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.

Before the Honorable Barton H. Thompson, Jr.
Special Master

MONTANA'S MOTION FOR SUMMARY JUDGMENT ON THE COMPACT'S LACK OF SPECIFIC INTRASTATE ADMINISTRATION REQUIREMENTS AND BRIEF IN SUPPORT

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July 3, 2013

MOTION

COMES NOW, the Plaintiff State of Montana, and moves for partial summary judgment that the Yellowstone River Compact does not impose specific requirements on intrastate regulation and administration of water rights as a prerequisite for a State's enjoyment of its pre-1950 Compact rights. This motion is brought as a motion in the nature of a motion for summary judgment under Federal Rule of Civil Procedure 56. As is more fully stated in the accompanying brief in support, the grounds for this motion are as follows:

1. There is no genuine dispute of material fact: the question presented is a purely legal question of compact interpretation and requires no factual investigation;

2. The plain language of the Compact preserves the rights of the compacting States to administer water rights within their borders according to their own State laws and practices;

3. Any silence in the Compact must be construed in favor of each State's retaining authority to administer the waters within its borders; and

4. Reliable extrinsic sources confirm that the States did not intend for the Compact to impose intrastate administration requirements as a prerequisite to a State's enjoyment of its pre-1950 Compact rights.

WHEREFORE, Montana requests partial summary judgment that the Yellowstone River Compact does not impose specific requirements on intrastate administration of water rights as a pre-requisite to enjoyment of a State's pre-1950 rights under the Compact.

Respectfully submitted,

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BRIEF

Table of Contents

Table of Authorities

The State of Montana submits this Brief in Support of its Motion for Summary Judgment on the Compact's Lack of Specific Intrastate Administration Requirements.

I. INTRODUCTION

Montana moves for summary judgment to resolve a legal question of compact interpretation. The question presented is whether the Yellowstone River Compact imposes particular requirements on administration and regulation of water rights within each State as a prerequisite for enjoyment of a State's pre-1950 rights under the Compact. Both the plain language of the Compact and extrinsic evidence of the intent of the States in adopting the Compact support a determination that the Compact does not dictate a particular method of intrastate administration; rather, each State is to administer its waters according to its own laws and practices.

The plain language of the Compact leaves the compacting States free to administer and regulate pre-1950 water rights within their borders according to their own State laws, and does not impose specific requirements on such intrastate administration as a pre-requisite to enjoyment of each State's pre-1950 water rights. In entering into the Compact, Montana did not concede any of its sovereign right to administer and regulate water under its own laws and practices.

If, however, the Compact's language is determined to be ambiguous, contemporaneous sources of Compact interpretation also indicate that the State did not intend to impose specific requirements on intrastate administration of pre-1950 water rights. These sources include previous drafts of the Compact, the negotiating history, and statements made by state and federal officials before Congress regarding the Compact.

Judicial efficiency will be significantly enhanced by a pre-trial determination of this legal question. That determination will affect the issues that must be resolved at trial.

II. BACKGROUND

A. Statement of Material Facts

1. Negotiations on the Yellowstone River Compact were first authorized by Congress in 1932. See First Interim Report of the Special Master ("FIR") 6 (2010). The negotiations ultimately spanned nearly two decades, giving rise to three unsuccessful drafts before the States agreed to the final Compact in 1950. *Id.* at 6-9.

2. A central factor informing the negotiations from early on was the difference between Montana's and Wyoming's water laws and how water rights were administered in each State. The States understood that such differences would render infeasible any provisions requiring interstate administration across state lines. Thus, throughout all compact drafts, the negotiators endeavored to protect existing water rights as a block allocation to each State to be administered according to its individual laws and practices. See *id.* at 5-9.

3. Each of the States ratified the final Compact by legislative enactment, and Congress granted its consent to the Compact in 1951. *Id* at 9.

4. As between Montana and Wyoming, the Compact allocates pre-1950 water rights to each state as a block, without attempting to quantify individual rights within each State. See First Interim Report, p. 21 ("The final Compact provides block protection for all existing, pre-1950 appropriations, without attempting to quantify the amounts of those appropriations . . . ."); *Montana v. Wyoming*, 131 S. Ct. 1765, 1772, 179 L. Ed. 2d 799 (2011) ("As between the States, the Compact assigned the same seniority level to all pre–1950 water users in Montana and Wyoming.").

5. Article V(A) of the Compact addresses pre-1950 rights: "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."

6. Article XVIII addresses the jurisdiction of the compacting States over their intrastate waters: "No sentence, phrase, or clause in this Compact or in any provision thereof, shall be construed or interpreted to divest any signatory State or any of the agencies or officers of such States of the jurisdiction of the water of each State as apportioned in this Compact.

7. Douglas R. Littlefield, Ph.D., a historian with expertise in water rights matters, has done extensive research in both archival and published primary sources on the history of the Compact. This research was conducted to determine what the historical record reflects regarding the discussions during the drafting and approval of the Compact with respect to how each State was to regulate the pre-1950 rights within its borders. The results of this historical research are detailed in the Rebuttal Report on Article V(A) of the 1950 Yellowstone River Compact (May 31, 2013) ("Littlefield Report"), attached hereto as Exhibit A.

8. With respect to archival sources, Dr. Littlefield reviewed all available files of the negotiators of the 1950 Yellowstone River Compact, as well as similar files for each draft of the Compact dating back to the 1930s. This research was conducted at the following locations:

a. The Montana Governors' files at the Montana Historical Society (the equivalent of a State archives) in Helena, Montana;

b. The records of the Montana Department of Natural Resources and Conservation in Helena;

c. The Wyoming State Engineer's files at the Wyoming State Archives in Cheyenne, Wyoming;

d. The Wyoming Water Resources Division files at the Wyoming State Archives in Cheyenne;

e. The Wyoming Governors' files at the Wyoming State Archives in Cheyenne;

f. The North Dakota Water Commission files in Bismarck, North Dakota;

g. The North Dakota Governors' files at the University of North Dakota in Grand Fork;

h. The Files of the U.S. Bureau of Reclamation at the U.S. National Archives branch in Denver, Colorado; and

i. The records of the Department of the Interior at the U.S. National Archives branch in College Park, Maryland.

Also as part of the archival research, Dr. Littlefield reviewed records, including unpublished reports and papers, regarding the Compact as understood by Harry Truman (President of the United States in 1950) and federal executive branch agencies, held by the Truman Presidential Library in Independence, Missouri. Littlefield Report 6-7.

9. With regard to published materials, Dr. Littlefield conducted a complete examination of all actions by Congress relating to the Compact and its history as shown in the Congressional Record, Congressional reports, and in published and unpublished Congressional hearings. Also examined were published reports and studies by the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers, as well as over four hundred historical newspaper articles covering the Compact negotiations, including interviews and other comments of the negotiators. *Id.*, at 7.

10. Dr. Littlefield's research encompassed all known, publicly available documents comprising the historical record of the negotiations and approval of the Compact.

B. Wyoming's Current Position

Since the Special Master determined, and Wyoming conceded, that Wyoming has obligations to Montana under Article V(A), Wyoming has taken the position that the Compact requires Montana to administer its water rights and uses in a particular manner (following Wyoming law and practices of administration) before Wyoming is required to deliver Article V(A) water to Montana. This position is evident in the expert report of Wyoming expert witness Bern Hinckley, entitled "Review of Expert Reports Submitted by Montana" ("Hinckley Report") (submitted April 2, 2013). In his report, Mr. Hinckley essentially contends that Wyoming was not obligated to deliver Article V(A) water to Montana because Montana has not properly administered its pre-1950 uses, as viewed under Wyoming law.

For instance, Mr. Hinckley asserts that "Tongue River Reservoir has not been managed to maximize storage at all times," Mr. Hinckley Report at 7, and that such "foregone storage opportunities" are the result of discretionary reservoir operations that have allowed water to pass through the reservoir for various reasons. *Id.* at 9. Mr. Hinckley's criticism of Montana's reservoir operations is based in part on his understanding of Wyoming's "one-fill" rule as the proper method for such operations. However, while that rule may guide Wyoming reservoir operations, it has no exact corollary in Montana law and practice. Mr. Hinckley's analysis would impose this Wyoming rule as the standard for describing the Tongue River Reservoir water right and evaluating Montana's reservoir operations for purposes of determining whether Montana was entitled to protection of its pre-1950 rights. This is an overt attempt to apply Wyoming law in Montana.

Mr. Hinckley also compares Montana's approach to water rights administration with Wyoming's approach, suggesting that Wyoming's approach is superior and that such an approach must be followed as a prerequisite to Compact enforcement. According to Mr. Hinckley:

> In Wyoming, where there are permanent, full-time water commissioners actively monitoring and regulating diversions, calls for regulation are commonplace and provide an immediate, contemporaneous identification of direct-flow shortages. In Montana, deposition testimony (e.g. Kerbel deposition, p. 159) paints a picture of informal, undocumented communications between water users to work out relative diversion priorities, with occasional input by Montana Water Resources Division to help sort out disputes. When shortages reach some unquantified threshold of sufficient concern, Montana provides for court appointment of a seasonal water commissioner upon petition by the affected water users. Mr. Hinckley Report at 23.

Mr. Hinckley then goes on to state: "We have found no evidence of a level or frequency of priority administration remotely comparable to what Fritz (2013) describes for the Tongue River Basin in Wyoming." Thus, Mr. Hinckley implies that Montana's approach to priority administration is somehow inadequate as compared to Wyoming's, and such perceived inadequacy should affect Montana's ability to enforce its pre-1950 Compact rights.

It is evident from the discovery sought by Wyoming and the reports submitted by its experts that one of Wyoming's primary goals is that Wyoming water law and methods of water rights administration should be adopted as the standard by which Wyoming's obligations to Montana under the Compact will be determined. As demonstrated below, the notion that the laws and methods of administration of one State are superior and must serve as the basis for determining whether another State has administered its water properly so as to be entitled to enjoyment of its Compact rights is contrary to the plain language of the Compact, the intent of the States in entering the Compact and the Congress in approving it, as well as relevant case law. There is no dispute that Montana does administer its pre-1950 rights under Montana law. While

Wyoming may not like Montana's laws regarding water rights administration, Montana is entitled to apply those laws, and the Compact does not give Wyoming the ability to dictate Montana's system of administration. This Motion therefore seeks a ruling that the Compact leaves each State free to administer its water rights according to its own State law, and does not impose Wyoming's requirements on Montana's intrastate administration of water rights as a prerequisite to Montana's entitlement to its Compact rights.

III. ARGUMENT

A. Standards of Decision

1. Summary Judgment

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). Federal Rule of Civil Procedure 56 and the Supreme Court's precedents construing that Rule "serve as useful guides" in original actions. *Ibid.*; Sup. Ct. R. 17.2.

2. Compact Interpretation

An interstate compact is both a contract between States and a law of the United States. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (citing *Texas v. New Mexico,* 482 U.S. 124, 128 (1987)). As a result, the customary rules of contract interpretation and statutory construction apply. *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013); *New Jersey v. Delaware*, 552 U.S. 597, __, 128 S.Ct. 1410, 1420 (2008) (citing *New Jersey v. New York*, 523 U.S. 767, 811 (1998)). As with other contracts and federal laws, if the text of the Compact is unambiguous it is conclusive. *See, e.g., Kansas v. Colorado*, 514 U.S. 673, 690 (1995) ("unless the compact to which Congress has consented is somehow unconstitutional, no

court may order relief inconsistent with its express terms") (citing *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)). In *New Jersey v. Delaware* the Court observed:

> Interstate compacts, like treaties, are presumed to be the "subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purpose of the high contracting parties."

552 U.S. at ___, 128 S. Ct. at 1423 (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)). In interpreting a compact, the Court should give effect to every clause and every word. *Id.* at 1420-21; *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (noting that a compact is "a legal document that must be construed and applied in accordance with its terms").

On the other hand, if the language of the Compact is determined to be ambiguous, other reliable indications of the parties' intent may be taken into account. *Oklahoma v. New Mexico*, 501 U.S. at 236, n.5. Those sources may include materials submitted to Congress in support of congressional approval of the Compact and items in the public record susceptible to judicial notice, such as the minutes of the Compact negotiations. *See id.*

B. The Compact Does Not Impose Particular Requirements on Intrastate Water Administration as a Prerequisite to A State's Entitlement to Its Compact Waters.

