

Exhibit E

Memo to Gary Fritz from Rich Moy

June 1, 1981

TO: Gary Fritz
FROM: Rich Moy
RE: Administration of the Yellowstone River Compact
DATE: June 1, 1981

Gary, I have researched the 1945-1962 files on the Yellowstone River Compact and have briefly summarized my findings regarding the administration of the pre- and post 1950 rights. In order to provide you with the proper perspective of the factors involved, I have also noted a few events leading to the culmination of the 1950 compact.

In 1945, Wyoming, Montana and North Dakota agreed to the second compact that would divide the waters of the Yellowstone River system. The first compact, by the way, was amended out of existence by the Wyoming legislature. The doctrine of appropriation was used in the second compact to divide all the waters of each tributary based on existing irrigated acres and priority dates. For example, of the first 2,200 acre-feet of mean divertible daily flow on the Tongue River between May 1 and September 30 inclusive of each year, Wyoming would receive 72% and Montana 28%. Of the next 1200 acre feet of mean divertible daily flow, Wyoming would receive 43% and Montana 57%. Unappropriate divertible daily flows in excess of 3400 AF and all unappropriated flows during the period May 1 to September 30 would be subject to future appropriations for beneficial use within the basin in Montana, Wyoming and North Dakota, accordance with the laws of these respective states. In this compact, both pre and post 1950 rights would be administered by the Compact Commission. The reason that 72% of the first 2200 AF/day during the irrigation season went to Wyoming is because she had 45,000 acres of land with water rights earlier than the first filing in Montana which was August 9, 1886. The Compact was passed by the legislatures of all three states and signed by the Governor of North Dakota and Montana, but was vetoed by Governor Hunt of Wyoming at the urgent request of the appropriators on the Tongue River in Wyoming. Tongue irrigators in Wyoming felt that because Montana had the Tongue River Reservoir with sufficient capacity to serve all the lands now under irrigation in the Tongue River Valley in Montana, that Wyoming should be entitled to use all of the normal direct flows of the river during the irrigation season and should not have to divide them with Montana during periods of shortage. The deadline for complete ratification of the Compact was June 1947. Governor Hunt had felt that the only conflict was the apportionment in the Tongue River and had hoped that the resolution of this problem would occur before the 1947 deadline. This, however, was not the case.

The next few years was devoted in setting up the next attempt in resolving the Yellowstone River Apportionment which took place in 1950.

A highly contested point during the negotiations was the administration and apportionment procedure for dividing the waters. There were three different positions leading into the third negotiation session on the compact.

The primary actor in Montana was Mr. Leonard, an attorney in Miles, ^{MT} and a Montana member of the negotiation team for the previous six years. He

Exhibit E

MT-13736

insisted that no state had the right on interstate streams to divert all the water regardless of any injury to a lower state. He held that the rights and interest of each state must be respected by the other states and therefore, pushed the doctrine of apportion as was used in the second compact. According to Mr. Leonard, the U.S. Supreme Court decision on the New Jersey vs. New York case 283 vs. 336 held that interstate streams which provide the necessity of the life must be rationed among those states who have power over it. In this case, He felt that both states have real and substantial interests which must be reconciled. In a letter to Governor Bonner of Montana, Mr. Leonard contended that Wyoming was making unrestricted and unlimited use of the interstate streams between that state and Montana without regard to the rights of Montana and only waste water or water which she could use to her advantage was allowed to enter Montana. Leonard stated in one of his letters to Governor Bonner the following:

"It is concluded that in both states the dependable natural flow of the river and its tributaries during the irrigation season has long been over-appropriated in both Montana and Wyoming. It is only when a shortage of water exists that a conflict exists. Hence, if Montana would recognize all existing rights (1950) in Wyoming in times of shortage, there would be nothing left for Montana.

The Wyoming quarter back was Mr. McNally a lawyer from Sheridan Wyoming. He claimed that the doctrine of "priority" on long river systems has been repudiated. He referred to the language of Mr. Justice Douglas in reference to the case of Nebraska vs. Wyoming which indicated that there is evidence that a river-wide priority system would disturb and disrupt long established uses; and that "equitable apportionment" is the correct rule. He further emphasized the case of Colorado vs. Wyoming where Junior rights in Colorado were recognized as having priority over senior rights in the lower state because to do otherwise would have disrupted the economy in Colorado which was built up upon Junior rights. To support Wyoming's case, Mr. McNally emphasized that 28% of the lands in Sheridan County, or over 7,000 acres would not be supplied with water if existing rights in Montana were recognized.

The third position was recommended by the Engineering Committee, which consisted of the state engineer from both Wyoming and Montana and their assistances. They prepared a report prior to the third meeting of the commission. ^{included} In that report was the following paragraph concerning the administration of existing rights.

"Concerning treatment of existing developments in the Compact, the committee is of the opinion that there be little to be gained from a water supply standpoint by regulating and administering existing diversions under a compact. 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. There are insufficient data upon which to base this type of administration due principally to differences in the water laws of the states involved. It would be a major research project to place existing rights in all states on an equivalent basis. Such a procedure undoubtedly would involve interstate adjudication proceedings."

The stage was more or less set for the third meeting of the Commission on October 24-25, 1950 in Billings. To reiterate, Mr. Leonard and some Montana commissioners wanted administration of both post and pre 1950 rights on a compact under the doctrine of appropriation. Conversely, most of Wyoming commissioners wanted no administration of existing rights and wanted to use equitable apportionment. The engineering committee, on the other hand, were not in favor of setting up a procedure for administering pre-1950 rights, but were willing to leave the option open to the members of the commission. Each section of the engineering report was voted upon by the full commission (attached). Mr. Leonard and some of the Montana delegates tried to table the above quoted section of this report but after much discussion withdrew his motion. However, the above section was debated with no resolution. But the commission did agree that quote "both states wanted existing rights recognized in the compact."

At the fourth meeting on the compact, the commission finally adopted the engineering draft of Article V of which paragraph A is the debated point. That paragraph is "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 action and use of water under the doctrine of appropriation." The Leonard draft went even further. It had the above paragraph but also . . . " and in the basis of priorities thereunder as single streams and regardless of state lines as such water rights existed as of January 1, 1950, and in the event of a shortage of water to supply all water rights available in any stream shall be divided and apportioned on the basis of priority of rights." But the above section was deleted. The rationale that went into adopting the doctrine of appropriation and not equitable apportionment and deleting the above section of the Leonard draft is unclear. It seems to me that pre 1950 rights are recognized but cannot be administered by the commission such as one pre 1950 right versus another in the other state.

The rules and regulations adopted by the commission in 1953 at the third annual meeting may lift the fog a bit more. Section B includes the following; all uses of water "after 1950 shall be furnished by the members of the commission for these states, at such time as the commission deems necessary for interstate administration as provided for by the terms of the compact."

I think it is pretty clear that the compact commission has the power to administer post 1950 rights and to protect pre 1950 rights as stated in Article V paragraph A. This would strongly suggest to me that post 1950 rights in Wyoming could be shut down to satisfy pre 1950 rights in Montana. But junior pre 1950 rights in Wyoming could not be or it would be very difficult to shut them off to protect senior pre 1950 rights in Montana.

I have attached a copy of the rules and regulations adopted in 1953 by the commission, letters by Mr. Leonard and Mr. McNally, and a copy of the engineering report and a news clipping ~~in~~ the Miles City Star regarding Governor Hunt's veto of the second compact.

RM:cc