaction of all surface water users' rights on these rivers depended on the construction of storage. App. 83-84, 85-86. The drafters refused to enact a

convoluted system of depletion accounting and interstate calls that Montana now suggests, because they expected that Montana would develop and properly manage its storage, and thereby obtain satisfaction from its generous percentages of divertible flow.

If this Court were to ignore the assumptions of the drafters about storage solving Montana's timing concerns, and effectively rewrite the Compact to allow Montana to demand water that Wyoming's post-1950 users are properly diverting within Wyoming's percentage share, then Montana could manipulate its water administration to unfairly harm Wyoming. For example, on the Tongue River, Montana could drain Tongue River Reservoir early in the irrigation season to satisfy post-1950 diversions, leaving insufficient water to satisfy its pre-1950 rights later in the season. Then, when the river flows are diminished and cannot satisfy pre-1950 users, it could force Wyoming to shut down its post-1950 users in order to make water available at the headgates or pumps of pre-1950 Montana users. Under Montana's theory, this could occur even if Wyoming's total cumulative post-1950 diversions and net gains in storage in the Tongue River Basin are less than its 40% allocation of the total divertible flow. The compact commission, and the congressional committees, believed that Montana would use storage as a shield for pre-1950 Montana users against late season low flows. App. 85-86. They did not give Montana the sword of *daily* divertible flow theory with which to abuse Wyoming.

Significantly, when the 1942 and 1944 commissioners drafted daily divertible flow versions that placed all water rights under percentage allocation, they allotted to Montana small percentages – 28% of the first 2,200 acre-feet divertible each day from the Tongue, and 3.5% of the first 2,000 acre-feet divertible each day from the Powder. These small percentages to Montana diverters made sense, since those draft compacts attempted to allocate all divertible flows, to both pre-1950 and post-1950 rights, between the states. Few of the existing water rights were in Montana. App. 12, 14 (1940 FPC report). If the 1942 and 1944 commissions had given Montana higher percentages of all the water, Wyoming's existing rights would have been diminished.

In the final Compact, the drafters gave much larger percentages to Montana: 60% on the Tongue and 58% on the Powder. This is consistent with Article V's provisions that allocated only post-1950 diversions by percentage, while grandfathering pre-1950 rights. The higher percentages to Montana in the final Compact were based on development potential only, since water for existing rights was excluded from the percentage allocations.

Now, Montana wants the best of both worlds. It wants high percentages of the 1951 Compact, but also wants to employ the daily scheme from the rejected 1942 and 1944 drafts to force post-1950 Wyoming diversions to cease diverting on particular days, even if Wyoming is cumulatively well within its 40% allocation. If Wyoming had agreed in 1950 to a repeat

of the daily divertible flow scheme of the 1944 compact, it surely would have insisted on the smaller percentages for Montana. Montana is not entitled to the higher percentages it received in the final Compact without also accepting the modified divertible flow system to which the percentages are linked.

The modified divertible flow method, as accepted by Montana, is simple, and could, under the appropriate circumstances, support a claim against Wyoming for its violation. Montana may initiate a claim by asserting that Wyoming is violating its cumulative percentage allocation as of a given date. To test this, each state would collect its measurements under subsections 1-4 of Section C of Article V, including: (1) all water diverted to post-1950 rights, (2) net changes in storage between October 1 and the given date for each post-1950 reservoir, (3) net changes in storage in pre-1950 reservoirs to the extent committed to serving post-1950 rights, and (4) the amount of water that passed the bottom of the particular river since October 1. YRC art. V, § C. Montana and Wyoming would then share these measurements and add them up. They would multiply this "cumulative total divertible flow" by their percentage limits to reach the amount of water measured in acre-feet that they were allowed between October 1 and the given date. YRC art. V, § C. They would then compare their allowance to the total cumulative amount of diversions and storage that occurred in their own states through the given date. In Wyoming's case, it would be in violation if its cumulative diversions and storage through the given

date exceeded its 40% of the total cumulative divertible flows on the Tongue, or 42% on the Powder. YRC art. V, § B.

To be enforced, the Compact requires the states to collect data over the entire water year. Flows at the points of measurement under Section C. 4., can be obtained by single stream gauges near the confluence of the Tongue and Powder Rivers and the Yellowstone. Net gains in reservoir storage can be obtained by water level measurements at the various reservoirs on two dates (October 1 and any given date). With its system of water rights filings, enforced by local hydrographers throughout the irrigation season, Wyoming can measure its actual post-1950 diversions on its side of the border. *See* WYO. STAT. ANN. §§ 41-3-602 through 606 (2007) (authority of hydrographers).

The Montana Legislature understood the need to develop its data collection for post-1950 rights covered by the Compact, because in 1953 it required all future diverters to install and use measuring devices and report the results to the Department of Natural Resources. MONT. CODE ANN. §§ 85-20-102 through 106 (2005). If Montana irrigators comply with the statute, Montana should be able to calculate the total divertible flow as of any given date, and should then be able to identify, and if necessary, allege a Wyoming violation. Tellingly, Montana has alleged no such violation, but instead offers incorrect Compact interpretations based on principles the drafters rejected.

After extensive negotiations, the Compact drafters incorporated the various tradeoffs that led to a rational, integrated, modified divertible flow compact. If this Court were to allow Montana to resurrect clauses from rejected drafts and insert concepts from other compacts between other states, such as the depletion principle, it would destroy the integrity and balance of the final Compact. Such an approach would violate the basic law of compacts that requires allegiance to the intent of the drafters. *See Oklahoma v. New Mexico,* 501 U.S. 221, 234-35 (1991). The Court should dismiss Montana's claims embodied in paragraphs 8 and 13 of its complaint.

C. Wyoming's Construction of Storage Reservoirs after January 1, 1950 Cannot Violate the Compact

Montana's first claim for relief targeting particular Wyoming water practices involves reservoir storage. Montana alleges that:

> Since January 1, 1950, Wyoming has allowed construction and use of new and expanded water storage facilities in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact.

(Compl. ¶ 9).

This allegation does not state a claim as to either Wyoming's construction or use of reservoirs. The Compact does not restrict the construction of reservoirs, but instead, encourages it in both states. YRC

Preamble. In Article VII, the Compact even allows a downstream state like Montana to construct storage in an upstream state, and, of course, obtain the advantage of such an investment for its downstream users. YRC art. VII.

One reason Wyoming and Montana opted to simplify the Compact in the 1949/1950 round of negotiations was to speed completion of the Compact so storage could go forward, including potential federal projects that Montana wanted at the state lines on the Powder River (Moorhead Reservoir) and the Big Horn River (Yellowtail). App. 70, 73-74 (report of Congressman Engle, report of Secretary of Interior Chapman); App. 81, 85-86 (Commissioner Newell: "Installation of physical works needed to foster that use has been delayed pending an agreement between the States as to division of waters").

Since the Compact's adoption, Wyoming has added storage on tributaries to the Tongue and Powder, and Montana has significantly expanded Tongue River Reservoir, which was built in 1938 before the Compact. App. 95. The federal government also completed Yellowtail Dam on the Bighorn. Construction of reservoirs is not a Compact violation.

The storage of water in post-1950 reservoirs is covered by Section C of Article V. YRC art. V, § C. 2. On any given date, any net gain in storage after October 1 is counted for cumulative allocation if a question of Wyoming's compliance with its percentage allocation has arisen. The net gain in storage is not

counted alone, but as one component of the cumulative divertible flow sum. *See* App. 64 (allocation operated on an "annual basis with provision to check as required"). Reservoir storage could only cause Wyoming to violate the Compact if it caused Wyoming to exceed its *total* cumulative percentage allocation as of a given date. Montana has not alleged that this has ever occurred, or is likely to occur.

Perhaps Montana is approaching the reservoir issue from its faulty premise that the Compact calls for daily interstate prior appropriation. In 2004, Montana's Director of Water Resources, Jack Stults, complained to Wyoming that pre-1950 diverters in Montana lacked water, so post-1950 reservoirs in Wyoming should be drained of water stored earlier during peak runoff when there was no shortage in Montana. App. 93. For reasons discussed above, this argument has no merit. Post-1950 reservoir storage, like post-1950 direct diversions, is administered under the Compact cumulatively, by adding net gains in storage to the cumulative divertible flow, not by daily comparisons between individual diversions in Montana and Wyoming storage reservoirs.

Montana's reservoir theory would also violate a broader principle of western water law. Under both Wyoming and Montana law, when water users build reservoirs, and fill those reservoirs from a stream "in priority" (at a time that filling the reservoir does not interfere with diversions of natural flow to other more senior appropriators), the reservoir owners essentially become the owners of that stored water. *Fed.*

Land Bank v. Morris, 116 P.2d 1007, 1012 (Mont. 1941), *cited in Wheatland Irrigation Dist. v. Pioneer Canal Co.,* 464 P.2d 533, 540 (Wyo. 1970); *Kearney Lake Land & Reservoir Co. v. Lake DeSmet Reservoir Co.,* 475 P.2d 548, 551 (Wyo. 1970); WYO. STAT. ANN. § 41-3-303 (2007). The owners cannot be forced to deliver water they legally stored to other irrigators at a later date simply because those other irrigators are short of natural flow. *Fed. Land Bank,* 116 P.2d at 1011-12, *citing* SAMUEL WIEL, WIEL ON WATER RIGHTS § 279 (3d ed. 1911). After all, the reservoir owners stored the water when the other irrigators did not need it. *Id.* Without storage, the water would have flowed out of the basin, unused by the other irrigators. Therefore, the reservoir owners' later use of the water does not injure the other irrigators, and the stored water is not considered part of the natural flow. *Id.* If irrigators who did not invest in the storage could demand that water when they ran short, they would simply be taking advantage of those who invested in building the reservoirs to capture surplus flows. *Id.* at 1011. No junior appropriators would have incentive to build storage.

In summary, Wyoming water users properly constructed new storage after 1950, and Montana has not alleged any instance in which Wyoming has exceeded its percentage of cumulative divertible flow through a net gain in storage combined with total diversions. That is the only way in which Wyoming could violate the Compact through its use of storage.

Montana's reservoir allegations therefore fail to state a claim.

D. Wyoming's Irrigation of New Acreage Cannot Violate the Compact

Following its reservoir claim, Montana attacks Wyoming's development of new diversions after 1950. (Compl. ¶ 10). Montana alleges that Wyoming should not allow new acreage to be put under irrigation in the Tongue and Powder River Basins. *Id.* Yet the primary reason for the Compact was to encourage the compacting states to proceed with irrigation of new acreage by establishing a firm understanding of how divertible flow would be allocated to such new acreage. The drafters established this understanding through the modified divertible flow method. Thus, in order to successfully allege a Wyoming violation of the Compact because of Wyoming's future irrigation and other development, Montana must allege a violation of the allocation formula in a particular instance. Montana fails to do so in its complaint.

Instead, Montana only alleges that by "undertaking and allowing the aforementioned actions," to include expanded irrigation development, Wyoming "has depleted and is threatening to deplete" the Tongue and Powder Rivers. (Compl. ¶ 13). Thus, Montana's allegation about post-1950 water development in Wyoming is based on its depletion theory that is foreign to the Compact. This Court should dismiss this claim.

E. Wyoming Cannot Violate the Compact by Increasing Water Consumption on Acreage that had Irrigation Rights Before 1950

In addition to complaining about Wyoming's development of new irrigated acreage, Montana complains about the adoption of new irrigation technology by Wyoming irrigators with pre-1950 water rights. Montana alleges that "[s]ince January 1, 1950, Wyoming has allowed the *consumption* of water on *existing* irrigated acreage in the Tongue and Powder River Basins to be increased in violation of Montana's rights under Article V of the Compact." (Compl. ¶ 12) (emphasis added). This allegation is based primarily on the fact that some Wyoming irrigators, like some Montana irrigators, have changed from the flood irrigation to sprinkler irrigation systems. (Mont. Br. in Support of Motion for Leave to File Bill of Complaint 15) Since this claim also relies on the rejected depletion principle, it must be dismissed.