1. The Plain Language of the Compact Confirms to the States The Jurisdiction to Regulate and Administer Their Water Rights Under State Law

The plain language of the Compact explicitly preserves the ability of each State to administer and regulate its water rights according to its own State laws and practices. Specifically, Article XVIII provides that nothing in the Compact "shall be construed or interpreted to divest any signatory State or any of the agencies or officers of such States of the jurisdiction of the water of each State as apportioned in this Compact." This language confirms

each State's jurisdiction over its Compact waters, thereby ensuring that the States retain authority to administer and regulate those waters according to their own laws.

Article VII provides additional support to Article XVIII's mandate. Article VII(A) allows one compacting State to acquire rights to appropriate unapportioned or unappropriated water in another compacting State for use in the first State, and to construct or participate in the construction of works in the other State for the purpose of conserving and regulating such rights. However, such rights must be acquired in accordance with the laws of the State in which water is being appropriated, and are "subject to the rights of [that] state to control, regulate, and use the water apportioned by it."

These provisions expressly indicate that the Compact does not affect a State's authority to administer the waters within its borders according to its own State laws and practices. The plain language of the Compact is not capable of an interpretation whereby the laws and practices of Wyoming would serve as the standard by which Montana's administration and regulation of its waters should be judged for purposes of determining whether Montana is entitled to enjoy its pre-1950 Compact rights.

2. Any Silence in the Compact Must Be Construed In Favor of Each State's Retaining Authority to Administer the Waters Within its Borders

In addition to the express Compact provisions discussed above that relate to intrastate water administration, there is no provision in the Compact that expressly requires that any State (Montana) must apply another State's (Wyoming's) laws governing regulation and administration of water rights before that State (Montana) is entitled to the protections and rights granted to it under the Compact. The absence of express authority requiring a State to follow within its own borders, another State's water laws and practices – or any particular practices regardless of State law – must be construed to protect each State's authority to apply its own

laws within its own borders. The Supreme Court recently confirmed this principle of basic sovereignty in *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120 (2013).

In *Tarrant*, the Court was asked to interpret the Red River Compact to determine whether the compact entitled a Texas water district to acquire water from within Oklahoma, thereby pre-empting Oklahoma statutes restricting out-of-state diversions of water. Finding that the compact was silent on that issue, the Court first noted that the "background notion that a State does not easily cede it sovereignty has informed our interpretation of interstate compacts." *Id.* at 2132. Relying on this fundamental principle, the Court reaffirmed the central rule of interpretation regarding inferences to be drawn from silence in intrastate compacts:

> "[W]hen confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that '[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens.' *Virginia v. Maryland*, 540 U.S. 56, 67 (2003)." *Ibid.*

The Court thus rejected any inference from the compact's silence regarding state borders that the signatory states had "dispensed with the core state prerogative to control water within their own boundaries." *Ibid.*

Pursuant to the established principles reaffirmed in *Tarrant*, silence in the Compact regarding the manner in which the signatory States must regulate and administer the waters within their borders must be construed in favor of each State retaining complete authority under their respective laws and practices over the regulation and administration of such waters. Wyoming seeks to apply its own law and practices regarding water regulation and administration to Montana. Montana has administered water within its own borders for over one hundred years, and has never ceded its sovereign right to exclusively apply that law within its borders.

3. Reliable Extrinsic Sources Confirm that the States and Congress Understood the Compact to Leave Intrastate Administration of Water Rights to the Individual States Under Their Respective State Laws

If it were determined, despite the foregoing arguments, that the language of the Compact is ambiguous with regard to whether the States are required to administer and regulate their intrastate waters in a particular manner in order to enjoy their Compact rights, resort to reliable sources of the parties' intent would be appropriate. FIR at 11 (citing *Oklahoma v. New Mexico,* 501 U.S. 221, 235 n. 5 (1991)); *see also Oklahoma v. New Mexico,* 501 U.S. at 248-250 (Rehnquist, C.J., dissenting). Reliable sources of the parties' intent with respect to the Yellowstone River Compact confirm that the Compact was intended to leave the States free to administer their pre-1950 rights in accordance with their individual State laws. These sources include the negotiating history between the compacting States and materials submitted to Congress in support of the Compact's congressional approval. *See Oklahoma v. New Mexico,* 501 U.S. at 235 n.5.

That the Compact would not impose particular requirements on intrastate administration of water rights is a central theme that runs throughout the lengthy negotiating history of the Compact. From very early on in the negotiating process, a primary factor informing the negotiations was the difference between Montana and Wyoming water laws and the ways in which water rights were administered in each State. See First Interim Report of the Special Master 5-6 (Feb. 10, 2010) Littlefield Report 9. Given these differences, the negotiators understood that interstate administration would be infeasible, and that existing rights in each State should therefore be protected as they were administered and regulated under each State's laws and practices. See First Interim Report at 22; Littlefield Report at 9. Thus, the first draft of the Compact made clear that there would be no transboundary management of water rights and

that each State would retain sole authority over how to administer the water within its borders. Littlefield Report 11 (quoting Article V(C) of the 1935 draft compact as stating: "Wherever and whenever practical, the waters of all interstate streams *shall be divided at the state line*, having due regard to the elements of return flow, priority, and established uses" (emphasis added)). Although the drafters attempted different approaches to allocating the interstate waters, the principle that any potential interstate accord should not endanger the existing uses, rights, and related administration in each State remained constant throughout the years of negotiations and numerous compact drafts. See *id.* at 12-27 (discussing historical record on each draft of the compact).

Statements in the historical record near the time of the Compact's final approval in 1951 confirm that the negotiators intended this principle to be part of the Compact. For instance, the Compact Commission's Engineering Committee explained to the Chairman of the Compact Commission in October of 1950:

> "[T]he committee is of the opinion that there is little to be gained from a water supply standpoint by regulating and administering existing diversions on a straight priority basis or otherwise. It is, of course, entirely up to the Commission whether or not existing rights are to be administered under the Compact, but from an engineering standpoint, the committee feels that the expense and difficulties of such an administration would in no way justify the benefits that might be obtained for the lower State. There are no available data upon which to base this type of administration, due to the differences in the water laws of Wyoming and Montana. It would be a major research project to place existing rights in both States on an equivalent basis, and it might eventually involve adjudication proceedings in either or both States." Draft letter of Engineering Committee to R.J. Newell, Oct. 3, 1950. See Littlefield Report at 33.

This same sentiment was echoed by Secretary of the Interior Oscar L. Chapman in explaining the Compact in a message to Congress endorsing ratification in September 1951. In discussing Article V's apportionment of the waters of the Yellowstone Basin, Chapman noted that the Compact Commission's Engineering Committee had determined that it would be

infeasible to regulate the "administration of existing appropriative rights in the signatory States." Chapman noted:

> "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. . . . Accordingly, paragraph A of Article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing to each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing acquisition and use of water under the doctrine of appropriation. U.S. Congress, *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*, 82 Cong., 1 sess., S. Rpt. 883, Oct. 2, 1951, pp. 9-12.

Thus, the historical record confirms that the Compact was not intended to impose particular requirements on how States administer or regulate their intrastate Compact waters as a pre-requisite to enjoyment of their pre-1950 Compact rights. Instead, the Compact made block allocations of pre-1950 rights to each State, to be administered within each State's borders according to State laws and practices. Accordingly, Wyoming's attempts to have Wyoming law and practice be deemed the standard by which Montana must administer its water rights as a pre-requisite to Montana's enforcement of its pre-1950 rights should be rejected.

IV. CONCLUSION

For the reasons stated above, the State of Montana requests partial summary judgment ruling that the Yellowstone River Compact does not impose specific requirements on the manner in which the signatory States regulate and administer their intrastate waters as a prerequisite to enjoyment of their pre-1950 Compact rights.

Respectfully submitted,

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STATE OF MONTANA,

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Before the Honorable Barton H. Thompson, Jr.
Special Master

CERTIFICATE OF SERVICE

I certify that a copy of Montana's Motion for Summary Judgment on the Compact's Lack of Specific Intrastate Administration Requirements and Brief in Support was served electronically, and by placing the same in the U.S. mail on July 3, 2013, to the following:

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I further certify that all parties required to be served have been served.

_____
John B. Draper

Montana v. Wyoming and North Dakota
No. 137, Original, U.S. Supreme Court

Rebuttal Report on Article V (A) of the 1950 Yellowstone River Compact

by

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May 31, 2013

EXHIBIT A

Table of Contents

I. Introduction

A. Purpose of Report, Summary of Opinions, Author's Qualifications, and Compensation

1. Report Purpose – Historical Questions for Consideration

This report focuses on the history of Article V (A) of the 1950 Yellowstone River Compact and is intended to be a rebuttal to Bern Hinckley's "Review of Expert Reports Submitted by Montana," April 2, 2013, in *Montana v. Wyoming and North Dakota*, No. 137, Original, U.S. Supreme Court. Article V (A) of the Yellowstone River Compact reads:

> 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.

I was asked by the State of Montana to undertake historical research to answer the following two questions relating to Article V (A) of the Yellowstone River Compact and to consider the historical conclusions derived from that research in relation to Hinckley's report. The two questions for historical consideration are:

> 1. Did the negotiators of the Yellowstone River Compact discuss imposing on either Wyoming or Montana a requirement for a particular type of water administration as a prerequisite for that State's enjoyment of its Article V (A) rights to water under the Compact?
>
> 2. What historical sources support the answer to Question 1?

2. Summary of Opinions

I am not an engineer, and this report does not attempt to analyze any engineering data presented in Hinckley's report. Rather, this study rebuts the fundamental historical assumption underlying Hinckley's entire report that Montana must define and administer its water rights in a predetermined manner to be entitled to its Article V (A) water under the Yellowstone River Compact. Essentially, Hinckley contends that Montana has not administered its water rights and

uses properly, notably with regard to the Tongue River Reservoir. For example, Hinckley asserts: "Tongue River Reservoir has not been managed to maximize storage at all times."[1] According to Hinckley, part of the failure "to maximize storage" has been due to "foregone storage opportunities" in order to pass water through the reservoir for various reasons.[2] Moreover, Hinckley adds: "Operations since the enlargement of the [Tongue River] reservoir in 1999 verify the discretionary nature of larger bypasses" through the reservoir.[3] "Thus," according to Hinckley, "it is reasonable to require a storage right [in the Tongue River Reservoir] to make reasonable efforts to store all available inflows. Again, the result of regulation otherwise would be a waste of water" – a waste that Hinckley maintains has occurred due to Montana's failure to manage its water rights and uses in a pre-ordained manner.[4] Hinckley further asserts: "Given the inevitable variations in irrigation-system ownership, management, and financial conditions, it is unreasonable to assume that all potentially irrigable acreage will be irrigated in any one year, much less in every year" as Hinckley claims one of Montana's experts has done.[5] In addition, Hinckley suggests that priority administration akin to that practiced in Wyoming is a prerequisite to Compact enforcement.[6] In short, according to Hinckley, all of these factors relating to how Montana has administered its water uses and rights need to be considered to determine whether Montana is entitled to its Article V (A) water under the Yellowstone River Compact.

This entire assumption that Montana must administer water allotted to that state in a preset manner before Wyoming is required to deliver Article V (A) water to Montana is not consistent with historical statements and documents generated during the negotiations leading to the 1950

[1] Bern Hinckley "Review of Expert Reports Submitted by Montana," April 2, 2013, submitted in *Montana v. Wyoming and North Dakota*, No. 137, Original, U.S. Supreme Court, Court (hereafter cited as "Hinckley Report"), p. 7.
[2] "Hinckley Report," p. 7.
[3] "Hinckley Report," p. 9.
[4] "Hinckley Report," p. 12.
[5] "Hinckley Report," p. 18.
[6] "Hinckley Report," p. 24.

Yellowstone River Compact. Indeed, during those deliberations both Wyoming and Montana insisted that no matter what the final allocations of water might be to either state under an interstate agreement, a central principle for the Yellowstone River Compact was that each state was to administer its own *intrastate* allocations in whatever manner was best suited to that state and its water users. Three statements from the historical record near the time of the Yellowstone River Compact's final approval in 1951 illustrate this point. (This report, however, will review the entire historical record to demonstrate that these were not just isolated examples – but three instances in a long history of similar statements.)

