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A CASE STUDY: THE YELLOWSTONE RIVER

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New Sources of Water for Energy
Development and Growth: Interbasin Transfers

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1. INTRODUCTION

(a) In the Yellowstone River Basin, the physical supply of water available for development for any use depends not only on the hydrological conditions in the basin, but also on the legal and institutional constraints. Addressed herein is the legal setting which affects the supply of water in the Yellowstone Basin for energy development. The legal constraints are addressed in the following context:

(1) The Indian water rights issue;

(2) The Montana reservation of water rights system;

(3) The Yellowstone River Compact

(b) Before commencing an effort to transfer water from the Yellowstone Basin one should have a general understanding of the character and history of the basin.

(1) Physical Characteristics. The Yellowstone River Basin
encompasses approximately 70,000 square miles in southeastern Montana, northern Wyoming and a very small section of western North Dakota. (See Appendix A and Appendix B). The mainstem of the Yellowstone River heads in Northwestern Wyoming and flows generally northeastward to its confluence with the Missouri River just east of the Montana-North Dakota border. The major tributaries, the Clarks Fork, Bighorn, Tongue, and Powder Rivers, all head in Wyoming and flow generally northward to their confluence with the Yellowstone. The western section of the basin is mountainous consisting of the mainstem of the Rocky Mountains, and the eastern part of the basin is located in the Northern Great Plains. Elevations in the
basin range from over 12,000 feet in the Absoraka, Bighorn and Wind River mountains to less than 2,000 feet at the confluence of the Yellowstone and Missouri Rivers. This elevation difference provides for great climatic variation within the basin from the semi-arid plains of the eastern basin where precipitation averages less than 15 inches per year to the alpine areas of the mountains that receive an average 60 inches of precipitation in a year. However, large annual deviations from these averages are quite common throughout the basin. These year to year variations lead to large fluctuations in runoff and streamflow particularly in unregulated tributary basins. Streamflow can vary from high flood flows in the spring to no
flow during some time in the late spring and summer weather which determines the distribution of runoff.

(2) Average Annual Flow. Montana is a headwater state. An average annual flow of approximately 9.50 million acre feet per year leave Montana from the Yellowstone River system. It is estimated that the water demand in the Yellowstone system amounts to 3.49 million acre feet per year withdrawn and 1.65 million acre feet per year depleted or consumed.

(3) History of Water Use in Basin. In past years the Yellowstone River Basin was generally blessed with ample supplies of high quality water. Agriculture was the primary user of water. State regulation of water was minimal until the re-discovery of southeastern Montana's vast coal reserves during the early 1970's. Three attempts were made to reach a
compact between the basin states. Finally, in 1951 the Yellowstone River Compact (Appendix I) was approved by Congress.

In the 1970's the specter of mushrooming energy development in the basin with its attendant demands for large volumes of water prompted Montana to initiate steps to protect existing users and to control future water uses.

Among the many laws passed in 1973 was the Water Use Act which initiated an orderly and centralized method of administering water rights. (Appendix C and Appendix K) This Act also gave state, substate, and federal agencies the right to apply for the reservation of water for future beneficial uses. (Appendix E) The establishment of an instream flow, for the purposes of fish and wildlife, recreation, water quality, and
the maintenance of minimum flows or levels, was defined as a beneficial use.

Within a year of the Act's passage, the Montana Department of Natural Resources and Conservation, the administrative entity, was flooded with permit applications by energy companies for waters of the Yellowstone drainage. (Appendix G) The quantities requested would have seriously depleted the mainstem if all of the permits were completely fulfilled. The 1974 Montana Legislature, therefore, suspended major water allocations in the Yellowstone River Basin for three years (Yellowstone Moratorium Act, Appendix F) to provide time for governmental agencies to prepare applications for the reservation of water for future use, including instream purposes. This
set the stage for a formalization of the competition for water between and among diversionary and instream applicants.

2. The Indian Water Rights Issue.

(a) There are three Indian Reservations in the Yellowstone River Basin: The Crow and Northern Cheyenne Reservations in Montana, and the Wind River Reservation in Wyoming.

(b) The Indian reservations in the Yellowstone River Basin can be expected to require significant quantities of water to satisfy reservation purposes.

(1) In general, the Indian contends that the purpose of the Indian reservation is to provide an economic base for the Indian people living on the reservation.

(2) The states generally argue that the Indian reserved rights attach only to the natural flow of a watercourse and not to water stored as a result of
artificial impoundments. Furthermore, the states argue the right cannot be used for other than the original purpose of the reservation.

(3) Resolution of the conflict in favor of the tribes may mean that little, if any, new water will be available through state processes for the appropriation of water for energy development.

(c) Attempts to quantify all water rights, including Indian reserved rights, are on going.

(1) Since 1977 the State of Wyoming has been involved in a general adjudication of all rights to the use of water in the Big Horn River System, including the water of the Wind River Indian Reservation.

(2) In 1979 the State of Montana strengthened its water law by establishing a mandatory claims registration system which is intended to lead to a final
determination of water rights in the State. (Appendix C) The Montana Supreme Court on June 8, 1979, set the judicial wheels in motion by ordering the filing of claims by January 1, 1982, later extended to April 30, 1982.


3. The Montana Reservation of water rights system.

(a) The concept of "first in time is first in right" essentially represents the foundation of western water law system.

(b) Two exceptions, each quite
different in creation, justification and problems presented—each known by the same name—reservation. The first is the federal reserved right, the second the statutory water reservation under state law. (Appendix E).

(1) The statutory water reservation arising under express state water law. Montana is the only state among the Yellowstone River Basin states that has such a law.


(2) Statutory framework. Reservations of water under the Montana statutory scheme may be for any existing or future beneficial use, but are water rights which nevertheless are strictly
governmental in nature and may not be acquired by private entities. (85-2-316(2), M.C.A.)

(i) Such statutory reservations are awarded only upon application by a qualified party. Furthermore, they may only be awarded following a notice and hearing procedure. (85-2-316(2), M.C.A.) Granting of a water reservation is at the discretion of the Montana Board of Natural Resources and Conservation, a lay seven member citizen board appointed by the Governor.

(ii) The law provides that a reservation shall have the priority date of the board's order adopting the reservation. (85-2-316(6), M.C.A.)

(iii) Further, the law provides that the board shall review each reservation at least once every ten years to insure that the purposes of
the reservation are being met. (85-2-316(7), M.C.A.)

(3) Amendments. The 1979 Montana legislature added language to the water reservation law allowing the reallocation without loss of reservation priority of water reserved for instream uses to other qualified reserved uses upon application for reallocation to the board by a qualified reservant. Such reallocation may be made by the board only after notice and hearing, and a showing that all or part of the reservation is not required for the purpose of the reservation, and that the need for the reallocation clearly outweighs the need shown by the original reservant. (85-2-316(10), M.C.A. New language also added by the 1979 Montana legislature further limits future instream reserva-
tions on gaged streams to a maximum of 50% of the average annual flow (85-2-316(5), M.C.A).

(4) Montana's statutory scheme for creating reservations has only been used once, and that was for the reservation of water in the Yellowstone River basin in Montana. Uses applied for included instream (for fish, wildlife, water quality, natural vegetation habitat), consumptive diversionary (municipal, irrigation, stock), and multi-purpose storage (recreation, hydro-electric generation, and subsequent sale primarily to agriculture, industry and municipalities). (See Appendix H which outlines the pertinent facts concerning the water reservations as applied for prior to the seven weeks of hearings in 1977, as well as the pertinent facts concerning the water reservations as actually
awarded by the board on December 15, 1978).

(i) It is immediately apparent that by quantity of water reserved the greatest recipients of reserved water were the instream interests, with multi-purpose storage projects second, irrigation by direct diversion third, and finally with municipalities constituting a distant fourth. This also represents the relative size order of the reservation requests, although the cumulative total of reservations granted in each type of use category except multi-purpose storage was considerably reduced from the amount applied for.

5. Effect of Reservations. The Yellowstone River statutory water reservations contribute to the uncertainty of reliable water supplies in the Montana portion of the basin for future
uses which might not be eligible to use Montana's reserved water. However, it should be noted that large reservations for instream use do indirectly help to improve prospects for present and future water availability for consumptive developments at points located below the downstream terminus of the instream reservation. In the case of the Montana statutory instream reservations this downstream terminus is at Sidney, Montana.

(i) It should be noted that the statutory Yellowstone water reservations in Montana do expressly recognize the energy development potential in Montana's portion of the basin, and do attempt to reserve stored water for such needs, albeit with the lowest priority in the reservation scheme, and even then only to
the extent such energy development interests may be interested in or may be able to purchase stored water from less than certain to be constructed state and federal multi-purpose off-stream or on-tributary storage reservoir projects. (See Appendix II which details the multi-purpose storage projects reserved so as to be expected to have stored reserved water available either wholly or partly for energy development).

6. Reason behind the decision. The reasoning seems to be that the direct human domestic needs of the basin deserve first priority; the unique ecological character of the upper basin must be preserved; agriculture, as Montana's principal industry, must be provided for; the ecological character of the lower basin must be protected, but not
at the expense of irrigated agriculture; and finally, although multi-purpose storage projects were granted to meet real and foreseeable needs, as storage projects they can best survive low flow years.

(c) The Yellowstone Moratorium. The Yellowstone Moratorium was an effort on the part of the 1974 Montana legislature, later extended by the 1977 Montana legislature, to provide the to-be-granted Yellowstone reservations with a "priority use" (85-2-603(2), M.C.A. over the seven large pending private applications for beneficial water use permits for industrial development in the Yellowstone River basin in Montana. (Appendix F) In addition to providing for the priority of use, the Moratorium suspended the Montana Department of Natural Resources and Conservation action on such applications until
after board action on the reservations. Such suspension has now terminated. (Appendix G summarized the previously suspended applications.)

4. The Yellowstone River Compact.
(a) The Yellowstone River Compact, administered by a commission consisting of one representative from Montana and Wyoming and a representative of the United States Geological Survey, was ratified by the three states and approved by Congress in 1951. (Appendix I).
(b) Article X of the Yellowstone River Compact provides:

"No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory states. In the event water from another river basin shall be imported into the Yellowstone River basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming or any of them jointly, the
state having the right to the use
of such water shall be given proper
credit therefor in determining its
share of water apportioned in
accordance with Article V herein."

(1) A case study: Intake Water
Company attempts to transfer
water out of the basin.

(i) On June 8, 1973 Intake
commences an appropriation of
111.4 ft.³/sec (80,650 acre
feet/year) from Yellowstone
River. Intake proposes to
divert water within the State
of Montana, but on occasion
to distribute water outside
the boundaries of the state.
(A) Section 85-1-121, H.C.A.,
forbids the diversion of
water within Montana for use
outside Montana, except pur-
suant to a legislative act
(Appendix J).

(ii) On November 4, 1977,
Intake petitioned the
Yellowstone River Compact

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Commission for approval or consent to divert and transfer 30,000 acre-feet from the basin to the Little Missouri basin. Intake also filed a Petition with North Dakota state engineer since North Dakota has no representative on the commission. On November 9, 1978, the Yellowstone River Commission declined jurisdiction.

(iii) Legislative attempts.

(a) February 9, 1979, HB694 (Appendix M) introduced in Montana legislature to delegate authority to executive branch agency to consent to diversions pursuant to Article X. The bill fails.

(b) January 22, 1981, SB243 introduced in Montana legislature to delegate authority to executive branch agency to consent to diversions pursuant to Article X. Bill passes (Appendix L).
(c) January 23, 1981, SB254 (Appendix N) introduced in Montana legislature to grant consent to specific transfer of water. The bill fails.

(iv) Legal challenges raised by Intake.

(A) Section 85-1-121, M.C.A. violates Article I, §8 of the United States Constitution (commerce clause).

(B) Article X violates Article I, §8 of the United States Constitution (commerce clause). In addition, SB243 is likewise unconstitutional.

(C) Article X is unconstitutional and in direct conflict with the Fourteenth Amendment. In addition, SB243 is likewise unconstitutional.

(D) Finally, Intake argues that none of the waters above Intake, Montana are subject to the provisions of the Compact.
(v) Motion to Dismiss.

(A) The State of Wyoming is an indispensable party which cannot be enjoined because it is not subject to service of process and because of the jurisdictional bar presented by the Eleventh Amendment.

(B) The Compact is federal law which cannot unduly burden commerce.

(C) Intake has made no attempt, outside its Montana legislative attempt, to seek administrative consent to diversion and transfer.

(D) Intake should submit an application for diversion of water to the appropriate forum in each compact state before controversy is ripe for a declaratory ruling.

(2) A case study: Montana/Wyoming conflict on the Little Big Horn River.
As a result of a proposed energy-related diversion, Montana and Wyoming took divergent positions on the extent of inclusion of the Little Bighorn river under the compact. Wyoming adopted the position that the Little Bighorn is completely excluded from coverage under the compact pursuant to the Article V exclusion. However, Montana has stated, through its Attorney General that Article X of the compact, which requires the approval of each signatory state before water may be diverted out of the Yellowstone River basin, applies fully to the Little Bighorn (Appendix 0). Potential litigation was averted after the Wyoming governor became unwilling to sanction the proposed development. Nevertheless, the problem has
not been settled as to compact coverage of the Little Bighorn. Consequently, any potential development of the waters of the Little Bighorn for use outside the Yellowstone River basin may be hindered by the polarized views of the two states. Any planning process should recognize the high probability of litigation ensuing should a similar proposal surface in the near future.

Montana and Wyoming have met and appear to be interested in resolving the Little Bighorn issue either through an amendment to the Yellowstone River compact or a separate compact.
APPENDICES

APPENDIX A   MAP OF YELLOWSTONE RIVER BASIN

APPENDIX B   COUNTY MAP OF YELLOWSTONE RIVER BASIN

APPENDIX C   MONTANA ADJUDICATION OF WATER RIGHTS LAW

APPENDIX D   NORTHERN CHEYENNE TRIBE, et al. v. ADSIT, et al. (9th Cir. 1982)

APPENDIX E   MONTANA RESERVATION OF WATER LAW

APPENDIX F   YELLOWSTONE MORATORIUM LAW

APPENDIX G   TABLE C - A LIST OF MAJOR INDUSTRIAL APPLICATIONS FOR YELLOWSTONE BASIN WATER SUSPENDED BY YELLOWSTONE MORATORIUM

APPENDIX H   TABLE D - A LIST OF RESERVATIONS GRANTED BY MONTANA BOARD OF NATURAL RESOURCES AND CONSERVATION

APPENDIX I   YELLOWSTONE RIVER COMPACT

APPENDIX J   MONTANA LAW: PROHIBITING DIVERSION OF WATER OUT OF MONTANA WITHOUT LEGISLATIVE CONSENT

APPENDIX K   MONTANA APPROPRIATION OF WATER RIGHTS LAW

APPENDIX L   MONTANA LAW: AUTHORIZING DIVERSIONS FROM THE YELLOWSTONE RIVER BASIN
APPENDICES (CONT'D)

APPENDIX II  HOUSE BILL 694
(NEVADA) 1979
PROPOSED LEGISLATION
TO AUTHORIZE
DIVERSIONS FROM
YELLOWSTONE RIVER
BASIN

APPENDIX III  SENATE BILL 254
(MONTANA) 1981
PROPOSED LEGISLATION
GRANTING CONSENT TO
TRANSFER WATER OUT OF
THE YELLOWSTONE RIVER
BASIN

APPENDIX III  VOLUME NO. 38,
ATTORNEY GENERAL'S
OPINIONS, OPINION NO.
13 (MONTANA-1979)
APPENDIX C

Adjudication of Water Rights

85-2-221. Petition by attorney general. Within 20 days after May 11, 1979, the state of Montana upon relation of the attorney general shall petition the Montana supreme court to require all persons claiming a right within a water division to file a claim of the right as provided in 85-2-221.

History: En. Sec. 20, Ch. 697, L. 1979.

Compiler's Comments

Purpose. Subsection (1) of sec. 1, Ch. 697, L. 1979, provided: "[This act] amends the Montana Water Use Act to expedite and facilitate the adjudication of existing water rights."

Codification. Sec. 35, Ch. 697, L. 1979, provided: "(1) Sections 1 through 10 of this act are intended to be codified as an integral part of Title 3, and the provisions contained in Title 3 apply to this act."

(2) Sections 11 through 27 are intended to be codified as an integral part of Title 85, chapter 2, part 2, and the provisions contained in Title 85, chapter 2, apply to this act.

(3) If the provisions of this act are not codified as stated above, the code commissioner shall add to the MCA, if necessary, statutory language to convey the intent of this act.
Because of rearrangement of the new material, Ch. 697 is now codified in Title 3, chapter 7; Title 85, chapter 2, parts 2 and 7; and 2-15-212.

Effective date. "This act is effective on passage and approval." Approved May 11, 1979.

Severability. Section 36, Ch. 697, L. 1979, was a severability section.