Wyoming does not dispute that sprinkler irrigation systems, invented in the 1940s, may be more efficient than flood irrigation systems, because the water is carried to the crops through pipes rather than leaky ditches, and is sprayed directly onto plants. Sprinkler systems can also reduce the need for "carriage water," extra water needed to make up for ditch seepage losses. On the other hand, sprinkler irrigation can cause irrigators to reduce their diversion of water from a stream because the water that gets to their crops is used more efficiently.

In any case, the Compact does not address delivery methods and does not restrict Wyoming's consumption of water in order to guarantee deliveries to Montana at the state line. Both states' irrigators with pre-1950 water rights are entitled to continue to enjoy those rights as they existed in each signatory state as of January 1, 1950. YRC art. V, § A. Wyoming irrigators with water rights as of January 1, 1950 would have obtained those rights either by the permitting process explained earlier in this brief, or by a stream-wide general adjudication earlier in the century, by which a Wyoming district court would have issued a decree confirming territorial water rights based on actual water use. *See* WYO. STAT. ANN. §§ 41-4-501 through 41-4-512 (permitting statutes) *and* WYO. STAT. ANN. §§ 41-4-301 through 41-4-317 (2007). In either case, the Wyoming water rights "existing" "as of January 1, 1950," are those which had been confirmed in writing filed at the State Engineer's Office.

As of 1950, Wyoming water rights identified, in writing, the acreages upon which the water could be applied, the point of diversion from the stream, and other particulars. WYO. STAT. ANN. §§ 41-4-501 and 41-4-502 (2007). Wyoming law, and permits or certificates of appropriation issued under that law, did not limit the technology by which irrigators could spread the water, or how much of the water would be consumed by their crops. If the irrigators could increase the efficiency of their water use so that more of the water went into the crop, or change their crop to one

that naturally consumed more water, that was their right, so long as the conditions on their certificates of appropriation remained the same. Wyoming law did not, and does not today, require irrigators to maintain any level of return flows to a stream. *Binning v. Miller*, 102 P.2d 54, 60-61 (Wyo. 1940); *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 601 (Wyo. 1957); *Fuss v. Franks,* 610 P.2d 17, 20 (Wyo. 1980). In *Bower,* the Wyoming Supreme Court wrote:

> No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolation to the river, no other appropriator can complain.

Bower, 307 P.2d at 601.

In Article V, the compact drafters did not state what methods irrigators in either state must use to apply diverted water onto their lands. They imposed no efficiency limit on irrigation, and stated no minimum flow that irrigators must return to a river from their land after using the water. As Montana's own Water Resources Division Administrator, Orrin Ferris, wrote about the Compact in 1976, "return flows are never mentioned." (App. A to Wyoming's

Brief in Opposition to Motion for Leave to File Bill of Complaint A-5).

Since the Compact excludes pre-1950 water rights from any percentage allocation, and allows irrigators in each state to simply abide by their own state's water laws, the Compact supports no claim that Wyoming irrigators cannot increase their consumption by changing crops or changing irrigation methods. If Montana wanted to impose consumption limits on pre-1950 Wyoming irrigators, it should have sought them in negotiations by supporting Mr. Myer's 1950 depletion draft. *See* App. 54-57 (Montana agreed with the choice of the divertible flow principle over the depletion principle).

Finally, if pre-1950 irrigators in either Montana or Wyoming can obtain new sources of water, most likely through new storage projects, to increase diversions onto existing irrigated acreage, or extend the irrigation season, the Compact provides that the supplemental supply is not counted under Section C against that state's cumulative allocation percentage. YRC art V, § B. Although such supplementation could increase the total consumption of water in that state, the increase would be expressly grandfathered under Section B.

In summary, Montana has failed to state a claim upon which relief can be granted based on increased consumption of water diverted to acreage that was under Wyoming water rights as of January 1, 1950. This is not a depletion Compact.

F. Montana Fails to State a Claim Regarding Wyoming's Groundwater Development

The Compact drafters made it clear in plain language throughout Article V that they intended the Compact to govern surface water, not groundwater. They also chose a modified divertible flow method, which unlike the depletion principle, regulates only surface water. Nevertheless, Montana alleges that Wyoming has violated Article V by "allowing the construction and use" of groundwater wells for irrigation and for production of coalbed natural gas in the Tongue and Powder Basins after 1950. (Compl. ¶ 11). This claim should be dismissed.

Section A of Article V states that the pre-1950 appropriative rights to the use of "the water of *the Yellowstone River System* . . . shall continue to be enjoyed[.]" YRC art. V, § A (emphasis added). The Compact defines the Yellowstone River System as "the Yellowstone River and all of its *tributaries, including springs and swamps*, from their sources to the mouth of the Yellowstone River[.]" YRC art. II, § D (emphasis added). The Compact defines the term tributary to mean "any *stream which in a natural state* contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof[.]" *Id.* § E (emphasis added). Finally, the Compact defines the "Interstate Tributaries" as the Clarks Fork of the Yellowstone River, Bighorn River, Tongue River, and Powder River. *Id.* § F.

These definitions simply do not encompass water produced artificially through the pumping of water from holes drilled in the ground, however deep. The 39 engineers, lawyers, farmers and ranchers on the Compact commission surely knew that a "stream" in its "natural state" or a "spring" or a "swamp," is not a groundwater well.[9] If they wanted Section A of Article V to cover groundwater, they simply could have said so.

The same analysis applies to Sections B and C of Article V. Section B begins by speaking of "waters of the Interstate tributaries of the Yellowstone River," which are defined as the four named "rivers." YRC art. II, § F. A river is "a natural stream of water larger than a creek and emptying into an ocean, a lake, or another river." NOAH WEBSTER, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1566 (Harold Whitehall ed. Cleveland World Publ'g Co. 1951). The second clause of Section B then allocates water for post-1950 rights by percentages among the four rivers. No groundwater is mentioned here.

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[9] A stream is "any current or flow of running water, especially one running along the surface of the earth; specifically, a small river." NOAH WEBSTER, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1800 (Harold Whitehall ed. Cleveland World Publ'g Co. 1951). A spring is "a flow of water from the ground, the source of a stream." *Id.* at 1760. A swamp is "spongy land; low ground filled with water; soft, wet ground; a marsh; a bog." *Id.* at 1840.

Section C of Article V, in defining the quantity of water subject to percentage allocation, refers to "*diversions*" above the points of measurement on the interstate tributaries, net changes in storage in "*reservoirs*," and the quantity of water that passes "the point of measurement in the *stream*." YRC art. V, § C (emphasis added). A reservoir is "a place where anything is collected and stored, generally a large quantity; especially, a natural or artificial lake or pond in which water is collected and stored for use, as to supply the needs of a community." NOAH WEBSTER, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1539 (Harold Whitehall ed. Cleveland World Publ'g Co. 1951). If the drafters intended the Compact to deal with underground storage in aquifers, they surely would have used terminology in addition to "reservoir." In the half century since the Compact was created, the compact commissioners have listed surface reservoir data in their annual reports, but no data for underground aquifers. *E.g.,* YELLOWSTONE RIVER COMPACT COMM'N, FIFTY-FIFTH ANNUAL REPORT, General Report 18-22 (2006).

The Compact defines "diversion" to mean "the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken." YRC art. II, § G. As noted above, tributary is defined by the compact as a "stream." *Id.* § E. Taking or removing water from a

tributary would mean pumping water from the stream's channel or turning it out through a headgate along the stream's bank. The exception embedded in the definition of diversion, which applies to water returned directly back into the stream's "*channel*," makes the definition even clearer. *Id.* § G. A diversion under the Compact does not include the pumping of water from a well drilled into an underground aquifer that might indirectly deplete a stream. Since Section C only seeks to allocate between the states quantities of water diverted, stored in reservoirs, or flowing out of a basin in a "stream," it only allocates surface water.

As explained throughout this brief, the compact drafters and Congress repeatedly described this Compact as a modified divertible "*flow*" compact. *E.g.,* App. 72 (Engle: "there is adopted a modified version of the divertible flow principle."); App. 84 (Newell: "the 'divertible flow' principle was chosen"). They thus intended their definitions to describe diversion of flows from surface waters – rivers, streams, tributaries, and interstate tributaries – not the gradual percolation of groundwater through aquifers.

In ¶ 11 of its complaint, Montana does not specify how Wyoming has violated the Compact by allowing groundwater pumping for irrigation and coalbed natural gas development in the Tongue and Powder River Basins. However, Montana has previously asserted that Wyoming groundwater development reduces water pressure in underground aquifers that contribute to springs that feed surface streams. On

page 14 of its Brief in Support of Motion for Leave to File Bill of Complaint, Montana stated: "All groundwater pumping has the potential to *deplete* the compacted waters of the Powder and Tongue Rivers." (emphasis added). Thus, Montana's groundwater allegation is based on its assertion that the Compact is a depletion compact. However, the passage of 57 years has not altered the plain fact that the drafters rejected the depletion principle in favor of modified divertible *flow*.

The Compact does not restrict Wyoming's depletions of the total annual water supply in a basin. If Montana wants to enter into a compact with Wyoming to administer groundwater, or to regulate the rivers and streams of the Yellowstone River Basin based on depletion or consumption concepts, it should invite Wyoming to the negotiating table, not ask this Court to rewrite the Compact. *See Arizona v. California,* 373 U.S. 546, 565 (1963) ("courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress"). Montana's groundwater claim must be dismissed.

CONCLUSION

Wyoming requests that the Court dismiss Montana's Bill of Complaint on grounds that it fails to state a claim upon which relief may be granted.

Respectfully submitted,

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April 2008

February 9, 1943

HON. LESTER C. HUNT, GOVERNOR
MEMBERS OF THE 27TH WYOMING
LEGISLATURE

Gentlemen:

As Interstate Streams Commissioner for Wyoming I deem it my duty at this time to outline for your information a brief summary of the history of the Yellowstone River Compact and some pertinent facts concerning which, it would seem, you should be advised.

The first Congressional authorization for a Yellowstone River Compact was in 1932 and included only the states of Montana and Wyoming. Clyde L. Seavey was appointed as the Federal Representative.

The first attempt at an allocation of any portion of the Yellowstone watershed was a so-called "Declaration of Plan of Allocating Water in the Big Horn basin", which was signed by members of the Big Horn Dam Association and by the Governors and State Engineers of Montana and Wyoming. It seems that this was not participated in or signed by a Federal representative, which may have been the reason it was never passed on by the Legislatures of the two states.

The next attempt at negotiations of which we have a record was February 6th, 1935, when a so-called Yellowstone River Compact, for allocation of the waters of the Yellowstone River between the

states of Montana and Wyoming was negotiated and signed at Cheyenne, Wyoming, by representatives of the two states and of the United States.

We have no record of this having been submitted to the State Legislatures for ratification.

The record shows no other representatives than the Governors and State Engineers at the 1933 meeting and only the State Engineers and the Federal representative at the second meeting. The only representative provided by law to represent the State prior to 1941 was the Interstate Streams Commissioner.

On August 2nd, 1937, the Congress again authorized the states of Montana and Wyoming to negotiate and enter into a compact for the equitable division of the waters of the Yellowstone River watershed and Clyde L. Seavey was appointed by the President to represent the United States and the Governors of each state appointed four representatives.

These commissioners met in Billings, Montana, May 5th, 1938, and again in Thermopolis, Wyoming, November 21st and 22nd, 1938. Each time negotiations were deferred pending the final report of the Bureau of Reclamation with reference to their basin-wide investigations including the water-shed of the Yellowstone River in Montana in Wyoming.

June 5th, 1940, Congress extended the time for negotiating the compact to June 1, 1943, and included North Dakota as a party to the negotiations.

October 10th, 1940, a meeting was held in Billings, Montana, where Wyoming was represented by Thornton, Metz and Bishop, and where it was agreed to postpone further negotiations until the basin-wide report of the Bureau of Reclamation was completed.