First, in the summer of 1950, shortly before the final talks leading to the 1950 Yellowstone River Compact took place, Wyoming's Yellowstone River Compact Commissioners met without Montana's negotiators present to develop language regarding Article V (A) that would be satisfactory from Wyoming's perspective. After the meeting adjourned, Wyoming Compact Commissioner W.E. McNally told R.J. Burke, a Bureau of Reclamation engineer advising the Commission's Engineering Committee, that Article V (A) should embody the concept that existing water uses as of January 1, 1950, had to be protected as they were administered under each state's law:

> We [the Wyoming Commissioners] will submit for consideration Paragraph A of Article V in the following words: "A. All existing rights to the beneficial use of the waters of Clarks Fork Basin, Yellowstone River, Big Horn River Basin (exclusive of Little Horn River), Tongue River Basin, and Powder River Basin (inclusive of Little Powder River), respectively, in the States of Montana and Wyoming *valid under the laws of those States, respectively, as of January 1, 1940* [*sic* – this should be 1950], *are hereby recognized and shall be and remain unimpaired by this compact*." [Emphasis added.][7]

[7] R.E. McNally to W.J. Burke, Regional Counsel, U.S. Bureau of Reclamation, Aug. 17, 1950, file 04-01-00, YCC Correspondence, 1950, Montana State Department of Natural Resources and Conservation, Helena, Montana. Parenthetical phrases are in the original; bracketed phrases have been added.

Second, the Yellowstone River Compact Commission's Engineering Committee concurred with McNally's assessment of what the meaning of Article V (A) ought to be once a final draft compact was reached. As the concluding Yellowstone River Compact negotiations were taking place in the fall of 1950, the Compact Commission's Engineering Committee explained on October 3, 1950, to R.J. Newell, Chairman of the Yellowstone River Compact Commission:

> *[T]he committee is of the opinion that there is little to be gained from a water supply standpoint by regulating and administering existing diversions on a straight priority basis or otherwise.* It is, of course, entirely up to the Commission whether or not existing rights are to be administered under the Compact, but from an engineering standpoint, the committee feels that the expense and difficulties of such an administration would in no way justify the benefits that might be obtained for the lower State. *There are no available data upon which to base this type of administration, due to differences in the water laws of Wyoming and Montana. It would be a major research project to place existing rights in both States on an equivalent basis, and it might eventually involve adjudication proceedings in either or both States.* [Emphases added.][8]

As a third example, after Montana, North Dakota, and Wyoming had ratified the Yellowstone River Compact, U.S. Secretary of the Interior Oscar L. Chapman explained Article V (A) in a September 1951 message to Congress endorsing federal ratification of the Compact. Chapman stated that the engineering advisors to the Compact's negotiators had determined "*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*[.]" (Emphasis added.)[9]

The above three examples illustrate the basic premise underlying Article V (A) of the Yellowstone River Compact that water rights and uses existing as of January 1, 1950, were to be protected under each state's water laws and administrative practices before any other allocations of water were made from future storage reservoirs then being contemplated by the United States. Yet

[8] Letter of Engineering Committee to R.J. Newell, Oct. 3, 1950, contained with letter from Carl L. Myers, Chairman, Engineering Committee, to Fred Buck, W.S. Hanna, Earl Lloyd, and J.J. Walsh, Oct. 3, 1950, materials provided by North Dakota.

[9] U.S. Congress, *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*, 82 Cong., 1 sess., S. Rpt. 883, Oct. 2, 1951, pp. 10-11.

these three illustrations do not stand alone – the same basic concept underlay every previous attempt to reach an interstate agreement dating back to the earliest negotiations in the 1930s. Therefore, to grasp the importance of this fundamental idea to all Yellowstone negotiators, it is essential to review the entire historical record. It is also important to review the full historical record because throughout multiple attempts to reach a satisfactory agreement, many of the negotiators remained the same over the years.

In sum, in my opinion, the historical record reflects that the states meant for pre-Compact water rights in use as of January 1, 1950, to be defined, administered, and managed by each state in accordance with its laws and practices, and the Compact was not meant to impose any particular form of administration of pre-Compact rights as a prerequisite for a state to enjoy its Compact rights.

The full historical discussion will follow a brief description of my qualifications as a historian, my rate of compensation, as well as a review of the research sources that form the basis for the historical conclusions presented here.

3. Qualifications of Douglas R. Littlefield and Compensation

With regard to my qualifications as a historian, I hold a Ph.D. in American history from the University of California, Los Angeles. I am the owner of Littlefield Historical Research, and I have nearly thirty years of experience as a historical consultant on environmental matters, especially those involving water rights, river navigability, and land uses. I have extensive historical research experience in many archives throughout the United States, including the U.S. National Archives and many of its regional branches, the Library of Congress, many states' official archives (including those of Montana, North Dakota, and Wyoming), numerous universities' special collections, and a wide variety of local and regional historical societies.

I have provided detailed historical expert witness reports and related exhibits to numerous clients around the United States, including several states' attorneys general, multiple law firms, corporations, land and water users' groups, and other organizations. I have provided affidavits, expert reports, depositions, and/or testimony in four original jurisdiction lawsuits before the United States Supreme Court. I also have testified in other federal and state courts, as well as before administrative or water regulatory agencies.

Additional information on my background can be found in my vita, which is attached as Appendix A to this report, as well as at Littlefield Historical Research's website: www.LittlefieldHistoricalResearch.com.

I have been compensated at a rate of $125 per hour for historical research and writing this report.

B. Historical Research Sources Considered and Sources Relied Upon

1. Historical Research Materials Considered

To provide an in-depth historical analysis and to reach conclusions with regard to the above questions, I conducted extensive research in both archival and published primary sources. With regard to archival sources, all available files of the negotiators of the 1950 Yellowstone River Compact were fully reviewed, as were similar files for all the Compact's previous drafts dating back to the 1930s. This work was done at the following research locations: 1) the Montana Governors' files at the Montana Historical Society (the equivalent of a state archives) in Helena, Montana; 2) the records of the Montana Department of Natural Resources and Conservation in Helena; 3) the Wyoming State Engineer's files at the Wyoming State Archives in Cheyenne, Wyoming; 4) the Wyoming Water Resources Division files at the Wyoming State Archives in Cheyenne; 5) the Wyoming Governors' files at the Wyoming State Archives in Cheyenne; 6) the North Dakota Water

Commission files in Bismarck, North Dakota; 7) the North Dakota Governors' files at the University of North Dakota in Grand Forks; 8) the files of the U.S. Bureau of Reclamation at the U.S. National Archives branch in Denver, Colorado; and 9) the records of the Department of the Interior at the U.S. National Archives branch in College Park, Maryland. In addition, because North Dakota also has provided further documentation in anticipation of discovery requests, those records also were reviewed for this study. (Those documents are cited as "materials provided by North Dakota" in the footnotes.) Finally, other records regarding the Yellowstone River Compact, as understood by Harry Truman (President of the United States in 1950) and federal executive branch agencies, were reviewed. These files include unpublished reports and papers now held by the Truman Presidential Library in Independence, Missouri.

With regard to published materials, a complete examination was undertaken of all actions by Congress relating to the 1950 Yellowstone River Compact and its history as revealed in the *Congressional Record,* Congressional reports, and in published and unpublished Congressional hearings. Also examined were published reports and other studies by the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers, both of which planned to build reservoirs in the Yellowstone River Basin once an interstate allocation of water supplies could be achieved – and both of which provided vital engineering data and other advice to the Yellowstone River Compact Commissioners.

In addition, actions and comments by parties concerned with the Yellowstone River Basin's interstate allocation were heavily covered by newspapers in Montana, Wyoming, and North Dakota in the years leading up to that accord's final ratification in 1951. Over four hundred historical newspaper articles were reviewed about the negotiations, including interviews and other comments by the negotiators.

2. Historical Research Materials Relied Upon

While the extensive historical research discussed above constitutes all materials considered in preparing this report, the research materials relied upon are cited in the report's footnotes. Copies of those cited documents appear in Appendix B and are arranged in chronological order.

II. Historical Setting and Early Compact Attempts

Beginning as early as the mid-1930s, negotiators for Montana and Wyoming (North Dakota joined the talks later) had attempted to find a compact solution to allocate the water supplies of the Yellowstone River and four of its principal tributaries (the Big Horn, Clark's Fork, Powder, and Tongue rivers). The results of these deliberations nearly had borne fruit several times, either in the form of partially completed accords or in finished agreements that for varying reasons were never fully ratified. Understanding the history of these previous compact attempts is important to comprehend the basic ideas behind the 1950 Yellowstone River Compact, especially with regard to Article V (A), where the basic tenet throughout all Compact talks was that existing water uses, rights, and water laws would remain protected and left to each state to administer as that state saw fit. Moreover, because some participants in one or more of the earlier sets of negotiations took part in later talks, their views tended to remain constant on certain key concepts, again, such as the idea behind Article V (A). It is therefore important *not* to view these earlier agreements as unrelated documents. Instead, these previous attempted settlements should be seen as drafts and discussions leading to the final 1950 Yellowstone River Compact. Therefore, the meaning given to the language used by negotiators in shaping those earlier accords is directly anticipatory of language used in Article V (A) of the final 1950 Compact.

A major historical factor why the basic philosophy behind Article V (A) stayed constant had to do with differences between Montana's and Wyoming's water laws when formal compact talks began in the mid-1930s. Wyoming had a centralized water rights registry system that required all applicants for water rights to file their appropriation notices with that state (although it was acknowledged by some of Wyoming's officials that filed claims, also known as "paper rights," and actual uses sometimes varied significantly). Montana, on the other hand, had no similar state-based water rights listing; Montana defined water rights as actual beneficial uses. While in some cases water rights claims in Montana were posted at points of diversion and/or filed in county records, in many other situations they were not, particularly if claims crossed county lines. In addition, as of the 1930s and 1940s during initial compact deliberations, only a small number of water rights had been adjudicated in either state.

These differences between how the two states administered water laws was a major reason why the predecessor versions of what became Article V (A) all contained the basic idea that the status quo of existing uses, rights, and water laws within each state would be maintained before any further allocations of new water supplies were made from future reservoirs then being contemplated by the U.S. Government. Moreover, both states' negotiators realized that their respective states' irrigators were adamant that no potential interstate accord endanger their existing uses or water rights, or related administration. Without the approval of existing water rights holders, negotiators knew, ratification would be impossible in their respective states' legislatures.

There also were other reasons why neither Montana nor Wyoming was willing to yield control over water uses and rights within their borders in exchange for achieving an interstate compact. Both states' officials and water users were well aware that the U.S. Government was planning possible new dams and reservoirs – some for the entire Missouri River watershed (which

includes the Yellowstone River Basin) – that would provide more water for lands with unreliable supplies and for new potentially irrigable acreage. Yet these federal proposals also threatened to reduce local water control in favor of greater basin-wide river regulation. How such reductions in localized control would be accomplished remained unknown at the time, but given the differences in Montana's and Wyoming's methods of regulating existing uses and rights, protecting the status quo as to administering actual uses and rights was crucial to achieving any compact. And a compact, in turn, was the price federal officials were demanding before any new reservoirs would be built.

A. The 1935 Compact Draft

Congress originally authorized Montana and Wyoming to negotiate a Yellowstone River compact in 1932,[10] and some efforts toward this goal took place during the next few years.[11] Yet these proposals were tentative and limited in scope. Significant deliberations began in 1935, and among other topics, the 1935 negotiators proposed accepting existing priorities across the state line to protect then-current water uses. This proposal, however, quickly ran up against the fact that Montana and Wyoming had considerably different laws and administrative rules for protecting existing uses and rights. That shortcoming notwithstanding, officials from the two states tried at least to see if this approach could be used.

For example, as early as February 1935, a draft interstate compact signed by Montana State Engineer J.S. James and Wyoming State Engineer Edwin Burritt tried to use priorities across the

[10] *An Act Granting the Consent of Congress to the States of Montana and Wyoming to Negotiate and Enter into a Compact or Agreement for Division of the Waters of the Yellowstone River*, 47 Stat. 306 (1932).

[11] See, for example, "Tentative Proposals Submitted for the Formulation of a Compact for Apportionment of the Waters of [the] Yellowstone River and Tributaries between Montana and Wyoming, at a Conference at Sheridan, Wyoming, October 5, 1932," file: Yellowstone River Compact, Compact Proposals, 1932, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming; "Wyoming's Tentative Draft, Yellowstone River Compact," Feb. 7, 1933, file: Yellowstone River Compact Records, Compact Drafts, 1933, 1935, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming State Engineer, Record Group 0037, ibid.

state line to protect existing uses and water rights. Yet, like the final 1950 Yellowstone River Compact, the 1935 draft made it clear that there was to be no trans-boundary management of water rights, either by any new interstate organization or by the states themselves. Each state was to retain sole authority over how it administered water uses and rights within its borders.

