

No. 137, Original

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In The  
Supreme Court Of The United States  
◆

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

◆  
Before the Honorable Barton H. Thompson, Jr.  
Special Master  
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**DECLARATION OF DOUGLAS R. LITTLEFIELD, PH.D.**  
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COMES NOW Douglas R. Littlefield, pursuant to 28 U.S.C. § 1746, and states as follows:

1. I am over 18 years of age. I have personal knowledge of the following facts, and if called to testify, I would and could testify competently thereto.

### **Expert Qualifications**

2. I received a Ph.D. in American history from the University of California, Los Angeles, in 1987. My principal field of expertise was the history of the American West with an emphasis on water law history. My Ph.D. dissertation focused on the history of the water conflict over the Rio Grande among New Mexico, Texas, and Colorado and the evolution of the 1938 Rio Grande Compact, an interstate agreement apportioning the river's flows among those

**Appendix B**

three states. My dissertation review committee was chaired by Prof. Norris Hundley, Jr., author of *Water and the West: The Colorado River Compact and the Politics of Water in the American West* (1975) and other works on western water law and policy. The committee also included Harrison C. Dunning, Professor of water law at the University of California at Davis.

3. I have published a book on the Rio Grande's interstate apportionment history entitled *Conflict on the Rio Grande: Water and the Law, 1879-1939* (University of Oklahoma Press, 2008) and numerous scholarly articles on water-related history topics. I also have peer-reviewed water-history-related scholarly manuscripts for university presses as well as written numerous book reviews on the history of water resources in the American West.

4. I have taught the history of the American West, environmental history, and American history on the undergraduate and graduate levels at California State University, East Bay, and for the University of Maryland's University College program at the Pentagon in Washington, D.C., and at Patuxent Naval Air Station in Maryland.

5. For the last twenty-seven years, I also have been a professional historian specializing in the history of water resources, water rights, and navigability, and I have provided historical consulting services in relation to many rivers in the United States. I have provided expert witness testimony, affidavits, reports, and exhibits in state and federal courts as well as before governmental commissions and legislative bodies. As part of this work, I have testified, been deposed, provided affidavits and reports, or otherwise assisted in four original jurisdiction cases before the United States Supreme Court, all four of which involved the history of interstate river disputes and/or interstate compacts. Those cases are: *Kansas v. Colorado*, No. 105, Original, a dispute over the Arkansas River; *Nebraska v. Wyoming*, No. 108, Original, a conflict over the North Platte River; *Kansas v. Nebraska and Colorado*, No. 126, Original, a controversy over the Republican River; and *Virginia v. Maryland*, No. 129, Original, a lawsuit over the Potomac River. In one of these, *Kansas v. Colorado*, No. 105, Original, I provided eleven days of testimony, an expert report, and over two hundred exhibits at trial on the history of the interstate apportionment of the Arkansas River and the 1948 Arkansas River Compact. A true

and correct copy of my curriculum vitae, which sets forth my education and relevant experience as a professional historian, is attached hereto as Exhibit 1.

### **Historical Question for Consideration**

6. At the request of the State of Montana, I have conducted research into the historical record of the negotiation and adoption of the 1950 Yellowstone River Compact with regard to documents that may shed light on whether Montana must notify Wyoming of a shortage (issue a “priority call”) in order to be entitled to water for Montana’s pre-1950 rights under the Yellowstone River Compact.

### **Historical Research Locations**

7. To provide an in-depth historical analysis and to reach conclusions with regard to the above question, I am relying on considerable historical research that I have undertaken in both archival and published sources. With regard to archival sources, I have reviewed the files of the Yellowstone River Compact negotiators (as well as other contemporary participants in those deliberations) at the following locations: 1) the Montana Governors’ files at the Montana Historical Society (the equivalent of a state archives) in Billings, Montana; 2) the Montana Attorney General’s records at the Attorney General’s Office in Billings; 3) the records of the Montana Department of Natural Resources and Conservation in Billings; 4) the Wyoming State Engineer’s files at the Wyoming State Archives in Cheyenne, Wyoming; 5) the Wyoming Water Resources Division files at the Wyoming State Archives in Cheyenne; 6) the Wyoming Governors’ files at the Wyoming State Archives in Cheyenne; 7) the North Dakota Water Commission files in Bismarck, North Dakota; 8) the North Dakota Governors’ files at the University of North Dakota in Grand Forks, North Dakota; 9) the files of the U.S. Bureau of Reclamation at the National Archives branch in Denver, Colorado; and 10) the records of the

Department of the Interior at the National Archives branch in College Park, Maryland. In addition, because North Dakota also has provided additional documentation in anticipation of discovery requests, I have reviewed those materials for this study. Finally, the understanding of President Harry Truman and federal executive branch agencies were reviewed – especially as those agencies expressed their views in unpublished reports now held by the Truman Presidential Library in Independence, Missouri – to ascertain the Truman Administration’s understanding of the 1950 Yellowstone River Compact.