The 1941 Legislature amended the Interstate Streams Commissioner law to provide for appointment of assistant commissioners upon the recommendation of the Interstate Streams Commissioner. Upon my recommendation at that time, Governor Smith appointed L. F. Thornton, John Gonin, Ray Bower, Ernest Goppert, David Anderson, R. E. McNally and Will G. Metz. Later Ed. J. Johnson became a member of the Commission by virtue of his appointment on the Planning and Water Conservation Board, and just before November, 1942, meeting in Billings, Mr. Earl Bower was appointed as an assistant commissioner on my recommendation.

The first meeting where a tentative draft of the Yellowstone River Compact as prepared by Lesher S. Wing was considered, was held in the office of Mr. E. B. Debler, the Chief Hydraulic Engineer of the U. S. Bureau of Reclamation, in Denver, Colorado, from 7:30 to 9:30 p.m. on October 15th 1942. Mr. Fred E. Buck represented the State of Montana, Mr. John T. Tucker, the State of North Dakota, and Mr. L F. Thornton, Mr. Ed J. Johnson and Mr. L. C. Bishop, the State of Wyoming. Mr. Lesher S. Wing, Engineer of the Federal Power Commission, acted as a substitute for Mr. Clyde L. Seavey, Mr. W. G. Sloan, Engineer of the Bureau of Reclamation, acted in an

advisory capacity answering questions concerning the progress of the basin-wide investigations of his department. It was agreed that the entire day of October 17th was to be spent in further consideration of the tentative draft of the compact.

The meeting was held on October 17th and a preliminary draft was agreed upon with the understanding that Mr. Lesher S. Wing was to prepare it in proper form and furnish copies to the Commissioners of the three states.

The revised draft was submitted to the joint commission at a meeting held in Billings, Montana, on December 1st, 1942. (Our Wyoming Commissioners spent the entire day of November 30th in organizing and preparing for the negotiations that were to take place the following days.)

A public Hearing was held at the Chamber of Commerce Building in Billings the entire day of December 2nd with Mr. Clyde L. Seavey presiding. this meeting had been advertised in all the papers covering the Yellowstone River watershed area.

December 3rd, the Commissioners of the three states met at the Chamber of Commerce Building with Mr. Clyde L. Seavey presiding, and, while a general plan was finally agreed upon, the Commissioners were not satisfied to sign a compact without further hearings in the basin and further consideration of the provisions. The meeting was adjourned at 11:50 p.m. to re-convene at the call of the chairman.

At the call of the chairman, the Commission again met at Billings, Montana, on December 29th, 1942, with Mr. Beebe presiding, and continued during December 30th and, at 1:15 a.m. December 31st, a unanimous agreement of the Commissioners was reached and all agreed to sign except Mr. R. E. McNally who was obliged to leave early in the evening of the 30th, and who later decided not to sign. Will G. Metz was not present at the meetings but signed the Compact as drafted and agreed upon.

The entire day of December 31st was spent by the engineers and some of the others in checking computations made by Mr. Wing and the wording of the draft as approved by the Commissioners.

This compact, as presented to the Legislature for ratification, represents conclusions which, in some instances, were compromises arrived at and unanimously agreed upon by the entire group of State representatives and the representative of the United States, assisted by engineers and attorneys of the Federal Power Commission, U. S. Bureau of Reclamation, Army Engineers and the U. S. Indian Service.

Mr. John A. Whiting, former State Engineer of Wyoming, Mr. Howard Bell, Civil Engineer of Cody, and Mr. Elmer K. Nelson, Civil Engineer of Laramie, were employed as engineer advisors for the Wyoming delegation with Mr. L. J. O'Marr, Wyoming Attorney General, and Mr. W. J. Wehrli, attorney from Casper, acting as legal advisors.

Also, on our commission, we had Mr. Ernest Goppert and Mr. R. E. McNally, attorneys, who rendered very able assistance, and contrary to the opinion expressed by some, the representatives of Federal Agencies have assisted by every means at their disposal to aid us in solving this problem.

Since the printed copies have been distributed, several protests have been registered, but, in my opinion, none have merits that will offset the benefits that will accrue to all concerned by approval of the Compact at this time. It is my opinion that without exception, the allotments are just and equitable and that the draft as a whole is a favorable to Wyoming as we could expect by any compact later entered into, and for reason stated herein, I recommend the passage of House Bill No. 99 entitled "A Bill for AN ACT to provide for the ratification and approval of the Yellowstone River Compact."

Respectfully submitted,

/s/ L. C. Bishop
L.C. BISHOP, State Engineer
and Interstate Streams
Commissioner For Wyoming.

YELLOWSTONE RIVER COMPACT
BETWEEN
THE STATES OF WYOMING AND MONTANA

* * *

ARTICLE V

(a) The waters of the Yellowstone River and tributaries are public waters and as such are the properties of the states within which they originate and flow, but the use of such waters is subject to appropriation for beneficial use under the laws of the separate states and under general water-right law as interpreted by the Courts.

(b) Priority of appropriation for beneficial uses shall give the better right. The right of a prior appropriator is such that he is entitled to have the stream flow, within the amount of his right, and within the needs of the beneficial use for which appropriation was made, as it did when he appropriated, undiminished by the use of any later appropriator or by any increased use of earlier priority. Beneficial use is the basis, the measure and the limit of any right to the use of public water.

(c) Wherever and whenever practical the waters of all interstate streams shall be divided at the state line, having due regard to elements of return flow, priority, and established uses. . . .

* * *

ARTICLE VI

* * *

(b) The Commission shall at once begin the study of the various interstate streams and shall determine the amount of water to be divided between the states at the state line. The conclusions reached are to be based on the law of priority, the law of beneficial use, due regard to stream increases caused by underground storage and return flow and any other salient facts, that in the opinion of the Commission, may have a bearing upon the equitable distribution of water, within the intents and purposes of this compact.

* * *

Executed in three original copies at Cheyenne, in the State of Wyoming, this Sixth day of February, A. D. 1935.

* * *

PROGRESS REPORT TO THE GOVERNORS OF THE STATES OF MONTANA AND WYOMING AND TO THE CONGRESS OF THE UNITED STATES REGARDING YELLOWSTONE BASIN COMPACT

* * *

The above-representatives of Federal and State interests comprise the Yellowstone River Compact Commission.

Following the appointment of these representatives, meetings were held on May 5, 1938, in Billings, Montana and on November 21, and 22, 1938, in Thermopolis, Wyoming. In addition to members of the Commission, there were also present at these meetings representatives of federal bureaus . . . The purpose of these meetings was to ascertain the character of information required for the drafting of the Yellowstone River Basin Compact, and the extent to which data on climate, topography, land ownership, population, and water development are available; to investigate the uses of water for irrigation, power, navigation, domestic and industrial purposes, and to study the laws of the States of Montana and Wyoming with respect thereto. . . .

From an analysis of the available information, it is the concensus of the Compact Commission:

1. That adequate factual data necessary to the drafting of a compact between the States of Montana and Wyoming are not available at

the present time; however, studies now being carried on by the Bureau of Reclamation, U. S. Army Engineers, Forest Service, Indian Service, and other Federal agencies will produce a considerable amount of additional data, which will be useful for this purpose. Information which is presently inadequate or entirely lacking is as follows:

(a) Existing diversions for irrigation;

(b) Priorities of irrigation appropriations and rights;

(c) Acreages presently being irrigated and which are irrigable from existing works;

(d) Net water duty on irrigated lands;

(e) Crops grown on irrigated lands;

(f) Potentially irrigable lands and their water requirements;

(g) Stream flow data on minor tributaries;

(h) Location and cost of additional storage;

(i) Soil surveys;

(j) Studies of soil erosion, and silting of reservoirs;

2. That apparently the annual run-off of the Yellowstone River basis is sufficient to meet all existing and potential consumptive uses if and when a comprehensive plan of storage has been developed and put into effect;

* * *

4. That approximately 740 square miles of the drainage basin of the Yellowstone River lies within the State of North Dakota; therefore it appears desirable that the Congress of the United States amend its authorization for a compact with reference to the waters of the Yellowstone River to include the State of North Dakota as a signatory thereto;

5. That, because existing water supplies as presently developed are inadequate to fully meet demands for irrigation and other uses in critically dry years, there is imminent danger that irrigators in certain areas will resort to costly and protracted litigation in order to protect their rights; therefore, it is essential that additional storage be constructed at strategic points at the earliest possible date in order to relieve this situation; . . .

* * *

Dated Feb. 25, 1939

PRELIMINARY REPORT
ON
YELLOWSTONE RIVER BASIN

COMPILATION OF FACTUAL DATA
FOR USE OF
THE YELLOWSTONE RIVER
COMPACT COMMISSION

FEDERAL POWER COMMISSION
BUREAU OF ENGINEERING
DENVER REGIONAL OFFICE

DECEMBER 1940

* * *

. . . According to the 1939 survey, a total of 57,605 acres are under canals, of which 53,305 acres are being irrigated at present. Of the area under canals, about 75 percent is in Wyoming and 25 percent in Montana.

It will be noted from table 43 that all of the existing projects in Montana take their water supply directly from the main stem of the Tongue River. This table also indicates that the 13,840 acres being irrigated in Montana suffered an average annual shortage of 10,450 acre-feet during the period 1930-1938. According to the field survey sheets from which the table was prepared, shortages occurred during July, August, and September of every year, and were particularly severe in 1934. From table 44, it is evidence that there is frequently less than fifty second-feet in the river at the state line. From July 18 to

September 3, 1934, there was never more than ten second-feet in the river at this point. The combined capacity of the diversion canals in Montana is about 300 cubic feet per second, and the gage at Miles City shows that the canals divert the entire stream during most of the irrigation season.

* * *

It is evident from the stream flow records that additional irrigation in this basin must depend upon new storage capacity. . . .

* * *

As shown in table 17, there are four existing reservoirs in the basin having a combined capacity of 73,020. Big Horn, Dome Lake, and Park reservoirs are all in Wyoming and have a total capacity of 13,020 acre-feet. The Tongue River Reservoir, which is in Montana, has a capacity of 60,000 acre-feet.

Table 1 of Appendix II lists eight potential reservoirs in Wyoming having an aggregate capacity of 103,446 acre-feet. Pumpkin Creek Reservoir, with a capacity of 6,800 acre-feet, is listed in table 3 of Appendix II. Two additional reservoirs on Pumpkin Creek are listed in table 2 of Appendix II. . . .

* * *

Irrigation along the lower reaches is at present almost negligible, as is indicated by the fact that less than 400 acres in Montana are irrigated from the Powder River.

* * *

It will be noted from this record that the flow at the state line is extremely low during the late irrigation season. . . .

* * *

Practically all the irrigated land in the Powder River Basin is in Wyoming. . . . According to the 1939 survey, a total of 75,480 acres are under canals, of which 63,785 acres are being irrigated at present. . . .

Only 380 acres in the Powder River Basin in Montana are irrigated at present. This area is in small tracts along the river, in Custer and Prairie Counties, and is irrigated from the main stem by pumping. . . .

* * *

The ultimate irrigable area of the basin as estimated by the Corps of Engineers is 122,705 acres. . . .

The Wyoming Report estimated the ultimate irrigable area in Wyoming at 216,500 acres (see table 18 and Appendix I, table 2). The Montana Reports do not give an estimate of the ultimate irrigable area in Montana, but indicate that the Army figure should be increased by 14,600 acres. . . .

* * *

The existing reservoirs in the basin have a total capacity of 35,013 acre-feet. The major reservoirs, all of which are in Wyoming, are listed in table 17. . . .

More than 30 sites for potential reservoirs have been investigated in the Powder River Basin. The combined capacity of the 34 potential reservoirs listed for Wyoming in table 1 of Appendix II is 255,270 acre-feet. The capacity of the potential Moorhead Reservoir in Montana is 46,000, which makes a total of 301,270 acre-feet for the entire basin. . . .