Articles V and VI of the 1935 draft compact specified that prior appropriation governed diversions from the Yellowstone River system, but those articles also stated that appropriations were to be determined by the separate laws of each state. In effect, any allotments were to be based upon cumulative existing priorities, but the actual allocations were to be blocks of water delivered at the state line in each tributary basin. As Article V (C) declared, "Wherever and whenever practical, the waters of all interstate streams [in the Yellowstone Basin] *shall be divided at the state line*, having due regard to elements of return flow, priority, and established uses." (Emphasis added.)[12] This was a provision clearly inserted in order to preserve the sanctity of each state's administration of its own water laws. And, while the 1935 compact draft also provided that parties in either state could appropriate water in the other for beneficial purposes, including storage in reservoirs, such appropriations were only possible if they followed the procedures of the state wherein the appropriations were to be made. In other words, there was to be no trans-boundary administrative system of priorities under the 1935 draft compact and no means whereby either state would be compelled to administer its water rights in a manner that differed from that state's existing practices.[13]

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[12] Articles V (C), "Yellowstone River Compact between the states of Wyoming and Montana," Feb. 6, 1935, file: Yellowstone River Compact Records, Compact Drafts, 1933, 1935, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming state Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

[13] Articles V and VI, "Yellowstone River Compact between the states of Wyoming and Montana," Feb. 6, 1935, file: Yellowstone River Compact Records, Compact Drafts, 1933, 1935, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming state Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

The 1935 compact draft also declared that a new commission would be formed to establish the relative priorities of existing uses and rights on either side of the state boundary as well as to allocate additional flows that might be created from new storage or other developments. Nevertheless, once such determinations were reached, each state would still govern those waters within its own borders under that state's existing laws and administrative procedures.[14] In sum, while the 1935 draft compact attempted to consider priorities in both Montana and Wyoming, the proposed agreement did not provide for any form of interstate regulation by priority across the state line nor did the accord mandate that either state change its existing practices with regard to water regulations. The attempt to utilize priorities, however, essentially was a means of recognizing existing uses, rights, and administrative procedures in both states as a fundamental principle underlying any interstate accord for the Yellowstone River system.

The 1935 proposed compact was never presented for ratification in Wyoming due to that state's biennial legislative schedule. In Montana, the compact was introduced in the State Senate, but it did not pass, probably due to Wyoming's decision to table the matter until the next session of its legislature.

B. Compact Deliberations During 1938 to 1941

Over the years following the failure of the 1935 compact proposal, officials from Montana and Wyoming continued to struggle with how best to address protecting the status quo of current water laws and practices in each state as well as existing uses and priorities. After authorization by Congress in 1937,[15] the states resumed deliberations in November 1938. At that

[14] Articles V and VI, "Yellowstone River Compact between the states of Wyoming and Montana," Feb. 6, 1935, file: Yellowstone River Compact Records, Compact Drafts, 1933, 1935, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming state Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

[15] *An Act Granting the Consent of Congress to the States of Montana and Wyoming to Negotiate and Enter into a Compact or Agreement for Division of the Waters of the Yellowstone River*, 50 Stat. 551 (1937).

time, both sides' delegates agreed that accepting existing uses was crucial to any successful compact, but they were uncertain whether that could be accomplished by using priorities across the state line – still because of the differences in state laws and the lack of information about actual uses in either state (especially in Montana due to that state's lack of a centralized water rights recording system). Montana's E.B. Donohue proposed simply extending priority recognition directly across the state line, apparently because he believed many of Montana's water uses and priorities were senior to those in Wyoming. Using the Big Horn River as an illustration, Donohue therefore argued, "Consider the Big Horn River as a big irrigation ditch. Forget [the] state line."[16] Yet even as he advocated accepting priorities regardless of state lines, he nonetheless conceded, "Montana is in no position to know about all of its rights until studies are made." Among other things, those analyses were to determine actual uses under Montana's existing water rights system and administrative practices. Montana compact negotiator Rockwell Brown concurred. Acknowledging that Montana's officials needed to develop more concise information about actual water uses in their state's part of the Yellowstone Basin, Brown nevertheless asserted that "Wyoming, in the event of shortage, should undertake to give due recognition to those [Montana's] rights."[17]

Yet how such a trans-boundary priority system would operate remained unclear, especially since Wyoming did not favor accepting priorities across the state line. Reflecting the lack of detailed knowledge about exactly what water rights and uses existed on both sides of the state border, Wyoming State Engineer John Quinn stated, "We agree with Mr. Brown's statement

[16] "Meeting of the Compact Commissions of Montana and Wyoming to Discuss the Yellowstone River Compact," Nov. 21-22, 1938, microfilm roll 158, State Engineer, General Correspondence, 1930-1939, Series 01.01.01, General Correspondence, 1886-1983, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

[17] "Meeting of the Compact Commissions of Montana and Wyoming to Discuss the Yellowstone River Compact," Nov. 21-22, 1938, microfilm roll 158, State Engineer, General Correspondence, 1930-1939, Series 01.01.01, General Correspondence, 1886-1983, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

completely [about the importance of accepting existing uses and rights], except as to the term he has used that Wyoming should give due recognition to prior rights in Montana." Quinn apparently believed that such recognition amounted to acceptance that Montana could issue a call against Wyoming irrigators, which then would have to be acted upon by Wyoming officials – something Quinn knew Wyoming's irrigators would never accept under any compact agreement. Also, Quinn undoubtedly opposed any Wyoming recognition of Montana's priorities because Montana's de-centralized water rights administration might mean accepting a considerably larger Montana claim in the future once Montana quantified all of its existing uses. Quinn therefore declared that Wyoming had to retain complete control over its own water laws and administrative practices and not be compelled to accept Montana's priority claims across the border in Wyoming. "We are willing that such a statement be made," he asserted, "if it be modified to the extent that Wyoming will give due consideration in the administration of its own rights to any shortage in Montana."[18] In short, Quinn believed that each state should manage its own water laws in whatever way that state saw fit, although he conceded that Wyoming would *consider* Montana's claims while not being bound by them.

Two years later, when deliberations resumed in October 1940, William G. Metz, a Wyoming delegate to the talks, made the same point. Summarizing the negotiations and discussions to date, Metz stressed the need to examine carefully the existing water uses (not so-called "paper rights" – claims never validated by actual beneficial use) to determine the prior rights that would be protected, or, as he put it, "the condition which prevails today." That circumstance, of course, included how each state administered its own water laws and uses. He added:

[18] "Meeting of the Compact Commissions of Montana and Wyoming to Discuss the Yellowstone River Compact," Nov. 21-22, 1938, microfilm roll 158, State Engineer, General Correspondence, 1930-1939, Series 01.01.01, General Correspondence, 1886-1983, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

> Wyoming suggests that the actual beneficial use now made of water be declared the principal factor in dividing the water to meet the needs of the situation as it is today. Actual use of water on land is of more importance than priorities or court decrees.[19]

Yet Metz also stressed that each state should manage its own allocations, whatever those might turn out to be under a final compact. In other words, actual uses could help determine a block quantity of water to be assigned under a compact to each state, but when it came to allocating those supplies on an *intrastate* basis, each state should handle that in its own manner. As Metz explained during the October 1940 negotiations, an outside objective third party might determine existing uses to help assist an interstate apportionment by a compact, but then any final resulting allocations between Wyoming and Montana ought to be, according to Metz, a "*mass allocation, and each state could distribute its share as it pleases.*" (Emphasis added.)[20]

Montana's Rockwell Brown, who, like many of the negotiators, believed that new storage systems then proposed by federal authorities would provide so much additional water that it would alleviate any need to enforce priorities across the state line or elsewhere, agreed that "consideration must be given to existing priorities during this interval [before new storage is constructed]." Brown also underscored the crucial role that water users in each state held in relation to preventing ratification of any interstate agreement that did not protect their existing uses and rights under each state's administrative system. "Our legislature," he declared, "is not going to enter into a compact that does not protect the priorities of the [Montana] irrigators."[21]

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[19] "Minutes of the Meeting of the Yellowstone River Compact Commission Held in the Chamber of Commerce Building, Billings, Montana," Oct. 10, 1940, file: Yellowstone River Compact Records, Annual Report, 1940, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

[20] "Minutes of the Meeting of the Yellowstone River Compact Commission Held in the Chamber of Commerce Building, Billings, Montana," Oct. 10, 1940, file: Yellowstone River Compact Records, Annual Report, 1940, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

[21] "Minutes of the Meeting of the Yellowstone River Compact Commission Held in the Chamber of Commerce Building, Billings, Montana," Oct. 10, 1940, file: Yellowstone River Compact Records, Annual Report,

Yet regardless of approach, it was clear that all negotiators wanted to find some means to protect the status quo of existing water uses and rights under then-prevailing administrative practices before any allocations were made from "new" water that would be made available by reservoir construction. H.F. McColley, who attended the compact talks and was the Secretary and Chief Engineer of North Dakota's State Water Conservation Commission, also observed that the negotiators wanted to protect existing uses and rights ahead of any division of new waters that might be made available from future constructed storage. The consensus of opinion, McColley told North Dakota Governor John Moses in a report on the proceedings, was that block allocations would be made based on existing uses and practices, and additional "new" water to be made available from storage would then be divided. McColley told Moses:

> that the Yellowstone River waters should be proportioned on the basis of existing irrigation, based on a water supply established from records of the lowest year recorded; then proportion additional waters that may be available in more abundant years to the irrigated acreage and to potential irrigable acreage, realizing that a second allotment program will require upstream water conservation reservoirs created by the construction of various dams.[22]

Yet McColley also offered no conclusion on how any acceptance of existing uses and rights might be implemented across state lines. This was a problem that continued to plague all the compact negotiators as well as other observers, such as Clifford H. Stone, the Director of Colorado's Water Conservation Board. Stone also had attended the October 10, 1940, Yellowstone River talks as a delegate for the National Resources Planning Board (NRPB), President Franklin Roosevelt's New Deal agency charged with overseeing natural resources development and management. Explaining to Frederic A. Delano (the head of the NRPB) that existing uses and practices had to be protected before any new reservoirs were built, Stone underscored the

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1940, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

[22] H.F. McColley, Secretary and Chief Engineer, North Dakota State Water Conservation Commission, to North Dakota Governor John Moses, Oct. 15, 1940, materials provided by North Dakota.

importance of this concept and how if it were not included in any compact, that accord probably would not be ratified:

> *Naturally Montana is interested in preserving as far as possible vested and present uses, and obviously any compact which might seriously interfere with such uses would be difficult of ratification.* Therefore, there is justification for securing, on as sound a basis as possible, information as to the present uses of water within the basin. In Wyoming, of course, this information is largely available through the administrative procedure which has existed in that State from the beginning. Wyoming also is apparently relying, according to the statements of its representatives, largely upon the information now being obtained by the Reclamation Bureau as to present uses of water within that State. This information also will be helpful to the State of Montana, but that State is unwilling apparently to rely entirely upon the Bureau's information, and deems it advisable to have its own figures and, in the interest of final ratification, to survey as fully as possible, through its own agencies, the situation as to water uses within the State. [Emphasis added.][23]

Even as more talks continued into late 1941, *how* to accept existing uses, priorities, and water administration in both Montana and Wyoming continued to remain uncertain even though both states did not dispute *whether* such uses and rights should be protected under each state's existing water law and practices.

C. The October 1942 Compact Draft

Negotiations continued, and a new draft compact was reached in October 1942. Importantly, this draft expressly stated that all regulation of existing rights would occur under the laws of each state within its own borders – a concept largely already accepted even if the specifics had not yet been worked out. In other words, the October 1942 compact's authors considered maintaining the status quo of each state's authority over its own laws and practices as crucial as preserving the status quo of existing water rights and uses. Article VIII of the draft stated:

> *Present vested rights within each State to the beneficial use of waters of the Yellowstone River System are recognized by this Compact.* All rights to the

[23] Clifford H. Stone, Chairman, Region 7, National Resources Planning Board, to Frederic A. Delano, National Chairman, National Resources Planning Board, Oct. 16, 1940, materials provided by North Dakota.

