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## The Yellowstone River Compact: An Overview

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## I. INTRODUCTION

The Yellowstone Basin's Fort Union Coal Formation, contained in Eastern Montana, Western North Dakota and Northern Wyoming, is the largest coal formation in the nation, exceeding the combined reserves of the Northern and Southern Appalachian Coal Fields.<sup>1</sup> With the recent federal policy towards dependence on domestic fuel supplies, particularly coal,<sup>2</sup> increasing attention is focusing on the Fort Union Formation and the applicable state and federal laws governing coal development.<sup>3</sup> The Formation in the Yellowstone Basin alone contains an estimated 43 billion tons of economically recoverable coal.<sup>4</sup>

Since coal development requires large expanses of water,<sup>5</sup> there is concern that the surface water in the Yellowstone Basin would not be adequate to meet the needs of energy development while also satisfying the requirements for agricultural, municipal, domestic and environmental needs. The State of Montana has determined that the Yellowstone Basin lacks adequate water supply, even with extensive damming, to meet both energy and irrigation requirements.<sup>6</sup> In con-

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1. C. BORIS AND J. KRUTILLA, WATER RIGHTS AND ENERGY DEVELOPMENT IN IN THE YELLOWSTONE RIVER BASIN I (1980).

2. Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. §§ 8301-8483 (Supp. III 1979). The purpose of the Act is to increase the nation's capability to use indigenous energy resources, to encourage and foster the greater use of coal and to encourage the use of synthetic gas derived from coal.

3. In 1979, over 32 million tons of coal were mined in the State of Montana, up from 22 million tons in 1975, 11 million in 1973, and 1 million in 1969. See MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, HOW THE RIVER RUNS, A STUDY OF POTENTIAL CHANGES IN THE YELLOWSTONE RIVER BASIN 7 (1981) (Available in University of Montana Law Library.).

4. L. PETERMAN, THE ECOLOGICAL IMPLICATIONS OF YELLOWSTONE RIVER FLOW RESERVATIONS 7 (1979) (Available in University of Montana Library.).

5. *Id.*

6. THE MONTANA ENVIRONMENTAL QUALITY CONTROL COUNCIL, MONTANA ENERGY POLICY STUDY 136 (1975) (Available in University of Montana Library.). The Yellowstone mainstem and Big Horn River would be able to meet the demands of high level development, although summer and fall flows would be extremely low in the mainstream as a result. Neither the Tongue nor the Powder Rivers would be able to supply the water

trast, the U.S. Bureau of Reclamation foresees the 8.8 million acre feet per year average yield of water of the Basin as adequate to serve Montana's needs, including coal conversion plants, with storage for dry periods.<sup>7</sup>

One of the most vital pieces of legislation affecting Yellowstone Basin waters is the Yellowstone River Compact,<sup>8</sup> which became effective on October 30, 1951. The Compact is an agreement between Wyoming, North Dakota and Montana on the allocation and use of the unappropriated waters of the Basin, and until recently has never been litigated. Its importance stems from the provision, Article V, allocating the unappropriated waters of the Clark Fork, the Bighorn, the Tongue and the Powder Rivers in percentages to the states of Montana and Wyoming.<sup>9</sup> Existing rights to these waters prior to January 1, 1950, are unimpaired by the Compact.<sup>10</sup>

This comment will discuss the history of the Yellowstone River Compact, its importance to the recent coal developments in the Yellowstone Basin, and analyze the major court decisions to date interpreting and affecting the Compact.

## II. LEGISLATIVE HISTORY

The Yellowstone River Compact is the result of three earlier attempts to get an agreement on the allocation and use of the waters of the Yellowstone Basin. The first, signed in February of 1935, concerned only Wyoming and Montana, and was never acted upon by either states' legislatures.<sup>11</sup> After approval was granted by Congress for another try at negotiations,<sup>12</sup> meetings were held in 1938, attended by representatives from Wyoming, Montana and several federal agencies.<sup>13</sup> At that time it was determined that the factual data necessary to draft a compact was not available. The Commission recommended in-

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demanding of them under high level development. See DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, *supra* note 3, at 37.

7. BORIS AND KRUTILLA, *supra* note 1, at 9.

8. Act of October 30, 1951, Ch. 629, 65 Stat. 663 (1951).

9. *Id.* at 666, 667. The breakdown of the percentages is as follows: Clark Fork, Yellowstone River: to Wyoming—60%; to Montana—40%. Big Horn River: to Wyoming—80%; to Montana—20%. Tongue River: to Wyoming—40%; to Montana—60%. Powder River (including the Little Powder River): to Wyoming—42%; to Montana—58%.