8. With regard to published materials, I have undertaken a complete examination of all actions by Congress relating to the 1950 Yellowstone River Compact and its history as revealed in the *Congressional Record*, Congressional reports, published Congressional hearings, and in unpublished Congressional hearings. I also have examined published reports and studies by the U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers (both of which planned to build reservoirs in the Yellowstone River Basin once an interstate allocation of water supplies could be achieved), particularly with regard to the agencies’ roles in providing suggestions and data to the 1950 Yellowstone River Compact’s negotiators.

9. In addition, actions and comments by parties concerned with the Yellowstone River Basin’s interstate allocation were heavily covered by newspapers in Montana, Wyoming, and North Dakota in the years leading up to that accord’s ratification in 1951. Because of those newspapers’ detailed accounts regarding the Compact’s history, I have reviewed over four hundred articles published in the three states describing contemporaneous events – including interviews and other comments by Compact negotiators – leading up to the final 1950 Compact.

10. I hereby certify that true and correct copies of the documents referred to in this Declaration are being provided herewith on a CD as the Addendum to this Declaration.

## **Importance of Full Historical Record**

11. It is important to note here that because deliberations leading to the 1950 Yellowstone River Compact transpired over several decades the answer to the historical question at the beginning of this Declaration was not addressed neatly in a package; rather, the answer emerged piecemeal as different problems were identified and addressed. In particular, those problems included considerable input from water users' groups on the Yellowstone River's tributaries – feedback that did not harmonize from one tributary to another. The problems also included the impacts during the 1930s to 1940s of the Great Depression, the Dust Bowl, and World War II, as well as the U.S. Government's efforts to address those calamities through, among other things, national water resources planning. Thus, from a historical perspective, the language contained in the 1950 Yellowstone River Compact was the result of over two decades of negotiations during momentous national, regional, and world-wide events.

12. Prior to 1950, and beginning as early as the 1930s, there had been several previous versions of a compact that had been achieved and/or discussed (none of which were ever fully ratified), but it is important *not* to view these earlier agreements as unrelated documents. Instead, these previous attempted settlements should be seen as drafts leading to the final 1950 Yellowstone River Compact, and therefore the meaning given to the language used by negotiators in shaping those earlier accords is directly anticipatory of language used in the final 1950 agreement. Similarly, the fundamental concepts found in the final Compact can be traced through these earlier attempts to find a solution to the Yellowstone's interstate apportionment problems. This is particularly true because not only did the 1950 Compact's negotiators refer back to previous negotiations for information on how best to proceed but many of the 1950 agreement's negotiators themselves had directly participated in the discussions leading to the earlier accords. The background of the previous agreements, therefore, should be perceived as a

continuous history leading to the final 1950 Yellowstone River Compact, and while not all early provisions were ultimately adopted for use in the 1950 Yellowstone River Compact, the discussions regarding those previous provisos cumulatively shed considerable light on the final 1950 accord, including with regard to the question of whether Montana must issue a “call” to Wyoming in order for Montana to be entitled to its pre-1950 water rights.

### **Historical Discussion**

13. A fundamental issue that arose in all the early attempts to achieve an interstate compact was how best to protect existing water rights and uses in both Montana and Wyoming (North Dakota entered the deliberations late in the talks). This was an essential concern that confronted the states’ negotiators because neither Montana nor Wyoming was willing to threaten its existing uses and rights to achieve an agreement with the other state. Moreover, both states’ existing water users were adamant that no potential interstate accord jeopardize their water rights, and without the approval of existing water rights holders, ratification would be impossible in the states’ legislatures. Negotiators in both states, therefore, viewed protecting established rights and uses as essential before any other discussions could take place on how to divide additional waters that might be made available through new storage works then being considered by the U.S. Government – a federal solution for the Great Depression, the Dust Bowl, and national growth and security during World War II. Multiple suggestions were then being proposed in Congress and by federal agencies for new dams and reservoirs – some for the entire Missouri River watershed (which includes the Yellowstone River Basin) – that would provide more water for lands with unreliable supplies and for new potentially irrigable acreage. Yet these federal proposals also threatened to reduce local water control in favor of greater basin-wide river regulation. Therefore, protecting status quo water rights and uses was crucial to any

interstate agreement for the Yellowstone River and its tributaries before the basin's water users would consent to any new dams and reservoirs.