> beneficial use of the waters of the Yellowstone River System heretofore and hereafter established under the laws of any signatory State shall be satisfied solely from the proportion of the water allotted to that State in which such rights are claimed and allowed and/or from the unallocated waters appropriated as provided in Article VI. [Emphasis added.][24]

Stressing this principle that each state would control and administer all water within its own borders, Lesher Wing of the Federal Power Commission, who was helping to write this version of the compact, subsequently told North Dakota State Engineer John Tucker that this provision meant that each state would get a block allotment to be subsequently divided under each state's laws among its water users. As Wing explained, "The water rights of individuals in each state are unaffected by the Compact, *since each person is entitled to his proportionate share of the state allotment*, in accordance with his existing appropriation rights and priority of filing." (Emphasis added.)[25]

Further underscoring the principle that each state would administer waters within its own borders according to its own laws and practices, the October 1942 draft declared in Article X:

> Unadjudicated appropriations shall hereafter be determined by the State in which the water is diverted, and where a portion or all of the lands irrigated are in the adjoining State shall be confirmed in that State by the proper authority. *Each adjudication is to conform with the laws of the State where the water is diverted and shall be recorded in the County and State where the water is used.* [Emphasis added.][26]

Also highlighting that each state's laws and practices were to govern its own water allotments under the proposed accord, the October 1942 draft declared that lower states could appropriate water in upper states and could build storage facilities for such new water supplies, but the draft compact established that such appropriations and reservoirs would have to conform

[24] Article VIII, "Preliminary Draft of Yellowstone River Compact (Revised October 17, 1942)," box/folder: 124110, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

[25] Lesher S. Wing to John Tucker, Nov. 3, 1942, materials provided by North Dakota.

[26] Article X, "Preliminary Draft of Yellowstone River Compact (Revised October 17, 1942)," box/folder: 124110, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

with the laws of the state where they took place[27] – much like the 1935 draft compact had provided.

The October 1942 draft also included an idea originally proposed in the 1935 compact draft of creating an interstate compact commission. Yet like the 1935 proposal, the commission outlined in October 1942 had no authority to compel juniors in one state to close their headgates in favor of senior water users in another state or to administer *intrastate* water allotments in any particular manner.[28] With no means to compel either state to administer its waters in any particular manner, the 1942 commission proposal was to create an agency that would gather information and make recommendations. As the draft compact expressly stated, "The findings of the Commission shall not be conclusive in any Court or tribunal having jurisdiction over this Compact."[29] In other words, each state's sovereignty over water rights and the administration of those rights within its borders were to be preserved – a fundamental principle that had been a part of the previous 1935 compact proposal, even if the methods to achieve that end differed from the earlier compact plan.

D. The December 1942 Compact Draft

By December 1942, interstate negotiators had dramatically changed their approach to dividing the waters of the Yellowstone River – in part because they had been unable to reach any conclusion about how to apportion the basin's water supplies by priority yet still fully respect the authority of each state over water laws and rights within its own borders. A new compact draft, dated December 15, 1942, retained in its Articles III-IV the provisions from the October 1942 draft

[27] Article VIII, "Preliminary Draft of Yellowstone River Compact (Revised October 17, 1942)," box/folder: 124/10, Yellowstone River Compact, 194I-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

[28] Article VII, "Preliminary Draft of Yellowstone River Compact (Revised October 17, 1942)," box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

[29] Article IV, "Preliminary Draft of Yellowstone River Compact (Revised October 17, 1942)," box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

establishing an interstate stream commission that would administer stream gauging stations in the Yellowstone Basin. But from there, the apportionment provisions were radically different. The December 15th draft compact simply turned the entire matter over to the proposed compact commission, which would divide flows in relation to three basic considerations: 1) priorities, 2) existing irrigated lands (uses) within the states involved, and 3) potentially irrigable lands within the Yellowstone Basin.[30] Yet even with these major changes in how allocations would be handled, the three states' negotiators still tried to maintain each state's control over rights, uses, and laws within its own boundaries through the retention of many of the provisions from the October 1942 draft.[31] As Federal Power Commissioner Wing, who helped write the December 15th version, explained to Montana negotiator P.F. Leonard, each state's priorities would be respected within its boundaries (even if the annual block allocations were handled by a compact commission based on cumulative priorities in each state along entire streams). "The actual distribution of the amount of water allotted to a State would, of course," Wing stated, "be on the basis of priorities within the State."[32] How this would be accomplished, however, had been the crucial question all along because there had been no agreement on what, precisely, constituted the existing uses and priorities within each state. The December 15th draft did not really answer this point. Not surprisingly, therefore, the draft was not widely supported and prompted heated debate.

While most compact negotiators favored protecting existing uses, rights, and water administration within each state, some Montanans did not support the concept, largely because an interstate administration of priorities regardless of state lines was assumed to favor Montana water

[30] Articles III-IV, "Preliminary Draft of Yellowstone River Compact (Revised December 15, 1942)," box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

[31] Articles VII-VIII, "Preliminary Draft of Yellowstone River Compact (Revised December 15, 1942)," box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

[32] Lesher S. Wing, Senior Engineer, Federal Power Commission, to P.F. Leonard, Dec. 19, 1942, file 04-01-00, YCC Correspondence, Montana State Department of Natural Resources and Conservation, Helena, Montana.

users, many of whom claimed earlier priorities than those upstream in Wyoming. Understandably, therefore, Wyoming's negotiators were stronger advocates of the sanctity of each state's laws, priorities, practices, and rights within its own borders. Montana State Engineer Fred Buck summarized both sides' thoughts on this point (and related problems) to Montana negotiator Joseph Muggli in late December 1942, and in so doing, Buck indicated that Wyoming's idea essentially was for a block allocation to each state determined by cumulative priorities:

> When the Montana members think of priorities, they have in mind the whole stream from its source to its mouth, forgetting entirely that the watershed is crossed by the State line. That is, a prior user on a stream, regardless of which State he lives in, is entitled to first use of the water. The user having the second priority may be in the other State but has second right to the use of water from that stream. Now I believe this is the principle the Montana boys have in mind when they speak of priorities, but Wyoming does not put this interpretation on the word. *Their idea is to divide the water at the State line in the ratio of percentages of irrigated land in the respective States, then each State takes its water so divided and distributes the same among its users according to the priorities within that State*. You can readily see the confusion that will eventually arise unless this matter is straightened out and stated very clearly. [Emphasis added.][33]

In an attempt to address Montanans' concerns over their assumed earlier priorities, as well as the uncertainties that existed at the time with regard to proving such rights and uses, by the end of December 1942, when a revised version of a compact was achieved, provisions were inserted in that accord that attempted to bridge the desire for "home-rule" with possible acceptance of Montana's earlier water rights claims. Those provisions were clauses in Article V of the December 31, 1942, compact draft providing for ten-year reviews and adjustments to the interstate allocations. These would be based on further information that might be developed during each succeeding decade including: 1) greater knowledge of existing rights, since those were in the midst of being studied in relation to federal proposals for more storage in the Yellowstone Basin, and 2) changes in direct flows caused by new storage, changes in return flows, and other factors. The idea,

[33] Montana State Engineer Fred E. Buck to Joseph Muggli, Dec. 22, 1942, file 04-01-00, YCC Correspondence, Montana State Department of Natural Resources and Conservation, Helena, Montana.

however, was not to adjust the block allocations due to *intrastate* changes in priorities themselves (such as due to individuals' abandonment or forfeiture). Instead, the existing uses and rights were to be covered by the minimum percentage allocations set forth in Article V.[34] The bottom line for this compact version, however – and the main reason for later strenuous objections to this accord – was that the actual allocations were to be left to a permanent commission created by the compact. This new decade-by-decade-review approach to Article V had been developed in recognition of the considerable disagreement over exactly what was the extent of existing water uses and rights within each state. But the two states also attempted to simultaneously endorse each state's administration of its own water rights, uses, and laws. As Article VI of that agreement provided:

> Present vested rights within each State and between States relating to the beneficial use of the waters of the Yellowstone River System are recognized by this Compact. *All rights to the beneficial use of the waters of the Yellowstone River System, heretofore and hereafter established under the laws of any signatory State, shall be satisfied solely from the proportion of the water allotted to that State as provided in Article V.* [Emphasis added.][35]

Moreover, as had been the case in previous compact efforts, downstream states still could appropriate water under the laws of upstream states for use in downstream locations.[36]

Combining "home rule" with a compact commission that could change allotments every decade, however, flew in the face of reality to many negotiators. R.E. McNally of Wyoming explained the problem with this version of the compact to Wyoming State Engineer L.C. Bishop in a January 14, 1943, letter that underscored Wyoming's desire to avoid any interstate regulation of existing rights, uses, and water laws and to leave those things to the oversight of the individual

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[34] Article V, "Yellowstone River Compact," Dec. 31, 1942, Subject File, Yellowstone River Compact, 1937-1971, box/folder 7, Hans L. Bille Papers, 1955-1973, MC2I9, Montana Historical Society, Helena, Montana.

[35] Article VI, "Yellowstone River Compact," Dec. 31, 1942, Subject File, Yellowstone River Compact, 1937-1971, box 1, folder 7, Hans L. Bille Papers, 1955-1973, MC219, Montana Historical Society, Helena, Montana.

[36] Article VI, "Yellowstone River Compact," Dec. 31, 1942, Subject File, Yellowstone River Compact, 1937-1971, box 1, folder 7, Hans L. Bille Papers, 1955-1973, MC219, Montana Historical Society, Helena, Montana.

states. In a lengthy analysis of the proposed compact and how it related to other interstate water disputes (including cases already decided by the U.S. Supreme Court as well as those still being litigated), McNally made it apparent that his state's position related to a desire not to have any trans-boundary regulation of priorities or interference with each state's ability to regulate its own waters. Instead, block allocations were to be made to each state, and those allotments then would be administered in whatever manner each state saw fit:

> [T]he State of Wyoming is making the following contentions: 1. Interstate priority administration is not to be applied. . . . *Equitable apportionment is accomplished by a mass allocation of the supply* [at the state line]. . . . Let us consider the first of these contentions. *We find our state contending very vigorously that interstate administration is entirely unfeasible, impracticable, and undesirable.* [Emphases added.][37]

McNally followed this point up by arguing that priority regulation of interstate rivers was not equitable because no specific quantity of water was assigned to either state. He therefore queried hypothetically, "In a huge basin, such as the Yellowstone River basin, is it practical to undertake interstate administration at all?" His implicit answer was obviously "no," which he made clear by noting the considerable differences between the two states in relation to length of irrigation seasons, precipitation, and regional requirements. After considerably more review of previous interstate water cases, McNally declared:

> I feel compelled to conclude that at least insofar as Tongue River and Powder River are concerned, I must oppose this matter of interstate administration. *I would want to limit the powers of the Interstate Commission so that each state would administer its own laws and its own water.* [Emphasis added.][38]

Yet there was no getting around the fact that this version of the compact gave the actual allocations of water to the commission created by the agreement – a commission that could trump

[37] R.E. McNally to Wyoming State Engineer L.C. Bishop, Jan. 14, 1943, materials provided by North. Dakota.

[38] R.E. McNally to Wyoming State Engineer L.C. Bishop, Jan. 14, 1943, materials provided by North Dakota.

each state's administration of its own water laws. The "solution" to the conundrum of how to deal with Montana's older claims by providing for ten-year reviews and adjustments to the interstate allocations under Article V had been a radically new approach to the priorities problem. Many parties nonetheless believed that all the clause did was to leave the entire issue up in the air, and as a result, they thought this version of the compact left too many questions unanswered. One of these issues, to Montana negotiator P.F. Leonard, even dealt with whether prior rights would be sacrosanct. Lesher Wing tried to clarify this point, and in so doing, he underscored that the prior rights being protected were to be considered permanent block allocations – blocks of water assigned to each state – that would not vary over time in relation to individuals' changed circumstances or the evolution of water law. Wing wrote to Leonard on January 30, 1943:

> The "present vested rights" referred to [in the compact draft] relate primarily to the rights of irrigators to divert and use water for growing crops, and this activity depletes the stream flows to a considerable extent. It clearly was the intent of the Compact Commission to protect this right to diminish the stream flows, and it also was their clear intent to divide the total stream flows among the signatory states, *permitting each to diminish the natural flow by certain definitely specified amounts; the amounts by which they are permitted to deplete the stream comprise the allotments.* [Emphasis added.][39]

Wesley D'Ewart, a Montana state senator and a compact negotiator, also tried to underscore this point in an analysis of the compact written to clarify its provisions to Montanans. After noting that it was imperative to reach an agreement among Montana, Wyoming, and North Dakota to avoid having the Yellowstone River's allocations co-opted into a larger arrangement among all the states of the Missouri River Basin – a very real possibility then being discussed among federal officials – D'Ewart explained, "Some thought that the Compact disturbed present vested rights," and here he quoted the provisions of Article VI, which provided:

> Present vested rights within each state and between states relating to the beneficial use of the water of the Yellowstone River system are recognized by this Compact.