85-2-212. Order by supreme court. (1) The Montana supreme court shall within 10 days of the filing of the petition by the attorney general issue an order to file a statement of a claim of an existing water right in substantially the following form:

"WATER RIGHTS ORDER

FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A CONCLUSIVE PRESUMPTION THAT THE WATER RIGHT OR CLAIMED WATER RIGHT HAS BEEN ABANDONED. (This introductory sentence shall be printed in not less than 12-point boldface type.) This order is notice of commencement of procedures for the general adjudication of existing rights to the use of water and of the requirement to file a claim for certain existing rights to the use of water. Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency or the state of Montana, and federal agency of the United States of America on its own behalf or as trustee for any Indian or Indian tribe, asserting a claim to an existing right to the use of water arising prior to July 1, 1973, is ordered to file a statement of claim to that right with the department no later than June 30, 1983. Claims for stock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources are exempt from this requirement; however, claims for such uses may be voluntarily filed. Claims filed with the department in the Powder River basin in a declaration filed pursuant to the order of the department of natural resources and conservation or a district court issued pursuant to sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are also exempt. For further information, contact the department of natural resources and conservation, Helena, Montana, for a copy of the law and an explanation of it."

(2) Upon petition of the attorney general, the Montana supreme court shall issue the order called for in subsection (1) with a shorter claim filing period of not less than 1 year, subject to extension not beyond June 30, 1983, by the Montana supreme court upon petition of the attorney general, in those basins or subbasins where state adjudication jurisdiction is being or is likely to be challenged.

History: En. Sec. 16, Ch. 697, L. 1979.
who may claim an existing water right are notified of the
requirement to file a claim of that right, the Montana
supreme court shall give notice of the order as follows:

(1) It shall cause the order, printed in not less than
10-point type, to be placed in a prominent and conspicuous
place in all daily newspapers of the state and in at least
one newspaper published in each county of the state within
30 days after the Montana supreme court order as provided in
(2) It shall cause the order, in writing, to be placed
in a prominent and conspicuous location in each county
courthouse in the state within 30 days after the Montana
supreme court order as provided in 85-2-212.
(3) It shall provide a sufficient number of copies of
the order to the county treasurers before October 15, 1979,
enclose a copy of the order with each statement of property
implementation of this subsection, the department shall
provide reimbursement to each county treasurer for the
reasonable additional costs incurred by the treasurer
arising from the inclusion of the order required by this
section. The department shall be reimbursed for such costs
from the water right adjudication account created by
85-2-241.
(4) It shall provide copies of the order, in writing,
to the press services with offices located in Helena within
30 days after the Montana supreme court order as provided in
(5) It shall, under authority granted to the states by
43 U.S.C. 666, provide for service of the petition and
order upon the United States attorney general or his
designated representative.
(6) It may also in its discretion give notice of the
order in any other manner that will carry out the purposes
of this section.
(7) It may also in its discretion order that the
department or the water judge assist the Montana supreme
court in the carrying out of this section.

History: En. Sec. 17 Ch. 697 L. 1979.

85-2-214. Commencement of action. (1) The action for
the adjudication of all existing water rights under this
part, part 7, and Title 3, chapter 7, is commenced with the
issuing of the order by the Montana supreme court to file a
statement of a claim of an existing water right as provided in
85-2-212. As to each claim, the action is considered
filed in the judicial district of the county in which the
diversion is made or, if there is a claimed right with no
diversion, in the judicial district of the county in which
the use occurs.
(2) The water judge shall monitor the claim filing
procedure for claims within his water division and make any
orders necessary to assure timely and accurate compliance
with the claim filing procedure.
85-2-215. Consolidation of matters. The water judge may consolidate all matters concerning the determination and interpretation of existing water rights within the water judge's division in any combination or groups of claims or matters for joint hearings or proceedings conducted by the water judge or water master in any location within the division. The water judge may make such consolidations as are necessary to administer the requirements of this part and part 7 in adjudicating claims of existing water rights.

History: En. Sec. 6, Ch. 697, L. 1979.

85-2-216. Venue for water rights determinations. All matters concerning the determination and interpretation of existing water rights shall be brought before or immediately transferred to the water judge in the proper water division unless witnesses have been sworn and testimony has been taken by a district court prior to the date of the Montana supreme court order as provided in 85-2-212.

History: En. Sec. 6, Ch. 697, L. 1979.

85-2-217. Suspension of adjudication. While negotiations for the conclusion of a compact under part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies which are negotiating are suspended. The obligation to file water rights claims for those reserved rights is also suspended. This suspension shall be effective until July 1, 1985, as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, 1985, the suspension shall terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies shall be subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section.

History: En. Sec. 27, Ch. 697, L. 1979; amd. Sec. 4, Ch. 268, L. 1981.

Compiler's Comments

1981 Amendment: Deleted "From the time of filing the petition required in 85-2-211 until July 1, 1982. and" from the beginning of the section; substituted "proceedings" for "actions" before "to generally adjudicate" in the first sentence; substituted "and federal reserved water rights of those tribes and federal agencies which are negotiating" for
"from a source of water in question under this part" in the first sentence; deleted "unless an action is commenced or is pending by or on behalf of an Indian tribe to adjudicate water from that source other than as provided for in Title 85, chapter 2. In such case, the suspension is maintained only if the action is dismissed or if the parties to the action stipulate to the suspension during compact negotiations of all further proceedings in the action except the determination of jurisdictional issues and an order is so issued" after "are suspended" in the first sentence; added the last five sentences.

Effective Dates: Section 11, Ch. 268, L. 1981, provided: "This act is effective on passage and approval." Approved April 3, 1981.

85-2-218 through 85-2-220 reserved.

85-2-221. Filing of claim of existing water right. (1) A person claiming an existing right, unless exempted under 85-2-222 or unless an earlier filing date is ordered as provided in 85-2-212, shall file with the department no later than June 30, 1983, a statement of claim for each water right asserted on a form provided by the department.

(2) The department shall file a copy of each statement of claim with the clerk of the district court for the judicial district in which the diversion is made or, if there is a claimed right with no diversion, the department shall file a copy of the statement of claim with the clerk of the district court of the judicial district in which the use occurs.

History: En. Sec. 11, Ch. 697, L. 1979.

85-2-222. Exemptions. Claims for existing rights for livestock and individual as opposed to municipal domestic uses based upon instream flow or groundwater sources and claims for rights in the Powder River Basin included in a declaration filed pursuant to the order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, or under sections 3 and 4 of Chapter 485, Laws of 1975, are exempt from the filing requirements of 85-2-221(1). Such claims may, however, be voluntarily filed.

History: En. Sec. 11, Ch. 697, L. 1979.

85-2-223. Public recreational uses. The department of fish, wildlife, and parks shall exclusively represent the public for purposes of establishing any prior and existing public recreational use in existing right determinations under this part, provided that the foregoing shall not exclude a federal governmental entity from representing the public for the purpose of establishing any prior and existing public recreational use in existing right determinations under this part. The foregoing shall not be construed in any manner as a legislative determination of whether or not a recreational use sought to be established

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prior to July 1, 1973, is or was a beneficial use.

History: En. Sec. 12, Ch. 697, L. 1979.

85-2-224. Statement of claim. (1) The statement of claim for each right shall include substantially the following:
   (a) the name and mailing address of the claimant;
   (b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;
   (c) the quantities of water and times of use claimed;
   (d) the legal description, with reasonable certainty, of the point or points of diversion and places of use of waters;
   (e) the purpose of use, including, if for irrigation, the number of acres irrigated;
   (f) the approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (c); and
   (g) the sworn statement that the claim set forth is true and correct to the best of claimant’s knowledge and belief.

(2) The claimant shall submit maps, plats, aerial photographs, decrees, or pertinent portions thereof, or other evidence in support of his claim. All maps, plats, or aerial photographs should show as nearly as possible to scale the point of diversion, place of use, place of storage, and other pertinent conveyance facilities.

History: En. Sec. 13, Ch. 697, L. 1979.

85-2-225. Filing fee. (1) Each claim filed under 85-2-221 or 65-2-222 must be accompanied by a filing fee in the amount of $40, subject to the following exceptions:
   (a) the total filing fees for all claims filed by one person in any one water court division may not exceed $480; and
   (b) no filing fee is required accompanying a claim of an existing right that is included in a decree of a court in the state of Montana and which is accompanied by a copy of that decree or pertinent portion thereof.

(2) A claim that is exempt from the filing requirements of 85-2-221(1) but that is voluntarily filed must be accompanied by a filing fee in the amount of $40. Exempt claims for a single development with several uses if filed simultaneously may be accompanied by a filing fee in the amount of $40.

History: En. Sec. 18, Ch. 697, L. 1979; amd. Sec. 1, Ch. 253, L. 1981; amd. Sec. 5, Ch. 268, L. 1981.

Compiler’s Comments

1981 Amendments: Chapter 253 deleted “certified” before “copy” in (1)(b) and “or verified as otherwise ordered by the court” at the end of (1)(b).
Chapter 268 inserted "or 85-2-222" after "85-2-221" and substituted "must" for "shall" in (1); added subsection (2).

**Effective Date:** Section 2, Ch. 253, L. 1981, and sec. 11, Ch. 268, L. 1981, provided: "This act is effective on passage and approval." Both acts were approved April 3, 1981.

85-2-226. Abandonment by failure to file claim. The failure to file a claim of an existing right as required by 85-2-221 establishes a conclusive presumption of abandonment of that right.

**History:** En. Sec. 14, Ch. 697, L. 1979.

85-2-227. Claim to constitute prima facie evidence. A claim of an existing right filed in accordance with 85-2-221 constitutes prima facie proof of its content until the issuance of a final decree.

**History:** En. Sec. 15, Ch. 697, L. 1979.

85-2-228 through 85-2-236 reserved.

85-2-231. Preliminary decree. (1) The water judge shall issue a preliminary decree. The preliminary decree shall be based on:
   (a) the statements of claim before the water judge;
   (b) the data submitted by the department;
   (c) the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights; and
   (d) any additional data obtained by the water judge.

The preliminary decree shall be issued within 90 days after the close of the special filing period set out in 85-2-702(3) or as soon thereafter as is reasonably feasible. This section does not prevent the water judge from issuing an interlocutory decree or other temporary decree if such a decree is necessary for the orderly administration of water rights prior to the issuance of a preliminary decree.

(2) A preliminary decree may be issued for any hydrologically interrelated portion of a water division, including but not limited to a basin, subbasin, drainage subdrainage, stream, or single source of supply of water, at a time different from the issuance of other preliminary decrees or portions of the same decree.

(3) The preliminary decree shall contain the information and make the determinations, findings, and conclusions required for the final decree under 85-2-234. The water judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of part 7 that has been approved by the legislature and the tribe or federal agency whether or not it has been ratified by congress.

(4) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary
decree set forth in subsections (1) and (3), and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not so satisfied, he may, at his option, recommit the report to the master with instructions, or modify the report and issue the preliminary decree.

History: En. Secs. 22, 27, Ch. 697, L. 1979; amd. Sec. 6, Ch. 268, L. 1981.

Compiler's Comments

1981 Amendment: Deleted "within a reasonable time after the close of the filing period" at the beginning of (1); inserted subsection (1)(c); added the material beginning with "The preliminary decree shall be issued . . ." in (1)(d); inserted subsection (2); substituted "approved by the legislature and the tribe or federal agency" for "agreed upon by the parties to the compact" in (3).

Effective Date: Section 11, Ch. 268, L. 1981, provided: "This act is effective on passage and approval." Approved April 3, 1981.

Commissioner's Correction: Because of rearrangement of sec. 27, Ch. 697, L. 1979, the Code Commissioner, 1979, added the words "negotiated under the provisions of part 7" to the last sentence in subsection (2).

85-2-321. Availability of preliminary decree. (1) The water judge shall send a copy of the preliminary decree to the department, and the water judge shall serve by mail a notice of availability of the preliminary decree to each person who has filed a claim of existing right, or in the Powder River Basin, to each person who has filed a declaration of an existing right. The water judge shall enclose with the notice an abstract of the disposition of such person's claimed or declared existing right. The notice of availability shall also be served upon those issued or having applied for and not having been denied a beneficial water use permit pursuant to Title 85, chapter 2, part 3, those granted a reservation pursuant to 85-2-316, or other interested persons who request service of the notice from the water judge. The clerk or person designated by the water judge to mail the notice shall make a general certificate of mailing certifying that a copy of the notice has been placed in the United States mail, postage prepaid, addressed to each party required to be served notice of the preliminary decree. Such certificate shall be conclusive evidence of due and legal notice of entry of decree.

(2) Any person may obtain a copy of the preliminary decree upon payment of a fee of $20 or the cost of printing, whichever is greater, to the water judge.

History: En. Sec. 22, Ch. 697, L. 1979.

85-2-322. Hearing on preliminary decree. (1) Upon objection to the preliminary decree by the department, a
person named in the preliminary decree, or any other person, for good cause shown, the department or such person is entitled to a hearing thereon before the water judge.

(2) If a hearing is requested, such request must be filed with the water judge within 90 days after notice of entry of the preliminary decree. The water judge may, for good cause shown, extend this time limit an additional 90 days if application for the extension is made within 90 days after notice of entry of the preliminary decree.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

History: En. Sec. 23, Ch. 697, L. 1979; amd. Sec. 7, Ch. 268, L. 1981.

Compiler's Comments

1281 Amendment: Increased the additional time extension from 30 to 90 days in (2).

85-2-234. Final decree. (1) The water judge shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying the preliminary decree. If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the water judge shall enter it as the final decree.

(2) The final decree shall establish the existing rights and priorities within the water judge's jurisdiction of persons required by 85-2-221 to file a claim for an existing right and of persons required to file a declaration of existing rights in the Powder River Basin pursuant to an order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973.

(3) The final decree shall state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person named in the decree are based.

(4) For each person who is found to have an existing right, the final decree shall state:
(a) the name and post-office address of the owner of the right;
(b) the amount of water, rate, and volume, included in the right;
(c) the date of priority of the right;
(d) the purpose for which the water included in the right is used;
(e) the place of use and a description of the land, if any, to which the right is appurtenant;
(f) the source of the water included in the right;
(g) the place and means of diversion;
(h) the inclusive dates during which the water is used each year;
(i) any other information necessary to fully define the nature and extent of the right.

History: En. Sec. 24, Ch. 697, L. 1979.

85-2-225. Appeals from final decree. A person whose existing rights and priorities are determined in the final decree may appeal the determination only if:
(1) he requested a hearing and appeared and entered objections to the preliminary decree; or
(2) his rights as determined in the preliminary decree were altered as the result of a hearing requested by another person.

History: En. Sec. 24, Ch. 697, L. 1979.

85-2-226. Certificate of water right. When a final decree is entered, the water judge shall send a copy to the department. The department shall on the basis of the final decree issue a certificate of water right to each person decreed an existing right. The original of the certificate shall be sent to the county clerk and recorder of the county where the point of diversion or place of use is located for recordation. The department shall keep a copy of the certificate in its office in Helena. After recordation, the clerk and recorder shall send the certificate to the person to whom the right is decreed.

History: En. Sec. 25, Ch. 697, L. 1979.

85-2-227 through 85-2-240 reserved.

85-2-241. Water right adjudication account. There is established a water right adjudication account in the earmarked revenue fund of the state treasury. All fees collected under this section and 85-2-232 shall be deposited in the account to pay the expenses incurred by the state for administering this part, part 7, and Title 31 chapter 7.

History: En. Sec. 26, Ch. 697, L. 1979.

85-2-242. Expenses to be borne by state. All expenses incurred by the state as a result of this part, part 7, and
Title 3, chapter 7, are to be paid from the water right adjudication account in the earmarked revenue fund established in 85-2-241. Expenses include but are not limited to the salaries and expenses of personnel, equipment, office space, and other necessities incurred in administering this part, part 7, and Title 3, chapter 7. If sufficient revenue is not available from the earmarked revenue fund, the expense shall be paid from the state's general fund.

History: En. Sec. 19, Ch. 697, L. 1979.

85-2-243. Department assistance to water judges. The department, subject to the direction of the water judge, shall, without cost to the judicial districts wholly or partly within his water division:

(1) provide such information and assistance as may be required by the water judge to adjudicate claims of existing rights;

(2) establish information and assistance programs to aid claimants in the filing of claims for existing rights required by 85-2-221;

(3) conduct field investigations of claims that the water judge in consultation with the department determines warrant investigation; and

(4) provide the water judge with all information in its possession bearing upon existing rights, including all declarations filed with and all information gathered by the department with respect to existing rights in the Powder River Basin.

History: En. Sec. 21, Ch. 697, L. 1979.
The NORTHERN CHEYENNE TRIBE
OF the NORTHERN CHEYENNE IN-
DIAN RESERVATION, et al., Plaintiff-
Appellants,

v.

Thomas Ralph ADSIT, et al.,
Defendants-Appellees.

Nos. 79-1887, 80-3028, 80-3032, 80-3038,
80-3040 to 80-3042, 80-3044, 80-3045
and 80-3061 to 80-3063.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 15, 1981.

United States and various Montana In-
dian tribes appealed from order entered by
the United States District Court for the
District of Montana, James F. Battin, Chief
Judge and Paul G. Hatfield, J., 484 F.Supp.
31, dismissing consolidated actions brought to
adjudicate federal and Indian water rights
in Montana in favor of state court proceed-
ings. The Court of Appeals, Ferguson, Cir-
cuit Judge, held that: (1) McCarran Act
does not repeal any of
jurisdiction of federal courts over Indian
water rights, but merely extends United
States' consent to suit in certain cases. De-
partment of Justice Appropriation Act,

2. Indians ⇒ 27(2)
McCarran Act does not grant jurisdic-
tion with respect to Indian water rights;
and thereby repeal state disclaimers, in
state which expressly disclaims jurisdiction
over Indian lands within its constitution
and enabling act. Department of Justice
Appropriation Act, 1953, § 208(a-c), 43 U.S.
676; Mont.Const.Art. 1, § 1.