10. *Supra* note 8, at Article V(A).

11. S. Rep. No. 883, 82nd Cong., 1st Sess. 5 (1951). Consent of Congress to this first Compact was granted by Act of June 14, 1932, ch. 253, 47 Stat. 306 (1932). On the 6th of February, 1935, the Commissioners of Wyoming and Montana entered the agreement on the division of waters. See S. Doc. No. 20, 74th Cong., 1st Sess. 1 (1935).

12. Act of August 2, 1937, ch. 552, 50 Stat. 551 (1937). It required that a Compact be negotiated not later than June 1, 1939.

13. H.R. Rep. No. 1682, 76th Cong., 3rd Sess. 1 (1940).

cluding representatives from North Dakota in future negotiations because 740 square miles of the Yellowstone River Basin drainage lies within that state.<sup>14</sup> Because of these deficiencies in data and representation, the Commission suggested in 1939 that an indefinite extension of time be granted in which to negotiate the Compact.<sup>15</sup> An extension was granted,<sup>16</sup> and the second Compact was signed in 1942. This Compact included North Dakota, but the Wyoming legislature, first to take action on its ratification, failed to approve it.<sup>17</sup> The third Compact, ratified by the legislatures of all three states, was vetoed by the governor of Wyoming and never became operative.<sup>18</sup>

Following approval by Congress for yet another try,<sup>19</sup> four formal meetings of the full Commission were held at Billings, Montana, on November 29, 1949, February 1 and 2, 1950, October 24 and 25, 1950, and December 7 and 8, 1950.<sup>20</sup> The final Compact was signed on December 8, 1950, and all three states ratified the Compact in early 1951.<sup>21</sup>

When the final draft of the Compact was submitted to Congress by the Compact Commission, there was some hesitancy over approving the agreement. The Justice Department, when asked for its opinion on the Compact, balked at the language in the agreement allocating the unused portions of the rivers to Wyoming and Montana in fixed percentages.<sup>22</sup> It was thought that the language might deprive the government of surplus waters flowing into the Missouri River; waters which were necessary for navigation and power projects. It also objected to the provision allowing the Compact Commission, of which a federal representative was a member, to be sued. It was feared that this might be construed to waive sovereign immunity of the federal government from suit.<sup>23</sup> It recommended that such language be omitted or revised, including the language "area of waters," contained in Article XVI(a), because of the term's obscurity.<sup>24</sup>

The Senate Committee on Interior and Insular Affairs considered

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14. *Id.*, at 2.

15. *Id.*

16. Act of June 15, 1940, ch. 372, 54 Stat. 399 (1940).

17. S. Rep. No. 883, *supra* note 11, at 5.

18. *Id.* This version may be found at 1945 Mont. Laws ch. 85.

19. Act of June 2, 1949, ch. 166, 63 Stat. 152 (1949).

20. S. Rep. No. 883, *supra* note 11, at 6.

21. The Wyoming governor signed the Compact on January 27, 1951, after approval by the state legislature. The Montana governor signed on February 13, 1951, after approval by the Montana legislature. And on March 7, 1951, the governor of North Dakota signed it after that state's legislative approval.

22. S. Rep. No. 883, *supra* note 11, at 2 and 3.

23. S. Rep. No. 883, *supra* note 11, at 3.

24. *Id.*

and rejected the recommendations, explaining that the language "area of waters" could only refer to the places where Yellowstone River waters may be held or flowing.<sup>25</sup> Also, the sovereignty and jurisdiction of the United States over these waters would not be impaired by the Compact, owing to the disclaimer contained in Article XVI restricting the impairment of any rights or powers of the government over the Yellowstone Basin waters, and the O'Mahoney-Milliken Amendment to the Flood Control Acts of 1944 and 1946 which governed the use of the waters for navigation and power.<sup>26</sup>

Finally, it found that the provision relating to suits by or against the Commission [Article III(G)] would not affect the federal government. It considered that the federal representative to the Commission was only an agent of the U.S. Geological Survey, that his powers were restricted to those instances when the Wyoming and Montana representatives could not agree [Article III(F)], and that "his actions would bind the Commission, not the United States. The United States is not a party to the Compact."<sup>27</sup>

One other area of concern was the language in the Compact requiring the unanimous consent of all the signatory states before diversions of water from the Yellowstone Basin could take place (Article X). Oscar Chapman, Secretary of the Interior, regretted "the spirit of localism" that induced the provision.<sup>28</sup> He found, however, that the language did not warrant refusal by Congress to enact the Compact.

The Compact was ratified by Congress on October 31, 1951. However, not until the 1970's did its provisions inspire litigation.