* * *

YELLOWSTONE RIVER COMPACT

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, have resolved to conclude a Compact as authorized under the Act of the Congress of the United States of America, approved June 15, 1940 (Public No. 632, 76th Congress, Third Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:	For the State of North Dakota:
Fred E. Buck	John T. Tucker
W. E. Ogden	Kenneth W. Simons
P. F. Leonard	Einar Dahl
H. W. Bunston	M. M. Millhouse
Wesley A. D'Ewart	Frank P. Whitney

For the State of Wyoming:

L. C. Bishop	Ernest Goppert
L. F. Thornton	David Anderson
John Gonin	~~R. E. McNally~~
Earl Bower	Will G. Metz
Ray Bower	Ed J. Johnson

* * *

I. The term "Divertible Flow" means the quantity of water that could be diverted from the stream flow above a designated point of measurement during a specified period of time. It is comprised of three elements: (a) the total net inflow to storage; (b) the total diversions; and (c) the remaining flow in the stream at the designated point of measurement for which the divertible flow is being determined. It is computed as follows:

The algebraic sum of:

(a) The quantity of water (in acre-feet) that flowed into reservoirs situated above the point of measurement during the specified period of time; less the outflow and diversions made directly from reservoirs (in acre-feet) during the same period; plus

(b) The quantity of water (in acre-feet) that was diverted from the stream above the point of measurement (including diversions made directly from reservoirs) during the specified period of time; plus

(c) The quantity of water in the stream (in acre-feet) that flowed past the point of measurement for which divertible flows are being determined during the specified period of time.

J. The term "Mean Divertible Daily Flow" means the average divertible flow occurring during a twenty-four hour period, beginning at 12:00 midnight.

* * *

3. Tongue River

Each day during the period May 1st to September 30th, inclusive, of each year, the first 2,200 acre-feet of mean divertible daily flow of the Tongue River, determined at the lowest point of diversion on this stream, shall be divided seventy-two (72) per cent to Wyoming and twenty-eight (28) per cent to Montana; and the next 1,200 acre-feet of mean divertible daily flow shall be divided forty-three (43) per cent to Wyoming, and fifty-seven (57) per cent to Montana; however, either State may temporarily divert, consume, or store for its beneficial use any unused part of the above flows allotted to the other, but no continuing right to such unused flows shall be established thereby. Unappropriated divertible daily flows in excess of 3,400 acre-feet occurring during the period May 1st to September 30th, inclusive, and all presently unappropriated flows occurring during the period October 1st to April 30th, inclusive, of each year, shall be subject to future appropriation by Montana, North Dakota, and Wyoming for beneficial use within the Yellowstone River Basin.

4. Powder River (Exclusive of Little Powder River)

Each day during the period May 1st to September 30th, inclusive, of each year, the first 2,000 acre-feet of mean divertible daily flow of the Powder River, determined at the Wyoming-Montana State line, shall be divided ninety-six and one-half (96½) per cent to Wyoming and three and one-half (3½) per cent

to Montana; and the next 2,600 acre-feet of mean divertible daily flow shall be divided sixty (60) per cent to Wyoming, and forty (40) per cent to Montana; however, either State may temporarily divert, consume, or store for beneficial use any unused part of the above flows allotted to the other, but no continuing right to such unused flows shall be established thereby. Unappropriated divertible daily flows in excess of 4,600 acre-feet occurring during the period May 1st to September 30th, inclusive, and all presently unappropriated flows occurring during the period October 1st to April 30th, inclusive, of each year, shall be subject to future appropriation by Montana, North Dakota, and Wyoming for beneficial use within the Yellowstone River Basin.

* * *

Done at the City of Billings in the State of Montana, this 31st day of December, in the year of Our Lord, One Thousand Nine Hundred and Forty-two.

* * *

PROPOSED YELLOWSTONE RIVER COMPACT

EXPLANATION OF ARTICLE V
Montana State Engineer's Office, Jan. 30, 1943

It is the intention herein to briefly explain the contents of Article V in as simple language as possible.

* * *

Mean Divertible Daily Flow:

If it was physically possible to measure items (a), (b), and (c) within any one 24-hour period, there would be no reason for injecting this term into the Compact. It may take a week or ten days to make all these measurements, (due to the long distances, poor roads, etc). When all the measurements are made and added up, the sum is then divided by the number of days it took to make the measurements, and the result is the "mean divertible daily flow". (Art. II, Sec. J).

* * *

P. F. LEONARD
Attorney at Law

MILES CITY, MONTANA

June 29, 1944

Mr. H. D. Comstock
Regional Director
Bureau of Reclamation
Billings, Montana

Dear Mr. Comstock:

* * *

I do not believe that Powder River need go in the compact as there is very little irrigation on Powder River in Montana and the proposed Moorhead dam should take care of the potential irrigation.

* * *

Sincerely yours,

P. F. LEONARD

YELLOWSTONE RIVER COMPACT

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, have resolved to conclude a Compact as authorized under the Act of the Congress of the United States of America, approved March 16, 1944 (Public No. 257, 78th Congress, Second Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:

Fred E. Buck	E. E. Tiffany
W. E. Ogden	D. M. Manning
P. F. Leonard	Chester E. Onstad
H. W. Bunston	Paul J. Hagan
Wesley A. D'Ewart	Axel Persson

For the State of North Dakota:

J. J. Walsh	M. M. Millhouse
Kenneth W. Simons	Frank P. Whitney
Einar H. Dahl	John T. Tucker

For the State of Wyoming:

L. F. Thornton	David G. Anderson
John Gonin	W. B. Snyder
Earl Bower	Mark N. Partridge
Ray Bower	L. C. Bishop
R. E. McNally	H. J. Paustian
E. J. Johnson	W. R. Holt
Ernest J. Goppert	

* * *

3. Tongue River

Each day during the period May 1st to September 30th, inclusive, of each year, the first 2,200 acre-feet of mean divertible daily flow of the Tongue River, determined at the lowest point of diversion on this stream, shall be divided seventy-two (72) per cent to Wyoming and twenty-eight (28) per cent to Montana; and the next 1,200 acre-feet of mean divertible daily flow shall be divided forty-three (43) per cent to Wyoming and fifty-seven (57) per cent to Montana: Provided, That either State may temporarily divert, consume, or store for its beneficial use any unused part of the above flows allotted to the other, but no continuing right to such unused flows shall be established thereby. Unappropriated divertible daily flows in excess of 3,400 acre-feet occurring during the period May 1st to September 30th, inclusive, and all presently unappropriated flows occurring during the period October 1st to April 30th, inclusive, of each year, shall be subject to future appropriation for beneficial use within the Yellowstone River Basin in

Wyoming, Montana, and North Dakota in accordance with the laws of said respective States.

The provisions herein, and each of them, and in particular the allotments, and each of them, shall be subject to the following conditions:

* * *

(b) Such provisions and allotments shall become operative either ten (10) years from and after the date that this Compact is ratified by the Congress; or on June 15 of the year in which water is available for release through any adequate distributary system, other than the stream bed, from the Tongue Rive Reservoir of the Montana Water Conservation Board for beneficial uses in Montana, the amount of water so released, however, shall be equal to at least one-half of the working capacity of such reservoir; or on June 15 of the year in which water is available for release through any adequate distributary system, other than the stream bed, if such be necessary, from any storage reservoir constructed in Wyoming to conserve for beneficial uses in Wyoming the waters of the Tongue River, the amount of water released, however, shall be equal to at least one-half of the working capacity of such reservoir; or whichever of said dates is the earlier.

Done at the City of Billings in the State of Montana, this 18th day of December, in the year of Our Lord, One Thousand Nine Hundred and Forty-four.

* * *

January 7, 1949

* * *

Dear Mr. Bishop:

* * *

In the Platte River Case, the Supreme Court did not disturb any existing water appropriations in Wyoming in the upper River Basin. All appropriations were recognized. These appropriations, all of them, amounted to 168,000 acres. The contention of Nebraska was that junior appropriators in Wyoming should have their headgates closed to supply water to senior appropriators in Nebraska. This contention by Nebraska was denied. Junior appropriators in Wyoming can freely use the waters of the Platte River without regard to senior appropriations in Nebraska. Said the Court in answer to this contention by Nebraska, "but as the Special Master points out, those Wyoming appropriations, though junior, represent old, established uses in existence from forth to over fifty years".

Many of our appropriations have been in existence for 69 years. You would reduce and impair those appropriations. This Compact does just that. But if the matter were submitted to the Supreme Court, these ancient rights would be protected as they were in the Platte River Case.

We should have no fear of litigation. The Courts would give us more, by far, than we are getting under this Compact. You have good irrigation lawyers

available to you. Why don't you consult them, and take their advice?

* * *

Very sincerely yours,

/s/ R.E. McNally
R. E. McNally

Discussion of the Yellowstone River Compact and Its Effect Upon the Water Users of the Upper Tongue River Basin in Wyoming

By E. C. GWILLIM
Irrigation Engineer

January 22, 1949

SHERIDAN, WYOMING

* * *

HISTORY:

A Yellowstone River Compact has been under discussion and consideration since the first Congressional authorization in 1932. The first discussions were between Montana and Wyoming. The first tentative draft was prepared in Denver, Colorado in October 1942. A revised draft was presented at Billings, Montana, on December 22, 1942 to the joint compact commission, which consisted of representatives of Montana, North Dakota, and Wyoming. The compact with additional revisions was approved and agreed to by all except one of the representatives of the three states. The final draft of the compact was prepared by representatives of federal agencies, namely; the United States Bureau of Reclamation and the United States Federal Power Commission. "A

Bill for An Act to provide for the ratification and approval of the Yellowstone River Compact" was presented to the 1943 Wyoming Legislature. The compact was amended to exclude Tongue and Powder Rivers and was so passed by the Wyoming Legislature. The states of Montana and North Dakota would not accept the compact as amended. The original compact was presented to the 1945 Wyoming Legislature and was approved by that body, but was vetoed by the Governor. Many interested persons and some compact commissioners favor having a bill introduced in the 1949 legislature for ratification. The legislatures of Montana and North Dakota have ratified the compact as approved at Billings, Montana on December 22, 1942.

* * *

The workability of the formula for determining the divertible flow is questionable. With few exceptions most of Wyoming diversions are for individual farms. To determine the divertible flow requires installing measuring devices on all ditches. In Tongue River Basin Wyoming there are over 400 diversions. To determine the daily divertible flow, a measurement must be taken every day during the period of May 1st to September 30th on each diversion. These measurements will be in cubic feet per second – the basis of measurement of irrigation water in Wyoming. Such measurements must be converted to acre feet. After the total divertible flow is determined then headgates must be adjusted to comply with the excess or deficit. Perhaps the stream flow has now varied

and new measurements must be again taken. The same situation exists in Montana. The miles to be covered in making such measurements daily will require the service of many people, many vehicles, and equipment. Installation of measuring boxes will be at the expense of each individual ditch owner and must be maintained by him. On the Big Horn River, of the 134,800 acres irrigated from Big Horn River 85 per cent of the water is diverted through 28 ditches, and of this amount 75% is diverted through seven ditches. The measurement of the water diverted in Big Horn Basin is relatively easy. The division of water on the daily divertible flow basis as determined by the formula has not been used in any other compact that has been drawn up in other states.*

* * *

United States
Department Of The Interior
Bureau Of Land Management
Region III
Missouri River Basin Investigations

LAND PLANNING AND CLASSIFICATION REPORT

as Relates to the Public Domain Lands
in the

POWDER RIVER BASIN
(Montana and Wyoming)

(For Administrative Use Only)

March 1949

* * *

The potential opportunities for ground water recovery within the basin very considerably because of the dissimilarity of geologic materials and structural conditions. The quality of ground water is good in most cases and becomes better as the mountainous west boundary is approached. No areas are known to exist where underground water occurs in sufficient quantity for irrigation to encourage additional well developments. However, according to reports of the U.S. Geological Survey, artesian flows occur irregularly along the Powder River. Thousands of small

stock-watering-reservoirs have been constructed primarily due to the lack of subsurface water supplies. In many of the lower elevation range areas, the reservoirs are the only source of water for livestock.

* * *

For Immediate Release OCTOBER 26, 1949.