14. One method proposed during compact deliberations for securing the status quo of existing water rights and uses within the Yellowstone River Basin was simply to accept prior appropriation across the state line, and, if a "call" became necessary due to shortages on any of the Yellowstone's tributaries, existing priorities across the state line would establish a framework within which such a demand for water could work. Yet regardless of the enormous appeal of this possible solution due to its seeming simplicity, it nonetheless also was an answer that proved to be considerably more complicated than appeared at first blush. Despite the theoretical attractiveness of using priorities to establish an interstate apportionment, Yellowstone negotiators were unable to find a way to implement this goal while simultaneously allowing existing laws to govern within each state. Permitting each state to regulate its own water laws was an objective both states considered as fundamental to maintaining the status quo as protecting existing uses and water rights because it was each state's laws that provided the legal basis and framework for that state's water rights priorities.

#### **A. The 1935 Compact Draft**

15. Congress originally authorized Montana and Wyoming to negotiate a Yellowstone River settlement in 1932,<sup>1</sup> and while some efforts toward this goal took place during the next few years,<sup>2</sup> the proposals were limited in scope until deliberations in 1935, talks that

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<sup>1</sup> *An Act Granting the Consent of Congress to the States of Montana and Wyoming to Negotiate and Enter into a Compact or Agreement for Division of the Waters of the Yellowstone River*, 47 Stat. 306 (1932). See also *Congressional Record*, 72 Cong., 1 sess., June 15, 1932, p. 13013.

<sup>2</sup> See, for example, "Tentative Proposals Submitted for the Formulation of a Compact for Apportionment of the Waters of [the] Yellowstone River and Tributaries between Montana and Wyoming, at a Conference at Sheridan, Wyoming, October 5, 1932," file: Yellowstone River Compact, Compact Proposals, 1932, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming; Wyoming's Tentative Draft, Yellowstone River Compact," Feb. 7,

attempted to accept priorities across the states line as a solution to the interstate apportionment. One central problem that emerged at that time with accepting priorities across state lines was that the two states had vastly different systems for recognizing such rights. Wyoming maintained a centralized recording system that required water users to file their claims with state officials as one important step to establish a valid water right. Yet such claims were not necessarily actual diversions, which required verification, something not always done in Wyoming. In fact, the state's compact negotiators freely acknowledged that in some cases such filings were simply "paper rights" – claims with little or no substantiation.

16. Montana, on the other hand, required posting of notices at actual diversions to claim water rights, but the state had no central recording with state officials. Sometimes such rights were filed with county recorders and/or adjudicated in state courts, but like Wyoming's shortcomings in verifying uses, filings in Montana were similarly not always fully documented. Thus, neither state's system was satisfactory to the other as a means of establishing existing uses and priorities. The differences in these two systems, therefore, meant that defining priorities across the Montana and Wyoming state line was extremely difficult, especially in light of the fact that data on actual uses in both states was severely lacking. Moreover, these differences compounded the reality that there was no administrative means to enforce a "call" by a downstream water user against a water user in an upstream state. This shortcoming, however, did not keep officials from the two states from discussing priorities across the state line even while accepting current state laws as a compact solution that maintained the status quo as to existing uses and rights.

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1933, file: Yellowstone River Compact Records, Compact Drafts, 1933, 1935, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming State Engineer, Record Group 0037, *ibid*.



17. For example, as early as February 1935, a draft interstate compact signed by Montana State Engineer J.S. James and Wyoming State Engineer Edwin Burritt dealt with priorities across the state line. Yet importantly, like the final 1950 Yellowstone River Compact, the 1935 draft made it clear that there was to be no trans-boundary administration of water rights, either by any new interstate organization or by the states themselves. Article V of the 1935 draft compact stated that prior appropriation governed diversions from the Yellowstone River system, but Article V also stated that appropriations were to be determined by the separate laws of each state. Moreover this article also declared that wherever possible, any interstate allocation would to be made at the state line – a provision clearly inserted in order to preserve the sanctity of each state’s administration of its own water laws. And, while the 1935 compact draft also provided that parties in either state could appropriate water in the other state for beneficial purposes, including storage in reservoirs, such appropriations were only possible if they followed the respective state’s laws.<sup>3</sup> In other words, there was to be no trans-boundary administrative system of priorities under the 1935 draft compact and no means whereby a “call” could be implemented across the state line.