[39] Lesher S. Wing to P.F. Leonard, Jan. 30, 1943, materials provided by North Dakota.

> *All rights to the beneficial use of the water of the Yellowstone River system, heretofore and hereafter established under the laws of any signatory state will be satisfied solely from the proportion of the water allotted to that state. . . .* Indian treaty rights pertaining to the waters of the Yellowstone River Basin are not affected by this Compact and are excluded therefrom. [Emphasis added.][40]

D'Ewart then declared emphatically: "It would appear to me that it would be hard to write an article more definitely recognizing vested rights within State boundaries. This Compact does not affect vested rights within state boundaries." D'Ewart added that further safeguards to the sanctity of each state's administration of rights and laws within its boundaries were the provisions in Article VIII permitting lower states to build reservoirs in upper states but only under the upper state's existing laws.[41]

Yet even this explanation did not quell all objections in both Montana and Wyoming, particularly due to the uncertainty over how much authority the compact commission would have over interstate allocations as each decade went by. As a result, ratification failed when Wyoming irrigators in the Tongue River and Powder River basins succeeded in having the Wyoming approval delete references to those two streams in the compact itself. In other words, the Tongue and Powder rivers were not to be covered by the agreement at all.[42] Thus, with only a partial interstate accord accomplished, the entire compact version died.

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[40] Wesley A. D'Ewart, "Yellowstone River Compact" [analysis of compact], Feb. 1943, materials provided by North Dakota.

[41] Wesley A. D'Ewart, "Yellowstone River Compact" [analysis of compact], Feb. 1943, materials provided by North Dakota.

[42] "House in Wyoming Acts on Bill on River Compact," *Helena Independent,* Feb. 16, 1943; "North Dakota Senate Votes Water Compact," *Billings Gazette,* Feb. 17, 1943; "Water Pact Voted by Wyoming House," ibid., Feb. 18, 1943; "Wyoming Senate Okehs Yellowstone Compact," ibid., Feb. 19, 1943; "Water Compact Rejected by Montana Senate," ibid., Feb. 20, 1943; "North Dakota Governor Vetoes Bill Designed to Ratify Water Pact," ibid., March 4, 1943; Montana State Engineer Fred E. Buck telegram to North Dakota State Engineer John T. Tucker, Feb. 19, 1943, file 04-01-00, YCC Correspondence, 1943, Montana State Department of Natural Resources and Conservation, Helena, Montana; "Montana Senate Rejects Compact," *Bismarck Tribune,* Feb. 20, 1943.

E. The 1944 Compact

By mid-1944, as deliberations were about to resume, the topic of each state's sovereignty over its own water rights and laws remained foremost in the negotiators' minds. P.F. Leonard, a Montana negotiator, explained the situation succinctly in a June 29, 1944, letter to H.D. Comstock, the Regional Director of the Bureau of Reclamation and the new federal representative to the compact talks:

> *It is my theory that the only purpose of a compact is to divide the water at the State line in order to avoid the conflicts by reason of the State line. The compact cannot settle or determine questions within the boundaries of a State.* I do not believe that the commissioners appointed under a compact would have authority to come into the State of Montana and divide water of interstate tributaries at the point where such tributaries join the Yellowstone River in Montana. The compact commissioners have no business attempting to measure or divide waters that have their source within or supply from territory entirely within the State of Montana. Any attempt to do so would be unlawful and would lead to confusion and discord and I do not believe it has ever been attempted previously. [Emphasis added.][43]

Wyoming State Engineer L.C. Bishop concurred that each state had to maintain the status quo of existing water rights and uses as well as had to maintain complete control over its own water laws and administrative procedures. Explaining the situation to Comstock on November 4, 1944, Bishop wrote that Wyoming's Tongue River water users would never accept any agreement whereby their claims might be compromised in favor of an allocation to Montana. "The people on Tongue River," Bishop declared, "will not agree to any compact whereby there is a possibility that some of their late water rights will be effected [*sic*]."[44]

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[43] P.F. Leonard to H.D. Comstock, Regional Director, U.S. Bureau of Reclamation, June 29, 1944, file: General Correspondence, 1940-1949, Yellowstone River (1943-44), Series 01.01.01, box 126, General Correspondence, 1940-1949, Yellowstone River - Z, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

[44] Wyoming State Engineer L.C. Bishop to H.D. Comstock, Regional Director, U.S. Bureau of Reclamation, Nov. 4, 1944, file: General Correspondence, 1940-1949, Yellowstone River (1943-44), Series 01.01.01, General Correspondence, 1886-1983, box 126, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

These concerns subsequently doomed yet a new version of the compact – which in many respects resembled the 1942 compact draft – although the 1944 version continued to assert in Article VI that each state would administer existing water rights within its own borders:

> *Present vested rights within each State and between States relating to the beneficial use of the waters of the Yellowstone River System are recognized by this Compact and shall be administered by the proper officials of the respective States.* All rights to the beneficial use of the waters of the Yellowstone River System, heretofore and hereafter established under the laws of any signatory State shall be satisfied solely from the portion of the water allotted to that State as provided in Article V. [Emphasis added.][45]

Despite this recognition of each state's existing rights, uses, water laws, and administrative procedures, Wyoming Governor Lester C. Hunt vetoed the 1944 compact in late February 1945. Hunt cited his belief that Wyoming's interests in each Yellowstone tributary were not adequately protected.[46]

III. The 1950 Compact and Contemporaneous Explanations

A. Discussions Leading to the 1950 Yellowstone River Compact

Due to the biennial nature of the three states' legislatures, several years transpired before negotiators for Montana, North Dakota, and Wyoming returned to discussions that eventually culminated in the 1950 Yellowstone River Compact. By this time, it had become obvious that any settlement had to recognize each state's right to administer its water laws, rights, and uses as that state saw fit. In addition, negotiators also had given up on the idea of a powerful commission that could change interstate allocations.

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[45] Article VI, Yellowstone River Compact (December 1944 draft), box/folder: 124111, Yellowstone Compact Commission, 1945-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

[46] Wyoming Governor Lester C. Hunt to Wyoming Secretary of State William Jack, Feb. 27, 1945, box/folder: 124111, Yellowstone Compact Commission, 1945-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana. See also "Water Pact Bill Vetoed by Hunt," *Billings Gazette,* March 2, 1945; "Wyoming Governor Vetoes Water Pact," *Bismarck Tribune,* March 9, 1945.

Nevertheless, when talks resumed, correspondence among the parties discussed the possibility of ratifying the previously-defeated 1944 compact, but the primary goal of the new interstate deliberations – protecting existing uses, rights water laws, and administrative procedures within individual states – remained foremost in the negotiators' minds. Indeed, as Montana's efforts reached fruition to clearly determine its existing uses and rights through county-by-county studies (which had started several years earlier), Montana's compact negotiators told Wyoming's leaders that with the new and better defined information in hand, Montana now would insist on a greater allocation of water in any revised compact negotiations to cover the state's existing uses and rights. Montana State Engineer and negotiator Fred E. Buck made this point to Wyoming State Engineer L.C. Bishop on January 2, 1948:

> At the time the present Compact was agreed upon we had no definite data as to the amount of the land being irrigated in Montana, but since then we have completed our water resources surveys and I am sure that the results of these surveys will show without a doubt that Montana is entitled to a larger percentage of the first block of water [existing uses and rights] than is shown in the present [1944] Compact.[47]

Montana compact negotiator Wesley A. D'Ewart concurred and explained his view to Wyoming State Engineer Bishop on March 24, 1948:

> Montana is anxious to cooperate with Wyoming in this matter of a compact. I am inclined to agree with Mr. Buck that if a new compact is opened up, Montana would have to insist on a larger percentage of the first block of water [existing uses and rights] based on Montana's more exact information as regards irrigated areas.[48]

For similar reasons, everyone now realized that no state was willing to relinquish any aspect of its water administration to a new commission charged with allocating flows among the states, even after a decade-by-decade review of new information. Nor was anyone willing to

[47] Montana State Engineer Fred E. Buck to Wyoming State Engineer L.C. Bishop, Ian. 2, 1948, materials provided by North Dakota.

[48] Congressman Wesley A. D'Ewart to Wyoming State Engineer L.C. Bishop, March 24, 1948, materials provided by North Dakota.

accept regulation of priorities across the state line if it meant any state surrendered jurisdiction over its own laws and water rights. As P.F. Leonard, a Montana negotiator, explained at the November 29, 1949, compact talks, the interstate allotments were block allocations. Leonard stated, "the water being divided is that which crosses the State line, not that which exists at any other point [within a state]."[49]

A similar view was expressed by the Yellowstone River Compact Commission's Engineering Committee, which had been created by the compact negotiators in late 1949.[50] Explaining in its final report to the full negotiating Compact Commission, the Engineering Committee noted that there were too many unknown facts relating to either state's priorities for such a trans-boundary administration of priorities or other aspects of water law administration to work:

> The States of Wyoming and North Dakota maintain central records of water appropriations from which it is possible to tabulate all the water rights on each stream, with the quantity of water appropriated and the date of the appropriation. The State of Montana has in recent years collected similar data, and is now in the process of correlating water rights with actual use. *To tabulate, classify, and analyze the data available in the three states concerning water right priorities would be a tremendous job, and one that the committee feels is not justified.* The problems attending any attempt to use such data for compact purposes would be considerable, due to differences in state diversion allowances, differences in adjustication [*sic*] proceedings, and other factors. *It would be difficult to arrive, for example, at a definition of a water right that could be applied in all three states.* [Emphases added.][51]

By the spring of 1950, a new draft compact had been circulated. W.J. Burke of the Bureau of Reclamation, who had authored the draft, explained on April 20, 1950, to R.J. Newell, Chairman of the Yellowstone River Compact Commission, that he had considered previous

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[49] "Yellowstone River Compact Commission, Minutes of Meeting, Nov. 29, 1949," Montana Attorney General's Office, Helena, Montana.

[50] "Yellowstone River Compact Commission, Minutes of Meeting, Nov. 29, 1949," Montana Attorney General's Office, Helena, Montana. See also "Group Is Named to Engineering Committee, Will Seek to Allocate Yellowstone River Use," *Independent Record* (Helena), Nov. 30, 1949: "Negotiations Reopened at Meet Here to Formulate Water Pact," *Billings Gazette*, Nov. 30, 1949.

[51] Yellowstone River Compact Commission, Engineering Committee, "Report of the Engineering Committee: Yellowstone River Compact Commission," Jan. 19, 1950 (unpaged), North Dakota State Water Commission Library, Bismarck, North Dakota.

efforts to formulate a compact as well as the work of the Engineering Committee. Yet among all those efforts, Burke noted, the only consistent principle he could find was that each state's existing uses, rights, water laws, and administrative procedures had to be protected before any further allocations were made.[52]

Several months later, Wyoming's Commissioners met separately from the other negotiators to be certain they all agreed on fundamental principles for any final compact. Subsequently, Wyoming's R.E. McNally wrote to W.J. Burke to relay the results of the Wyoming caucus. McNally indicated that he and other Wyoming Commissioners had "reached a tentative agreement on most of the important questions which will arise when the Drafting Committee meets." McNally then stated that one of those issues involved the question of the treatment of prior water rights under the proposed compact. This, in turn, he observed, raised the topic of whether prior water rights and uses (which all previous compact versions had attempted to safeguard, although the means to do so had been uncertain) were to be protected as they then existed under existing water laws in each state or whether they might be subject to variations in individuals' status or changes in water laws over time. As McNally explained, the actual water supplies to satisfy the rights and uses that existed under each state's laws on January 1, 1950, were those that were to be protected:

> We will submit for consideration Paragraph A of Article V in the following words: "A. All existing rights to the beneficial use of the waters of Clarks Fork Basin, Yellowstone River, Big Horn River Basin (exclusive of Little Horn River), Tongue River Basin, and Powder River Basin (inclusive of Little Powder River), respectively, in the States of Montana and Wyoming *valid under the laws of those States, respectively, as of January 1, 1940* [*sic* – this should be 1950], *are hereby recognized and shall be and remain unimpaired by this compact.*" [Parenthetical

[52] W.J. Burke to R.J. Newell, Chairman, Yellowstone River Compact Commission, April 20, 1950, file 04-01-00, YCC Correspondence, Montana State Department of Natural Resources and Conservation, Helena, Montana.

phrases are in the original; bracketed phrase has been added and emphasis has been added.][53]

To underscore that he meant the proposed language to apply to all Yellowstone tributaries, McNally added, "This phraseology, we think, should be made applicable to all of the rivers involved in these negotiations."[54]

As deliberations continued in the late summer and fall of 1950, it became clear that almost no one continued to support an allocation of interstate waters according to priorities regardless of state lines – a division that would trump *intrastate* water laws and practices. While some continued to believe that strict adherence to priorities across the Montana-Wyoming boundary would bring Montanans more water, this position was roundly rejected by the majority of the compact negotiators, who backed complete sovereignty by each state over its own waters, no matter how the interstate allocation itself might be determined. For instance, North Dakota's I.A. Acker tried to persuade Montana's P.E. Leonard, who had changed his mind and now favored using priorities regardless of state lines, of the futility of Leonard's position in a September 23, 1950, letter. Acker pointed to the 1938 U.S. Supreme Court decision in *Hinderlider v. La Plata River and Cherry Creek Ditch Company*, which, according to Acker, declared that states sharing an interstate stream had a mutual right to an equitable apportionment of that stream, notwithstanding priorities along the entire length of the stream. Acker then explained what this meant, pointing out that any attempt to impose outside regulation upon *intrastate* water laws would be exceptionally difficult. Acker also observed that Wyoming negotiator McNally's idea essentially was to create block allocations of

[53] R.E. McNally to W.J. Burke, Regional Counsel, U.S. Bureau of Reclamation, Aug. 17, 1950, file 04-01-00, YCC Correspondence, 1950, Montana State Department of Natural Resources and Conservation, Helena, Montana.