R. J. NEWELL NAMED U. S. COMMISSIONER ON YELLOWSTONE BASIN COMPACT

R. J. Newell, who recently retired as regional director of the Bureau of Reclamation at Boise, Idaho, has been named by President Truman to be United States commissioner for the formulation of an interstate compact providing for an equitable division and apportionment of the waters of the Yellowstone River and its tributaries among the States of Wyoming, Montana, and North Dakota.

* * *

YELLOWSTONE RIVER COMPACT COMMISSION

Minutes of Meeting
Nov. 29, 1949

The first meeting of the Yellowstone River Compact Commission was held at the Northern Hotel in Billings, Montana, on November 29, 1949, and was called to order at 10:00 a.m. by Mr. R. J. Newell, Federal representative on the Commission.

* * *

Mr. Lloyd urged that an Engineering Committee be set up to assemble basic data.

Mr. McNalley moved that the Chair appoint an Engineering Advisory Committee consisting of three representatives from Montana, three from Wyoming, and representatives of Governmental agencies to investigate, gather data and assist the Compact Commission. The motion was seconded.

It was recommended that the Bureau of Reclamation, Geological Survey and Federal Power Commission have representatives on the Committee.

It was suggested that North Dakota should be represented and the maker of the motion stated that the omission was an oversight. Mr. Acker asked that the State Engineer of North Dakota be the only Committee member from that state. It was suggested that the State Engineers of the three states be designated on the Committee with power to call on others for assistance. Mr. Lloyd stated that the State Engineer of Wyoming, as ex-officio Interstate Streams

Commissioner, would probably prefer not to serve on the Engineering Committee. Mr. Buck suggested that three representatives from each state should not be necessary, that one would be sufficient.

* * *

It was moved to amend the motion by reducing the representation to one from each state and one from the Bureau of Reclamation.

Motion was seconded and unanimously carried.

* * *

The Chair appointed the State Engineers of the three states, Mr. Fred Buck from Montana, Mr. J. J. Walsh from North Dakota, and Mr. L. C. Bishop from Wyoming, together with Mr. Carl L. Myers as the Bureau of Reclamation representative.

The Chair asked if written instructions would be required for the guidance of the Committee.

Mr. Manning suggested four items to be required, and as discussion continued the list was expanded to the following:

1. A flow table on the main stem and tributaries.

2. Acreage irrigated.

3. Potential irrigable acreage together with the source of records and estimate.

4. Record of priorities in the three states.

5. Consumptive use of water including industrial use.

6. Climatological data.

7. Storage available.

8. Potential Storage.

* * *

Mr. Pratt moved that the Engineering Committee heretofore selected be instructed by the Commission to prepare as soon as possible, but not later than January 15, 1950, a tabulation of existing information included within the eight items previously discussed, and a tabulation of further items which the Committee feels are required to enable the Commission to arrive at a solution.

The motion was seconded.

* * *

The motion was carried immediately.

* * *

YELLOWSTONE RIVER COMPACT COMMISSION

Minutes of Meeting
Feb. 1-2, 1950

The second meeting of the Yellowstone River Compact Commission was held at the Northern Hotel in Billings, Montana, on February 1 and 2, 1950, and was called to order at 10:10 a.m. by Mr. R. J. Nowell, Chairman. . . .

* * *

The Chairman called on Mr. C. L. Myers, Chairman of the Engineering Committee, who reported on the two meetings which the Committee had held and presented the report of the Committee, which had previously been distributed to all Commissioners. There was discussion as to the proper disposition of the report. A motion to approve was modified by the maker and as finally stated read "that the report be accepted as a basis for negotiation and that sincere thanks be extended to the Committee for its work." The motion was seconded and carried.

* * *

Mr. Thornton suggested discussion of Compact policy, forgetting the prior drafts, and the discussion proceeded along these lines, including the questions of whether inter-state priorities would be considered, whether storage would enter into the negotiations, and the general proposition that water would be divided on the basis of acres irrigated and potentially irrigable.

* * *

Mr. Person suggested two principles to be followed:

(1) Existing rights shall be recognized and remain unimpaired.

(2) The unappropriated unused water shall be divided on the basis of potential development. Mr. Leonard asked whether interstate priorities should be considered. Mr. Person replied that they should not.

* * *

Mr. McNally, speaking for the Wyoming members of the Tongue River Committee, stated that the Committee had not been able to agree on the question of existing rights. He stated that the Wyoming Commissioners wanted all such rights recognized in both states, but that the Montana Commissioners were not willing to let these rights remain unimpaired.

Mr. Leonard, speaking for the Montana Commissioners, stated that it was the sense of his group that no Compact could be agreed upon unless the division of the Tongue River water was on an equitable basis, and that the proposal suggested by Wyoming was not considered to be on such a basis. Montana proposed as one possible basis for the Compact, consideration of the rights on the stream in terms of priority without respect to State line.

The Chairman suggested referring the question back to the Committee with instructions to attempt further to reach an agreement.

* * *

Mr. Leonard requested that Mr. Burke, Regional Counsel of the Bureau of Reclamation, and the Engineering Committee submit to the Drafting Committee a suggested form of Compact. He discussed the procedure of drafting previous Compacts and asked whether Mr. Burke would be willing to prepare the first draft. Mr. McNally and Mr. Acker concurred in the request. Mr. Pratt agreed to phone Mr. Burke and inquire whether he would accept this assignment. Following the phone call, Mr. Pratt reported that Mr. Burke would accept the assignment, but wanted specific instructions as to whether he should fit the agreed upon provisions into the 1944 draft or should begin with a completely new draft, Mr. Acker moved that the draft prepared by Mr. Burke should be a completely new start, built from the ground up. The motion was seconded and unanimously carried.

* * *

YELLOWSTONE RIVER COMPACT

Tentative Agreements Reached February 2, 1950

at Billings, Montana.

* * *

TONGUE RIVER

1. Appropriative rights to the beneficial uses of the water of the Tongue River system existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

2. Wyoming and Montana agrees that the unappropriated waters of the Tongue River system subsequent to January 1, 1950, shall be allocated to each state as follows;

60% to Montana
40% to Wyoming

* * *

(Draft, 4/14/50)

YELLOWSTONE RIVER COMPACT

* * *

H. The terms "Divert" and "Diversion" mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken.

I. The term "Divertible Flow" means the quantity of water that could be diverted from the stream flow above a designated point of measurement during a specified period of time. It is comprised of three elements: (a) the total net inflow to storage; (b) the total diversions; and (c) the remaining flow in the stream at the designated point of measurement for which the divertible flow is being determined. It is computed as follows:

The algebraic sum of:

(a) The quantity of water (in acre-feet) that flowed into reservoirs situated above the point of measurement during the specified period of time; less the outflow and diversions made directly from reservoirs (in acre-feet) during the same period; plus

(b) The quantity of water (in acre-feet) that was diverted from the stream above the point of measurement (including

diversions made directly from reservoirs) during the specified period of time; plus

(c) The quantity of water in the stream (in acre-feet) that flowed past the point of measurement for which divertible flows are being determined during the specified period of time.

J. The term "Mean Divertible Daily Flow" means the average divertible flow occurring during a twenty-four hour period, beginning at 12:00 midnight.

* * *

ARTICLE V

A. The States of Montana, North Dakota, and Wyoming hereby agree that the waters of the Yellowstone River and its interstate tributaries shall be apportioned among said States as follows:

1. Clarks Fork, Yellowstone River.

All existing rights to the beneficial use of the waters of the Clarks Fork Basin in the States of Montana and Wyoming valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact.

The total unused or unappropriated divertible flow of the Clarks Fork River Basis is divided:

40% to Montana

60% to Wyoming

2. Big Horn River (Exclusive of Little Horn River).

Subject to existing Indian Treaty Rights, all existing rights to the beneficial use of the waters of the Big Horn River Basin in the States of Montana and Wyoming, valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact: *Provided*, That at times when insufficient water is available to supply all existing rights in both States the water that is available will be apportioned to rights in the two States on the basis of priority of rights in the two States.

The total unused or unapportioned divertible flow of the Big Horn River Basin is divided:

___% to Montana

___% to Wyoming

(The percentages are to be based on potential irrigable areas in the two States as determined by the Engineering Committee and approved by the Compact Commissioners.)

3. Tongue River

Appropriative rights to the beneficial uses of the water of the Tongue River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation,

Wyoming and Montana agree that the unappropriated waters of the Tongue River System subsequent to January 1, 1950, shall be allocated to each States as follows:

60% to Montana

40% to Wyoming

4. Powder River (Exclusive of Little Powder River).

All existing rights to the beneficial use of the waters of the Powder River in the States of Montana and Wyoming valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact.

The total unused or unappropriated divertible flow of the Powder River Basis is divided:

58% to Montana

42% to Wyoming

YELLOWSTONE RIVER COMPACT COMMISSION

Memorandum Notes of Meeting of Drafting
and Engineering Committees
Billings, Montana
August 22 and 23, 1950

A joint meeting of the representatives of the Drafting and Engineering Committees of the Yellowstone River Compact Commission was called to order by O. C. Reedy, Secretary, at 10:30 a.m. on August 22, 1950. . . .

* * *

It was then recommended by Mr. Leonard that the compact written by Mr. Burke be reviewed and objections voiced. The changes proposed by Mr. Leonard were discussed, together with those of Mr. McNally for Wyoming. Drafts of these changes were circulated.

* * *

Mr. Acker made the suggestion that Mr. Leonard write a compact for Montana and Mr. McNally write one for Wyoming, in order to find out definitely what each State expects. When the Commission meets again, they can be read together to eliminate parts disagreeing and combine parts agreeing.

* * *

Mr. Myers stated that the only problem he could see to solve was how to provide for new storage, and that the simplest kind of compact was most practical and easy to administer. One of the ways to make it

simple is to put a ceiling on the depletion to take place upstream, using whatever standards we need.

* * *

YELLOWSTONE RIVER COMPACT

* * *

ARTICLE V

A. Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

B. The unused and unappropriated waters of the interstate tributaries of the Yellowstone River, exclusive of uses coming within the provisions of paragraph E of this Article V, are hereby allocated to each State for storage or direct diversion as follows:

1. *Clarks Fork, Yellowstone River*

   a. To Wyoming 60%

      To Montana 40%

   b. The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.

* * *

3. *Tongue River*

   a. To Wyoming 40%

      To Montana 60%

   b. The point of measurement shall be below the last diversion from the Tongue River

above its junction with the Yellowstone River.

* * *

2. *Big Horn River (Exclusive of Little Big Horn River)*

   a. To Wyoming 80%

      To Montana 20%

   b. The point of measurement shall be below the last diversion from the Big Horn River above its injunction with the Yellowstone River, and the inflow of the Little Big Horn River shall be excluded from the quantity of water subject to allocation.

* * *

4. *Powder River (including the Little Powder River)*

   a. To Wyoming 42%

      To Montana 58%

   b. The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

C. The quantity of water subject to the above percentage allocations shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors

shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The total diversions, in acre-fee, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana developed after January 1, 1950, during the period from October 1st to that given date;

2. The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

3. The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date;

4. The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

E. There are hereby excluded from the provisions of this Compact:

* * *

2. Supplemental water for use on lands under existing developments.

* * *

ARTICLE VII

A. A lower signatory State shall have the right, by compliance with the laws of an upper signatory State, except as to legislative consent, to file application for and receive permits to appropriate and use any waters in the Yellowstone River System not specifically apportioned to or appropriated by such upper State as provided in Article V; and to construct or participate in the construction and use of any dam, storage reservoir, or diversion works in such upper State for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower State: *Provided*, That such right is subject to the rights of the upper State to control, regulate, and use the water apportioned to and appropriated by it: *And provided further*, That should an upper State elect, it may share in the use of any such facilities constructed by a lower State to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

* * *

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

Yellowstone District
P.O. Box 1264
Billings, Montana

Memorandum

To: Fred Buck, Helena, Montana
Earl Lloyd, Cheyenne, Wyoming
W. S. Hanna, Billings, Montana
J. J. Walsh, Bismarck, North Dakota

Subject: Draft of Compact

There is enclosed a rough draft of a possible Compact which I hope you can look over before our next meeting. It is based on these principles:

a. Existing rights are to be undisturbed and not administered under the Compact.

b. Each State is to be allotted sufficient water for its probable needs, to be consumptively used.

c. That the provisions made for the Yellowstone River will fit into any future Compact covering more, or all, of the Missouri River Basin.

d. That the total water production of an interstate basin is to be stored by the States concerned on the same basis. That is, an upper State is entitled to no special privilege by reason of its geography, and a lower

State must include in the compacted water its own intrastate production.