3. Indians ⇒ 27(2)
In those states which so provide, legis-
latively action alone suffices to repeal consti-
tutional disclaimer of jurisdiction over Indi-
ans. Department of Justice Appropriation

4. Indians ⇒ 27(2)
In enacting section dealing with states
which disclaim jurisdiction over Indians in
public law establishing procedure whereby
states may repeal disclaimers in their con-
stitutions and enabling acts, Congress
meant to remove any federal impediments
to state jurisdiction that may have been
created by an enabling act. Act Aug. 15,
Determination of whether legislative action is sufficient to repeal disclaimer of state jurisdiction over Indians depends upon whether such action is sufficient under law of acting state to amend its constitution. Department of Justice Appropriation Act, 1953, § 208(a-c), 43 U.S.C.A. § 666; Act Aug. 15, 1953, § 6, 67 Stat. 588.


McCarran Act overrides sovereign immunity of United States in comprehensive water rights adjudications and immunity of Indian tribe represented by government in such a proceeding. Department of Justice Appropriation Act, 1953, § 208(a-c), 43 U.S.C.A. § 666.


Valid exercise of state jurisdiction requires that state have both personal and subject-matter jurisdiction.
14. Courts 493(3)

Even if Montana had validly repealed disclaimer language with respect to jurisdiction over Indians in its Constitution, no exceptional circumstances mandated dismissal of consolidated federal court actions brought to adjudicate federal and Indian water rights in Montana in exercise of wise judicial administration where state court litigation had not passed notice stage, state’s comprehensive water consolidation plan was not enacted until four years after first federal suit was filed, there were no findings on comprehensiveness of state court proceeding, and Indian tribe appeared to be necessary party to state court proceeding yet neither Congress nor tribe had consented to suit in state court. 28 U.S.C.A. §§ 1345, 1362; Act Feb. 22, 1889, § 4, 25 Stat. 676; Mont.Const.Art. 1, § 1.

15. Federal Courts 441

Conservation of federal judicial resources is not proper reason for dismissing case from federal courts.

16. Federal Courts 441

Action properly filed in district court is not to be dismissed or referred to state court simply because district court considers itself too busy to try action.

17. Courts 489(1)

Federal Courts 447

Dismissal of action involving Indian water rights in favor of state court proceedings is only required where federal proceeding would be piecemeal and state proceeding is comprehensive; where such is not the case and jurisdiction is concurrent, federal court may not abdicate its judicial obligations. 28 U.S.C.A. §§ 1345, 1362.

18. Indians 27(5)

When United States which, in any state litigation, must represent water rights of all tribes and as those of Bureau of Land Management, United States Forest Service, and other federal entities, is faced with conflict among such interests, its representation of Indians is inadequate. 28 U.S.C.A. §§ 1345, 1362.

19. Indians 27(5)

McCarran Act is complied with only when inclusion of United States as necessary party to action involving Indian water rights will provide complete adjudication of all issues. Department of Justice Appropriation Act, 1953, § 208(a-c), 43 U.S.C.A. § 666.

20. Indians 27(1)

Without express waiver of sovereign immunity, Indian tribe cannot be sued.

Appeal from the United States District Court for the District of Montana.

Before MERRILL, CHOY and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

The United States government and various Montana Indian tribes appeal the dismissal of consolidated actions brought to adjudicate federal and Indian water rights in Montana. The federal court actions were dismissed in favor of state court proceedings. Dismissal was predicated on the Supreme Court's decision in Colorado River Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (hereinafter "Akin"). Because Akin was erroneously applied to the facts of the Montana litigation, we reverse.
PROCEDURAL HISTORY.

In January, 1975, the Northern Cheyenne Tribe brought suit in United States District Court for the District of Montana to adjudicate water rights in the Tongue River and Rosebud Creek in Montana. Jurisdiction was alleged under 28 U.S.C. § 1362. In March, 1975, the United States brought suit pursuant to 28 U.S.C. § 1345 for the same purpose, in its own right and as fiduciary on behalf of the Northern Cheyenne and other reservation tribes. In July, 1975, the Montana Department of Natural Resources and Conservation ("DNR") filed petitions in state court for a determination of all existing rights to those waters in accordance with existing state law.

In August, 1975, the United States brought suit in the district court on behalf of the Crow Tribe. Judge Battin consolidated the cases and stayed proceedings in February, 1976, pending the Supreme Court's decision in Akin. The State of Montana, a defendant in those cases, moved to dismiss as a result of that decision. At the same time, the Crow Tribe moved to intervene. Both motions were argued in the summer of 1976.

In February, 1979, the federal government and the tribes moved for expedited consideration. In April, 1979, the United States filed more actions in the district court seeking a declaration of water rights on behalf of the United States and four additional tribes.

On May 11, 1979, an amended state water consolidation plan, Montana Senate Bill 76, took effect. The Montana Supreme Court ordered implementation and authorized the DNR to notify relevant parties in June, 1979.

In July, 1979, Judge Hatfield stayed the federal actions initiated in 1979. In November of that year, Judges Battin and Hatfield issued a joint opinion dismissing all federal actions as an exercise of "wise judicial administration" as outlined in Akin. Northern Cheyenne Tribe v. Tongue River Water Users, 484 F.Supp. 31 (D.C.Mont. 1979).

The United States and the Indian tribes appeal that dismissal, arguing that it is predicated on an erroneous application of Akin. They maintain that because the Montana constitution and enabling act contain disclaimers of jurisdiction over Indian tribes, the litigation in that state differs from the Colorado litigation which was the subject of Akin. Further, they argue that the specific factors underlying the Akin decision are not present in the Montana litigation and that the contrast requires retention of federal jurisdiction.

II. THE DISCLAIMER ISSUE.

A. Jurisdiction over Indian Water Rights.


1. 28 U.S.C. § 1362 provides:

   The district courts shall have original jurisdiction of all civil actions brought by any Indian tribe ... wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

2. 28 U.S.C. § 1345 provides:

   [T]he district courts shall have original jurisdiction of all civil actions or proceedings commenced by the United States, or by any agency or officer thereof ....
have consistently exercised jurisdiction over Indians on reservations, Minnesota v. United States, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939), unless jurisdiction is explicitly granted to the states by congressional statute. Fisher v. District Court of Montana, 424 U.S. 382, 388, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976). Congress has granted state courts jurisdiction over Indian rights with respect to various criminal and civil matters, but in each grant, jurisdiction over Indian water rights has been specifically excluded. 28 U.S.C. § 1360(b); 18 U.S.C. § 1162(b); 25 U.S.C. § 1322.3

[1] In 1952, Congress passed the McCarran Amendment, 43 U.S.C. § 666, granting state courts jurisdiction over the United States when litigation involves comprehensive adjudication of water rights and the United States is a necessary party.

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. § 666(a). The Act does not mention Indians or reservations. It is limited to waiving the sovereign immunity of the federal government with respect to water rights acquired "by . . . appropriation or otherwise." In no way does the McCarran Act repeal any of the jurisdiction of the federal courts. The Act merely extends the United States' consent to suit in certain cases.

In 1976, the Supreme Court interpreted the McCarran Amendment as a grant of jurisdiction over water rights of Indian tribes when the right is asserted by the federal government as a fiduciary. Colorado River Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (Akin). When the United States is a party to a proceeding involving these rights, the Court held that the ability of the state to assert jurisdiction over the federal government implicitly allows jurisdiction over the rights of tribes that, without the McCarran Act, would have been immunized by federal statutes against suits in state court.

In a crucial footnote, the Court noted the restrictions on jurisdiction over Indian water rights provided in 25 U.S.C. § 1322(b) and 28 U.S.C. § 1360(b).4 Id. at 812, n.20, 96 S.Ct. at 1244, n.20. The Court, however, held that limiting language in those sections only qualifies the import of the general consent to state jurisdiction given by those sections; the language does not purport to limit the special consent to jurisdiction given by the McCarran Amendment.

3. Each statutory section states:

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States . . . .

(Emphasis supplied).

Sections 25 U.S.C. 1322(b) (alienation, encumbrance, taxation, use, and probate of property) and § 1360(b) (state civil jurisdiction in actions to which Indians are parties) further provide that nothing in these sections shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

4. See footnote 3, supra.
Accordingly, the Court dismissed the federal proceeding in favor of the comprehensive ongoing state proceeding.


[2] The Montana litigation raises a question not at issue in Akin. In a state which, unlike Colorado, expressly disclaims jurisdiction over Indian land within its constitution and enabling act, does the McCarran Act grant jurisdiction and thereby repeal the state disclaimers? We hold that it does not.

Montana was admitted to statehood in 1889 on condition that it disclaim right and title to jurisdiction over Indian lands. Montana's enabling act provides that the state "disclaim[s] all right and title to the unappropriated public lands ... owned or held by any Indian or Indian tribes ..." 25 Stat. 676 (1889). The disclaimer of title in the enabling act is reinforced by the disclaimer of jurisdiction in the Montana Constitution that specifically provides, "all land owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the United States ..." Art. I, Mont. Const. 1972.


Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.


[3-5] The Supreme Court held that the 1953 legislation allows assumption of jurisdiction in disclaimer states by legislative action. Yakima, supra, 439 U.S. at 484, 99 S.Ct. at 753. Federal law does not prescribe "the manner in which the States are to modify their organic legislation." Id. Accordingly, in those states which so provide, legislative action alone suffices to repeal the constitutional disclaimer of jurisdiction over Indians. Id. Furthermore, in enacting § 6, Congress meant to remove any federal impediments to state jurisdiction that may have been created by an enabling act. Id. at 488, 99 S.Ct. at 755. Hence, the determination of whether legislative action is sufficient to repeal a disclaimer depends on whether such action is sufficient under the law of the acting state to amend its constitution. Id. at 493, 99 S.Ct. at 757.
[6] Public Law 280 was amended in 1968 to provide "that States that have not extended criminal or civil jurisdiction to Indian country can make future extensions only with the consent of the tribes affected." 25 U.S.C. §§ 1321(a), 1322(a). See Yakima, supra, at 494, n.40, 99 S.Ct. at 758, n.40. Hence, after 1968, a state may repeal a disclaimer of jurisdiction over reservation Indians only with the consent of the affected tribes. In addition, the scope of consent is limited to the same jurisdiction provided automatic transfer states, i.e., § 7 states. 25 U.S.C. § 1322.

C. Analytic Framework.

[7,8] The McCarran Act overrides sovereign immunity of the United States in comprehensive water rights adjudications and the immunity of an Indian tribe represented by the government in such a proceeding. It cannot be read to amend a state constitution disclaiming subject matter jurisdiction over such matters.

[9] A valid exercise of state jurisdiction requires that the state have both personal and subject matter jurisdiction. Via the McCarran Act, the United States has waived sovereign immunity from suit in certain cases involving water rights. In Akin, this waiver of sovereign immunity operated to give Colorado personal jurisdiction over the United States and implicitly allowed jurisdiction over the rights of otherwise immune Indian tribes in circumstances where the state had subject matter jurisdiction. However, when a state has chosen to disclaim subject matter jurisdiction over Indian water rights, the combination of jurisdictional prerequisites necessary for a state court to hear a challenge to Indian water rights would appear to be lacking.

[10-12] The appearance that subject matter jurisdiction is lacking in a state court in a disclaimer state would only be defeated by a finding that the disclaimer had been validly repealed. In order to make such a finding, a court must first determine whether the Montana water consolidation plan acts as a legislative repeal of the constitutional disclaimer of jurisdiction. Washington v. Yakima, supra. Second, it must determine whether such repeal required tribal consent as provided in the 1968 amendment to Public Law 280. Only if the Montana water legislation is determined to constitute a legislative repeal within the requirements of the federal law will the McCarran Act's grant of personal jurisdiction over the United States, acting as trustee for Indian water rights, furnish the state court with the requisite personal and subject matter jurisdiction. Only if a legislative repeal is found and the state has subject matter jurisdiction need one consult the waiver of immunity provisions of the McCarran Act and consequently the terms of Akin.

The district court made no such analysis. Instead, it determined that the disclaimer/non-disclaimer distinction was inconsequential to Congress in passing the McCarran Act. This conclusion cannot be accepted when viewed in light of the specific attention paid to the disclaimer/non-disclaimer distinction in P.L. 280 by Congress only a year after it passed the McCarran Act.

The district court's decision would rob the disclaimer/non-disclaimer distinction made by Congress of all significance and meaning, and would deprive the 1968 Amendment to P.L. 280, which requires tribal consent to a repeal of the disclaimer, of any
effect. Accordingly, the district court's basis for decision was erroneous.

In so holding, we decline to follow the Tenth Circuit's decision in *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.), cert. denied, 444 U.S. 955, 100 S.Ct. 530, 62 L.Ed.2d 426 (1979). *Jicarilla*, in considering the precise issue raised here, refused to recognize the distinction between states with constitutional disclaimers and those without. For the reasons noted above, we believe that recognition of this distinction is crucial deciding the jurisdiction issue.

Except for *Jicarilla*, with which we expressly disagree, no case brought to our attention permits a disclaimer state to adjudicate a challenge directed against Indian water rights. Construing the Montana enabling act, *Draper v. United States*, 164 U.S. 240, 247, 17 S.Ct. 107, 109, 41 L.Ed. 419 (1896), merely held that the disclaimer in Montana's enabling act did not deprive that state of power to punish for crimes committed on a reservation or Indian lands by non-Indians.

*Williams v. Lee*, 358 U.S. 217, 218, 223, 79 S.Ct. 269, 269, 273, 3 L.Ed.2d 251 (1958), held that the State of Arizona, which expressly disclaimed jurisdiction over Indian lands, did not have jurisdiction over an action brought by a non-Indian in state court to collect a debt against an Indian and his wife. At issue in *Williams* was whether the case should be heard in tribal or state court. In holding that the case must be heard in tribal court, *Williams* explained that state jurisdiction would interfere with essential tribal relations. In the present case, the choice is between federal court and state court, not between state and tribal court; although essential tribal relations may not be involved, essential Indian rights to water, basic to the survival of tribes, are certainly at stake. An observation in *Williams* is relevant to this case. "Through conquest and treaties [Indian tribes] were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land." *Id.* at 218, 79 S.Ct. at 269. Were the State to expressly disclaim jurisdiction and the federal courts to give up their protective jurisdiction over Indian lands, including water rights, the Indians would seem deprived of the benefit of the original bargain that they were driven to make. Of course, by general statute, Congress later expressed its willingness to have any state assume jurisdiction over reservation Indians if the state legislature or the people voted affirmatively to accept such responsibility. *Id.* at 222, 79 S.Ct. at 271. To date, Montana does not appear to have accepted such responsibility.

In passing, we note that *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 179, 180, 93 S.Ct. 1257, 1266, 36 L.Ed.2d 129 (1972) (holding that Arizona could not impose an income tax on reservation Indians), has expressly limited the application of the *Williams* tribal self-government test to certain circumstances:

It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. [citations omitted]. In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

The problem posed by this case is completely different. Since appellant is an Indian and since her income is derived
wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves. Appellee cites us to no cases holding that this legislation may be ignored simply because tribal self-government has not been infringed.

Similarly, in the present case, we do not believe that the enabling act, the Montana constitution, P.L. 280, and its 1968 amendment can be overlooked simply because tribal self-government has not been infringed. Unlike Williams, but like McClanahan, the present case is not one that presents as a central issue, a choice between tribal and state jurisdiction; therefore, the Williams test has no application whatsoever to the present situation.

Kake Village v. Egan, 369 U.S. 60, 75, 82 S.Ct. 562, 570, 7 L.Ed.2d 573 (1962), held that a disclaimer state could regulate the fishing of off-reservation Indians by enforcing against non-reservation Indians a state statute forbidding the use of salmon traps. Referring to Kake, White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1280 (9th Cir. 1981), which held that a disclaimer state is not precluded from imposing fishing and hunting license fees on non-Indians on a reservation, noted that the enabling acts do not force states to disclaim governmental or regulatory authority over Indian lands. We believe that Jicarilla, supra, went too far by relying on the distinction between proprietary and governmental functions drawn in Kake and White Mountain Apache Tribe. All that the latter two cases recognize is that a state may have a strong governmental interest that empowers it to regulate certain limited conduct concerning non-reservation Indians or non-Indians on reservations. Neither Kake nor White Mountain Apache Tribe permits a state court to decide how much water reservation Indians may take for use on their reservations.

[13] The present case is not about fishing traps or licenses. More is at stake here than the mere power of a state legislature to regulate the use of fishing traps, where the power to regulate may have a secondary effect on Indian fishing rights; instead, the right of Indians to the water itself is at issue. The power of a court in a disclaimer state to enforce a regulatory statute that may adversely affect Indians falls far short of the power to adjudicate a direct challenge to Indian water rights and to the waters of streams. A disclaimer state cannot assert jurisdiction over such matters until Indian sovereign immunity has been waived and the state has repealed its disclaimer. Unless the state effectively repeals its disclaimer, it cannot hear this matter.