[54] R.E. McNally to W.J. Burke, Regional Counsel, U.S. Bureau of Reclamation, Aug. 17, 1950, file 04-01-00, YCC Correspondence, 1950, Montana State Department of Natural Resources and Conservation, Helena, Montana.

water based on existing priorities to be divided at the state line. Those blocks of water would then be administered by each state under its own legal system and practices:

> In other words, under the rule of equitable division between states, the right of prior beneficial use of water in each state would apply to the portion of flow "equitably" allocated to it. Under the rule suggested by you at our meeting last August, state lines would be ignored and determination of priority would involve consideration of water-rights along the entire length of a stream. It is quite obvious, however, that if the question of priority of water-rights must be adjudicated on the basis of time of appropriation for beneficial use, without regard to state lines, administration would be very difficult.
>
> Under the rule suggested by Mr. McNally, the maxim "first in time first in right" would, as to an appropriator in Wyoming, apply to the share of the flow of a stream allocated to Wyoming and likewise the priority of a water-right in Montana would concern only the water "equitably" allocated to that state.
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> *I am inclined to agree with Mr. McNally that the waters of an interstate stream must first be equitably divided between the states through which it flows, and that the question of priority of water-rights must be decided in each state under its law*, and should concern only priority as to the beneficial use of the quantity of water allotted to each state. [Emphasis added.][55]

Members of the engineering committee of the Yellowstone River Compact Commission clearly backed Acker's views of the sanctity of each state's laws and practices and not Leonard's position of regulating priorities regardless of state lines. As Carl Myers, Chairman of the Engineering Committee, summarized in a draft letter to Compact Commission Chairman R.J. Newell, any attempt to administer existing rights or uses across state lines would be futile, although Myers nearly simultaneously made it clear that such rights ought to be recognized and permanently protected. With regard to protecting existing rights, practices, and uses, Myers told members of the Compact Commission's Engineering Committee on September 19, 1950, that one of the basic principles underlying a compact draft that he was forwarding for the Committee's consideration was

[55] I.A. Acker, Counsel for the [North Dakota] State Water Conservation Commission, to P.F. Leonard, Sept. 23, 1950, discovery materials provided by North Dakota.

that "Existing rights are to be undisturbed and not administered under the Compact."[56] This sentence meant simply that existing rights *would be* administered by each state under its own laws and practices. The draft letter to Newell forwarded by Myers then added:

> *Concerning treatment of existing developments in the Compact, the committee is of the opinion that there is little to be gained from a water supply standpoint by regulating and administering existing diversions on a straight priority basis or otherwise*. It is, of course, entirely up to the Commission whether or not existing rights are to be administered under the Compact, but from an engineering standpoint, the committee feels that the expense and difficulties of such an administration would in no way justify the benefits that might be obtained for the lower State. There are no available data upon which to base this type of administration, due to differences in the water laws of Wyoming and Montana. *It would be a major research project to place existing rights in both States on an equivalent basis, and it might eventually involve adjudication proceedings in either or both States*. [Emphases added.][57]

B. Post-Compact Statements

Following the approval of the 1950 Yellowstone River Compact, various officials offered their views on exactly what the agreement meant in preparation for ratification procedures by the three states and by Congress. These statements further highlighted the fundamental concept that Article V (A) protected existing water rights and uses in each state under then-prevailing water laws and practices. For instance, on January 23, 1951, Elmer K. Nelson, an engineering consultant for the U.S. Senate Committee on Interior and Insular Affairs, wrote a memorandum to Senator Joseph C. O'Mahoney of Wyoming, who chaired that Committee. The Committee was to consider the Compact for ratification and make a recommendation to the full Senate. Nelson reviewed the provisions of Article V, and in so doing, he offered his views regarding the meaning of that article's sections. Nelson specifically stated with respect to water rights and uses prior to January 1, 1950,

[56] Carl Myers, Chairman, Engineering Committee, Yellowstone River Compact Commission, to Fred Buck, Early Lloyd, W.S. Hanna, and J.J. Walsh, Sept. 19, 1950 (with compact draft), file 04-01-00, YCC Correspondence, Montana State Department of Natural Resources and Conservation, Helena, Montana.

[57] Draft letter of Engineering Committee to R.J. Newell, Oct. 3, 1950, contained with letter from Carl L. Myers, Chairman, Engineering Committee, to Fred Buck, W.S. Hanna, Earl Lloyd, and J.J. Walsh, Oct. 3, 1950, materials provided by North Dakota.

that the Compact did not permit any external interference with such existing intrastate water rights, uses, and water administration:

> 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 these 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. [Emphasis added.][58]

Robert Newell, the federal delegate to the compact talks, also explained the meaning behind Article V, observing that that article did not contemplate any adjustments to pre-1950 rights and uses even in light of changes in individuals' circumstances or subsequent alterations in water law. Newell stressed the difficulties the negotiators had had in addressing how existing uses and rights would be handled across state lines, especially in light of each state's differing water laws. In so doing, he noted that the 1950 Yellowstone River Compact purposely did not attempt to divide among the states "water now appropriated and in use" nor did the agreement interfere with existing "water laws and practices in establishing water rights":

> 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

[58] Elmer K. Nelson Memorandum to U.S. Senator Joseph C. O'Mahoney of Wyoming, Jan. 23, 1951, Montana Attorney General's Office, Helena, Montana.

> these are built, even the operation provisions of the compact are expected to become easy of administration.[59]

Secretary of the Interior Oscar L. Chapman used similar language to explain the 1950 Yellowstone River Compact in a message to Congress endorsing ratification in September 1951. Noting that Article V set forth the apportionment of the Yellowstone Basin's waters among the states, Chapman wrote that the Compact Commission's Engineering Committee had determined it would be infeasible to regulate the "administration of existing appropriative rights in the signatory States." Chapman wrote:

> 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*. . . . Accordingly, paragraph A of Article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing to 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. [Emphasis added.][60]

had to be protected as block allocations to each state under its existing individual laws and practices before any new allocations of supplemental water or stored new supplies were made. Moreover, because the 1950 Yellowstone River Compact's negotiators understood that there were vast differences in how each state measured and administered its own water rights, they believed those existing rights and uses had to be set aside to each state at the state line at the time the Compact was concluded. Thereafter, again due to differences in state laws and the difficulty in measuring the standards of one state against another, the allocations made under Article V (A) were to be a permanent part of each state's water supplies and only subject to regulation according to each individual state's *intrastate* water laws and practices.

In short, the premise underlying Bern Hinckley's "Review of Expert Reports Submitted by Montana" that Montana must manage its water rights and uses in a particular manner in order to be entitled to its Article V (A) supplies under the Yellowstone River Compact is fundamentally flawed. Moreover, Hinckley's assumption is contrary to the complete history of the Yellowstone River Compact, which clearly demonstrates that each state was to administer its own water rights, uses, and laws as that state saw fit.

APPENDIX A – VITA OF DOUGLAS R. LITTLEFIELD

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EDUCATION:

Ph.D. American history. University of California, Los Angeles, 1987. Dissertation: "Interstate Water Conflicts, Compromises, and Compacts: The Rio Grande, 1880-1938." Fields: history of California and the American West, water rights history, legal history, environmental history.

M.A. American history. University of Maryland, College Park, 1979. Master's thesis: "A History of the Potomac Company and Its Colonial Predecessors." Fields: business history, colonial history, early republic history, trans-Appalachian West history, British history.

B.A. English literature. Brown University, 1972.

CONSULTING AND EXPERT WITNESS EXPERIENCE:

2008-present: Research historian and consultant for McAfee & Taft in Tulsa, Oklahoma (attorney Robert Joyce). Providing historical research, written report, and testimony regarding lead and zinc mining and land use in northeastern Oklahoma for use in *Quapaw Tribe of Oklahoma, et al., v. Blue Tee Corp, et al.*, U.S. District Court for the Northern District of Oklahoma, Civil Action No. 03-CV-486-CVE-PJC.

2006-2007: Research historian and consultant for Loeb & Loeb in Los Angeles (attorney Anthony Murray). Provided historical research and deposition testimony regarding the history of natural disasters (mudslides, floods, fires, earthquakes, etc.) in Southern California for use in *Dane W. Alvis, et al., v. La Conchita Ranch Company, et al.*, Ventura County (California), Superior Court Case No. CIV 238700.

2005-present: Research historian and consultant for the Stinson Beach County Water District in Marin County, California (counsel: Hanson, Bridgett, Marcus, Vlahos & Rudy of San Francisco). Providing historical research on the history of the water rights of the District.

2005: Research historian and consultant for the Lake Arrowhead Community Services District (counsel: Best, Best & Krieger of Riverside, California). Provided historical research and documentation on the history of water rights associated with Lake Arrowhead in southern California. Testified before the California State Water Resources Control Board concerning the District's pre-1914 water rights claims (and post-1914 claims).

2004 – 2006: Research historian and consultant for City of Santa Maria, California (counsel: Best, Best & Krieger of Riverside, California). Provided historical research and documentation on the history of water rights of the U.S. Bureau of Reclamation's Santa Maria Project (California) for use in *Santa Maria Valley Water Conservation District v. City of Santa Maria, Southern California Water Company, City of Guadalupe, et al.*, Santa Clara County (California) Superior Court, Case No. CIV 770214. Deposed and subsequently testified as an expert witness at trial.

2004 – Present: Research historian and consultant for City of Pocatello, Idaho (counsel: Beeman & Associates of Boise, Idaho, and White & Jankowski of Denver, Colorado). Providing historical research and documentation on the history of Pocatello's water rights for use in Snake River Basin Adjudication (*In Re: the General Adjudication of Rights to the Use of Water From the Snake River Drainage Basin Water System, State of Idaho v. United States; State of Idaho; and all unknown claimants to the use of water from the Snake River Drainage Basin Water System*, County of Twin Falls (Idaho) District Court, Case No. 39576. Provided affidavit testimony.

2003 – 2004: Research historian and consultant for U.S. Bureau of Reclamation (Mid-Pacific Region). Providing historical research and a report on the history of the water rights of the Friant Unit of the Bureau's Central Valley Project (California).

2002: Research historian and consultant for the Alameda County Water District (counsel: Hanson, Bridgett, Marcus, Vlahos & Rudy of San Francisco). Provided historical research on the history of the water rights of the District.

2001 – 2007: Research historian and consultant for Paloma Investment Limited Partnership (counsel: Mesch, Clark & Rothschild of Tucson, Arizona). Provided historical research and deposition regarding whether the Gila River was commercially navigable in 1912 when Arizona became a state for use in *Flood Control District of Maricopa County v. Paloma Investment Limited Partnership* and *Paloma Investment Limited Partnership v. Flood Control District of Maricopa County*, Maricopa County (Arizona) Superior Court, Case No. CV97-07081.

2000 – 2001: Research historian and consultant for Salt River Project, Arizona (counsel: Salmon, Lewis & Weldon of Phoenix, Arizona). Provided historical research and documentation on Zuni Indian water rights and land claims in Arizona and New Mexico for use in *In re the General Adjudication of All Rights to Use of Water in the Little Colorado River System and Source*, Apache County (Arizona) Superior Court, Case No. 6417.