There are several variations of this theory that might be considered. Existing rights might be included, in which case the depletions would be in terms of virgin flow at the basin mouth; administration could be through State officials instead of by a Commission; and apportionment might be on the basis of a moving 5 or 10 year average. You can think of others.

I had in mind that the consumptive use figures to be inserted would be made up as follows:

a. Consumptive use of potential and *reasonably* possible irrigable areas.

b. Loses from potential new reservoirs.

c. Miscellaneous expected uses, such as stock water, spreaders, and industrial uses.

d. A generous factor of safety.

All this should total considerably less than the annual runoff of the streams as now depleted. The balance will be available for appropriation as provided in Article IX and for future apportionment by the Commission.

Indian rights, though the draft does not specifically state, would come out of the State's apportionment, and their priorities would be exercised with the State. I know of no case to date where Indian priorities have been exercised across State lines, although I

understand the Little Horn may provide one soon. At any rate, on the Big Horn this would actually involve Indians against Indians, since by the time a priority enforcement would be required the Indian rights in Wyoming would be about the only ones receiving water.

We will also want to consider including the Little Big Horn and Little Powder Rivers.

I am writing the Irma Hotel in Cody for reservations for Sunday night, September 24. I assume that we will finish in two days, arriving at Thermopolis on Tuesday night, and that Wednesday we will draft our report. Accordingly, I am writing the Carter Hotel for reservations on that date for all except Mr. Thornton. I am also having two members of our staff meet us there with aerial photos, maps, etc.

Very truly yours,

/s/ Carl L. Myers
Carl L. Myers, Chairman
Engineering Committee
Yellowstone Compact Commission

Enclosure

(Draft 9/18/50)

YELLOWSTONE RIVER COMPACT

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, have resolved to conclude a Compact as authorized under the Act of Congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st Congress, First Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:

For the State of North Dakota:

For the State of Wyoming:

who, after negotiations participated in by R. J. Newell, appointed as the representative of the United States of America, have agreed upon the following articles, to-wit:

* * *

ARTICLE V

A. There is hereby apportioned from the Yellowstone River System in perpetuity to the States of North Dakota, Montana, and Wyoming, respectively, exclusive of established rights and other uses coming within the provisions of paragraph D of this Article V, the consumptive use per annum of water, as follows:

Main Stem Yellowstone River

To Montana _____ acre-feet

To North Dakota _____ acre-feet

Powder River

To Montana _____ acre-feet

To Wyoming _____ acre-feet

Tongue River

To Montana acre-feet

To Wyoming _____ acre-feet

Big Horn River

To Montana _____ acre-feet

To Wyoming _____ acre-feet

Clarks Fork River

To Montana _____ acre-feet

To Wyoming _____ acre-feet

B. The apportionment made to the respective States by paragraph A hereof shall be determined on an annual water year basis measured from October 1

of any year through September 30 of the succeeding year.

C. The consumptive use of water, which use is apportioned in paragraph A hereof, shall be determined for each State by the inflow-outflow method of terms of man made depletions in addition to existing depletions as of January 1, 1951.

D. There are hereby excluded from the provisions of this Compact:

1. Existing and future domestic and stock water uses of water: *Provided*, That the capacity of any reservoir for stock water so excluded shall not exceed 10 acre-feet.

2. Established rights to the beneficial use of water in each signatating State existing on January 1, 1951, including losses from reservoirs constructed prior to January 1, 1951.

ARTICLE VI

A. In the event that stream flow in the Yellowstone River System should be insufficient to meet the apportionment made herein, the shortage shall be prorated between the States concerned, according to their respective apportionments made in Article V.

B. If a signatory State, in any water year, shall have consumptively used more water than it was entitled to use under the apportionment made in Article V, such State, upon demand of the lower

State, shall deliver to the lower State during the next water year a quantity of water equal to its overdraft.

* * *

October 23, 1950

Mr. R. J. Newell
P. O. Box 1866
Boise, Idaho

Dear Mr. Newell:

At the joint meeting of the drafting and engineering committees of the Yellowstone River Compact Commission held in Billings, Montana on August 22-23, 1950, the engineering committee agreed to recommend a basis for the Yellowstone River Compact. This subject has been carefully considered by the committee, which herewith submits its report and recommendations.

* * *

There are two principles upon which a satisfactory allocation of the unused waters of the Yellowstone River could be based. One is the so-called divertible flow principle, which has been used in previous Yellowstone River Compact attempts. The other is the depletion principle as used in the Upper Colorado River Basin Compact. The committee feels, that since the divertible flow principle has been previously used as a basis for a compact, it should be retained, but modified to make the apportionment operative on other than a daily basis so that allocation could be in terms of cumulative volumes of water through an entire year, or portion thereof rather than by daily stream flow. . . .

* * *

YELLOWSTONE RIVER COMPACT COMMISSION

Minutes of Meeting
Oct. 24-25, 1950

The third meeting of the Yellowstone River Compact Commission was held at the Northern Hotel in Billings, Montana, on October 24 and 25, 1950, and was called to order at 10:05 a.m. by R. J. Newell, Chairman. . . .

* * *

The second job given the Committee was to attempt to prepare an article for inclusion in a draft of compact covering the apportionment of water. The Committee spent considerable time on this problem with the help of Mr. H. T. Person, Dean of Engineering at the University of Wyoming, and an Engineering Advisor to the Wyoming Commission, and Mr. J. R. Riter, Chief of Hydrology Division, Bureau of Reclamation. Two principles were considered for use in the preparation of the draft. The first is the depletion theory used in the Upper Colorado River Compact, which places a ceiling on the beneficial consumptive use of water permitted in each state. The second is the divertible flow theory which limits the amount or percentage of total amount of water which can be diverted in a state. The Committee believed that a modification of the divertible flow principle was most appropriate in this case, this being the principle considered in all previous compact negotiations on the Yellowstone.

* * *

There was discussion as to whether the Engineering Committee Report being considered by the group included the draft of Compact article. Mr. Leonard said that no Compact could be signed that asked Montana to give up rights to water now in use in Montana. Mr. Acker asked for a specific proposal, but Mr. Leonard replied that they would insist on recognition of the doctrine of appropriation.

* * *

Mr. Acker moved that the Report of the Engineering Committee be received for consideration and possible adoption of each of the principles stated. The motion was seconded by Mr. McNally and passed.

The items as identified by Mr. Burke in the Engineering Committee letter were considered as follows:

> 1. It is a generally accepted fact that irrigation development in the Yellowstone River Basin, particularly on the interstate tributaries, has very nearly reached its maximum practicable limit without the provision of additional new storage capacity.

It was moved and seconded to adopt this item, and the motion was carried.

> 2. The committee feels that clearing the way for this new storage should be the underlying objective of any interstate Compact.

It was moved and seconded that the item be adopted. Upon objection it was moved to amend the

motion to insert the words, "one of" between "be" and "the" and change the word, "objective" to "objectives." The amendment was carried, and the motion as amended was carried.

3. From an interstate standpoint, the situation in the Yellowstone River Basin is extremely favorable since on three of the four interstate tributaries there is a reservoir site at or near the State line which can provide adequate control of residual flows from the upper State for continued development in the lower State.

4. The fourth tributary, Clarks Fork, is not likely to experience water shortages.

5. The reservoir on Tongue River has already been constructed, and those on the Big Horn River and the Powder River are authorized by Congress for construction by the Bureau of Reclamation.

As to each of these items individual motions that the item be adopted were made, seconded, and carried.

* * *

12. There are two principles upon which a satisfactory allocation of the unused waters of the Yellowstone River could be based. One is the so-called divertible flow principle, which has been used in previous Yellowstone River Compact attempts. The other is the depletion principle as used in the Upper Colorado River Basin Compact.

13. The committee feels, that since the divertible flow principle has been previously used as a basis for a compact, it should be retained, but modified to make the apportionment operative on other than a daily basis so that allocation could be in terms of cumulative volumes of water through an entire year, or portion thereof rather than by daily stream flow. This is because substantially all new development will be based on storage rather than direct flow.

* * *

There was discussion on the item. Mr. Thornton moved to adopt the divertible flow principle as modified in accordance with Committee recommendations. The motion was seconded. Mr. Leonard stated that he favored the divertible flow principle, but objected to modification. In the following discussion Wyoming proposed leaving the question of modification open for the present. By consent the group adopted the divertible flow principle as a basis for Compact, modification to be considered later.

* * *

19. Some consideration must be given to supplemental water supply and since such water is for use on existing projects, it is felt that such allocation should be made under the category of existing irrigation works rather than potential.

It was moved and seconded that this item be adopted, and the motion was carried.

* * *

Mr. McNally referred to the draft paragraph in the Engineering Committee's Report and to corresponding paragraphs in the Leonard draft McNally-Wehrli draft and a Myers draft. He stated that Wyoming would not agree to interstate administration. He read from the draft paragraph by the Engineering Committee and stated that Wyoming wanted division of the water on an annual basis as provided for in this draft. He then read from a paragraph of the Myers' draft which used as a basis for division of water the allocation of beneficial consumptive use on an annual basis, October to September, placing a ceiling on the amount of water which can be consumptively used in each of the states. He read from the McNally-Wehrli draft which also provided for division on the consumptive use basis and from the Leonard draft which provided for the application of the Doctrine of Appropriation on an interstate basis. Mr. McNally stated that he objected to interstate administration. He stated that he would insist on "equitable apportionment" which includes priorities and other factors. He stated that if agreement could be reached on the language to be used in the article, of which he read from several examples, and on the question of interstate administration, then agreement could be reached on a compact.

* * *

Mr. Leonard insisted that under the Doctrine of Appropriation state lines must be wiped out. He insisted on recognition of established rights under

interstate administration, and on apportionment of natural flow, not storage.

* * *

. . . Mr. Myers asked specifically whether the Commission wanted to operate on a daily basis or on an annual basis , subject to check as required. Mr. Bower moved to have operations on an annual basis with provisions to make a check at any time desirable, but not required on a daily basis. The motion was seconded. In respect to a question, Mr. Buck stated he agreed to the annual basis with provision to check as required. The motion was passed.

* * *

Proposals made by P. F. Leonard
as a member of the drafting committee
of the Yellowstone River Compact

* * *

ARTICLE V

A. The states of Montana, North Dakota and Wyoming hereby agree that the waters of the Yellowstone River and its interstate tributaries shall be apportioned among said states as follows:

Appropriative water rights in the Yellowstone River Basin, including the Clarks Fork, Big Horn River, Tongue River and Powder River existing as of January 1, 1950, shall continue to be enjoyed in accordance with the general law governing the acquisition and use of waters under the Doctrine of Appropriation and on the basis of priorities thereunder as single streams and regardless of state lines.

* * *

YELLOWSTONE RIVER COMPACT COMMISSION

Minutes of Meeting
Dec. 7-8, 1950

The fourth meeting of the Yellowstone River Compact Commission was held at the Northern Hotel at Billings, Montana on December 7 and 8, 1950, and was called to order at 10:15 a.m. by R. J. Newell, Chairman.

* * *

The Chairman stated that the meeting had been called for the purpose of considering the draft of Compact prepared by the Engineering Committee with the advice and assistance of Mr. Burke, pursuant to instructions given at the third meeting, and distributed to the Commissioners by mail. He stated that the draft would be read and considered, article by article, and that as rapidly as possible a Compact would be finally typed for approval as a whole.