III. THE AKIN FACTORS.

[14] Even if we were to find that Montana had validly repealed the disclaimer language in its constitution, we would nonetheless be compelled to reverse the decision below. The limited factual circumstances of Akin prevent its application to the Montana litigation. Noting the virtually unflagging obligation of the federal courts to retain jurisdiction, the Akin Court held that principles of "wise judicial administration," Akin, supra, at 817, 96 S.Ct. at 1246, required dismissal given the "exceptional circumstances" of that case. Id. at 818, 96 S.Ct. at 1246. In the instant case, no exceptional circumstances mandate dismissal in the exercise of wise judicial administration.

The "exceptional circumstances" requiring dismissal in Akin included the follow-
The Court noted in its decision (a) the apparent absence of any proceedings in the district court other than the filing of the complaint, (b) the extensive involvement of the state and state water rights, (c) the inconvenience of the federal forum's 300-mile distance from the location of the dispute and (d) the existing participation by the Government in the state proceeding. Id. at 820, 96 S.Ct. at 1247. Further, it noted that the federal forum must defer to the state where both have concurrent jurisdiction and the state action preceded the federal.

In limiting its holding, the Court stated: "[W]e do not overlook the heavy obligation to exercise jurisdiction. We need not decide ... whether, despite the McCarran Amendment, dismissal would be warranted if more extensive proceedings had occurred, ... if the involvement of state water rights were less extensive ... or if the state proceedings were in some respect inadequate to resolve the federal claims..." id. at 820, 96 S.Ct. at 1247. Further, it noted that the federal forum must defer to the state where both have concurrent jurisdiction and the state action preceded the federal.

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[15, 16] Before considering the factors discussed in Akin, we note that under the heading "wise judicial administration," the district court included limited federal resources as a reason for leaving adjudication to the state courts. Northern Cheyenne Tribe, supra, at 36. It is a well established point, however, that conservation of federal judicial resources is not a proper reason for dismissing a case from the federal courts. An action properly filed in district court is not to be dismissed or referred to state court simply because the district court considers itself too busy to try the action. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 326, 344, 96 S.Ct. 584, 589, 46 L.Ed.2d 542 (1975). Shortages of judicial manpower are indeed unfortunate where they occur; however, it is not wise judicial administration for a federal court to shirk its responsibility to hear federal questions just because the court may not be able to dispatch the case as quickly as it may want to.

A. Stage of the Proceedings.

Akin involved a completed proceeding which had been in the adjudication process for years. Furthermore, the federal action in Akin involved only one section of the state; the United States was already a party in state proceedings in other water divisions. Finally, Akin did not involve allegations that the United States would be subject to conflicts of interest in representing its varied interests along with tribal interests.

In contrast, the Montana state court litigation has not passed the notice stage. The comprehensive plan envisioned by Montana...
was not enacted until four years after the first federal suit was filed. Claims to all water rights under the plan will not be complete until 1982. In addition, though the federal litigation is no further along than the state litigation, the district courts stayed proceedings, apparently awaiting the state legislation.

B. Comprehensiveness.

Akin involved a truly comprehensive proceeding in state court with a concurrent piecemeal proceeding in federal court. Montana claims that a federal proceeding in the Montana case will be piecemeal because the federal courts have been unable to obtain jurisdiction over all defendants due to the in personam nature of the case. Further, Montana points out that the federal proceeding excludes the Missouri River and other important water bodies within the state. The federal action is limited to claims in which the United States owns a reserved water right. As to the actions that took place, the state claims that federal notice to affected parties was inadequate.

The Tribes counter that the state proceeding will be piecemeal because Indian allottees may not be joined. They also claim that the state proceeding is inadequate as it adjudicates only claims accruing after 1973 and excludes claims for livestock purposes. The state asserts that the exempted water rights involve a minimal amount of water. The district court does not explain the basis for its conclusion on the issue of comprehensiveness; nor did it make findings regarding the Tribe's claims.

C. The Race to the Court.

In Akin, state proceedings were ongoing when the federal action was filed. In Montana, the federal proceeding was the predecessor. This factor is not determinative, however, as both proceedings are in their infancy.

D. Forum Non Conveniens.

Akin relied on factors suggestive of a forum non conveniens analysis. Distance was a major consideration as the federal proceeding was 800 miles from the water district in question. The court relied on difficulty to the parties in travelling to the location. That factor is not present in this case to encourage dismissal.

E. Conflicts of Interest.

[18] In any state litigation, the United States must represent the water rights of all tribes as well as those of the Bureau of Land Management, the U. S. Forest Service, and other federal entities. The United States and the Tribes argue that conflicts among these interests would prevent the United States from representing them adequately. When the United States is faced with such a conflict, its representation of Indians is inadequate. Manygoats v. Kleppe, 558 F.2d 556, 558 (9th Cir. 1972). Hence, the United States and the Tribes claim the Indians would be necessary parties over whom the state court has no jurisdiction.
[19] The Tribes further argue that the result in Akin was limited to a situation in which the United States could effectively represent all of its diverse rights because of the limited scope of the proceeding. In contrast, the Montana litigation involves all water rights in the state. The McCarran Act is complied with only when the inclusion of the United States as a necessary party will provide complete adjudication of all issues. Akin, supra, at 819, 96 S.Ct. at 1247.

[20] The state, relying on Jicarilla, argues that the Indians' right to intervene in court proceedings sufficiently protects their interests. However, we are reluctant to follow Jicarilla on this point for two reasons. First, it is unclear that the tribes have a right to intervene; if the state has disclaimed personal jurisdiction over the Indians, then they may not have that right. Whether the state disclaimer provisions reach so far is a question of state law that we need not and do not reach. Second, apart from any possible state disclaimer of personal jurisdiction, Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers; without express waiver of sovereign immunity, an Indian tribe cannot be sued. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 1676-1677, 56 L.Ed.2d 106 (1979).

In the present case, the Indian tribe appears to be a necessary party to the state court proceeding, yet neither Congress nor the Tribe has consented to such a suit in state court. Under these circumstances, where the sovereign immunity of the Tribe has not been waived, and there is a conflict of interest between the Tribe and the United States, the Tribe could only protect its rights by intervening, at the expense of its basic right to sovereign immunity. We will not put the Tribe to this Hobson's choice.

Thus, the instant case is unlike the Akin case, in which the Tribe was not a necessary party and the United States, as trustee to the Indians' water rights, could apparently act as trustee without conflict of interest. Our examination of this conflicts factor leads us to conclude that it would not be wise or appropriate for the federal court to give up its traditional jurisdiction and defer to the state court in this case.


The Montana litigation involves petitions by Indian tribes pursuant to 28 U.S.C. § 1362. That section, enacted in 1966, authorizes suits by tribes in federal courts without the $10,000 amount in controversy requirement.

In Akin, the Supreme Court dismissed a suit brought by the federal government pursuant to 28 U.S.C. § 1345, authorizing the United States to sue in federal court. The Court declined to decide whether dismissal would have been appropriate had suit been brought by a private party. 424 U.S. at 820, n.26, 96 S.Ct. at 1247, n.26.

If this court were to further extend Akin in the Montana case to a suit brought by an Indian tribe, the result could prevent Indians from fully litigating their rights to water in federal court. Each time a tribe sued in federal court, the state need only join the United States as a party to obtain dismissal of the federal action. It is contrary to all reason to permit the states to frustrate federal jurisdiction merely by joining the United States as a party.

IV. CONCLUSION.

The Supreme Court has expressly and repeatedly noted the obligation of federal
courts to retain jurisdiction in all but the most exceptional of circumstances.

The circumstances of the Montana litigation are sufficiently distinct from the factors warranting exceptional treatment in Akin. The conflicts of interest present, the embryonic stage of state and federal proceedings, and the procedural status of the Montana case favor retention of federal jurisdiction. Accordingly, we reverse.

V. THE CROW TRIBE APPEAL.

The Crow Tribe moved to intervene in the district court. The district court refused to rule on the motion, instead dismissing the action with the rest. To the extent that the court's action was a de facto denial of the motion, the tribe should be permitted to intervene in the interest of avoiding piece-meal litigation.

The judgment of the district court is REVERSED.

MERRILL, Circuit Judge, dissenting:

I dissent from the Court's holding that the disclaimer clauses in the Montana Statehood Act and in the State Constitution deprive the state courts of jurisdiction to establish and adjudicate reserved water rights of the United States held by it in trust for the Indians. On this issue I agree with Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir.), cert. denied, 444 U.S. 995, 100 S.Ct. 530, 62 L.Ed.2d 426 (1979).

The disclaimer clauses disclaim all right and title to Indian lands. But no one here lays any claim to Indian lands or water rights. The Statehood Act disclaimer provides that Indian lands "shall be and remain subject to the disposition of the United States, and * * * shall remain under the absolute jurisdiction and control of the Congress of the United States." 25 Stat. 676 (1889). But no one here disputes that Congress has always had jurisdiction and control over land owned by the United States and held by it in trust for Indians and that such lands always remained subject to disposition by Congress. Indeed, in enacting the McCarran Amendment, 43 U.S.C. § 666, Congress exercised its plenary control over Indian lands to authorize the states to adjudicate, as part of general stream adjudications, the federal reserved water rights of Indians. See Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) ("Akin"). The sole question then, as I see it, is whether the language "absolute jurisdiction and control of the Congress" is to be construed to mean exclusive jurisdiction of the federal courts in all suits involving Indian lands or property rights. In holding that is not the meaning to be attributed to the language, Jicarilla followed Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), where the Supreme Court held to that effect.

In that case, under the Alaska Statehood Act, the United States retained "absolute jurisdiction and control" over Indian property. The property in question was Indian fishing rights and the issue was the right of Alaska to regulate the Indian use of salmon traps. Speaking for the Court, Justice Frankfurter concluded from the Court's decisions in Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1946), and Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896), that "absolute federal jurisdiction is not invariably exclusive jurisdiction." 369 U.S. at 68, 82 S.Ct. at 567. "[A]n examination of past decisions makes clear," he wrote, "that the words 'absolute jurisdiction and control' are not intended to oust the State complete-
ly from regulation of Indian 'property (including fishing rights)." Id. at 71, 82 S.Ct. at 568. He concluded, "These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." Id. at 75, 82 S.Ct. at 570.

To the same effect is this Court's recent decision in White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981). We there cited the Organized Village of Kake and Jicarilla decisions for the proposition that the "Enabling Acts themselves forced states to disclaim only their proprietary interest in Indian land, not the states' governmental or regulatory authority over that land." 649 F.2d at 1280.

If the disclaimers are no bar to state regulation of Indian property rights where those rights confront legitimate state interests, the McCarran Amendment, as discussed in Akin, makes it clear that state courts are vested with jurisdiction in the adjudication of Indian water rights.

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), is not to the contrary. There, in holding that Arizona was without jurisdiction to impose on reservation Indians a tax on income derived from reservation sources, the Supreme Court described the tribal interest at issue as "totally within the sphere which the relevant treaty and statute leave for the Federal Government and for the Indians themselves." Id. at 179-180, 93 S.Ct. at 1266. Here, in stark contrast, the McCarran Amendment actually authorizes the states to adjudicate as part of comprehensive stream adjudications the federal reserved water rights of Indians. "The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights..." Akin, supra, 424 U.S. at 819, 96 S.Ct. at 1247.

Further I dissent from the Court's holding that wise judicial administration, as that term is used in Akin, does not call for dismissal of the federal suits. The district court dealt at length with the special circumstances presented by this case, taking note of Montana's detailed water use legislation. See 484 F.Supp. at 55-56. Pursuant to that legislation, the Montana Supreme Court has filed an order requiring all persons claiming a water right within the state to file a statement of that claim with the State Department of Natural Resources and Conservation. These claims will be referred to water judges appointed in each of the state's four water divisions who shall enter a preliminary, and after an opportunity for hearing, a final comprehensive water decree.

The district court concluded:

It is clear that the adjudication contemplated by the Bill is both comprehensive and efficient. As the general adjudication has been initiated by recent order of the Montana Supreme Court, it would seem that the greater wisdom lies in following Colorado River, and, on the basis of wise judicial administration, deferring to the comprehensive state proceedings. The federal proceedings are all in their infancy; service of process has been but recently completed. The state proceedings are thorough, as opposed to the piecemeal proceedings initiated by the Government. There is no jurisdictional question preliminarily attending the state adjudication; all such questions have been eliminated by the McCarran Amendment. The state forum will likely be more con-
venient, geographically, than the federal forum. The amount of time contemplated for completion of the state adjudication is significantly less than would be necessary for federal adjudication, insofar as the state has provided a special court system solely devoted to water rights adjudication. The federal judicial resources in Montana are limited; continued exercise of federal jurisdiction over the pending adjudications would either exhaust or severely deplete those resources for a substantial number of years, just by virtue of the number of parties involved. (In these cases, there are approximately 9,000 defendants.) The possibility of conflicting adjudications by the concurrent forums also looms large and could be partially avoided only by staying the pending state adjudication, an action Colorado River has intimated is distinctly repugnant to a clear state policy and purpose.

484 F.Supp. at 36. Accordingly, “on the basis of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,” the court ordered the cases dismissed. Id.

I agree with the district court. Water adjudication is essentially a local concern, and in every western state water scarcity poses a problem not just to Indians but to everyone. In my view, it is highly important that each state be accorded room for an effort to solve its water scarcity problem in the manner it regards as most appropriate. Here so long as Montana gives recognition to Indian water rights and their establishment pursuant to federal law, I see no good reason why Indians should not be joined with all other water users in the state in order to achieve a comprehensive state adjudication.

I would affirm.
**APPENDIX E**

25-2-1-. **Reservation of Waters.**

1. The state or any political subdivision or agency thereof or the United States or any agency thereof may apply to the board to reserve waters for existing or future beneficial uses or to maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates.

2. Upon receiving an application, the department shall proceed in accordance with 25-2-307 through 25-2-309. After the hearing provided in 25-2-309, the board shall decide whether to reserve the water for the applicant. The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, shall be paid by the applicant. In addition, a reasonable proportion of the department's cost of preparing an environmental impact statement shall be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.

3. The board may not adopt an order reserving water unless the applicant establishes to the satisfaction of the board:

   a. the purpose of the reservation;
   b. the need for the reservation;
   c. the amount of water necessary for the purpose of the reservation;
   d. that the reservation is in the public interest.

4. If the purpose of the reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the board that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan.

5. The board shall limit any reservations after May 9, 1979, for maintenance of minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of the average annual flow of record on gauged streams. Ungauged streams can be allocated at the discretion of the board.

6. After the adoption of an order reserving waters, the department may reject an application and refuse a permit for the appropriation of reserved waters or may, with the approval of the board, issue the permit subject to such terms and conditions it considers necessary for the protection of the objectives of the reservation.

7. Any person desiring to use water reserved to a conservation district for agricultural purposes shall make application for such use with the district, and the district
upon approval of the application must inform the department of the approved use. The department shall maintain records of all uses of water reserved to conservation districts and be responsible, when requested by the districts, for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of such applications for the conservation districts. The department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts within 12 months of the time the request was made. The board shall extend the time allowed to develop a plan identifying projects for utilizing a district's reservation so long as the conservation district makes a good faith effort, within its staffing and budget limitations, to develop a plan.

(8) A reservation under this section shall date from the date the order reserving the water is adopted by the board and shall not adversely affect any rights in existence at that time.

(9) The board shall, periodically but at least once every 10 years, review existing reservations to ensure that the objectives of the reservation are being met. Where the objectives of the reservation are not being met, the board may extend, revoke or modify the reservation.

(10) The board may modify an existing or future order originally adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water, so as to reallocate such reservation or portion thereof to an applicant who is a qualified reservant under this section. Reallocation of reserved water may be made by the board following notice and hearing wherein the board finds that all or part of the reservation is not required for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need shown by the original reservant. Reallocation of reserved water shall not adversely affect the priority date of the reservation, and the reservation shall retain its priority date despite reallocation to a different entity for a different use. The board may not reallocate water reserved under this section on any stream or river more frequently than once every 5 years.

(11) Nothing in this section vests the board with the authority to alter a water right that is not a reservation.

History: En. Sec. 26, Ch. 452, L. 1973; amd. Sec. 11, Ch. 485, L. 1975; amd. Sec. 7, Ch. 416, L. 1977; R.C.M. 1947, 89-890; amd. Sec. 1, Ch. 639, L. 1979; amd. Sec. 1, Ch. 186, L. 1981; amd. Sec. 6, Ch. 357, L. 1981.

Compiler's Comments

1981 Amendments: Chapter 186 inserted "when requested by the districts" before "for rendering technical and administrative assistance" in (7); inserted "preparation and" before "processing of such applications" in the middle of (7); added last two sentences of (7).

Chapter 357 added the last sentence of (2).
APPENDIX F

Part 6

Yellowstone River Basin

85-2-601. Statement of legislative findings and policy. The legislature, noting that appropriations have been claimed, that applications have been filed for, and that there is further widespread interest in making substantial appropriations of water in the Yellowstone River basin, finds that these appropriations threaten the depletion of Montana's water resources to the significant detriment of existing and projected agricultural, municipal, recreational, and other uses and of wildlife and aquatic habitat. The legislature further finds that these appropriations foreclose the options to the people of this state to utilize water for other future beneficial purposes, including municipal water supplies, irrigation systems, and
minimum flows for the protection of existing rights and aquatic life. The legislature, pursuant to its mandate and authority under Article IX of the Montana constitution, declares that it is the policy of this state that before these proposed appropriations are acted upon, existing rights to water in the Yellowstone basin must be accurately determined for their protection and that reservations of water within the basin must be established as rapidly as possible for the preservation and protection of existing and future beneficial uses.