### III. LITIGATION

Early in the 1970's, Intake Water Company, a wholly owned subsidiary of Tenneco, Inc., requested North Dakota's consent to its diversion of water from the Yellowstone Basin in Montana to North Dakota for use in a coal gasification plant.<sup>29</sup> In answer, North Dakota filed a complaint against the Company in state court because of fear that any diversion would reduce the water available to North Dakota consumers. That suit was dismissed when Intake agreed to seek the consent of the Yellowstone River Compact Commission for its proposed in-

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25. *Id.*

26. Act of December 22, 1944, ch. 665, § 1-8, 15, 58 Stat. 887 (1944) (codified as amended in scattered sections of 10, 16, 33, 43 U.S.C. and Act of July 24, 1946, ch. 596, 60 Stat. 641 (codified as amended in scattered sections of 10, 16, 33, 40, 43 U.S.C.).

27. S. Rep. No. 883, *supra* note 11, at 3.

28. *Id.* at 12.

29. BORIS & KRUTILLA, *supra* note 1, at 32.

terbasin transfer.<sup>30</sup>

On June 29, 1973, Intake Water Company filed suit in Montana federal district court against the Compact Commission and its members.<sup>31</sup> The suit requested: (1) that the Attorney General of Montana be enjoined from enforcing R.C.M. § 89-846 (1973) [now MCA § 85-1-121 (1981)], which prohibits out-of-state diversions without the consent of the Montana legislature; (2) that the Yellowstone River Compact Commission and its members be enjoined from enforcing Article X (which requires unanimous consent of the signatory states for interbasin diversions of Yellowstone waters), and that Article X be declared unconstitutional as an unwarranted burden on interstate commerce; and (3) that the Commission be enjoined from enforcing Article X, and that Article X be declared unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution.<sup>32</sup> In October of 1980, Intake amended its complaint to alter its attack in count one from a direct one aimed against the Montana anti-exportation statute [MCA § 85-1-121 (1981)] to one of repeal by implication by virtue of the adoption of the Yellowstone River Compact. That case is still pending.<sup>33</sup>

In 1976, the Montana Department of Natural Resources and Conservation (DNRC) filed a declaratory judgment action with the Montana Supreme Court<sup>34</sup> against Intake Water Company, seeking to have the Company's application for appropriation of water declared null and void. Intake's project involved appropriation of some 80,650 acre feet of water per year, and the size of the project, it was contended, was primarily determined by the extent of useable coal reserves.<sup>35</sup> DNRC was concerned about the use of the water in a coal gasification plant, and based its action to void the permit on R.C.M. § 89-811 (1947) (now repealed), which required actual construction of the diversion works to be started within 40 days of the notice of appropriation.<sup>36</sup> The court, however, held that this was not necessary; it construed the language in the statute to mean only that a company had to make a steady, ongoing

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30. *Id.*

31. Intake Water Co. v. Yellowstone River Compact Comm'n, No. 1184 (D. Mont., filed June 29, 1973).

32. YELLOWSTONE RIVER COMPACT COMMISSION, 22nd Annual Report 3 (1973).

33. On December 17, 1981, a second amended complaint was filed by the plaintiff seeking a declaratory judgment. Intake Water Company also attempted to get special Montana legislative approval for interbasin transfers of Yellowstone River waters by introducing S. 254, 47th Leg., Reg. Sess., 1981 Montana. The Bill failed on the first vote and was never allowed a second reading.

34. Montana Dept. of Natural Resources and Conservation v. Intake Water Co., 171 Mont. 416, 558 P.2d at 1110 (1976), *reh'q. denied* (1977).

35. *Id.* at 419, 558 P.2d at 1112.

36. R.C.M. § 89-811 (1947) was repealed at 1973 Mont. Laws ch. 452 § 46.

effort to accomplish the construction, which Intake was then doing.<sup>37</sup> The company's permit for appropriation, therefore, was still valid, though it has yet to receive the required consent for the interstate diversion of the mid-Yellowstone waters.<sup>38</sup>

*Utah International Inc. v. Intake Water Co.*,<sup>39</sup> a Montana Federal District Court decision, is of major importance to the Yellowstone River Compact. That case stemmed from the plaintiff's desire to divert water from the Powder River and Fence Creek (a Powder River tributary), both located in Wyoming, to a coal development site in Montana. Seeking to utilize a portion of Montana's share of Powder River water allocated to the state under the Yellowstone Compact, Utah International filed its application for appropriation with the Wyoming State Engineer's office. It received a priority date of November 20, 1973, and filed duplicate copies of its application with Montana's DNRC. Although Montana requested a revised application on a Montana form, DNRC assigned Wyoming's priority date of November 20, 1973, when the application was finally perfected on January 4, 1975.