18. The compact draft achieved by Montana State Engineer James and Wyoming State Engineer Burritt in early 1935 also reached the conclusion that a new commission to be created by the proposed compact could help establish the relative priorities of existing rights on either side of the boundary as well as allocate additional flows that might be created from new storage or other developments. Nevertheless, once such determinations were reached, each state

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<sup>3</sup> Article V, “Yellowstone River Compact between the states of Wyoming and Montana,” Feb. 6, 1935, file: Yellowstone River Compact Records, Compact Drafts, 1933, 1935, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming state Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

would still govern those waters within its own boundaries.<sup>4</sup> This was an especially important consideration in light of the growing proposals in the mid-1930s for new reservoirs to be built by the U.S. Government, which might involve federal regulation or an interstate compact covering the entire Missouri River Basin, including the Yellowstone system. In other words, any new compact commission would not have the authority to recognize or enforce “calls” across state lines and thus fulfill senior appropriators’ demands for water from juniors on the other side of the boundary. This was in part simply because – as the 1935 negotiators understood – the differing state water laws would have made it very difficult at that time to accurately establish which rights were junior or senior on either side of the state line. Furthermore, both states’ negotiators realized that none of their existing water users were willing to jeopardize their water rights in order to achieve an interstate settlement.

19. In sum, while the 1935 draft compact attempted to consider priorities in both Montana and Wyoming, the proposed agreement did not provide for any form of interstate regulation by priority across the state line. Yet the attempt to utilize priorities was basically a means of recognizing existing uses and rights in both states as a fundamental principle underlying any interstate accord for the Yellowstone River system. Due to the timing of the 1935 draft compact and biennial schedule of the Wyoming Legislature, the 1935 draft was never presented for ratification.

## **B. Compact Deliberations During 1938 to 1941**

20. Over the years that followed, officials from Montana and Wyoming continued to struggle with how best to address existing priorities and uses in both states without directly

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<sup>4</sup> Article VI, “Yellowstone River Compact between the states of Wyoming and Montana,” Feb. 6, 1935, file: Yellowstone River Compact Records, Compact Drafts, 1933, 1935, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

establishing a means to recognize or enforce "calls" across the state line. After continued compact negotiations were authorized by Congress in 1937<sup>5</sup> following the failure of the 1935 talks, Montana Chief Engineer E.B. Donohue told future Montana compact negotiator Joseph Muggli in May 1938 that "the issue of existing priorities would be basic to the new negotiations." Donohue added that Montana would be especially interested in "a determination of the existing water rights granted in each state," information that would be derived by obtaining data on adjudications in each state, the relationships between appropriations in each state and stream flows, water requirements versus existing rights, and how each state administered its own water rights.<sup>6</sup> Donohue favored accepting priorities across state lines, apparently on the theory that most of Montana's priorities were older than those in Wyoming, but how to implement this concept remained elusive.

21. Donohue's views became obvious when compact deliberations resumed in November 1938. At that time, both sides' delegates agreed that accepting existing priorities and uses were crucial to any successful compact, but, with the exception of Donohue, they remained uncertain about how to deal with those priorities across the state line – still because of the differences in state laws and the lack of information about priorities in either state (especially in

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<sup>5</sup> *An Act Granting the Consent of Congress to the States of Montana and Wyoming to Negotiate and Enter into a Compact or Agreement for Division of the Waters of the Yellowstone River*, 50 Stat. 551 (1937). For more information on this legislation, see U.S. Congress, Senate, *Granting the Consent of Congress to the States of Montana and Wyoming to Negotiate and Enter into a Compact or Agreement for Division of the Waters of the Yellowstone River*, S. Rpt. 2227, 74 Cong., 2 sess., 1936; U.S. Congress, House, *Compact between Montana and Wyoming*, H. Rpt. 3034, 74 Cong., 2 sess., 1936; U.S. Congress, Senate, *Granting Consent to Montana and Wyoming to Enter in to [a] Compact for [the] Division of [the] Waters of [the] Yellowstone River*, S. Rpt. 42, 75 Cong., 1 sess., 1937; "Wheeler Sees Tongue River Funds Allocation," *Billings Gazette*, Jan. 7, 1937; "Wheeler Urges Pushing Tongue River Project," *ibid.*, Jan. 12, 1937; "Water Compact Bill Approved," *ibid.*, Feb. 9, 1937; "Western Congressmen Cooperate on Reclamation Bills," *ibid.*, March 30, 1937; "Committee Approves Wheeler Bill Monday," *ibid.*, April 20, 1937; "States May Bargain on Water Diversion," *ibid.*, July 23, 1937; "Wheeler Takes Lead in War in Major Issue in Congress Session," *ibid.*, Aug. 22, 1937; E.B. Donohue, Chief Engineer, Montana State Water Conservation Board, to the Members of the [Montana] Yellowstone River Compact Commission, Jan. 13, 1940, file 04-01-00, YCC Correspondence, 1940, Montana State Department of Natural Resources and Conservation, Helena, Montana.

<sup>6</sup> E.B. Donohue, Chief Engineer, Montana State Water Conservation Board, to Joseph Muggli, May 21, 1938, file 04-01-00, YCC Correspondence, Montana State Department of Natural Resources and Conservation, Helena, Montana.