History: En. 89-8-103 by Sec. 1, Ch. 116, L. 1974; R.C.M. 1947, 89-8-103.

85-2-602. Definitions. Unless the context clearly requires otherwise, in this part the following definitions apply:

(1) (a) "Application" means an application for a permit under part 3 of this chapter to appropriate surface water from any source of supply within the basin for either or both of the following purposes:
   (i) a reservoir with a total planned capacity of 14,030 acre-feet or more; or
   (ii) for a flow rate greater than 20 cubic feet of water per second.
   (b) The term also includes an application for approval under 85-2-402 to change the purpose of use.
(2) "Basin" means the Yellowstone River basin.
(3) "Reservation" means a reservation of water provided for by 85-2-316.

History: En. 89-8-104 by Sec. 2, Ch. 116, L. 1974; R.C.M. 1947, 89-8-104(Intro.), (2) thru (4).

85-2-603. Suspension of action. (1) The department may not grant or otherwise take any action on an application until one of the following first occurs:
   (a) The board of natural resources and conservation makes a final determination on the applications for reservations of water in the basin filed before January 1, 1977, in accordance with 85-2-316;
   (b) A final determination of existing rights has been made in the source of supply in accordance with part 2 of this chapter; or
   (c) January 1, 1978; however, if a court stays or enjoins the continuance of proceedings on any pending application for reservation of water in the basin filed before January 1, 1977, and such stay or injunction prevents the board from making a final determination on such application before January 1, 1978, the court shall extend this date by the length of delay incurred. The court may not extend this date beyond January 15, 1979.
   (2) A reservation established before such application for permit is granted is a preferred use over the right to appropriate water pursuant to the permit, and the permit, if granted, shall be issued subject to that preferred use.
85-2-604. When department may suspend action. The department may suspend action on applications not meeting the definition of application in 85-2-602 if it determines, after a public hearing conducted under the contested case procedures of the Montana Administrative Procedure Act, that the cumulative impact of those applications, if granted, would be contrary to the policies and purposes of this part. If the department suspends action on such applications, the provisions of 85-2-603 apply.

85-2-605. Reservations. The department may apply for reservations and shall, as rapidly as possible, assist other appropriate state agencies and political subdivisions in applying for reservations within the basin. The United States or any agency thereof may apply for reservation of water in the basin under 85-2-316 for beneficial use of that water in the state of Montana. Particular emphasis shall be given to applications to reserve water for agricultural, municipal, and minimum flow purposes for the protection of existing rights and aquatic life.

85-2-606. Application of part. This part applies to applications currently pending with the department, as well as applications filed with the department after March 11, 1974.

85-2-607. Utility facilities. This part does not apply to applications to appropriate water for use by a utility facility for which a certificate of environmental compatibility and public need is granted pursuant to the Montana Major Facility Siting Act.

85-2-608. Certain changes of use allowed. Notwithstanding any provision of this part, the department may approve a change of purpose of use to agricultural, irrigation, domestic, and municipal uses if it determines that the change is not contrary to the policies and purposes of this part.
TABLE C. MAJOR INDUSTRIAL APPLICATIONS FOR YELLOWSTONE BASIN WATER SUSPENDED BY THE YELLOWSTONE MORATORIUM

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Source</th>
<th>Appropriation Request</th>
<th>Proposed Uses</th>
<th>Estimated Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Utah International, Inc. No. 1004-s423</td>
<td>Powder River</td>
<td>400 cfs up to 106,730 af/y with offstream storage on Fence Creek</td>
<td>82,705 acre-feet, industrial, 2,090 acre-feet, municipal, 7,610 acre-feet, irrigation and reclamation, 14,325 acre-feet, fish and wildlife</td>
<td>$38 million</td>
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<tr>
<td>Montana Storage Company No. 1205-s42C</td>
<td>Tongue River</td>
<td>675 cfs up to 130,000 af/y offstream storage on Lay Creek and 55 cfs up to 40,000 af/y direct diversion</td>
<td>Rent, sale or distribution for industrial, domestic, wildlife, municipal, agricultural, and recreational uses</td>
<td>$10.3 million</td>
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<tr>
<td>Water Reserve Company No. 1271-s42C</td>
<td>Tongue River</td>
<td>500 cfs up to 91,000 af/y offstream storage on Squaw Creek and Mill Creek and 50 cfs up to 36,200 af/y direct diversion</td>
<td>Rent, sale, or distribution for industrial, agricultural, domestic, municipal, fish and wildlife, and recreational uses</td>
<td>$12.5 million</td>
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<tr>
<td>Getty Oil Company No. 1391-s42M</td>
<td>Yellowstone River</td>
<td>250 cfs up to 32,000 af/y offstream storage on Thirteenmile Creek and 89.2 cfs up to 60,000 af/y direct diversion</td>
<td>Industrial, municipal, irrigation, domestic, recreational, and fish and wildlife uses</td>
<td>$4 million</td>
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<tr>
<td>Applicant</td>
<td>Source</td>
<td>Appropriation Request</td>
<td>Proposed Uses</td>
<td>Estimated Cost</td>
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<td>---------------------------------</td>
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<tr>
<td>Mobil Oil Company No. 5440-s42M</td>
<td>Yellowstone River</td>
<td>60 cfs direct diversion up to 35,000 af/y (conversion of native 1) or 400 cfs peak coal to synthetic fuels and af/y for offstream storage byproducts) (alternative 2)</td>
<td>Industrial uses</td>
<td>$31.1 million</td>
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<td>Sec. 35, T. 19N., R. 57E.</td>
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<td></td>
<td>Richland County, MT</td>
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<tr>
<td>Intake Water Company No. 3763-s42J</td>
<td>Powder River</td>
<td>564,400 af/y for mainstem storage</td>
<td>245,000 acre-feet, $35.7 million industrial</td>
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<td></td>
<td>Sec. 19, T. 9S., R. 48E.,</td>
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<td>35,000 acre-feet, municipal</td>
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<td></td>
<td>Powder River County, MT</td>
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<td>30,700 acre-feet, irrigation</td>
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<td></td>
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<td></td>
<td>245,700 acre-feet, sediment storage</td>
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<td>Gulf Mineral Resources No. 4045-4048</td>
<td>Yellowstone River;</td>
<td>210 cfs up to 90,000 af/y, of which, depending on the alternative chosen, portions will be diverted directly or stored offstream</td>
<td>Industrial, municipal, domestic, irrigation, fish and wildlife, and recreation</td>
<td>$11.2 million</td>
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<tr>
<td></td>
<td>Pumpkin, Lignite, Coal, and Mizpah creeks;</td>
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<td></td>
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<tr>
<td></td>
<td>ground-water wells</td>
<td></td>
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<td>Possible storage sites and their respective capacities:</td>
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<td></td>
<td></td>
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<td>Pumpkin Creek, 86,310 af</td>
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<td></td>
<td></td>
<td></td>
<td>Lignite Creek, 50,410 af</td>
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<td></td>
<td></td>
<td>Coal Creek, 29,240 af</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>Mizpah Creek, 77,525 af</td>
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<td></td>
<td>Ground-water wells will produce 10 cfs each and will be 5,000-10,000 ft depth</td>
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### TABLE B

#### MUNICIPAL RESERVATIONS

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<tr>
<th>Reservant</th>
<th>Stream</th>
<th>Population</th>
<th>Year</th>
<th>Maximum Diversion (cfs)</th>
<th>Annual Diversion (acre-feet)</th>
<th>Population</th>
<th>Year</th>
<th>Maximum Diversion (cfs)</th>
<th>Annual Diversion (acre-feet)</th>
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<tbody>
<tr>
<td>City of Livingston</td>
<td>Yellowstone R.</td>
<td>35-40,000</td>
<td>2000</td>
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#### INSTREAM RESERVATIONS

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<th>Reservant</th>
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<th>Approximation of Reserved Flow in AF/Y Based on Existing Streamflow Records</th>
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<tr>
<td>Yellowstone River at Sidney</td>
<td></td>
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<td>STREAM</td>
<td>REQUEST (acre-feet/year)</td>
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<td>APPROXIMATION OF RESERVED FLOW IN AF/Y BASED ON EXISTING STREAMFLOW RECORDS</td>
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<tr>
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<td>Upper Deer C. (from headwaters to point upstream from the interstate 90 bridge)</td>
<td>5,615</td>
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<td>Sweet Grass Creek (from F.S. Boundary to mouth)</td>
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<td>217,990</td>
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<td>Boulder River at Contact</td>
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<td>East Boulder River (at its mouth)</td>
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<td>23,146</td>
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<td>Shields River (near Wilsall)</td>
<td>Instantaneous Flow</td>
<td>90th percentile flow</td>
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<td>Shields River (near Clyde Park)</td>
<td>21,214 (Partial Year) Instantaneous Flow (Remainder of Year)</td>
<td>90th percentile flow</td>
<td>35,434</td>
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<td>Shields Tributaries (4 requests)</td>
<td>Instantaneous Flow</td>
<td>50th percentile flow</td>
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<td>Upper Yellowstone Tributaries (18 requests)</td>
<td>Instantaneous Flow</td>
<td>20th percentile Oct-April 50th percentile May-Sept.</td>
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<td>Upper Yellowstone Spring Creeks (4 requests)</td>
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<td>10th percentile Oct-April 50th percentile May-Sept.</td>
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<td>Yellowstone River (Gardiner through Livingston)</td>
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<td>20th percentile Oct-April 95th May-Sept. Plus dominant discharge</td>
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MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
### Table B. (continued)

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<tr>
<th>Reservant</th>
<th>Stream</th>
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<th>Reservation</th>
<th>Approximation of Reserved Flow in AF/Y Based on Existing Streamflow Records</th>
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<tbody>
<tr>
<td>Yellowstone River at Miles City</td>
<td>5,015,000</td>
<td>80th percentile flow, less consumptive reservation</td>
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**North Custer County Conservation District**

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**U.S. Bureau of Land Management**

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(A) flows not estimated in Board Order

(B) percentile flows not specified in Board Order
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<th>ANNUAL DIVERSION (acre-feet)</th>
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<th>MAXIMUM DIVERSION (cfs)</th>
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<td>MAXIMUM DIVERSION (cfs)</td>
<td>ANNUAL DIVERSION (acre-feet)</td>
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</tbody>
</table>

A) Maximum diversion rate not specified in request.
B) Water reservation was given to DNRC but water is to be used by this reservant.
<table>
<thead>
<tr>
<th>APPLICANT</th>
<th>STREAM</th>
<th>PROJECT</th>
<th>REQUEST</th>
<th>PROPOSED USES</th>
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<td>Cedar Ridge Offstream Storage</td>
<td>121,800 450</td>
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<td>Buffalo Creek Offstream Storage</td>
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<td>U.S. Bureau of Reclamation</td>
<td>Yellowstone River</td>
<td>Sunday Creek Offstream Storage</td>
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<td>Tongue River</td>
<td>Tongue River Reservoir</td>
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<td></td>
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A) Maximum Diversion rate was not specified in request

B) Maximum Diversion rate was not specified by the Board of Natural Resources and Conservation
CHAPTER 9

YELLOWSTONE RIVER COMPACT—RATIFICATION OF

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<td>89-902</td>
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<tr>
<td>89-903</td>
<td>Yellowstone River Compact—approval</td>
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<tr>
<td>89-904</td>
<td>Legislative and congressional approval necessary</td>
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<td>89-905</td>
<td>Purpose of the act</td>
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<td>89-906</td>
<td>Definitions</td>
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<tr>
<td>89-907</td>
<td>Filing written statement with water conservation board</td>
</tr>
<tr>
<td>89-908</td>
<td>Duty to install weir or other measuring device</td>
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<tr>
<td>89-909</td>
<td>Duty to measure water</td>
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<tr>
<td>89-910</td>
<td>Rights acquired prior to January 1, 1950 not to be impaired by nor subject to the act</td>
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<tr>
<td>89-911</td>
<td>Domestic and stock uses not within the act</td>
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<tr>
<td>89-912</td>
<td>Water conservation board to make rules and regulations</td>
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<tr>
<td>89-913</td>
<td>Act applies to adjudicated and nonadjudicated waters</td>
</tr>
<tr>
<td>89-914</td>
<td>Water conservation board to make record available</td>
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<tr>
<td>89-915</td>
<td>County attorneys to perform certain services</td>
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<td>89-916</td>
<td>Penalty</td>
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Repeal

These sections (Secs. 1, 2, Ch. 85, L. 1945), relating to the approval and ratification of the Yellowstone River Compact, were repealed by Sec. 1, Ch. 91, Laws 1953, effective February 25, 1953.

89-903. Yellowstone River Compact—approval. The legislative assembly of the state of Montana hereby approves and ratifies the compact designated as the "Yellowstone River Compact," dated at the city of Billings, state of Montana, on the 8th of December, 1950, signed by Fred E.
Buck, A. W. Bradshaw, H. W. Bunston, John Herzog, John M. Jarussi, Ashton Jones, Chris Josephson, A. Wallace Kingsbury, P. F. Leonard, Walter M. McLaughlin, Dave M. Manning, Joseph Muggli, Chester E. Onstad, Ed F. Parriott, R. R. Renne and Keith W. Trout, as state representatives of the state of Montana on a compact commission between the states of Montana, North Dakota and Wyoming; which compact is as follows:

YELLOWSTONE RIVER COMPACT

The state of Montana, the state of North Dakota, and the state of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said states and between persons in one and persons in another with respect to the waters of the Yellowstone river and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone national park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, acknowledging that in future projects or programs for the regulation, control and use of water in the Yellowstone river basin the great importance of water for irrigation in the signatory states shall be recognized, have resolved to conclude a compact as authorized under the Act of Congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st Congress, First Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective commissioners:

For the state of Montana:

Fred E. Buck
A. W. Bradshaw
H. W. Bunston
John Herzog
John M. Jarussi
Ashton Jones
Chris Josephson
A. Wallace Kingsbury
P. F. Leonard
Walter M. McLaughlin
Dave M. Manning
Joseph Muggli
Chester E. Onstad
Ed F. Parriott
R. R. Renne
Keith W. Trout

For the state of North Dakota:

I. A. Acker
Einar H. Dahl
J. J. Walsh

For the state of Wyoming:

L. C. Bishop
Earl T. Bower
J. Harold Cash
Ben F. Cochrane
Ernest J. Goppert
Richard L. Greene
E. C. Gwilliam
E. J. Johnson
Lee E. Keith
N. V. Kurtz
Harry L. Littlefield
R. E. McNally
Will G. Metz
Mark N. Partridge
Alonzo R. Shreve
Charles M. Smith
Leonard P. Thornton
M. B. Walker

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

**ARTICLE I**

A. Where the name of a state is used in this compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, 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 said state.

B. Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory state, 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 said state, shall be subject to the terms of this compact. Where the singular is used in this article, it shall be construed to include the plural.

**ARTICLE II**

A. The state of Montana, the state of North Dakota, and the state of Wyoming are hereinafter designated as "Montana," "North Dakota," and "Wyoming," respectively.

B. The terms "commission" and "Yellowstone river compact commission" mean the agency created as provided herein for the administration of this compact.

C. The term "Yellowstone river basin" means areas in Wyoming, Montana, and North Dakota drained by the Yellowstone river and its tributaries, and includes the area in Montana known as lake basin, but excludes those lands lying within Yellowstone national park.

D. The term "Yellowstone river system" means the Yellowstone river and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone river near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone national park.

E. The term "tributary" means any stream which in a natural state contributes to the flow of the Yellowstone river, including interstate tributaries and tributaries thereof, but excluding those which are within or contribute to the flow of streams within the Yellowstone national park.

F. The term "interstate tributaries" means the Clarks Fork, Yellowstone river; the Big Horn river (except Little Big Horn river); the Tongue river; and the Powder river, whose confluences with the Yellowstone river are respectively at or near the city (or town) of Laurel, Big Horn, Miles City, and Terry, all in the state of Montana.

G. The terms "divert" and "diversion" mean the taking or removing of water from the Yellowstone river or any tributary thereof when the
water so taken or removed is not returned directly into the channel of the Yellowstone river or of the tributary from which it is taken.

II. The term "beneficial use" is herein defined to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man.

I. The term "domestic use" shall mean the use of water by an individual, or by a family unit or household for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.

J. The term "stock water use" shall mean the use of water for livestock and poultry.

ARTICLE III

A. It is considered that no commission or administrative body is necessary to administer this compact or divide the waters of the Yellowstone river basin as between the states of Montana and North Dakota. The provisions of this compact, as between the states of Wyoming and Montana, shall be administered by a commission composed of one representative from the state of Wyoming and one representative from the state of Montana, to be selected by the governors of said states as such states may choose, and one representative selected by the director of the United States geological survey or whatever federal agency may succeed to the functions and duties of that agency, to be appointed by him at the request of the states to sit with the commission and who shall, when present, act as chairman of the commission without vote, except as herein provided.