In the interim period between December 4, 1973 (when Montana first received copies of Utah International's Wyoming application) and January 14, 1975 (the perfection date), Intake Water Company also filed an application for appropriation of Powder River waters. This permit application was for appropriation of water to be stored in a reservoir on the Montana-Wyoming border for ultimate sale in both states. Upon learning of Utah International's receipt of an earlier appropriation date, Intake filed suit in Montana district court<sup>40</sup> to compel DNRC to issue Utah International an appropriation date of January 14, 1975, thus giving Intake an earlier priority right to the Powder River waters. That case ended when the court granted the defendant's motion to dismiss Intake Water Co.'s amended affidavit and application for writ of mandate.<sup>41</sup> Judge Shanstrom determined that DNRC acted in accord with the Yellowstone Compact and all applicable state and federal laws and decisions in granting Utah International a priority date of November 20, 1973.<sup>42</sup> Intake Water Company has appealed to

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37. 171 Mont. at 436, 558 P.2d at 1121.

38. Intake Water Company's suit against the Yellowstone Compact Commission is still pending (*see* note 31.), and until it is resolved, or until the company receives unanimous consent of the signatory states to its inter-basin transfer of water, its project cannot be completed. *See infra* notes 33 and 75.

39. 484 F. Supp. 36 (D. Mont. 1979).

40. State ex rel. Intake Water Co. v. Board of Natural Resources and Conservation, et al., No. 38781 (1st Jud. District Montana, 1975).

41. *Id.* (Order Quashing and Dismissing Intake's Amended Affidavit and Application for Writ of Mandate, issued February 25, 1981.)

42. *Id.* at 20.

the Montana Supreme Court.<sup>43</sup>

While the above suit by Intake Water Company against DNRC was still pending in state district court, Utah International filed an action in Montana federal court,<sup>44</sup> seeking: 1) a declaration by the court of the respective water rights of the parties; 2) approval of Utah International's priority date of November 20, 1973; 3) a declaration that Montana courts have no jurisdiction to adjudicate the priority of Compact water for which a diversion point in Wyoming is proposed; and 4) a declaration that Wyoming has exclusive jurisdiction to adjudicate priority of the plaintiff's application, to be enforced by Montana. The federal court deferred all issues in the case to the pending state district court action, but construed two provisions of the Yellowstone Compact which were vital to the controversy: Articles VII and XVIII.<sup>45</sup>

In the federal district court decision, Judge Battin interpreted the Compact so that joint sovereignty was involved when diverting water in one state for use in another; however, any adjudication of a water right must be conducted "in conformity and according to the law of the state in which the water is diverted."<sup>46</sup> Wyoming's law on priority of appropriative rights is similar to Montana's; Wyoming's Statute states that priority of appropriation dates from the filing of the application in the State Engineer's office.<sup>47</sup>

A duplicate of this application had been filed in Montana in compliance with Article VII of the Compact, which requires such procedure in multi-state diversions. And even though Montana requested an amended application on a Montana form, it observed and assigned the same priority date which Wyoming had assigned.

Judge Battin indicated that this procedure conformed to the spirit of the Compact: "The joint sovereignty of Montana and Wyoming over the Compact waters in issue is recognized and permitted the leeway essential to its proper function, while at no time divesting or impinging upon either state's sovereign control over those waters found within its boundaries."<sup>48</sup> In addition, the Constitutions of both states observe their respective sovereignty and ownership over waters found

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43. Oral Arguments were heard on February 26, 1982; the decision was rendered on April 15, 1982, affirming the district court ruling. *State ex rel. Intake Water Co. v. Board of Natural Resources and Conservation, et al.*, — Mont. —, — P.2d —, 39 St. Rptr. 717 (1982).

44. *Utah International Inc.*, 484 F. Supp. 36.

45. Article VII allows either Montana or Wyoming to divert its own shares of the Yellowstone waters from the other State, providing each complies with the other state's laws. Article XVIII holds that nothing in the Compact is meant to divest any signatory state or agency thereof of its jurisdiction over its own waters as apportioned in the Compact. North Dakota has no allocation of waters under the Compact.

46. 484 F. Supp. at 45.