Montana due to that state's lack of a centralized recording system). Donohue, on the other hand, proposed simply extending priority recognition across the state line. "Consider the Big Horn River as a big irrigation ditch," Donohue argued in relation to one of the Yellowstone's tributaries, "Forget [the] state line."<sup>7</sup> Yet even as he advocated a pure priority administration regardless of state lines, he nonetheless conceded, "Montana is in no position to know about all of its rights until studies are made." Montana compact negotiator Rockwell Brown concurred. Acknowledging that Montana's officials needed to develop more concise information about water rights in their state's part of the Yellowstone Basin, Brown nonetheless asserted that under a priority administration across the state line, "calls" ought to be respected regardless of the state boundary with Wyoming. "Wyoming, in the event of shortage," Brown declared, "should undertake to give due recognition to those [Montana's prior] rights."<sup>8</sup>

22. But how such a trans-boundary priority system would operate was unclear, especially since Wyoming did not favor accepting priorities across the state line. Reflecting the lack of detailed knowledge about exactly what water rights existed on both sides of the border as well as how to administer "calls" across the boundary, Wyoming State Engineer John Quinn stated, "We agree with Mr. Brown's statement completely [about the importance of accepting existing uses and rights], except as to the term he has used that Wyoming should give due recognition to prior rights in Montana. We are willing that such a statement be made if it be modified to the extent that Wyoming will give due consideration in the administration of its own

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<sup>7</sup> "Meeting of the Compact Commissions of Montana and Wyoming to Discuss the Yellowstone River Compact," Nov. 21-22, 1938, microfilm roll 158, State Engineer, General Correspondence, 1930-1939, Series 01.01.01, General Correspondence, 1886-1983, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

<sup>8</sup> "Meeting of the Compact Commissions of Montana and Wyoming to Discuss the Yellowstone River Compact," Nov. 21-22, 1938, microfilm roll 158, State Engineer, General Correspondence, 1930-1939, Series 01.01.01, General Correspondence, 1886-1983, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

rights to any shortage in Montana.”<sup>9</sup> In short, Quinn believed that each state should administer its own water laws, although he conceded that Wyoming would *consider* Montana’s claims while not being bound by them.

23. Two years later, when deliberations resumed in October 1940, William G. Metz, a Wyoming delegate to the talks, made the same point. Summarizing the negotiations to date, Metz stressed the need to carefully examine actual existing water uses (not so-called “paper rights”) to determine the prior rights that would be protected – “the condition which prevails today” as he put it. He added, “Wyoming suggests that the actual beneficial use now made of water be declared the principal factor in dividing the water to meet the needs of the situation as it is today. Actual use of water on land is of more importance than priorities or court decrees.” Yet Metz also stressed that Wyoming believed that each state should administer its own allocations, whatever those might turn out to be under a final compact. As Metz explained during the October 1940 negotiations, an outside objective third party might determine existing uses and rights to help assist an interstate apportionment by a compact, but then any final resulting allocations between Wyoming and Montana ought to be a “mass allocation, and each state could distribute its share as it pleases.” Montana’s Rockwell Brown, who, like many of the negotiators, believed that new storage systems then proposed by federal authorities would alleviate any need to enforce priorities across state lines or elsewhere, agreed that “consideration must be given to existing priorities during this interval [before new storage was constructed].” Brown also underscored the crucial role that water users in each state held in relation to preventing ratification of any interstate agreement that did not protect their existing rights and uses. “Our legislature,” he declared, “is not going to enter into a compact that does not protect

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<sup>9</sup> “Meeting of the Compact Commissions of Montana and Wyoming to Discuss the Yellowstone River Compact,” Nov. 21-22, 1938, microfilm roll 158, State Engineer, General Correspondence, 1930-1939, Series 01.01.01, General Correspondence, 1886-1983, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

the priorities of the irrigators.”<sup>10</sup> Nevertheless, Brown, who, as noted earlier, supported priority acceptance regardless of state lines, offered no backing to the “mass allocation” approach nor did he describe how “calls” would work in relation to the state boundary.

24. Yet regardless of approach, it was clear that all negotiators wanted to find some means to protect the status quo for existing water rights and uses before any allocations were made from “new” water to be made available by reservoir construction. H.F. McColley, who was the secretary and chief engineer of North Dakota’s State Water Conservation Commission and who had attended the compact discussions on October 10, 1940, shortly after North Dakota had joined them, also observed that it was the intent of the negotiators to protect existing uses and rights ahead of any division of new waters that might be made available from future constructed storage. “The consensus of opinion,” McColley told North Dakota Governor John Moses in a report on the proceedings, “was that the Yellowstone River waters should be proportioned on the basis of existing irrigation, based on a water supply established from records of the lowest year recorded; then proportion additional waters that may be available in more abundant years to the irrigated acreage and to potential irrigable acreage, realizing that a second allotment program will require upstream water conservation reservoirs created by the construction of various dams.”<sup>11</sup> Yet McColley also offered no conclusion on how any acceptance of existing uses and rights might be implemented across the state lines – a problem that continued to plague all the compact negotiators as well as other observers.