* * *

. . . Mr. Burke discussed the basis on which the Compact was drafted and the general theory of the Compact. Yields of the basin are to be burdened by (1) existing appropriative rights and (2) supplemental water for existing developments. The remainder, the unappropriated and unused water, or residual water, is to be compacted. He called attention to an ambiguous situation in the language of paragraph B respecting supplemental water rights and suggested rewriting paragraph B as follows:

> B. Of the unused and unappropriated waters of the interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory state such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

* * *

Paragraph C was read. Mr. Burke suggested, as clarifying language which should have been included in the original draft, that the word "above" in the first line be stricken, a comma added after "allocations", and the following wording: "in paragraph B1, 2, 3 and 4 of this Article V,". A motion was made, seconded, and carried to approve the paragraph as clarified.

Paragraph C 1, C 2 , C 3, and C 4 were read, and as to each a motion was made, seconded, and carried that it be approved.

* * *

The meeting reconvened at 8:15. Paragraphs VII A, B, and C were read, and as to each a motion was made, seconded, and carried that it be approved.

* * *

The complete Compact as previously approved paragraph by paragraph was presented and read in its entirety. Mr. Buck moved that the Compact as read be adopted. The motion was seconded and by Mr. Bower and unanimously carried.

* * *

Upon signature of the Compact, the meeting adjourned at 11:45 a.m.

* * *

82D CONGRESS } HOUSE OF { REPORT
1st Session } REPRESENTATIVES { No. 1118

GRANTING THE CONSENT AND APPROVAL OF CONGRESS TO A COMPACT ENTERED INTO BY THE STATES OF MONTANA, NORTH DAKOTA, AND WYOMING RELATING TO THE WATERS OF THE YELLOWSTONE RIVER

OCTOBER 10, 1951. – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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MR. ENGLE, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H. R. 3544]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H. R. 3544) granting the consent and approval of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

* * *

PURPOSE OF THE BILL

The negotiation of the Yellowstone River Basin compact was an important stop toward full utilization

of the waters of the Yellowstone River. The consent of the Congress to the compact entered into by the States of Montana, Wyoming, and North Dakota will be another forward move toward maximum beneficial use of these waters without, unnecessary conflict between the States over the right to its use.

It has long been recognized that the maximum beneficial use of the water resources of the Yellowstone River in the Missouri River Basin is dependent upon the construction and operation of storage reservoirs. A plan for such reservoirs was set forth in Senate Document No. 191, Seventy-eighth Congress. If such a plan is to become a reality for the Yellowstone River Basin, construction of storage reservoirs will be required at sites at or near the Wyoming-Montana line so that the residual flows from Wyoming can be controlled for use in the lower States of Montana and North Dakota.

REASONS FOR THE AMENDMENTS

One of the reasons for the numerous amendments is to make H. R. 3544 conform to Senate bill 1311. Also, other amendments were made to correct H. R. 3544 so it reads exactly as the official copy of the compact adopted by the States.

EXPLANATION OF THE BILL

Article V of the compact is the article that sets out the apportionment of the benefits of the water resources of the basin among the signatory States

that they have agreed upon. Extensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little could be gained, from a water-supply standpoint by attempting, in the compact, the regulation and administration of existing appropriative rights in the signatory States. (The engineering committee comprised the State engineers of the three States and two Federal engineers from the Bureau of Reclamation and the Bureau of Indian Affairs.)

Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Paragraph B of article V is the core of the compact. The following analysis of this paragraph is made:

(1) The unused and unappropriated waters of the interstate tributaries only are treated – i. e., the waters that are residual to these required for the enjoyment of the appropriative rights that are recognized in paragraph A of article V.

(2) The supplemental water supplies that are needed for the better enjoyment of the rights recognized in paragraph A of article V are given a preferred status over water supplies for new projects.

(3) The water that is residual after the enjoyment of the rights in paragraph A of article V and after the furnishing of the supplemental water supplies to the projects with the rights recognized in paragraph A are allocated to Wyoming and to Montana in stated percentages. I am informed that these percentages were calculated, in accordance with the recommendation of the engineering committee, by dividing the total of the potential and possible acres in Wyoming and in Montana by the total of the potential and possible acres in both States.

In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water year, fixed as October 1 of any year through September 30 of the succeeding year, in order to accommodate the new projects in the basin which must rely on storage water rather than on natural flow.

* * *

HON. JOHN R. MURDOCK,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D. C.

MY DEAR MR. MURDOCK: I have for report H. R. 3544, a bill granting the consent and approval of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming, relating to the waters of the Yellowstone River. . . .

* * *

In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water year, fixed as October 1 of any year through September 30 of the succeeding year, in order to accommodate the new projects in the basin which must rely on storage water rather than on natural flow.

Considered with paragraph A of article V, paragraph D of article V gives to the lower Yellowstone Federal reclamation project in Montana and North Dakota the protection of a right existing on January 1, 1950. Additionally, paragraph D recognizes all rights to the beneficial use of water that existed in Montana and North Dakota on January 1, 1950, and that divert below Intake, Mont, and it permits the beneficial use of the flow of water of the Yellowstone River below Intake, Mont., on lands within Montana and North Dakota on a proportionate basis of acreage irrigated. This latter provision is important, particularly to North Dakota, because the flow of water of the Yellowstone River below Intake, Mont., will be residual water after the use of water above Intake, Mont. The flow will thus be not only a regulated flow, as a consequence of the construction and operation of the reservoirs at the strategic sites on the Big Horn River, the Tongue River and the Powder River, but it will also include the return flows that are certain to appear below Intake, Mont., with the expansion of irrigation after storage water becomes available. The

sharing of this residual flow by Montana and North Dakota, on a proportionate basis of acreage irrigated, will keep the new developments in the two States in balance and minimize future interstate disputes.

* * *

Calendar No. 837

82D CONGRESS, *1st Session* } SENATE { REPORT No. 883

GRANTING THE CONSENT OF CONGRESS TO A COMPACT ENTERED INTO BY THE STATES OF MONTANA, NORTH DAKOTA, AND WYOMING RELATING TO THE WATERS OF THE YELLOWSTONE RIVER

OCTOBER 2 (legislative day, OCTOBER 1), 1951.
– Ordered to be printed

MR. O'MAHONEY, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany S. 1311]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 1311) granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River, having considered the same report favorably thereon without amendment and with the recommendation that the bill do pass.

THE PURPOSE OF THE BILL

The bill would give the consent of Congress to a compact entered into between the States of Montana,

North Dakota, and Wyoming providing for an equitable division of the use of waters from the Yellowstone River and its tributaries. Public Law 83, Eighty-first Congress, approved June 2, 1949, gave the consent of Congress to negotiate and enter into a compact, provided for the appointment of a Federal representative to represent the United States in the negotiations and to report thereon to the Congress. The compact was agreed to by the several representatives of the affected States at Billings, Mont., on December 8, 1950, and the States ratified the compact early in 1951.

APPORTIONMENT OF USE OF WATER

The compact appears to be fair and equitable in apportioning the use of waters of the Yellowstone Basin, as defined. The compact provisions are easily administered, and require no elaborate organization. In all respects, it presents an unusually practicable solution to the problems which, during the early years of negotiations, seemed highly complicated and difficult.

The Yellowstone River Basin and the Yellowstone River system (i. e., the river and its tributaries) are, for the purposes of the compact, exclusive of the Yellowstone National Park area and its waters, and the waters of the Little Bighorn River.

The apportionment, or division, of the waters of the basin is provided in article V, subsections A, B, and D, as follows:

V-A. Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory States. No regulation of the supply is mentioned for the satisfaction of those rights, and it is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing. Where these rights have deficient supplies they would be supplemented by rights obtained from "unused and unappropriated waters" in the basin as of January 1, 1950, from the allocated waters under subsection B. North Dakota rights are covered specifically in subsection D.

V-B. Unused and unappropriated waters as of January 1, 1950, of the four interstate tributaries, the Clarks Fork of the Yellowstone, the Big Horn, Tongue, and Powder Rivers, all of which rise in Wyoming and join the main stem of the Yellowstone River in Montana, are allocated in variable percentages between Montana and Wyoming. The definition of these waters is found in subsection C of article V. The allocations (by the method of computation of the waters not appropriated and used as of January 1, 1950) are percentages of divertible and storable waters in each tributary basin during any water year or at any time in the water year after its beginning (October 1). Allocations, thereby, take into account return flows and uses of them as well as original runoff. This results from the computation directive which says, in effect, that allocated flows are the sum of diversions

and outflows from the tributary basin corrected for changes in the storage of such waters.

* * *

BOISE, IDAHO, *March 16, 1951.*

Hon. ALBEN W. BARKLEY,
President of the Senate, Washington, D. C.

MY DEAR MR. PRESIDENT: I have the honor to enclose a conformed copy of a compact entered into on December 8, 1950, among the States of Montana, North Dakota, and Wyoming to determine the rights and obligations of those States respecting uses of the waters of the Yellowstone River and its tributaries.

By virtue of my appointment by the President as the representative of the United States, I participated in the negotiations which led to the compact. My report thereon is enclosed.

Sincerely yours,

R. J. NEWELL,
Representative of the United States,
Yellowstone River Compact Negotiations.

REPORT TO THE CONGRESS BY THE FEDERAL REPRESENTATIVE ON THE YELLOWSTONE RIVER COMPACT

By the act of June 2, 1949 (Public Law 83, 81st Cong.), Congress granted its consent to the States of Montana, North Dakota, and Wyoming to negotiate and enter into a compact or agreement for the division of the waters of the Yellowstone River excepting

waters within or tributary to the Yellowstone National Park.

Commissioners representing these States, after negotiations extending over a year, have reached final agreement on the provisions of the proposed compact at a meeting held in Billings, Mont., on December 7 and 8, 1950, and each one of them has affixed his signature thereto. The State Legislature of Wyoming ratified the agreement by an act signed by the Governor on January 27, 1951, Montana's Legislature likewise approved and the Governor signed on February, 13, 1951, and North Dakota's Legislature approved and the Governor signed on March 7, 1951.

The authorizing act required that a Federal representative be appointed to participate in the negotiations and to report to the Congress on the proceedings and on any compact or agreement entered into. Accordingly, the President, on October 19, 1949, appointed me as such Federal representative, and I have participated in the negotiations of the commissioners and hereby report as directed.

I believe that the proposed compact is a sound basis for further development in the use and control of waters of the Yellowstone River for multiple purposes especially for irrigation, that the division of the waters among the States as agreed on is equitable, and that the rights of the United States are properly protected, and, therefore, I recommend that the consent of Congress be given the proposed compact, a copy of which is attached.

Further report follows:

PREVIOUS NEGOTIATIONS

Three previous compacts have been negotiated on the Yellowstone River. The first of these was signed in February 1935. It concerned only the States of Montana and Wyoming, and was never acted upon by the legislatures. The second compact was negotiated in 1942 and went to the legislatures in 1943. This concerned the three States – Montana, Wyoming, and North Dakota. The Wyoming Legislature was the first to take action on this compact and failed to ratify it. A third compact, quite similar in form to the previous compact, was negotiated in 1944, and reached the Legislatures of Montana, Wyoming, and North Dakota in 1945. This compact was ratified by North Dakota, Montana, and by the Legislature in Wyoming, but was vetoed by the Governor of Wyoming. The present compact is therefore the fourth that has been negotiated by Montana and Wyoming, and the third to concern all three States.

* * *

PURPOSES

The major purposes of the proposed compact, as stated therein, are to promote interstate comity, to remove causes of present and future controversy between the States with respect to the waters of the Yellowstone River and its tributaries, to provide for an equitable division and apportionment of such waters and to encourage the beneficial development

and use thereof. Installation of physical works needed to foster that use has been delayed pending an agreement between the States as to division of waters.

* * *

NEGOTIATIONS

Four formal meetings of the full commission, all at Billings, Mont., were held on the following dates: November 29, 1949; February 1 and 2, 1950; October 24 and 25, 1950; December 7 and 8, 1950.