47. Wyo. Stat. § 41-4-412 (1977).

48. 484 F. Supp. at 45.



within their own boundaries.<sup>49</sup>

Also, it appears from an overall reading of Article VII of the Compact that there was a general intent to respect the authority of individual states over waters within their own boundaries. This conclusion is supported by the statements of the Bureau of Reclamation's representative to the Commission, Mr. Bill Burk: "Article VII provides for reciprocity and is designed to meet the situation of not trespassing on the sovereignty of another state."<sup>50</sup>

This conclusion is further supported by the changes in the earlier Compact of 1944 over that language contained in the final approved Compact of 1951. According to the older Compact, in order to divert water in one state for use in another, the application had to be filed in the state of diversion and checked against records in the state of use so that there was no conflict with existing rights.<sup>51</sup> This language was removed from the later Compact, indicating a desire to place full control over priority of rights with the state of diversion.<sup>52</sup>

Arguments against this conclusion, however, can be found in the minutes of the Yellowstone Compact Commission meetings, 1949-1950. Mr. Bunsten, Commission representative from Montana, proposed inserting the language, "including the principle of priority, regardless of state line," into Article V of the Compact behind the word 'appropriation.'<sup>53</sup> This proposal was withdrawn, followed by discussion on the insertion of other language which eventually became Article XVIII: "No sentence, phrase or clause . . . shall . . . divest any signatory state . . . of the jurisdiction of the water as apportioned in this Compact."<sup>54</sup>

This sequence of discussions indicates that the intention of the Commission was to avoid interstate administration of priority rights, preserving instead the authority of each state over its allocated shares of water. This assumption is supported by the statement of Mr. McNally, Commission representative from Wyoming, who said that Wyoming would not agree to interstate administration.<sup>55</sup> Instead, what was

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49. MONT. CONST. art. IX, § 3; Wyo. Const. art. VIII, § 1.

50. Minutes of the Joint Meeting of the House Comm'n on Irrigation and Water Conservation and the Senate Comm'n on Water Conservation and Flood Control, 32nd Mont. Legis. Assembly 3 (Jan. 25, 1951).

51. 1945 Mont. Laws ch. 85, Article VII (B).

52. Act of October 30, 1951, *supra* note 8, at Article VII (B). This Compact Article now reads that applications for diversions of water from one state for use in another must be filed with the State Engineer's office only in the state of diversion, with duplicate copies filed with the State Engineer's office in the state of use.

53. Yellowstone River Compact—Minutes of Formal Meetings of the Yellowstone River Compact Commissioners, Oct. 24-25, 1951, at 17.

54. *Id.* at 13.

55. *Id.* at 17.

settled on was language giving each state jurisdiction over those waters allocated to it under Article V.

What results from this analysis of the minutes of the Yellowstone Compact Commission meetings is a confusion of theories. If the Commissioners intended to give each state total control over those waters allocated to it, regardless of where diverted (Article XVIII), they would not have included the language in the agreement which provides for adherence to the laws of the state of diversion (Article VII). Since Article XVIII is the last provision in the Compact, it would seem justified to give it more weight over other provisions which contradict it.

The result of the holding in *Utah International Inc. v. Intake Water Co.*<sup>56</sup> is that one diverting a portion of Montana's allocated share of water under the Compact from Wyoming to Montana must abide by the priority date assigned by Wyoming. Judge Battin makes it clear that each state is to retain jurisdiction over the waters found within its borders. Unfortunately, the decision fails to mention whether or not the minutes of the Yellowstone Compact Commission were examined in order to determine the Commissioners' intentions when drafting Articles VII and XVIII. Whether this would have influenced the court in its determination is mere conjecture.

However, an interesting problem remains. Since the State of Montana has not yet quantified all existing water rights to state waters, Montana users may have already over-appropriated Montana's share of the waters allocated to it under the Compact. Would a Wyoming user wishing to divert a share of Wyoming's waters in Montana have to stand behind all prior Montana users, or only those who have appropriated up to the limit of Montana's allocated share?

The answer might be found within Article VII of the Compact. Section A of Article VII reads: "A lower signatory state [and vice versa] shall have the right . . . to file application for and receive permits to appropriate and use any waters in the Yellowstone River system *not specifically apportioned to or appropriated by* such upper state as provided in Article V." (Emphasis added.)

Under this language, Montana should not exceed its appropriated and allocated shares of water to the detriment of a Wyoming user wishing to divert a portion of Wyoming's water in Montana. Although there may have been an underlying intent in the Compact to respect the sovereignty of the states as found by the court in *Utah International*,<sup>57</sup> it appears clear that the foremost scheme was to ensure access by each state to its allocated share of water. If Montana were using more than

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56. 484 F. Supp. 36.

57. *Id.*

its allotment of water, those using the extra water would probably have a qualified right, subject to Wyoming users wishing to divert in Montana.