B. The salaries and necessary expenses of each state representative shall be paid by the respective state; all other expenses incident to the administration of this compact not borne by the United States shall be allocated to and borne one-half by the state of Wyoming and one-half by the state of Montana.

C. In addition to other powers and duties herein conferred upon the commission and the members thereof, the jurisdiction of the commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this compact, and recommendations to such states upon matters connected with the administration of this compact, and the commission may employ such services and make such expenditures as reasonable and necessary within the limit of funds provided for that purpose by the respective states, and shall compile a report for each year ending September 30 and transmit it to the governors of the signatory states on or before December 31 of each year.

D. The secretary of the army; the secretary of the interior; the secretary of agriculture; the chairman, federal power commission; the secretary of commerce, or comparable officers of whatever federal agencies may succeed to the functions and duties of these agencies, and such other federal officers and officers of appropriate agencies of the signatory states having services or data useful or necessary to the compact commission, shall cooperate, ex officio, with the commission in the execution of its duty in the col-
lection, correlation, and publication of records and data necessary for the proper administration of the compact; and these officers may perform such other services related to the compact as may be mutually agreed upon with the commission.

E. The commission shall have power to formulate rules and regulations and to perform any act which they may find necessary to carry out the provisions of this compact, and to amend such rules and regulations. All such rules and regulations shall be filed in the office of the state engineer of each of the signatory states for public inspection.

F. In case of the failure of the representatives of Wyoming and Montana to unanimously agree on any matter necessary to the proper administration of this compact, then the member selected by the director of the United States geological survey shall have the right to vote upon the matters in disagreement and such points of disagreement shall then be decided by a majority vote of the representatives of the states of Wyoming and Montana and said member selected by the director of the United States geological survey, each being entitled to one vote.

G. The commission herein authorized shall have power to sue and be sued in its official capacity in any federal court of the signatory states, and may adopt and use an official seal which shall be judicially noticed.

ARTICLE IV

The commission shall itself, or in conjunction with other responsible agencies, cause to be established, maintained, and operated such suitable water gaging and evaporation stations as it finds necessary in connection with its duties.

ARTICLE V

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

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

1. Clarks Fork, Yellowstone River

   a. To Wyoming 60%
   To Montana 40%

   b. The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.
2. **Big Horn River (Exclusive of Little Big Horn River)**
   a. To Wyoming 80%
   To Montana 20%
   b. The point of measurement shall be below the last diversion from the Big Horn river above its junction with the Yellowstone river, and the inflow of the Little Big Horn river shall be excluded from the quantity of water subject to allocation.

3. **Tongue River**
   a. To Wyoming 40%
   To Montana 60%
   b. The point of measurement shall be below the last diversion from the Tongue river above its junction with the Yellowstone river.

4. **Powder River (Including the Little Powder River)**
   a. To Wyoming 42%
   To Montana 58%
   b. The point of measurement shall be below the last diversion from the Powder river above its junction with the Yellowstone river.

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

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

D. All existing rights to the beneficial use of waters of the Yellowstone river in the states of Montana and North Dakota, below Intake, Montana, valid under the laws of these states as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this compact. During the period May 1 to September 30, inclusive, of each year, lands within Montana and North Dakota shall be entitled to the beneficial use of the flow of waters of the Yellowstone river below Intake, Montana, on a proportionate basis of acreage irrigated. Waters of tributary streams, having their origin in either Montana or North Dakota, situated entirely in said respective states and flowing into the Yellowstone river below Intake, Montana, are allotted to the respective states in which situated.
E. There are hereby excluded from the provisions of this compact:

1. Existing and future domestic and stock water uses of water: Provided, that the capacity of any reservoir for stock water so excluded shall not exceed 20 acre-feet;

2. Devices and facilities for the control and regulation of surface waters.

F. From time to time the commission shall re-examine the allocations herein made and upon unanimous agreement may recommend modifications therein as are fair, just, and equitable, giving consideration among other factors to:

Priorities of water rights;
Acreage irrigated;
Acreage irrigable under existing works; and
Potentially irrigable lands.

ARTICLE VI

Nothing contained in this compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone river and its tributaries owned by or for Indians, Indian tribes, and their reservations.

ARTICLE VII

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

B. Each claim hereafter initiated for an appropriation of water in one signatory state for use in another signatory state shall be filed in the office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the state engineer of the signatory state in which the water is to be used.

C. Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudications 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.

D. The use of water allocated under Article V of this compact for projects constructed after the date of this compact by the United States of America or any of its agencies or instrumentalities, shall be charged as a use by the state in which the use is made: Provided, that such use incident to the diversion, impounding, or conveyance of water in one state for use in another shall be charged to such latter state.

ARTICLE VIII

A lower signatory state shall have the right to acquire in an upper state by purchase, or through exercise of the power of eminent domain, such lands, easements, and rights of way for the construction, operation, and maintenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges granted herein to such lower state. This provision shall apply with equal force and effect to an upper state in the circumstance of the necessity of the acquisition of rights by an upper state in a lower state.

ARTICLE IX

Should any facilities be constructed by a lower signatory state in an upper signatory state under the provisions of Article VII, the construction, operation, repairs, and replacements of such facilities shall be subject to the laws of the upper state. This provision shall apply with equal force and effect to an upper state in the circumstance of the necessity of the acquisition of rights by an upper state in a lower state.

ARTICLE X

No water shall be diverted from the Yellowstone river basin without the unanimous consent of all the signatory states. In the event water from another river basin shall be imported into the Yellowstone river basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly, the state having the right to the use of such water shall be given proper credit therefor in determining its share of the water apportioned in accordance with Article V herein.

ARTICLE XI

The provisions of this compact shall remain in full force and effect until amended in the same manner as it is required to be ratified to become operative as provided in Article XV.

ARTICLE XII

This compact may be terminated at any time by unanimous consent of the signatory states, and upon such termination all rights then established hereunder shall continue unimpaired.
ARTICLE XIII

Nothing in this compact shall be construed to limit or prevent any state from instituting or maintaining any action or proceeding, legal or equitable, in any federal court or the United States Supreme Court, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE XIV

The physical and other conditions characteristic of the Yellowstone river and peculiar to the territory drained and served thereby and to the development thereof, have actuated the signatory states in the consummation of this compact, and none of them, nor the United States of America by its consent and approval, concedes thereby the establishment of any general principle or precedent with respect to other interstate streams.

ARTICLE XV

This compact shall become operative when approved by the legislature of each of the signatory states and consented to and approved by the Congress of the United States.

ARTICLE XVI

Nothing in this compact shall be deemed:

(a) To impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact; any rights or powers of the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone river basin nor its capacity to acquire rights in and to the use of said waters;

(b) To subject any property of the United States of America, its agencies, or instrumentalities to taxation by any state or subdivision thereof, nor to create an obligation on the part of the United States of America, its agencies, or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any state or political subdivision thereof, state agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

(c) To subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any state to an extent other than the extent to which these laws would apply without regard to the compact.

ARTICLE XVII

Should a court of competent jurisdiction hold any part of this compact to be contrary to the constitution of any signatory state or of the United States of America, all other severable provisions of this compact shall continue in full force and effect.
ARTICLE XVIII

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 of [or] officers of such states of the jurisdiction of the water of each state as apportioned in this compact.

IN WITNESS WHEREOF the commissioners have signed this compact in quadruplicate original, one of which shall be filed in the archives of the department of state of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the governor of each signatory state.

Done at the city of Billings in the state of Montana, this 8th day of December, in the year of Our Lord, one thousand nine hundred and fifty.

Commissioners for the state of Montana:

Fred E. Buck /S/ Fred E. Buck
A. W. Bradshaw /S/ A. W. Bradshaw
H. W. Bunston /S/ H. W. Bunston
John Herzog /S/ John Herzog
John M. Jarussi /S/ John M. Jarussi
Ashton Jones /S/ Ashton Jones
Chris Josephson /S/ Chris Josephson
A. Wallace Kingsbury /S/ A. Wallace Kingsbury
P. P. Leonard /S/ P. P. Leonard
Walter M. McLaughlin /S/ Walter M. McLaughlin
Dave M. Manning /S/ Dave M. Manning
Joseph Muggli /S/ Joseph Muggli
Chester E. Onstad /S/ Chester E. Onstad
Ed F. Parriott /S/ Ed F. Parriott
R. R. Renne /S/ R. R. Renne
Keith W. Trout /S/ Keith W. Trout

Commissioners for the state of North Dakota:

I. A. Acker /S/ I. A. Acker
Einar H. Dahl /S/ Einar H. Dahl
J. J. Walsh /S/ J. J. Walsh

Commissioners for the state of Wyoming:

L. C. Bishop /S/ L. C. Bishop
Earl T. Bower /S/ Earl T. Bower
J. Harold Cash /S/ J. Harold Cash
Ben F. Cochrane /S/ Ben F. Cochrane
Ernest J. Goppert /S/ Ernest J. Goppert
Richard L. Greene /S/ Richard L. Greene
E. C. Gwillim /S/ E. C. Gwillim
E. J. Johnson /S/ E. J. Johnson
Lee K. Keith /S/ Lee K. Keith
N. V. Kurtz /S/ N. V. Kurtz
Harry L. Littlefield /S/ Harry L. Littlefield
R. E. McNally /S/ R. E. McNally
I have participated in the negotiation of this compact and intend to report favorably thereon to the Congress of the United States.

/S/ R. J. Newell

R. J. Newell,
Representative of the United States of America.

History: En. Sec. 1, Ch. 39, L. 1951.

Compiler's Note
The compiler has inserted the bracketed word "or" in Article XVIII.
85-1-121. Out-of-state use of water. None of the waters in the state of Montana shall ever be appropriated, diverted, impounded, or otherwise restrained or controlled while within the state for use outside the boundaries thereof, except pursuant to a petition to and an act of the legislature of the state of Montana permitting such action. Any appropriation, diversion, impounding, restraining, or attempted appropriation, diversion, impounding, or restraining contrary to the provisions of this section shall be null and void. All officers, agents, agencies, and employees of the state are prohibited from knowingly permitting, aiding, or assisting in any manner such unauthorized appropriation, diversion, impounding, or other restraint. It shall be unlawful for any person, persons, or corporation, directly or indirectly, personally or through agents, officers, or employees, either to attempt to so appropriate, divert, impound, or otherwise restrain or control any of the waters within the boundaries of this state for use outside thereof, except in accordance with the terms of this section.

History: En. Sec. 1, Ch. 220, L. 1921; re-en. Sec. 7135, R.C.M. 1921; re-en. Sec. 7135, R.C.M. 1935; R.C.M. 1947, 89-846.
Part 3

Appropriations, Permits, and Certificates of Water Rights

85-2-301. Right to appropriate. After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 495, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(1).

85-2-302. Application for permit. Except as otherwise provided in (1) and (2) of 85-2-304, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the
The application shall be made on a form prescribed by the department. The department shall make the forms available through its offices and the offices of the county clerk and recorders. The department shall return a defective application for correction or completion together with the reasons for returning it. An application does not lose priority of filing because of defects if the application is corrected, completed, and refiled with the department within 30 days after its return to the applicant or within a further time as the department may allow. If an application is not corrected and completed within 30 days or within a further time as the department allows, up to 18 months, the priority date of the application shall be the date of refileing the application with the corrections with the department. An application not corrected within 18 months shall be terminated.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 9, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-830(2).

85-2-303. Permit for conversion of nonproductive oil or gas well. A person who desires to convert a nonproductive oil or gas well to a water well may do so immediately but shall file a notice of completion or apply for a permit, depending on the maximum yield of the well, as otherwise provided in this chapter. The date of appropriation shall be the date of filing the notice of completion or the application for a permit.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-880(6).

85-2-304. Appropriation by state board of land commissioners. The state board of land commissioners may, through the department of natural resources and conservation, at its discretion, appropriate any available waters for use upon state lands and authorize the construction of irrigation works for these lands. The appropriation shall be made in the same way and under the same laws as those governing the appropriation of water by individuals.


85-2-305. Appropriation permit for reservoir. A person intending to appropriate water by means of a reservoir shall apply for a permit as prescribed in this chapter.

History: En. Sec. 25, Ch. 452, L. 1973; R.C.M. 1947.
Outside the boundaries of a controlled groundwater area, a permit is not required before appropriating groundwater by means of a well or developed spring with a maximum appropriation of less than 100 gallons per minute. Within 60 days of completion of the well or developed spring and appropriation of the groundwater for beneficial use, the appropriator shall file a notice of completion with the department on a form provided by the department at its offices and at the offices of the county clerk and recorders. Upon receipt of the notice, the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it. A notice does not lose priority of filing because of defects, if the notice is corrected, completed, and refiled with the department within 30 days or within a further time as the department may allow, not to exceed 6 months. If a notice is not corrected and completed within the time allowed, the priority date of appropriation shall be the date of refiled a correct and complete notice with the department. A certificate of water right may not be issued until a correct and complete notice has been filed with the department. The original of the certificate shall be sent to the county clerk and recorder in the county where the point of diversion or place of use is located for recordation. The department shall keep a copy of the certificate in its office in Helena. After recordation, the clerk and recorder shall send the certificate to the appropriator. The date of filing of the notice of completion is the date of priority of the right.

(2) An appropriator of groundwater by means of a well or developed spring, first put to beneficial use between January 1, 1962, and July 1, 1973, who did not file a notice of completion as required by laws in force prior to April 14, 1981, with the county clerk and recorder shall file a notice of completion, as provided in subsection (1) of this section, with the department to perfect the water right. The priority date of the appropriation shall be the date of the filing of a notice as provided in subsection (1) of this section. An appropriation under this subsection is an existing right, and a permit is not required; however, the department shall acknowledge the receipt of a correct and complete filing of a notice of completion, except that for an appropriation of less than 100 gallons per minute, the department shall issue a certificate of water right.

(3) A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is from a source other than a perennial flowing stream, and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger.
used in this subsection, a perennial flowing stream means a stream which historically has flowed continuously at all seasons of the year, during dry as well as wet years. However, within 60 days after constructing the impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Upon receipt of a correct and complete application for a stockwater provisional permit, the department shall then automatically issue a provisional permit. If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to such terms, conditions, restrictions, or limitations it considers necessary to protect the rights of other appropriators.

(4) A person may also appropriate water without applying for or prior to receiving a permit under rules adopted by the board under §5-2-113.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 3, Ch. 435, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-3-105(5), (7); amd. Sec. 1, Ch. 30, L. 1981; amd. Sec. 1, Ch. 160, L. 1981; amd. Sec. 1, Ch. 357, L. 1981.

Compiler's Comments

1981 Amendments: Chapter 30 inserted "and the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger" in the middle of (3).

Chapter 160 substituted "within 60 days after" for "before" in the third sentence of (3); inserted the fourth sentence in (3); substituted "after a hearing" for "after processing the application" in the last sentence of (3); substituted "it may revoke the permit or require the permittee to modify the impoundment or pit and may then make" for "it may require the applicant to modify the construction of the impoundment or pit and issue" in the last sentence of (3).

Chapter 357 inserted "or developed spring" after "well" in two places in (1); substituted "maximum appropriation of less than 100 gallons per minute" for "maximum yield of less than 100 gallons a minute" in the first sentence of (1); inserted "with the department" after "notice of completion" in the second sentence of (1); substituted "the department shall review the notice and may, before issuing a certificate of water right, return a defective notice for correction or completion, together with the reasons for returning it" for "the department shall automatically issue a certificate of water rights" in the third sentence of (1); inserted the fourth, fifth, and sixth sentences in (1); inserted subsection (2).

Applicability: Section 2, Ch. 30, L. 1981, provided: "This act applies to applications pending with the department on the effective date of this act, as well as
applications filed with the department after the effective
date of this act."

Subsection (1), sec. 7, Ch. 357, L. 1981, provided:
"Subsection (2) of section 1 [sec. 1, Ch. 357, L. 1981,
amending 85-2-306] applies to all notices of completion
filed with the department after July 1, 1973."

Subsection (2), sec. 7, Ch. 357, L. 1981, provided:
"Subsection (1) of section 1 [sec. 1, Ch. 357, L. 1981,
amending 85-2-306], section 3 [sec. 3, Ch. 357, L. 1981,
amending 85-2-310], and section 4 [sec. 4, Ch. 357, L.
1981, amending 85-2-311] apply to notices of completion and
applications pending before the department and to those
filed with the department after April 14, 1981."

Effective Dates: Section 9, Ch. 357, L. 1981, provided:
"This act is effective on passage and approval." Approved
April 14, 1981.

85-2-307. Notice of application. (1) Upon receipt of a
proper application for a permit, the department shall
prepare a notice containing the facts pertinent to the
application and shall publish the notice in a newspaper of
general circulation in the area of the source once a week
for 3 consecutive weeks. Before the last date of
publication, the department shall also serve the notice by
first-class mail upon an appropriator of water or applicant
for or holder of a permit who, according to the records of
the department, may be affected by the proposed
appropriation. A notice shall also be served upon any public
agency that has reserved waters in the source under
85-2-316. The department may, in its discretion, also serve
notice upon any state agency or other person the department
feels may be interested in or affected by the proposed
appropriation. The department shall file in its records
proof of service by affidavit of the publisher in the case
of notice by publication and by its own affidavit in the
case of service by mail.