2000 – 2001: Research historian and consultant for the Maryland Attorney General. Provided historical research and affidavit testimony on the 1785 "Mount Vernon" interstate compact between Maryland and Virginia for use in U.S. Supreme Court case of *Virginia v. Maryland*, No. 129 Original.

2000: Research historian and consultant for the Salt River Project, Arizona (counsel: Salmon, Lewis & Weldon of Phoenix, Arizona). Provided historical research and documentation on water rights of the Gila River, Arizona, for use in *In Re: The General Adjudication of All Rights to Use Water in the Gila River System and Source*, Maricopa County (Arizona) Superior Court, Case No. W1-203.

1998 – 2000: Research historian and consultant for the Idaho Attorney General. Provided historical research on whether the Salmon River and selected tributaries were commercially navigable in 1890 when Idaho became a state.

1998 – 1999: Research historian and consultant for the Idaho Coalition, a landowners' group (counsel: John K. Simpson of Rosholt, Robertson & Tucker of Boise, Idaho, and Shawn Del Ysura of J.R. Simplot Company of Boise, Idaho). Provided historical research, and affidavit testimony on the impacts of various dams in the Columbia River and Snake River watersheds on anadromous fish for use in Snake River Basin Adjudication (*In Re: the General Adjudication of Rights to the Use of Water From the Snake River Drainage Basin Water System, State of Idaho v. United States; State of Idaho; and all unknown claimants to the use of water from the Snake River Drainage Basin Water System*, County of Twin Falls (Idaho) District Court, Case No. 39576.

1998 – 2000: Research historian and consultant for Sacramento Municipal Utility District of California (counsel: Ronald Aronovsky of Alden, Aronovsky & Sax of San Francisco). Provided research on land site history for use in *Sacramento Municipal Utility District v. California Department of Transportation, Sacramento Housing and Redevelopment Agency, et al.*, Sacramento County (California) Superior Court, Case No. 96AS04149.

1997 – 2005: Research historian and consultant for City of Las Cruces, New Mexico (counsel: Stein & Brockmann of Santa Fe, New Mexico). Provided historical research on the City's water rights for use in *State of New Mexico v. Elephant Butte Irrigation District*, Dona Ana County (New Mexico) District Court, Case No. CV 96-888.

1997 – 2003: Research historian and consultant for Fort Hall Water Users' Association, Idaho (counsel: Richard Simms of Hailey, Idaho). Provided historical research and report the Association's water rights in relation to the Shoshone and Bannock Indian land cessions on the Fort Hall Indian Reservation in Idaho for use in *Fort Hall Water Users' Association, et al., v. United States of America*, U.S. Court of Federal Claims, Case No. 01-445L.

1997 – 2004: Research historian and consultant for Kern Delta Water District (counsel: McMurtrey, Hartsock & Worth of Bakersfield, California). Providing historical research and report on Kern Delta's water rights for use in *North Kern Water Storage District v.*

Kern Delta Water District, et al., Tulare County (California) Superior Court, Case No. 96-172919. Testified in that case as an expert witness historian for ten days in the initial trial, which was remanded for additional testimony and evidence. Provided additional research and written reports on water rights for the remanded trial.

1996 – 1998: Research historian and consultant for Idaho Attorney General. Provided historical research on water rights in relation to the Deer Flat National Wildlife Refuge for use in Snake River Basin Adjudication (*In Re: the General Adjudication of Rights to the Use of Water From the Snake River Drainage Basin Water System, State of Idaho v. United States; State of Idaho; and all unknown claimants to the use of water from the Snake River Drainage Basin Water System*, County of Twin Falls (Idaho) District Court, Case No. 39576.

1995 – 1998: Research historian and consultant for U.S. Department of Justice. Provided historical documentation on the history of water rights on the Santa Margarita River at U.S. Marine Corps Base, Camp Pendleton, in southern California.

1995 – Present: Research historian and consultant for the Salt River Project (counsel: Salmon, Lewis & Weldon of Phoenix, Arizona). Providing historical documentation and reports on whether the Salt, Gila, and Verde rivers were commercially navigable in 1912 when Arizona became a state. Testified between 1997 and 2005 several times before the Arizona Navigable Stream Adjudication Commission regarding the navigability of the Salt, Verde, and Gila rivers. Testified on the same subject in 1998 and 1999 before the Arizona State Legislature.

1995 – 2001: Research historian and consultant for Nebraska Department of Water Resources (counsel: Simms & Stein of Santa Fe, New Mexico). Provided historical documentation and report on water rights and the history of *Nebraska v. Wyoming*, 325 U.S. 589 (1945), for use in U.S. Supreme Court case of *Nebraska v. Wyoming*, Original No. 108, regarding the apportionment of the waters of the North Platte River. Deposed in that case, but the case was settled before trial.

1993 – 1994: Research historian and consultant for Simms and Stein, attorneys specializing in water law in Santa Fe, New Mexico. Provided historical documentation and affidavit testimony on Arapaho and Shoshone land claims and cessions along the Wind River in Wyoming for use in *In Re: the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming.*

1991 – 2003: Research historian and consultant for Legal Counsel, Division of Water Resources, Kansas State Board of Agriculture (counsel: Montgomery & Andrews of Santa Fe, New Mexico). Provided historical research on water rights and history of apportionment of the Republican River and its tributaries among Kansas, Nebraska, and Colorado for use in U.S. Supreme Court case of *Kansas v. Nebraska and Colorado*, No. 126 Original, regarding the interstate apportionment of the Republican River. Provided affidavit testimony.

1991 – 1993: Research historian and consultant for Nickel Enterprises (Bakersfield, California; counsel: Anthony Murray of Carlsmith, Ball, Wichman, Murray, Case, Mukai & Ichiki of Long Beach, California. Provided historical documentation and report on the navigability of the Kern River for use in *Nickel Enterprises v. State of California*, Kern County (California) Superior Court, Case No. 199557. Testified as an expert witness historian in this case for eleven days.

1989 – 1990: Research historian for Pacific Enterprises, Los Angeles, California. Directed historical research for and coauthored a corporate history of this southern California holding company entitled *The Spirit of Enterprise: A History of Pacific Enterprises, 1867-1989* (1990).

1988 – 1989: Research historian and consultant for Water Defense Association, Roswell, New Mexico (counsel: Simms & Stein of Santa Fe, New Mexico). Provided historical documentation of water rights claims along the Bonito, Hondo, and Ruidoso rivers in southeastern New Mexico for use in *State v. Lewis*, Chaves County (New Mexico), Case Nos. 20294 & 22600, Consolidated.

1986 – 1990: Research historian and consultant for Legal Counsel, Division of Water Resources, Kansas State Board of Agriculture (counsel: Simms & Stein of Santa Fe, New Mexico). Provided historical documentation and report on water rights and interstate apportionment of the Arkansas River between Kansas and Colorado for use in U.S. Supreme Court case of *Kansas v. Colorado*, October Term 1985, Original No. 105, regarding the interstate apportionment of the Arkansas River. Deposed and later testified as an expert witness historian for twelve days.

1986 – 1989: Research historian and consultant for Legal Counsel, State Engineer Office, State of New Mexico. Provided historical documentation and report on water rights in the Carlsbad Irrigation District in southeastern New Mexico for use in *State v. Lewis*, Chaves County (New Mexico) Case Nos. 20294 & 22600, Consolidated.

1986 – 1987: Historical consultant for *National Geographic Magazine*. Advised editors on June 1987 article, "George Washington's Patowmack Canal."

1984 – 1986: Research historian and consultant for Legal Counsel, State Engineer Office, State of New Mexico. Provided historical documentation and report on the history of water rights on the Rio Grande and interstate apportionment disputes between New Mexico and Texas for use in *El Paso v. Reynolds*, U.S. District Court, Civ. Case No. 80-730-HB.

AWARDS AND OTHER PROFESSIONAL EXPERIENCE:

2008: Winner of the National Council on Public History's Consultant Award.

July 1, 2007 – present: Member, Board of Directors, California Supreme Court Historical Society.

August 2006: Faculty lecturer for Continuing Legal Education (CLE) International, Arizona Water Law Conference. Taught course on "Historians and Water Rights – The Role of Historians in U.S. Supreme Court Interstate Stream Litigation."

1999: Gave keynote address at New Mexico Water Resources Institute's 44th Annual New Mexico Water Conference on "The History of the Rio Grande Compact of 1938."

January 1992 – 1994: Member of Board of Editors of *Western Historical Quarterly*.

1991 – 1995: Lecturer, Department of History, California State University, Hayward. Taught a graduate seminar on environmental history and also taught courses on American history and California history.

1980 – 1984: Editorial Assistant, *Pacific Historical Review*. Edited scholarly articles and book reviews.

1979 – 1979: Lecturer, University of Maryland's University College off-campus program. Taught courses on the history of the American West and U.S. History surveys at the Pentagon and at a military base.

PUBLICATIONS:

Books:

Conflict on the Rio Grande: Water and the Law, 1879-1938. University of Oklahoma Press (2009).

The Spirit of Enterprise: A History of Pacific Enterprises, 1867-1989 (coauthor, 1990).

Articles:

"Jesse W. Carter and California Water Law: Guns, Dynamite, and Farmers: 1918-1939," *California Legal History* (2009).

"History and the Law: The Forensic Historian in Court," *California Supreme Court Historical Society Newsletter* (2008).

"The History of the Rio Grande Compact of 1938," in Catherine T. Ortega Klett, ed., *44th Annual New Mexico Water Conference – Proceedings – The Rio Grande Compact: It's the Law* (Las Cruces: New Mexico Water Resources Research Institute, 2000).

"The Forensic Historian: Clio in Court," *Western Historical Quarterly* (1994).

"The Rio Grande Compact of 1929: A Truce in an Interstate River Apportionment War," *Pacific Historical Review* (1991).

"Eighteenth Century Plans to Clear the Potomac River: Technology, Expertise, and Labor in a Developing Nation," *Virginia Magazine of History and Biography* (1985).

"The Potomac Company: A Misadventure in Financing an Early American Internal Improvement Project," *Business History Review* (1984).

"Water Rights During the California Gold Rush: Conflicts over Economic Points of View," *Western Historical Quarterly* (1983).

"Maryland Sectionalism and the Development of the Potomac Route to the West, 1768-1826," *Maryland Historian* (1983).

Book Reviews:

Sarah S. Elkind, *Bay Cities and Water Politics: The Battle for Resources in Boston and Oakland* (Lawrence: University Press of Kansas, 1998), in *Environmental History* (2000).

David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941* (Berkeley: University of California Press, 1994), in *Pacific Historical Review* (1995).

Daniel Tyler, *The Last Water Hole in the West: The Colorado - Big Thompson Project and the Northern Colorado Water Conservancy District* (Niwot, Colorado: University Press of Colorado, 1992), in *Montana: The Magazine of Western History* (1994).

Lloyd Burton, *American Indian Water Rights and the Limits of Law* (Lawrence: University Press of Kansas, 1991), in *Journal of the West* (1994).

Zachary A. Smith, ed., *Water and the Future of the Southwest* (Albuquerque: University of New Mexico Press, 1989), in *Western Historical Quarterly* (1991).

F. Lee Brown and Helen Ingram, *Water and Poverty in the Southwest* (Tucson: University of Arizona Press, 1987), in *The Public Historian* (1990).

David J. Eaton and Michael Andersen, *The State of the Rio Grande/Rio Bravo: A Study of Water Resource Issues Along the Texas/Mexico Border* (Tucson: University of Arizona Press, 1987), in *New Mexico Historical Review* (1988).

Pat Kelley, *River of Lost Dreams: Navigation on the Rio Grande* (Lincoln: University of Nebraska Press, 1986), in *Pacific Historical Review* (1988).

Marc Reisner, Cadillac Desert: The American West and Its Disappearing Water (New York: Viking Penguin, Inc., 1986), in *Environmental History Review* (1987).

Thomas F. Hahn, *The Chesapeake and Ohio Canal: Pathway to the Nation's Capital* (Metuchen, N.J.: Scarecrow Press, Inc., 1984), in *Business History Review* (1987).

PROFESSIONAL AFFILIATIONS:

American Historical Association, American Society for Environmental History, California Committee for the Promotion of History, California Historical Society, California Supreme Court Historical Society, National Council on Public History, Ninth Judicial Circuit Court Historical Society, Organization of American Historians, Western History Association, Western Council on Legal History.