Another important aspect of the *Utah International, Inc.*<sup>58</sup> decision came about as a result of the plaintiff's assertion that it should be considered a "state" under the Compact, thus invoking federal jurisdiction. Article I states that:

[w]here the name of a state is used in this Compact, as a party thereto, it shall be construed to include the individuals . . . , appropriators, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River system under the authority of the state.

Article XIII of the Compact allows "any state" to institute or maintain any action in federal court for the protection of any right under the Compact or enforcement of its provisions. As a duly authorized appropriator, Utah International sought to use these provisions of the Compact in order to attain federal jurisdiction over all of the issues presented by it.

The court summarily rejected these arguments, however, notwithstanding Article 1.<sup>59</sup> This opened the door for state adjudication of rights under the Compact, and would appear to be in harmony with both Article VII(A), which allows each state to control and regulate the water apportioned to it, and Article XVIII, which maintains the jurisdiction of each state over its apportioned waters.

#### IV. INDIAN RIGHTS

One provision of the Compact likely to be of major importance in the near future is Article VI, which prevents the Yellowstone Compact from adversely affecting the rights of Indians to the waters of the Yellowstone Basin. Because the Indian reserved water rights are not subject to the Compact, the percentage division of Yellowstone tributary waters to Montana and Wyoming will be reduced by the shares of water apportioned to the Northern Cheyenne, the Crow, and the Wind River reservation located in the Basin.

A 1975 Department of the Interior report projected water withdrawals for the year 2020 for the Crow, Northern Cheyenne, and Wind River Indian tribes to be roughly 2.1, 0.5 and 2.2 million acre feet per

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58. *Id.* at 42.

59. Judge Battin stated in his opinion that "[a]lthough the plaintiff would have this court so rule, this is not a suit between two states signatory to the Compact. It is a suit between private enterprises whose right to appropriate water is derived from the signatory states." 484 F. Supp. at 42.

year respectively.<sup>60</sup> To date, however, the reserved rights of the Indians have not been quantified. Under the *Winters* Doctrine,<sup>61</sup> the Indians would have command of the beneficial use of the lands and waters located on the reservation, including necessary uses for the "arts of civilization."<sup>62</sup> This would theoretically include the water necessary for the development of the coal reserves located on the reservations, although this issue has yet to be settled.<sup>63</sup> If these Indian reserved water rights do extend to coal development, then some of the most senior rights in the Basin would encompass industrial uses.

On February 22, 1982, *Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, et al v. Adsit*<sup>64</sup> was decided by the Ninth Circuit Court of Appeals. The decision reversed a Montana Federal District Court ruling<sup>65</sup> which dismissed consolidated actions brought to adjudicate Indian reserved water rights in Montana. The federal district court decision held that the state was the proper forum under the McCarren Amendment<sup>66</sup> for such adjudication. The circuit court, in its reversal, held that the state could not assume jurisdiction over Indian water rights under the McCarren Amendment because of the disclaimer of jurisdiction over Indian lands contained in Montana's constitution and enabling act.<sup>67</sup>

This decision poses a potential problem to the state of Montana in its implementation of Senate Bill 76<sup>68</sup> which, with extensions, requires statewide filing of all water rights by April 30, 1982.<sup>69</sup> Although the state may adjudicate non-Indian water rights in their relation to each other, the quantification of Indian water rights will ultimately determine non-Indian rights because most Indian rights have earlier priority dates.

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60. BORIS & KRUTILLA, *supra* note 1, at 48.

61. *Winters v. United States*, 207 U.S. 564 (1908).

62. *Id.* at 576.

63. The Crow Indians had requested a declaration of reserved rights to water in the Yellowstone Basin for purposes of the "full utilization of the reservation and its resources for the benefit of the Crow Indians." *United States v. Big Horn Low Line Canal*, No. 75-34-BLG (D. Mont., filed Aug. 29, 1975). This suit was dismissed in 1979 and was reversed on appeal to the 9th Circuit. See BORIS & KRUTILLA, *supra* note 1 at 56-58, and text accompanying note 67, *infra*. See also *Arizona v. California*, 373 U.S. 546, 601 (1963), where the court determined the quantity of Indian reserved waters by the amount of irrigable acreage.

64. 668 F.2d 1080 (1982).

65. *Northern Cheyenne Tribe v. Tongue River Water Users Ass'n.*, 484 F. Supp. 31 (D. Mont. 1979).

66. 43 U.S.C. § 666 (1976).

67. MONT. CONST. art. I; Act of February 22, 1889, ch. 180 § 4, 25 Stat. 676.

68. 1979 Mont. Laws ch. 697.