(2) The notice shall state that by a date set by the
department (not less than 30 days or more than 60 days after
the last date of publication) persons may file with the
department written objections to the application.

(3) The requirements of subsections (1) and (2) of
this section do not apply if the department finds, on the
basis of information reasonably available to it, that the
appropriation as proposed in the application will not
adversely affect the rights of other persons.

History: En. Sec. 17, Ch. 452, L. 1973; amd. Sec. 9,
Ch. 485, L. 1975; R.C.M. 1947, 89-881; amd. Sec. 2, Ch. 357,
L. 1981.

Compiler's Comments
1981__Amendment: Substituted "first-class" for
"certified" before "mail" in the second sentence of (1).

Effective Dates: Section 9, Ch. 357, L. 1981, provided:
"This act is effective on passage and approval." Approved
April 14, 1981.
85-2-309. Objections. (1) An objection to an application must be filed by the date specified by the department under 85-2-307(2).

(2) The objection must state the name and address of the objector and facts tending to show that there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, that the property, rights, or interests of the objector would be adversely affected by the proposed appropriation, or the objector may state any other objections to the proposed appropriation he considers pertinent.

History: En. Sec. 18, Ch. 452, L. 1973; R.C.M. 1947, 39-882.

85-2-309. Hearings on objections. If the department determines that an objection to an application for a permit states a valid objection to the issuance of the permit, it shall hold a public hearing on the objection within 60 days from the date set by the department for the filing of objections, after serving notice of the hearing by certified mail upon the applicant and the objector. The department may consolidate hearings if more than one objection is filed to an application. The department shall file in its records proof of the service by affidavit of the department.


85-2-310. Action on application. (1) The department shall grant, deny, or condition an application for a permit in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons therefore by certified mail upon the applicant and each person who has filed an objection as provided by 85-2-308.

(2) However, an application may not be approved in a modified form or upon terms, conditions, or limitations specified by the department or denied, unless the applicant is first granted an opportunity to be heard. If no objection is filed against the application but the department is of the opinion that the application should be approved in a modified form or upon terms, conditions, or limitations specified by it or that the application should be denied, the department shall prepare a statement of its opinion and the reasons therefore. The department shall serve a statement of its opinion by certified mail upon the applicant, together with a notice that the applicant may obtain a hearing by filing a request therefor within 30 days after.
the notice is mailed. The notice shall further state that
the application will be modified in a specified manner or
denied, unless a hearing is requested.
(3) The department may cease action upon an
application for a permit and return it to the applicant when
it finds that the application is not in good faith or does
not show a bona fide intent to appropriate water for a
beneficial use. An application returned for any of these
reasons shall be accompanied by a statement of the reasons
for which it was returned, and there shall be no right to a
priority date based upon the filing of the application.
Returning an application pursuant to this subsection shall
be deemed a final decision of the department.

History: (1) (2)En. Sec. 29, Ch. 452, L. 1973; and
Sec. 10, Ch. 485, L. 1975; and Sec. 5, Ch. 416, L. 1977;
Sec. 89-884, R.C.M. 1947 (3)En. Sec. 16, Ch. 452, L. 1973;
and Sec. 2, Ch. 238, L. 1974; and Sec. 4, Ch. 485, L.
1975; and Sec. 4, Ch. 416, L. 1977; and Sec. 1, Ch. 470,
L. 1977; Sec. 89-880, R.C.M. 1947; R.C.M. 1947, 89-880(3),
89-884; and Sec. 3, Ch. 357, L. 1981.

Compiler's Comments
1981 Amendment: Substituted "objections have been
received" for "hearing is held" after "if no" in the first
sentence of (1); inserted "or objections have been received"
after "if a hearing is held" at the end of the first
sentence of (1).

Applicability: Subsection (2), sec. 7, Ch. 357, L.
1981, provided: "Subsection (1) of section 1 [sec. 1, Ch.
357, L. 1981, amending 85-2-306], section 3 [sec. 3, Ch.
357, L. 1981, amending 85-2-310], and section 4 [sec. 4,
Ch. 357, L. 1981, amending 85-2-311] apply to notices of
completion and applications pending before the department
and to those filed with the department after April 14,
1981."

Effective Date: Section 9, Ch. 357, L. 1981, provided:
"This act is effective on passage and approval." Approved
April 14, 1981.

85-2-311 Criteria for issuance of permit. The
department shall issue a permit if:
(1) there are unappropriated waters in the source of
supply:
(a) at times when the water can be put to the use
proposed by the applicant;
(b) in the amount the applicant seeks to appropriate;
and
(c) throughout the period during which the applicant
seeks to appropriate, the amount requested is available;
(2) the rights of a prior appropriator will not be
adversely affected;
(3) the proposed means of diversion, construction, and
operation of the appropriation works are adequate;
(4) the proposed use of water is a beneficial use;
(5) the proposed use will not interfere unreasonably

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(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).

History: En. Sec. 21, Ch. 452, L. 1973; amd. Sec. 1, Ch. 196, L. 1975; amd. Sec. 1, Ch. 307, L. 1977; amd. Sec. 6, Ch. 416, L. 1977; R.C.S.E. 1947, 89-835; amd. Sec. 4, Ch. 357, L. 1981.

Compiler’s Comments
1981 Amendment: Substituted “diversion, construction, and operation of the appropriation works” for “diversion or construction” in (3); substituted “and” for “or” after “a year or more” in (6); added subsection (7).

Applicability: Subsection (2), sec. 79 Ch. 3579 L. 1931, provided: “Subsection (1) of section 1 [sec. 1, Ch. 3579, L. 1981] amending 85-2-3061, section 3 [sec. 3, Ch. 3579, L. 1981, amending 85-2-310], and section 4 [sec. 4, Ch. 3579, L. 1981, amending 85-2-311] apply to notices of completion and applications pending before the department and to those filed with the department after April 14, 1981.”

Effective Date: Section 99 Lb. 357, L. 1981, provided: “This act is effective on passage and approval.” Approved April 14, 1981.

85-2-312. Terms of permit. (1) The department may issue a permit for less than the amount of water requested, but in no case may it issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. It may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, and it may issue temporary or seasonal permits. A permit shall be issued subject to existing rights and any final determination of those rights made under this chapter.

(2) The department may limit the time for commencement of the appropriation works, completion of construction, and actual application of the water to the proposed beneficial use. In fixing those time limits, the department shall consider the cost and magnitude of the project, the engineering and physical features to be encountered, and, on projects designed for gradual development and gradually increased use of water, the time reasonably necessary for that gradual development and increased use. For good cause shown by the permittee, the department may in its discretion reasonably extend time limits.
The original of the permit shall be sent to the county clerk and recorder in the county where the point of diversion or place of use is located for recordation, and a copy shall be kept in the office of the department in Helena. After recordation, the clerk and recorder shall send the permit to the permittee.

History: En. Sec. 22, Ch. 452, L. 1973; R.C.M. 1947, 89-986.

85-2-313. Provisional permit. A permit issued prior to a final determination of existing rights is provisional and is subject to that final determination. The amount of the appropriation granted in a provisional permit shall be reduced or modified where necessary to protect and guarantee existing rights determined in the final decree. A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the permit would have been denied or modified if the final decree had been available to the department.

History: En. Sec. 16, Ch. 452, L. 1973; amd. Sec. 2, Ch. 238, L. 1974; amd. Sec. 8, Ch. 485, L. 1975; amd. Sec. 4, Ch. 416, L. 1977; amd. Sec. 1, Ch. 470, L. 1977; R.C.M. 1947, 89-883(4).

85-2-314. Revocation of permit. If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not being followed, the department may, after notice, require the permittee to show cause why the permit should not be revoked. If the permittee fails to show sufficient cause, the department may revoke the permit.

History: En. Sec. 23, Ch. 452, L. 1973; R.C.M. 1947, 89-887.

85-2-315. Certificate of water right. (1) Upon actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the department that the appropriation has been properly completed. The department may then inspect the appropriation, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a certificate of water right. The original of the certificate shall be sent to the county clerk and recorder in the county wherein the point of diversion or place of use is located for recordation, and a duplicate shall be kept in the office of the department in Helena. After recordation, the clerk and recorder shall send the certificate to the appropriator.

(2) Except as provided in 85-2-313, a certificate of
water right in a particular source may not be issued prior
to a general determination under part 2 of this chapter of
existing rights in that source.

History: En. Sec. 24, Ch. 452, L. 1973; R.C.W. 1947,
99-138.

25-2-316. Reservation of water. (1) The state or any
political subdivision or agency thereof or the United States
or any agency thereof may apply to the board to reserve
waters for existing or future beneficial uses or to maintain
a minimum flow, level, or quality of water throughout the
year or at such periods or for such length of time as the
board designates.

(2) Upon receiving an application, the department
shall proceed in accordance with 85-2-301 through 85-2-309.
After the hearing provided in 85-2-309, the board shall
decide whether to reserve the water for the applicant. The
department's costs of giving notice, holding the hearing,
conducting investigations, and making records incurred in
acting upon the application to reserve water, except the
cost of salaries of the department's personnel, shall be
paid by the applicant. In addition, a reasonable proportion
of the department's cost of preparing an environmental
impact statement shall be paid by the applicant unless
waived by the department upon a showing of good cause by the
applicant.

(3) The board may not adopt an order reserving water
unless the applicant establishes to the satisfaction of the
board:
(a) the purpose of the reservation;
(b) the need for the reservation;
(c) the amount of water necessary for the purpose of
the reservation;
(d) that the reservation is in the public interest.

(4) If the purpose of the reservation requires
construction of a storage or diversion facility, the
applicant shall establish to the satisfaction of the board
that there will be progress toward completion of the
facility and accomplishment of the purpose with reasonable
diligence in accordance with an established plan.

(5) The board shall limit any reservations after May
9, 1979, for maintenance of minimum flow, level, or quality
of water that it awards at any point on a stream or river to
a maximum of 50% of the average annual flow of record on
gauged streams. Ungauged streams can be allocated at the
discretion of the board.

(6) After the adoption of an order reserving waters,
the department may reject an application and refuse a permit
for the appropriation of reserved waters or may, with the
approval of the board, issue the permit subject to such
terms and conditions it considers necessary for the
protection of the objectives of the reservation.

(7) Any person desiring to use water reserved to a
conservation district for agricultural purposes shall make
application for such use with the district, and the district
upon approval of the application must inform the department of the approved use. The department shall maintain records of all uses of water reserved to conservation districts and be responsible, when requested by the districts, for rendering technical and administrative assistance within the department's staffing and budgeting limitations in the preparation and processing of such applications for the conservation districts. The department shall, within its staffing and budgeting limitations, complete any feasibility study requested by the districts within 12 months of the time the request was made. The board shall extend the time allowed to develop a plan identifying projects for utilizing a district's reservation so long as the conservation district makes a good faith effort, within its staffing and budgeting limitations, to develop a plan.

(8) A reservation under this section shall date from the date the order reserving the water is adopted by the board and shall not adversely affect any rights in existence at that time.

(9) The board shall, periodically but at least once every 10 years, review existing reservations to ensure that the objectives of the reservation are being met. Where the objectives of the reservation are not being met, the board may extend, revoke, or modify the reservation.

(10) The board may modify an existing or future order originally adopted to reserve water for the purpose of maintaining minimum flow, level, or quality of water, so as to reallocate such reservation or portion thereof to an applicant who is a qualified reservant under this section. Reallocation of reserved water may be made by the board following notice and hearing wherein the board finds that all or part of the reservation is not required for its purpose and that the need for the reallocation has been shown by the applicant to outweigh the need shown by the original reservant. Reallocation of reserved water shall not adversely affect the priority date of the reservation, and the reservation shall retain its priority date despite reallocation to a different entity for a different use. The board may not reallocate water reserved under this section on any stream or river more frequently than once every 5 years.

(11) Nothing in this section vests the board with the authority to alter a water right that is not a reservation.

History: En. Sec. 26, Ch. 452, L. 1973; amd. Sec. 11, Ch. 485, L. 1975; amd. Sec. 7, Ch. 416, L. 1977; R.C.M. 1947, 89-90; amd. Sec. 1, Ch. 639, L. 1979; amd. Sec. 1, Ch. 186, L. 1981; amd. Sec. 6, Ch. 357, L. 1981.

Compiler's Comments

1981 Amendments: Chapter 186 inserted "when requested by the districts" before "for rendering technical and administrative assistance" in (7); inserted "preparation and" before "processing of such applications" in the middle of (7); added last two sentences of (7).

Chapter 357 added the last sentence of (2).
Applicability: Subsection (3), sec. 7, Ch. 357, L. 1981, provided: "Section 6 [sec. 6, Ch. 357, L. 1981; amending 85-2-316] applies to applications pending before the board on April 14, 1981, as well as applications filed with the board after April 14, 1981."

1981 Effective Date: Section 9, Ch. 357, L. 1981, provided: "This act is effective on passage and approval." Approved April 14, 1981.

1981 Effective Date: Section 2, Ch. 639, L. 1979, provided: "This act is effective on passage and approval." Approved May 7, 1979.

85-2-317. Limitation on appropriation of ground water.
(1) After May 7, 1979, no application for a permit to appropriate ground water in excess of 3,000 acre feet per year may be granted, except pursuant to an act of the legislature permitting the specific appropriation.
(2) Subsection (1) applies to any permit to appropriate ground water for which application has been made but which has not been granted as of May 7, 1979.
(3) This section does not apply to appropriations by municipalities for municipal use or to appropriations for public water supplies as defined in 75-6-102 or to appropriations for the irrigation of cropland owned and operated by the applicant.
(4) Any person, association, corporation, or other entity that applies for a permit to appropriate ground water, singularly or collectively, for the purpose of circumventing this section is punishable by a fine not exceeding $5,000.


Compiler's Comments
Effective Date: Sec. 5, Ch. 631, L. 1979, provided: "This act is effective on passage and approval." Approved May 7, 1979.

85-2-318. Water right appropriation account. There is established a water right appropriation account in the earmarked revenue fund of the state treasury. All fees collected as provided in 85-2-113 shall be deposited in the account to help pay the expenses incurred by the department for administering this part, part 1, part 4, and part 5 of chapter 2, Title 85.

History: En. Sec. 5, Ch. 357, L. 1981.

Compiler's Comments
Codification Instruction: Section 8, Ch. 357, L. 1981, provided: "Section 5 [85-2-318] is intended to be codified as an integral part of Title 85, chapter 2, part 3, and the provisions of Title 85, chapter 2, apply to section 5."

Effective Date: Section 9, Ch. 357, L. 1981, provided: "This act is effective on passage and approval." Approved April 14, 1981.

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APPENDIX L

Part 8

Diversions from the Yellowstone River Basin

Part Compiler's Comments

1981 Title: The title to SB 243 (Ch. 581, L. 1981) read: "An act to delegate authority to the department of natural resources and conversation to authorize diversions from the Yellowstone River basin under Article X of the Yellowstone River Compact, section 85-20-101, MCA, on behalf of the state of Montana; providing for legislative review; and providing an effective date."

Codification Instruction: Section 6, Ch. 581, L. 1981, provided: "This act is intended to be codified as a new part in Title 85, chapter 2, and the provisions of Title 85, chapter 2, apply to this act."

Sextability: Section 9, Ch. 581, L. 1981, was a severability section.

Effective Date: Section 10, Ch. 581, L. 1981, provided: "This act is effective on passage and approval." Approved May 1, 1981.

85-2-501 Definitions. Unless the context requires otherwise, in this part the following definitions apply:
(1) "Basin" means the Yellowstone River Basin.
(2) "Compact" means the Yellowstone River Compact provided for in 85-20-101.

History: En. Sec. 1, Ch. 581, L. 1981.

85-2-502 Authority to approve diversions. The department may consent on behalf of the state of Montana to diversions of water from the basin pursuant to Article X of the compact, including diversions of water allocated under the terms of the compact to the other signatory states of Wyoming and North Dakota.

History: En. Sec. 2, Ch. 581, L. 1981.

85-2-503 Legislative Review. (1) A diversion of water from the basin pursuant to Article X of the compact consented to by the department under the provisions of this part may not be made until one of the following occurs, whichever is later:

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(a) the legislature ratifies the first determination of the department to consent to a diversion of water from the basin pursuant to Article X of the compact; or
(b) July 1, 1983.

(2) A decision by the department to disapprove a diversion of water is not subject to legislative approval.

History: En. Sec. 3, Ch. 581, L. 1981.

85-2-304. Application, notice, objections, hearing. (1) Any appropriator proposing to divert from the basin water allocated to Montana under the terms of the compact or divert from the basin unallocated compact water within Montana shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:
(a) the diversion and ultimate use of the water in Montana is for a beneficial use of water;
(b) the diversion and ultimate use of water will not adversely affect the water rights of other persons;
(c) the proposed means of diversion, construction, and operation are adequate;
(d) the diversion and ultimate use will not interfere unreasonably with other planned uses or developments for which a water right has been established or a permit has been issued or for which water has been reserved;
(e) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states;
(f) the diversion and ultimate use of the water are in the public interest of Montana; and
(g) the applicant intends to comply with the laws of the signatory states to the compact.