25. Clifford H. Stone, the director of Colorado’s Water Conservation Board who also had attended the October 10, 1940, Yellowstone River talks as a delegate for the National

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<sup>10</sup> “Minutes of the Meeting of the Yellowstone River Compact Commission Held in the Chamber of Commerce Building, Billings, Montana,” Oct. 10, 1940, file: Yellowstone River Compact Records, Annual Report, 1940, Series 03.12, Yellowstone River Compact Commission Records, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

<sup>11</sup> H.F. McColley, Secretary and Chief Engineer, North Dakota State Water Conservation Commission, to North Dakota Governor John Moses, Oct. 15, 1940, materials provided by North Dakota.

Resources Planning Board (President Franklin Roosevelt's New Deal agency charged with overseeing natural resources development and management), made the same points to Frederic A. Delano, the head of the federal agency on October 16, 1940. Stone explained the importance of protecting existing uses and water rights, especially from Montana's perspective:

Naturally Montana is interested in preserving as far as possible vested and present uses, and obviously any compact which might seriously interfere with such uses would be difficult of ratification. Therefore, there is justification for securing, on as sound a basis as possible, information as to the present uses of water within the basin. In Wyoming, of course, this information is largely available through the administrative procedure which has existed in that State from the beginning. Wyoming also is apparently relying, according to the statements of its representatives, largely upon the information now being obtained by the Reclamation Bureau as to present uses of water within that State. This information also will be helpful to the State of Montana, but that State is unwilling apparently to rely entirely upon the Bureau's information, and deems it advisable to have its own figures and, in the interest of final ratification, to survey as fully as possible, through its own agencies, the situation as to water uses within the State.<sup>12</sup>

26. Even as more talks continued into late 1941, *how* to accept existing uses and priorities in both Montana and Wyoming continued to remain uncertain even though both states did not dispute *whether* such rights and uses should be protected. As Leshar Wing, a representative of the Federal Power Commission attending the deliberations, explained to Compact Commissioner and Wyoming State Engineer L.C. Bishop in December 1941, one of the concepts for allocating water to Montana and Wyoming was "to base the allocation of the flows upon priorities, disregarding state lines until rights of existing irrigated acreage are satisfied" with excess water divided in some other manner.<sup>13</sup> Wing, however, offered no ideas on how to deal with "calls" across the state line.

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<sup>12</sup> Clifford H. Stone, Chairman, Region 7, National Resources Planning Board, to Frederic A. Delano, National Chairman, National Resources Planning Board, Oct. 16, 1940, materials provided by North Dakota.

<sup>13</sup> Leshar S. Wing, Senior Engineer, Federal Power Commission, to Fred E. Buck, Chief Engineer, Montana State Water Conservation Board, Dec. 29, 1941, file 04-01-00, YCC Correspondence, 1941, Montana State Department of Natural Resources and Conservation, Helena, Montana.

### C. The October 1942 Compact Draft

27. Negotiations continued, and a new draft compact was reached in October 1942. Yet while the trans-border "call" solution remained elusive, the October 1942 compact draft made it clear that all regulation of existing rights would occur under the laws of each state within its own borders. In other words, the compact's authors considered maintaining the status quo of each state's authority over its own laws as crucial as preserving the status quo of existing water rights and uses. Article VIII of the draft stated: "All rights to the beneficial use of the waters of the Yellowstone River System heretofore and hereafter established under the laws of any signatory State shall be satisfied solely from the proportion of the water allotted to that State in which such rights are claimed and allowed[.]"<sup>14</sup> Stressing that each state would control all water within its own borders, Leshner Wing of the Federal Power Commission, who was helping to write this version of the compact, subsequently told John Tucker, North Dakota's state engineer, that this provision meant, "The water rights of individuals in each state are unaffected by the Compact, since each person is entitled to his proportionate share of the state allotment, in accordance with his existing appropriation rights and priority of filing."<sup>15</sup> Moreover, the October 1942 draft declared that "Unadjudicated appropriations shall hereafter be determined by the State in which the water is diverted, and where a portion or all of the lands irrigated are in the adjoining State shall be confirmed in that State by the proper authority. Each adjudication is to conform with the laws of the State where the water is diverted and shall be recorded in the County and State where the water is used."<sup>16</sup> In addition, the draft also accepted "present vested

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<sup>14</sup> Article VIII, "Preliminary Draft of Yellowstone River Compact (Revised October 17, 1942)," box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

<sup>15</sup> Leshner S. Wing to John Tucker, Nov. 3, 1942, materials provided by North Dakota.