69. The final Montana Supreme Court order granting the extension to April 30, 1982, can be found in *The Matter of Proposed Rules of Procedure for the Water Courts of the State of Montana*, No. 14883 (Mont. Sup. Ct., Dec. 18, 1981).

Depending on the amount of water finally allocated to the Indian tribes, water users in the Yellowstone Basin could either have their own rights reduced or removed altogether. However, it is likely that many years will pass before a final water rights determination is made, regardless of the forum for adjudication.<sup>70</sup>

## V. UNANIMOUS CONSENT FOR INTERBASIN DIVERSIONS

As previously mentioned,<sup>71</sup> the provision in the Compact requiring unanimous consent of the signatory states before interbasin diversions of waters may occur (Article X) was agreed to with some reluctance by the then Secretary of the Interior, Oscar Chapman. As a suit is currently pending on the constitutionality of this provision,<sup>72</sup> mention of it will only be made in passing.

Since water is considered an article of commerce by the courts, it is subject to the Commerce Clause;<sup>73</sup> the provision, therefore, may be found in contravention of federal regulatory authority. Due, however, to the limited availability of water in the Yellowstone Basin, Article X may also be construed as reasonable.

The Compact Commission did request a determination by the signatory states of what was required by the word "consent" in Article X.<sup>74</sup> Montana and Wyoming answered that such consent means the approval of the legislatures of their respective states, while North Dakota, which has no representative to the Commission, only requires the consent of its state water commission.<sup>75</sup> Thus, any request for diversion of water from the Yellowstone Basin may entail a significant amount of time before approval is granted.

## VI. ADMINISTRATION OF THE COMPACT

Administration of the Compact is left to the representatives of Wyoming and Montana, and the United States Geological Survey or its successor [Article III(A)]. They have the power "to formulate rules and regulations and to perform any act necessary to carry out the provisions

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70. Great Falls Tribune, March 3, 1982 at 9-A, col. 4.

71. See *supra* text accompanying note 27.

72. See *infra* note 31 and accompanying text.

73. *Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd per curiam*, 385 U.S. 35 (1966).

74. YELLOWSTONE RIVER COMPACT COMMISSION, 26th Annual Report 5 (1977).

75. YELLOWSTONE RIVER COMPACT COMMISSION, 27th Annual Report III (1978). In 1981, Montana enacted MONTANA CODE ANNOTATED §§ 85-2-801 to 807, (1981) [hereinafter cited as M.C.A.] which allows the Montana Dept. of Natural Resources and Conservation to give consent on behalf of the State of Montana to diversions of water from the Basin. If the first consent by DNRC occurs prior to July 1, 1983, it is subject to ratification by the Montana Legislature.

of this Compact and to amend such rules and regulations.”<sup>76</sup> The federal representatives’ powers to vote are limited to those instances where the Montana and Wyoming representatives fail to agree [Article III(F)].

The Commission’s powers, therefore, are merely administrative; any interpretation of the Compact, which is considered a federal law,<sup>77</sup> would require a judicial determination by a federal court.<sup>78</sup> In addition, the Commission’s powers to enforce the Compact provisions should not supersede, expressly or by implication, those of the constituted state authorities.<sup>79</sup>

Thus, the power of the Commission to resolve disputes implicit in the Compact is severely limited; one example of its limited capabilities was the Commission’s request for determination by the three signatory states of the meaning of “consent” in Article X.<sup>80</sup>

## VII. CONCLUSION

Without water storage in the Powder sub-basin or expansion of existing storage on the Tongue, there is not a dependable supply of water in these areas for expanding existing uses, let alone coal conversion.<sup>81</sup> And as far as the Tongue, Powder and Bighorn Basins are concerned, the level of irrigation projected for future needs would not be consistent with the maintenance of current state water quality standards, quite apart from the issue of the suitability of the total dissolved solids concentrations for irrigating crops.<sup>82</sup>

In 1973 the Montana legislature reacted to the depletion of its state’s water resources by passing the 1973 Water Use Act<sup>83</sup> which allows for reservation of waters for future or existing beneficial uses, or to maintain a minimum flow. The Yellowstone River Moratorium<sup>84</sup> was enacted in 1974 and suspended actions on all large water use applications (diversions exceeding 20 cubic feet per second or storage of over 14,000 acre feet per year) in the Yellowstone Basin until 1977, so that

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76. Act of October 30, 1951, *supra* note 8 at Article III(E).

77. *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517, 521, 522 (9th cir. 1974), *cert. denied* 420 U.S. 974 (1975).

78. Such an action would be viewed as arising under the laws of the United States within the meaning of 28 U.S.C. § 1331(a) (1976). *League*, 507 F.2d at 521.