(2) Any appropriator proposing to divert from the basin water allocated to North Dakota or Wyoming under the terms of the compact or divert from the basin unallocated compact water within North Dakota or Wyoming shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:
(a) the proposed means of diversion, construction, and operation are adequate;
(b) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states; and
(c) the applicant intends to comply with the compact.

(3) Notice of the proposed diversion must be given by the department in the same manner as provided in subsections (1) and (2) of 85-2-307.

(4) An objection to an application must be filed by the date specified by the department in the notice.

(5) The objector to an application under subsection (1) shall state his name and address and facts tending to show that:
(a) the diversion and ultimate use of the water in Montana are not for a beneficial use of water;
(b) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;
(c) the proposed means of diversion, construction, and operation are not adequate;
(d) the diversion and ultimate use will interfere unreasonably with the objector's planned uses or development for which the objector has a water right, a permit, or a reserved water right;
(e) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state; or
(f) the diversion and ultimate use of the water are not in the public interest of Montana.

(6) The objector to an application under subsection (2) shall state his name and address and facts tending to show that:
(a) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;
(b) the proposed means of diversion, construction, and operation are not adequate; or
(c) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state.

(7) If the department receives an objection to an application, it shall hold a hearing on the application within 60 days from the date set by the department for filing objections. Service of notice of the hearing must be made by certified mail upon the applicant and the objector.

(8) The hearing shall be conducted under the contested case procedures of the Montana Administrative Procedure Act in Title 2, chapter 4, part 6.

History: En. Sec. 4, Ch. 581, L. 1981.

85-2-305. Criteria for approval of terms. (1) The department may issue its approval of a diversion of water allocated to Montana under the terms of the compact or unallocated compact water diverted in Montana if:
(a) the diversion and the ultimate use of the water in Montana are for a beneficial use of water;
(b) the diversion and ultimate use of water will not adversely affect the water rights of other persons;
(c) the proposed means of diversion, construction, and operation are adequate;
(d) the diversion and ultimate use will not interfere unreasonably with other planned uses or developments for which a water right has been established or a permit has been issued or for which water has been reserved;
(e) the diversion and ultimate use of water will not exceed the allocated share under the compact of any of the signatory states;
(f) the diversion and ultimate use of the water are in the public interest of Montana; and
(g) the applicant signs an agreement to comply with
the laws of the signatory states to the compact in constructing, operating, and maintaining all facilities associated with the diversion and ultimate use of the water.

(2) The department may approve a diversion of water allocated to North Dakota or Wyoming or unallocated compact water diverted in North Dakota or Wyoming if the diversion will not adversely affect the property, rights, or interests of an appropriator located in Montana and if the diversion and ultimate use of water will not exceed the allocated share under the compact of any of the signatory states.

(3) The department may approve a diversion subject to such terms, conditions, restrictions, and limitations as it considers necessary to meet the applicable criteria listed in subsection (1) or (2).

History: En. Sec. 5, Ch. 581, L. 1981.

85-2-806. Combined proceedings. The department, upon petition by the applicant, may consider and act upon any application for diversion of water from the basin filed pursuant to the provisions of this part in conjunction with any board proceedings involving the siting of a facility or associated facilities conducted under the provisions of Title 75, chapter 20, part 4, as amended, or in conjunction with any departmental proceeding involving the issuance of a permit or approval of a change conducted under Title 65, chapter 2, as amended, if in the opinion of the department consideration of both applications in the same proceeding will better enable the board and department to fulfill their functions, duties, and responsibilities under the provisions of Title 75, chapter 20, part 4, or Title 65, chapter 2, and this part. The department's consent to the diversion of Montana water out of the basin for ultimate use in a facility as defined in Title 75, chapter 20, shall be contingent upon the department's issuance of a certificate for the facility in accordance with Title 75, chapter 20. The department's consent shall terminate 10 years after the date of issuance of the consent unless the board issues the certificate for the facility in accordance with Title 75, chapter 20, and approval of North Dakota and Wyoming is secured in accordance with Article X of the compact or unless consent is extended by the department.

History: En. Sec. 6, Ch. 581, L. 1991.

85-2-807. Department authorized to appear in administrative and legal proceedings. The department may appear on behalf of the state of Montana in proceedings before the legislatures and administrative agencies of the other signatory states to the compact and in legal proceedings commenced in federal or state court within the other signatory states involving the consent of such signatory states to diversions of water from the basin under Article X of the compact and any other laws or rules of such signatory states applicable to such diversions to the extent necessary to protect the interests and the citizens of Montana in those proceedings.

History: En. Sec. 7, Ch. 581, L. 1981.
A BILL FOR AN ACT ENTITLED: AN ACT DELEGATING AUTHORITY TO THE BOARD OF NATURAL RESOURCES AND CONSERVATION TO AUTHORIZE DIVERSIONS FROM THE YELLOWSTONE RIVER BASIN UNDER ARTICLE X OF THE YELLOWSTONE RIVER COMPACT, SECTION 85-20-101, MCA, ON BEHALF OF THE STATE OF MONTANA AS A SIGNATORY STATE THERETO; AND PROVIDING AN EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Definitions. Unless the context requires otherwise, in this act the following definitions apply:

(1) "Basin" means the Yellowstone River Basin.
(2) "Board" means the Board of Natural Resources and Conservation provided for in 2-15-3302.
(3) "Compact" means the Yellowstone River compact provided for in 85-20-101.
(4) "Department" means the Department of Natural Resources and Conservation provided for in Title 2, chapter 15, part 33.

Section 2. Authority to approve diversions. The Board of Natural Resources and Conservation may consent on behalf of the State of Montana to diversions of water from the basin pursuant to Article X of the compact, including diversions of water allocated under the terms of the compact to the other signatory states of Wyoming and North Dakota.

Section 3. Application -- notice -- objections -- hearing. (1) Any appropriator proposing to divert water from the basin shall file an application with the board.
(2) Notice of the proposed diversion shall be given by the board in the same manner as provided in 85-2-307.
(3) (a) An objection to an application must be filed by the date specified by the board in the notice.
(b) The objection must state the name and address of the objector and facts tending to show that:
(i) the diversion is not for a beneficial use of water under the laws of Montana;
(ii) the water will be used outside Montana in the case of water allocated to Montana;
(iii) the property, rights, or interests of the objector would be adversely affected by the proposed diversion;
(iv) the diversion is not in the public interest of Montana regardless of whether the water in question is allocated to Montana or one of the other signatory states to the compact.
(4) If the board receives an objection to an application it shall hold a hearing on the application within 60 days from the date set by the board for filing.
objections, after service of notice of the hearing by certified mail upon the applicant and the objector.

(5) The hearing shall be conducted under the contested case procedures of the Montana Administrative Procedure Act provided for in Title 2, chapter 4, part 6.

Section 4. Criteria for approval -- terms. (1) The board may issue its approval of a diversion of water allocated to Montana under the terms of the compact or unallocated compact water diverted in Montana if:

(a) the diversion is for a beneficial use under the laws of Montana;

(b) the water will not be used outside Montana;

(c) the property, rights, or interests of an appropriator will not be adversely affected; and

(d) the diversion is in the public interest of Montana.

(2) In determining if the diversion is in the public interest of Montana, the board shall consider:

(a) the benefits to the applicant and the state resulting from the proposed diversion;

(b) the effects of economic activity in Montana resulting from the proposed diversion;

(c) the effects of the proposed diversion on the public health, welfare, and safety;

(3) Notwithstanding the provisions of subsection 1. The board may approve a diversion of water allocated to North Dakota or Wyoming, or unallocated compact water diverted in North Dakota or Wyoming, if the diversion will not adversely affect the property, rights, or interests of an appropriator located in Montana.

(4) The board may approve a diversion subject to such terms, conditions, restrictions, and limitations as it considers necessary to meet the criteria listed in subsection (1) above.

Section 5. Combined proceeding. The board, in its discretion, may consider and act upon any application for diversion of water from the basin filed pursuant to the provisions of [this act] in conjunction with any proceedings involving the siting of a facility or associated facilities conducted under the provisions of Title 75, chapter 20, part 4, as amended, or in conjunction with any departmental proceeding involving the issuance of a permit or approval of a change conducted under Title 85, chapter 2, as amended, or in the opinion of the board consideration of both applications in the same proceeding will better enable the board to fulfill its functions, duties, and responsibilities under the provisions of Title 75, chapter 20, part 4, or Title 85, chapter 2, and [this act].

Section 6. Board authorization to appear in administrative and legal proceedings -- delegation to
(1) The board may appear on behalf of the state of Montana in proceedings before the legislatures and administrative agencies of the other signatory states to the compact and in legal proceedings commenced in federal or state court within the other signatory states involving the consent of such signatory states to diversions of water from the basin under Article X of the compact and any other laws or regulations of such signatory states applicable to such diversions, to the extent necessary to protect the interests of Montana and the citizens of Montana in those proceedings.

(2) The board may exercise the authority delegated to it under the provisions of subsection (1) by and through the department as the board may direct.

Section 7. Supplementary application. [This act] is supplemental to the provisions of Title 85, chapter 2, or any rule promulgated under that chapter.

Section 8. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 9. Effective date. This act is effective on passage and approval.
INTRODUCED BILL

BILL NO. 254

SB 254

APPENDIX N

47th Legislature

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(2) 2,000 acre-feet a year for municipal and domestic uses within the state of Montana;

(3) waters not used for industrial, municipal, or domestic uses pursuant to subsections (1) and (2) may be used for agricultural uses within the state of Montana.

Section 3. Permission for use in North Dakota -- permitted use. Of the 14,000 acre-feet specified in [section 1], the state of Montana hereby grants permission to Intake Water Company, in accordance with 85-1-121, to divert 2,000 acre-feet a year of the waters of the Yellowstone River from its appropriation for ultimate use by the customers of Intake Water Company in the state of North Dakota for municipal and domestic purposes.

Section 4. Conditions of consent and permission. The consents given under [sections 1 and 2] are conditioned upon the issuance of the appropriate permits under the Montana Major Facility Siting Act, Title 75, chapter 20, with respect to any facility or associated facility to be constructed that will use all or any portion of the water of the Yellowstone River so diverted by Intake Water Company.

-End-

SB 254
WATER AND WATERWAYS - Yellowstone River Compact; applicability of Article X to Little Bighorn River.

MONTANA CODE ANNOTATED - Section 85-20-101.

HELD: Article X of the Yellowstone River Compact requires the consent of the states of Montana and North Dakota before water from the Little Bighorn River may be exported from the Yellowstone River basin by a coal slurry pipeline.

14 May 1979

The Honorable Ted Schwinden
Lieutenant Governor
State Capitol
Helena, Montana 59601

Dear Lieutenant Governor Schwinden:

You have requested my opinion on the following question:

Does the Yellowstone River Compact, section 85-20-101, MCA (hereinafter "The Compact"), require the State of Wyoming to secure the approval of the states of Montana and North Dakota before water may be appropriated from the Little Bighorn River in Wyoming and exported to Texas by a coal slurry pipeline?

I have reviewed the memorandum prepared by the Department of Natural Resources on the question, as well as materials submitted by the Attorney General of Wyoming relating to the legislative history of the Compact, and it is my opinion that Article X of the Compact, which requires the approval of each signatory state before water may be diverted out of the Yellowstone River basin, applies fully to the Little Bighorn River, and that Montana therefore must give its approval before water from that river may be diverted outside the basin.

Statutory construction involves the search for legislative intent, and where that intent is clear from the language used and no ambiguity exists, resort to extrinsic sources such as legislative history to aid in construction is not required. State ex rel. Hinz v. Moody, 71 Mont. 473, 481-82, 230 P. 575 (1924). It has been suggested that an ambiguity exists in the Compact as to the inclusion of the Little Bighorn within the Compact's coverage, and that the legislative history of the Compact strongly suggests the exclusion of coverage. I have reviewed the Compact and its history, and I conclude that no ambiguity exists as to the coverage of the Compact, and that in any event the legislative history does not compel the conclusion that the commissioners and legislators who drafted the Compact intended to completely exclude the Little Bighorn from its coverage.

Articles II and X of the Compact contain the pertinent provisions. The first sentence of Article X provides: "No
water shall be diverted from the Yellowstone River basin without the unanimous consent of all the signatory states." The definitions set forth in Article II suggest that this provision applies with full force to the Little Bighorn. Under Article II(A), the Yellowstone River basin comprises all "areas in Wyoming, Montana, and North Dakota drained by the Yellowstone River and its tributaries... but excludes those lands lying within the Yellowstone National Park." The Little Bighorn is a "tributary" of the Yellowstone under Article II(E), since in its natural state it contributes to the flow of the river. Since the "Yellowstone River basin" includes the Little Bighorn as a "tributary," it follows that a diversion of water from the Little Bighorn is a diversion of Yellowstone River basin water which falls within the limitation of Article X of the Compact.

The suggested ambiguity arises from the provisions of Article V, which apportions the water of the Yellowstone and its interstate tributaries between the various signatory states. The Little Bighorn is excluded from the definition of "interstate tributary," Article II(F), and Article V(B)(2) specifically excludes the Little Bighorn from the apportionment.

I find no ambiguity or conflict between the exclusion of the Little Bighorn from the interstate apportionment in Article V and its inclusion in the protective provisions of Article X. Initially, the legislative history of the Compact suggests that the Little Bighorn water was not apportioned because of the claim of the Crow Indians to the water from the river under the Crow Treaty of 1868. The requirement that Montana and North Dakota consent before Wyoming may export Little Bighorn water to Texas is entirely consistent with any Indian water rights. Further, the purpose of the Compact, as set forth in its preamble, is two-fold: "to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof..." (Emphasis added.) The exclusion of the Little Bighorn for apportionment purposes in no way evidences an abdication of the intention of the Compact to encourage the beneficial use and development of its waters for all the signatory states. Finally, while Article V only apportions the "interstate tributaries" of the Yellowstone River, Article X applies by its terms to the entire geographic region drained by the Yellowstone River system, which obviously includes the Little Bighorn. If the framers had intended to exclude the Little Bighorn from Article X, they could easily have done so by requiring unanimous consent from the signatory states for diversions from the Yellowstone and its "interstate tributaries," a term which expressly excludes the Little Bighorn.

It is my conclusion that the terms of the Compact, when read according to their plain meaning, are clear and unambiguous in their inclusion of the Little Bighorn under the provisions of Article X. However, even assuming that resort to the Compact's legislative history is necessary, I find that history to be fully consistent with my conclusion. Three aspects of the legislative history are said to suggest that the Little Bighorn is not covered by the Compact. Initially, the report of the deliberations of the Senate Committee on Interior and Insular Affairs on the bill providing congressional ratification of the Compact is said to evidence an intent to exclude the Little Bighorn. The language in question is found on page 2 of the report, S.Rep. No. 563, 82nd Cong., 1st Sess. (1951). There, under...
the heading of "Apportionment of Use of Water," the following statement appears:

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

This statement is not compelling proof of an intent to exclude the Little Bighorn under Article X, since it is found in the section of the report dealing with apportionment of water under Article V. As noted above, Article V expressly excludes the Little Bighorn from its provisions while Article X does not.

Attention is also drawn to the checkered history of exclusion and inclusion of the Little Bighorn in prior drafts of the Compact. The original 1942 draft expressly included the Little Bighorn, then known as the "Little Horn," and apportioned all its water to the State of Wyoming. This approach met with strenuous protests from Federal and Indian representatives, and the 1942 draft as adopted by the Commissioners simply made no apportionment of the Little Bighorn, on the theory that any attempted allocation would be deemed preempted by federally created Indian treaty rights. See United States v. Powers, 94 F.2d 783 (9 Cir. 1939), aff'd 305 U.S. 527 (1939). This theory apparently carried through to the 1949 version which was finally adopted by the signatory states and ratified by Congress. This history carries little weight as far as Article X is concerned, since the protection of Indian treaty rights afforded by the exclusion of the Little Bighorn from Article V is in fact aided by the provisions of Article X, which obviously make it more difficult to impair Indian water rights by exporting water from the region.

Finally, reference is made to a provision in a prior draft requiring unanimous approval of the Commissioners before water could be transferred from one interstate tributary to another within the Yellowstone River system. The provision was deleted in the negotiations regarding the proper protection of Indian water rights. I am not persuaded that Article X was intended as a substitute for the deleted provision, and was therefore intended to be similarly limited in scope to "interstate tributaries." Transportation of water from tributary to tributary is a matter entirely different from the exportation of water from the geographic area of the basin to another region of the country. Further, even if the framers of the Compact intended to substitute Article X for the deleted interbasin diversion provision, the fact that they drafted Article X in terms of diversions from the entire Yellowstone River basin rather than merely from its "interstate tributaries" suggests an intent to broaden the scope of the provision.

I conclude that the Compact is clear on its face. Wyoming may not divert Little Bighorn River water out of the Yellowstone Basin without the consent of the states of Montana and North Dakota. The fact that the waters of the Little Bighorn were not apportioned under Article V of the Compact does not alter the coverage of Article X, nor does the legislative history indicate an intention contrary to my conclusion.
THEREFORE, IT IS MY OPINION:

Article X of the Yellowstone River Compact requires the consent of the states of Montana and North Dakota before water from the Little Bighorn River may be exported from the Yellowstone River basin by a coal slurry pipeline.

Very truly yours,

MINE GREELY
Attorney General

cc: Department of Natural Resources
    Attorney General of North Dakota
    Attorney General of Wyoming