<sup>16</sup> Article X, "Preliminary Draft of Yellowstone River Compact (Revised October 17, 1942)," box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.



rights” as protected, but the draft did not address the topic of changes in individual water users’ circumstances (such as abandonment or forfeiture).<sup>17</sup> Further stressing that each state’s laws were to govern its own water rights, the October 1942 draft agreement established that lower states could appropriate water in upper states and could build storage facilities for such new water supplies, but the draft established how these activities would take place to conform with the respective state laws – much like the 1935 draft compact had provided.<sup>18</sup>

28. The October 1942 draft also included the idea originally proposed in the 1935 compact draft of creating an interstate compact commission. Yet like the 1935 proposal, the commission outlined in 1942 had no authority to compel juniors to close their headgates in favor of senior water users in another state, although the commission could rotate low-flow supplies among all users on a given Yellowstone tributary if the commissioners jointly determined such a procedure would be most useful to all concerned.<sup>19</sup> Instead, the 1942 version of a commission was an agency to gather information and make recommendations, and the draft compact also expressly stated, “The findings of the Commission shall not be conclusive in any Court or tribunal having jurisdiction over this Compact.”<sup>20</sup> In other words, each state’s sovereignty over water rights within its borders was to be maintained – a principle that, despite many Montanans’ desire to implement priorities regardless of state lines, remained fundamental to most negotiators in Montana, Wyoming, and North Dakota.

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<sup>17</sup> Article VIII, “Preliminary Draft of Yellowstone River Compact (Revised October 17, 1942),” box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors’ Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

<sup>18</sup> Articles X-XII, “Preliminary Draft of Yellowstone River Compact (Revised October 17, 1942),” box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors’ Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

<sup>19</sup> Article VII, “Preliminary Draft of Yellowstone River Compact (Revised October 17, 1942),” box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors’ Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

<sup>20</sup> Article IV, “Preliminary Draft of Yellowstone River Compact (Revised October 17, 1942),” box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors’ Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

## **D. The December 1942 Compact Draft**

29. By December 1942, interstate negotiators had dramatically changed their approach to dividing the waters of the Yellowstone River – in part because they had been unable to reach any conclusion about how to apportion the basin's water supplies by priority yet still fully respect the authority of each state over water laws and rights within its own borders. A new compact draft, dated December 15, 1942, retained in its Articles III-IV, the provisions from the October 1942 draft establishing an interstate stream commission that would administer stream gauging stations in the Yellowstone Basin.<sup>21</sup> But from there, the apportionment provisions were radically different. Instead, the December 15th draft compact simply turned the entire matter over to the proposed compact commission, which would divide flows in relation to three basic considerations: 1) priorities, 2) existing irrigated lands within the states involved, and 3) potential irrigable lands within the Yellowstone Basin.<sup>22</sup> Yet even with these major changes in how allocations would be handled, the three states' negotiators still tried to maintain each state's control over rights, uses, and laws within its own boundaries through the retention of many of the provisions from the October 1942 draft.<sup>23</sup> As Federal Power Commissioner Wing, who helped write the December 15th version, explained to Montana negotiator P.F. Leonard, each state's priorities would be respected within its boundaries (even if the annual allocations were handled by a compact commission based on priorities along entire streams). "The actual distribution of the amount of water allotted to a State would, of course," Wing stated, "be on the basis of

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<sup>21</sup> Articles III-IV, "Preliminary Draft of Yellowstone River Compact (Revised December 15, 1942)," box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

<sup>22</sup> Article V, "Preliminary Draft of Yellowstone River Compact (Revised December 15, 1942)," box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

<sup>23</sup> Articles VII-VIII, "Preliminary Draft of Yellowstone River Compact (Revised December 15, 1942)," box/folder: 124/10, Yellowstone River Compact, 1941-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

priorities within the State.”<sup>24</sup> How this would be accomplished, however, had been the crucial question all along because there had been no agreement on what, precisely, constituted the existing priorities within each state. The December 15th draft did not really answer this point, and not surprisingly, the draft was not widely supported and prompted heated debate.