79. NATIONAL RECLAMATION ASSOCIATION, COMMITTEE TO CONFER WITH WESTERN GOVERNORS TO PROVIDE THE MACHINERY TO STUDY AND PRESERVE THE INTEGRITY OF STATE WATER LAWS, REPORT AND RECOMMENDATIONS 127 (1943) (available in University of Montana Library).

80. *See infra* discussion accompanying notes 73 and 74.

81. BORIS & KRUTILLA, *supra* note 1, at 255.

82. *Id.*

83. M.C.A. § 85-2-316 (1981).

84. M.C.A. §§ 85-2-601 to 608 (1981).

action could be taken on requests for water reservations. This was later extended to December 31, 1978.<sup>85</sup> Both Intake Water Company and Utah International Incorporated's applications for industrial use of the Powder River were held in abeyance by the Moratorium.<sup>86</sup> Both companies opposed the Montana Department of Fish and Game's reservation application for instream use of the waters of the Yellowstone Basin for the preservation of the water ecology.<sup>87</sup> Their opposition stemmed from the companies' fear of the reservation's adverse effect upon their own water use applications; since these applications are not existing but mere inchoate rights, the instream reservations granted before the end of the Moratorium will have priority over them.<sup>88</sup>

On December 15, 1978, the Board of Natural Resources and Conservation rendered its decision on the reservation applications, granting a priority as follows: 1) municipalities; 2) instream flow upstream of the Bighorn River; 3) irrigation; 4) instream flows downstream of the Bighorn River; and 5) storage.<sup>89</sup>

With the granting of these reservations, the availability of Yellowstone waters for future coal development has been severely curtailed, and the future quantification of Indian reserved rights compounds the need for impoundment of waters in the Basin. Strip mining in Eastern Montana will also have a deleterious effect on the quantity and quality of the shallow ground water aquifers in that part of the state, thereby impairing the use of that water for future beneficial use.<sup>90</sup>

The Yellowstone Compact, however, will prohibit diversion of any waters impounded in the Yellowstone Basin for use outside of the Basin without the unanimous consent of the signatory states,<sup>91</sup> preventing the ready use of Yellowstone waters in such important areas as the Gillette Basin in Wyoming.<sup>92</sup> And the decision in *Utah International, Inc.*

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85. The original enactment carried a suspension date of March, 1977, but was extended by subsequent state legislative amendment and state supreme court actions until December 31, 1978.

86. PETERMAN, *supra* note 4, at 30.

87. *Id.*

88. BORIS & KRUTILLA, *supra* note 1, at 29, n. 23. See also PETERMAN, *supra* note 4, at 55 (letter from Gary Fritz, Chief of the Water Planning Bureau, Montana Department of Natural Resources and Conservation).

89. PETERMAN, *supra* note 4, at 56 (letter from Fritz, *supra* note 88).

90. U.S. DEPT. OF THE INTERIOR, WATER RESOURCES INVESTIGATIONS OF THE U.S. GEOLOGICAL SURVEY IN THE NORTHERN GREAT PLAINS COAL REGION OF EASTERN MONTANA, 1975-76, 22 (1976) (available in University of Montana Library.).

91. Act of October 30, 1951, *supra* note 8, at Article X.

92. YELLOWSTONE RIVER COMPACT COMMISSION, 21ST ANNUAL REPORT 3 (1972): "[M]uch of the interest shown by the energy industry is related to development of the coal resources in the Gillette, Wyoming, area, some of which is outside of the Yellowstone River Basin."

*v. Intake Water Co.*<sup>93</sup> gives the state of diversion the power to assign priority dates for the right to use water allocated to the state of use (Article VII). Such provisions of the Compact, including the important Article V provision apportioning waters of the Yellowstone Basin to Montana and Wyoming, will figure significantly into future applications for use of the Yellowstone waters in coal development. Pending litigations and future Attorney General Opinions<sup>94</sup> will hopefully shed more light on the provisions of this long debated and increasingly controversial piece of interstate legislation.

*Rick Bāch*

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93. 484 F. Supp. 36 (1979).

94. The Montana Department of Natural Resources and Conservation requested in the fall of 1981 an opinion from the Attorney General of the State of Montana as to whether a Wyoming user wishing to divert a portion of Wyoming's share of Compact waters out of Montana, must abide by Montana's statute, M.C.A. § 85-2-104 (104) (1981), prohibiting use of water in a coal slurry pipeline. This opinion is still forthcoming (discussion with Robert Lane, Legal Counsel, Montana Department of Natural Resources and Conservation, March 30, 1982).