Minutes of these meetings were made and adopted officially by the commissioners. They have been assembled and labeled "Yellowstone River compact – Minutes of formal meetings of the Yellowstone River compact commissioners." They are not being sent out as part of the text of this report, but copies are being furnished for the official files of the appropriate committees of Congress and for the General Services Administration of the United States for filing with the original of the compact. Each of the meetings was well attended, though three were held in winter and the commissioners came from widely scattered points over a huge area. Meetings were open to the public and the press. Because of the size of the group, including 30 commissioners and a number of advisers, consultants, and other interested parties, much of the detail work of collecting and digesting information and drafting language had to be done in smaller committees. Informal meetings of

representatives of interested Federal agencies were held on November 28, 1949, and February 2, 1950.

A drafting committee made up of attorneys from each of the three States held one meeting in August 1950, and attempted to draft language satisfactory to all parties.

However, most of the ground work was laid most of the material gathered and most of the questions answered by an engineering committee made up of the State engineers of the three States, the area engineer of the Bureau of Indian Affairs, and the district engineer of the Bureau of Reclamation, Yellowstone district, and assisted on occasion by numerous others, from private, State and Federal ranks, who had information of value to offer. This committee held a number of meetings and made one field trip throughout the length of the Big Horn River (largest tributary of the Yellowstone) to check field data on the ground.

MAIN FEATURES OF THE COMPACT

The compelling reason for the negotiation of a compact was the need for agreement on division of the waters of interstate tributaries in the Yellowstone River Basin that would allow further development to go forward. Because the main stem of the river is almost entirely in Montana and its water supply under any future program appears adequate for feasible developments along its course, it was given little consideration in the negotiations. While North

Dakota representatives contributed in an important measure to the work of the commission, the real interest of the State in the compact is minor on account of the very small part of the drainage basin that is within its borders. The waters in Yellowstone National Park and tributary thereto were expressly excluded by the language of the authorizing act. The real problem and the purpose of the undertaking was then to divide the waters of four principal tributaries, the Clarks Fork, Big Horn, Tongue, and Powder, all rising in Wyoming and flowing across the State line into Montana, with developments, existing and proposed, in both States.

In earlier attempts to arrive at a compact and in the early meetings here reported, there was searching discussion as to whether the agreement sought on division of waters should include the water now appropriated and in use or should apply only to the unappropriated and unused balance which is available for further development. The latter principle was decided on (art. V-A) for several reasons. First, it would be a huge and time-consuming task to determine and fix comparable values for existing rights in three States with differing water laws and practices in establishing water rights. Second, the basic fact that there is enough water if properly conserved by storage to take care of all existing and all feasible future developments points up the importance of arriving promptly at the simplest workable agreement that would permit such storage projects to proceed. When these are built, even the operation

provisions of the compact are expected to become easy of administration.

It is further agreed (art. V-B) that existing irrigation developments with an inadequate supply should have a preferred right to the unused remainder over new projects.

The final residue of supply was then divided between the States for further development. The basis for the division on each tributary was the acreage of land in each State that could be feasibly irrigated from that tributary, the requirements used to determine feasibility being the same in each State.

* * *

In determining the amount of water subject to allocation, the "divertible flow" principle was chosen over the "depletion" principle, because the former had been used in earlier negotiations and was more familiar to the commissioners, who were assured by the consultants that the latter had no outstanding advantages even though it had been selected on the upper Colorado.

* * *

CONCLUSION

The effort that has been carried on by the States for nearly 20 years to secure a compact for the division of the waters of the Yellowstone River and its tributaries would seem to be conclusive evidence that such a compact is needed. The instrument submitted herewith is the result of a year's intensive study and

discussion by a large number of qualified State commissioners with the benefit of all past negotiations and the cooperation of many Federal agencies and private individuals, ending finally in agreement by all. The plan proposed appears to be easily installed, workable, and not requiring the establishment of a large new organization for its operation. The division of the waters is believed to be equitable and fair. Obstacles to the continued orderly development of resources would be removed. The rights of the United States seem to be fully protected. Therefore I recommend that the proposed compact be approved by the Congress of the United States.

R. J. NEWELL,
Federal Representative,
Yellowstone River Compact Negotiations.

* * *

HON. JOSEPH C. O'MAHONEY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington 25, D. C.

MY DEAR SENATOR O'MAHONEY: I have for report S. 1311, a bill granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming, relating to the waters of the Yellowstone River. . . .

* * *

The practical accomplishment, in the circumstances, of an equitable apportionment of the benefits of the waters of the Yellowstone River system among the States of Wyoming, Montana, and North Dakota

will require the construction, at strategic sites, at or near the Wyoming-Montana State line, of storage reservoirs so that the residual flows from Wyoming can be controlled and conserved for use in the lower States of Montana and North Dakota. Fortunately, such strategic reservoir sites are available on the Big Horn River, the Tongue River, and the Powder River.

* * *

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours,

OSCAR L. CHAPMAN,
Secretary of the Interior.

FIRST ANNUAL REPORT

YELLOWSTONE RIVER
COMPACT COMMISSION

1952

* * *

The Commission being satisfied that the allocations of the upstream state or states were not approached for the period ending September 30, 1952, did not factually determine the extent of allocable use.

* * *

ELEVENTH ANNUAL REPORT
YELLOWSTONE RIVER COMPACT COMMISSION
1962

* * *

The substantial flows of the year were indicative that the prescribed shares of Wyoming were not exceeded and no attempts at detailed administration were made. Mr. J. W. Ross told the Commission that critical situations of water supply arose on the Clark's Fork of Yellowstone River during 1961 and may be expected again with greater severity. He had no information to indicate that Wyoming has exceeded its prorata share. He stated new pumping installations have been made or are ready for installation in both states. Mr. Ross said clarification of water rights in Montana should be undertaken for proper administration of the Compact when that should become necessary and also for apportionment of limited flows in Montana. The Commission assured him of its desire to assist in matters pertinent to the Compact, but suggested the division of waters within either State was a matter of local or State control.

* * *

Diversions:

The Commissioners for Montana and Wyoming are agreed that allocable uses under the Compact were less than the proportionate shares in either

State. The Compact only provides for the allocation of water uses originating after January 1, 1950.

* * *

DRAFT REPORT

A COOPERATIVE PLAN TO ADMINISTER THE

YELLOWSTONE RIVER COMPACT

by

Dan Ashenberg
Water Resources Division
Department of Natural Resources and Conservation

November, 1983

* * *

. . . The issue of reusing return flows is important to both states because Article V apportions flow based on diversions not on depletions.

* * *

November 29, 1989

YELLOWSTONE RIVER COMPACT
by
Water Management Bureau
Water Resource Division
DNRC

* * *

9. DIVERSION VERSUS DEPLETION.

ISSUE: The apportionment formula in Article V is based on diversions and not depletions. When agriculture is the predominate use, diversions is a reasonable basis for determining the apportionment. Since the initiation of the 1970's and the increase in industrial use with little or no return flows, the use of diversions may not be the most appropriate measurement to use. Moreover, the apportionment mixes two types of water (divertable and diversionary flows) that makes it impossible to balance water apportioned to the two states.

WYOMING POSITION: Wyoming sees no problem with the use of the four measurements as defined in Article V as the basis for apportionment.

MONTANA POSITION: Montana believes that it is possible to prepare a water budget based on the two types of flows used in the apportionment. The only way the apportionment formula can work properly would be to use similar units. All units should be converted to their divertable flow equivalents. conversely, divertable flow equivalents could be converted back to depletable flows when it is necessary

to calculate the quantity of water to be released from storage.

* * *

YELLOWSTONE RIVER

COMPACT COMMISSION

FIFTY-THIRD ANNUAL REPORT

2004

* * *

Mr. Stults stated that 2004 flows in the Tongue River in Montana were deficient such that water rights senior to 1950 were not filled. Due to the continuing drought in the basin and the likelihood that average runoff will not fill depleted reservoirs, Montana and Wyoming should discuss an equitable plan so that users in both States get a fair share of the water in 2005 according to Article V of the Yellowstone River Compact. Montana felt that water rights in both States senior to 1950 should be filled before water rights junior to 1950 are filled. Montana specifically requested that Wyoming release post-1950 stored water so that pre-1950 users in Montana could satisfy their water rights. Wyoming indicated that this call would not be heeded as Wyoming believes there is no legal basis for making such deliveries.

* * *

Yellowstone River
Compact Commission
Fifty-Fifth Annual Report
2006

* * *

Water-Year-End Contents for Yellowstone River Compact Reservoirs[1] or Lakes

Table 10. Water-year-end contents for Yellowstone River Compact reservoirs[1] or lakes.

[Contents are in acre-feet. Reservoirs or lakes are listed in alphabetical order by drainage basin. Symbol: –, no data or not available]

Reservoir or lake name	Pre-compact 1950 water right	Post-compact 1950 water right	Usable capacity	Usable contents on Sept. 30, 2006	Usable contents on Sept. 30, 2005	Change in usable contents
Bighorn River basin						
(Lake) Adelaide Reservoir[2]	1,450	4,760	6,210	450	2,000	-1,550
Anchor Reservoir[3]	17,410	0	17,410	233	269	-36
Bighorn Lake[3]	–	1,116,000	1,312,000	745,800	984,500	-238,700
Boysen Reservoir[3]	701,500	0	701,500	407,700	591,900	-184,200
Buffalo Bill Reservoir[3]	456,600	190,000	646,600	441,100	450,300	-9,200
Bull Lake[3]	152,000	0	152,000	50,540	66,100	-15,560
Greybull Valley Reservoir[2]	0	33,170	33,170	322	8,000	-7,678
Pilot Butte Reservoir[3]	34,600	0	34,600	1,020	12,300	-11,280
Sunshine Reservoir[2]	52,990	0	52,990	5,960	24,000	-18,040
Lower Sunshine Reservoir[2]	42,640	42,300	84,940	720	21,000	-20,280
Powder River basin						
Cloud Peak Reservoir[2]	3,400	172	3,570	0	3,570	-3,570
Dull Knife Reservoir[2]	–	4,320	4,320	63	1,314	-1,251
Healy Reservoir[2]	–	5,140	5,140	1,336	4,652	-3,316
Kearney Reservoir[2]	1,850	4,470	6,320	1,085	2,641	-1,556
Lake DeSmet[2]	37,520	197,500	235,000	187,278	206,672	-19,394
Muddy Guard Reservoir[2]	–	2,340	2,340	500	492	8
Tie Hack Reservoir[2]	1,650	2,440	2,440	1,921	2,440	-519
Willow Park Reservoir[2]	4,460	–	4,460	451	2,896	-2,445
Tongue River basin						
Bighorn Reservoir[2]	2,750	1,880	4,630	584	670	-86
Cross Creek Reservoir[4]	–	798	798	309	474	-165
Dome Reservoir[2,4]	1,840	188	2,030	1,209	1,177	32
Granger Reservoir[2]	146	–	146	0	0	0
Last Chance Reservoir[2]	90	–	90	0	0	0
Martin Reservoir[2]	561	–	561	0	0	0
Park Reservoir[2]	7,350	3,020	10,360	3,088	4,684	-1,596
Sawmill Lakes Reservoir[2]	–	1,280	1,280	746	825	-79
Tongue River Reservoir[5]	79,070	–	79,070	42,720	43,760	-1040
Twin Lakes Reservoir[2,6]	1,180	2,220	3,400	2,842	3,013	-171
Weston Reservoir[2]	370	–	370	0	0	0
Willits Reservoir[2]	79	–	79	0	0	0

[1]Wyoming disagrees with the term "Compact reservoirs" as used throughout this annual report. Wyoming's acceptance of this annual report should not be construed as Wyoming's acceptance of the use of that term.2 Reservoirs managed by the State of Wyoming.

[2]Reservoirs managed by the State of Wyoming.

[3]Reservoirs managed by Bureau of Reclamation.

[4]Data are combined contents of Dome Lake and Dome Lake Reservoir.

[5]Reservoir managed by State of Montana.

[6]Data are combined contents of Twin Lakes Number 1 and Twin Lakes Number 2.