30. As noted regarding earlier compact discussions, some Montanans did not like the concept of each state fully retaining jurisdiction over its own water laws and rights in any Yellowstone settlement, largely because an interstate administration of priorities regardless of state lines was assumed to favor many Montana water users, who claimed earlier priorities than those upstream in Wyoming. Understandably, therefore, Wyoming’s negotiators were stronger advocates of the sanctity of each state’s laws within its own borders. Montana State Engineer Fred Buck summarized both sides’ thoughts on this point (and the related problems) to Montana negotiator Joseph Muggli in late December 1942:

When the Montana members think of priorities, they have in mind the whole stream from its source to its mouth, forgetting entirely that the watershed is crossed by the State line. That is, a prior user on a stream, regardless of which State he lives in, is entitled to first use of the water. The user having the second priority may be in the other State but has second right to the use of water from that stream. Now I believe this is the principle the Montana boys have in mind when they speak of priorities, but Wyoming does not put this interpretation on the word. Their idea is to divide the water at the State line in the ratio of percentages of irrigated land in the respective States, then each State takes its water so divided and distributes the same among its users according to the priorities within that State. You can readily see the confusion that will eventually arise unless this matter is straightened out and stated very clearly.<sup>25</sup>

31. In an attempt to address Montanans’ concerns over their claimed earlier priorities (as well as the uncertainties that existed at the time with regard to proving such rights), by the end of December 1942, when a revised version of a compact was achieved, provisions were

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<sup>24</sup> Lesher S. Wing, Senior Engineer, Federal Power Commission, to P.F. Leonard, Dec. 19, 1942, file 04-01-00, YCC Correspondence, Montana State Department of Natural Resources and Conservation, Helena, Montana.

<sup>25</sup> Montana State Engineer Fred E. Buck to Joseph Muggli, Dec. 22, 1942, file 04-01-00, YCC Correspondence, Montana State Department of Natural Resources and Conservation, Helena, Montana.

inserted in that accord that attempted to bridge the desire for “home-rule” with possible acceptance of Montana’s earlier water rights claims. Those provisions were clauses in Article V of the December 31, 1942, compact providing for ten-year reviews and adjustments to the interstate allocations based on further information that might be developed during each succeeding decade.<sup>26</sup> The decade-by-decade review was to permit adjustments based on: 1) greater knowledge of existing rights, since those were in the midst of being studied in relation to federal proposals for more storage in the Yellowstone Basin, and 2) changes in flows caused by such storage, changes in return flows, and other factors. The idea, however, was not to adjust allocations due to changes in priorities themselves (such as due to individuals’ abandonment or forfeiture). Instead, the existing uses and rights were to be covered by the minimum percentage allocations set forth in Article V. The bottom line for this compact version, however – and the main reason for later objections to this accord – was that the actual allocations were to be left to a permanent commission created by the compact. This new decade-by-decade-review approach to Article V had been developed in recognition of the considerable disagreement over exactly what was the extent of existing water uses and rights within each state. But the two states also attempted to simultaneously endorse each state’s administering its own water rights, uses, and laws. As Article VI of that agreement provided, “Present vested rights within each State and between States relating to the beneficial use of the waters of the Yellowstone River System are recognized by this Compact. All rights to the beneficial use of the waters of the Yellowstone River System, heretofore and hereafter established under the laws of any signatory State, shall be satisfied solely from the proportion of the water allotted to that State as provided in Article

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<sup>26</sup> Article V, “Yellowstone River Compact,” Dec. 31, 1942, Subject File, Yellowstone River Compact, 1937-1971, box/folder 7, Hans L. Bille Papers, 1955-1973, MC219, Montana Historical Society, Helena, Montana.

V....”<sup>27</sup> Moreover, as had been the case in previous compact efforts, downstream states still could appropriate water under the laws of upstream states for use in downstream locations.<sup>28</sup>

32. Combining “home rule” with a compact commission that could change allotments every decade, however, flew in the face of reality to many negotiators. R.E. McNally of Wyoming explained the problem with this version of the compact to Wyoming State Engineer L.C. Bishop in a January 14, 1943, letter that underscored Wyoming’s desire to avoid any interstate regulation of existing rights and uses and to leave those rights and uses to the oversight of the individual states. In a lengthy analysis of the proposed compact and other interstate water disputes (including cases already decided by the U.S. Supreme Court as well as those still being litigated), McNally made it apparent that his state’s position related to a desire not to have any trans-boundary regulation of priorities:

[T]he State of Wyoming is making the following contentions: 1. Interstate priority administration is not to be applied. . . . Equitable apportionment is accomplished by a mass allocation of the supply. . . . Let us consider the first of these contentions. We find our state contending very vigorously that interstate administration is entirely unfeasible, impracticable, and undesirable.<sup>29</sup>

33. Following a lengthy discussion of these points in relation to other interstate water disputes showing that such priority regulation of interstate rivers was not equitable because no specific quantity of water was assigned to either state, McNally therefore queried hypothetically, “In a huge basin, such as the Yellowstone River basin, is it practical to undertake interstate administration at all?” His implicit answer was obviously “no,” which he made clear by noting the considerable differences between the two states in relation to length of irrigation seasons,

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<sup>27</sup> Article VI, “Yellowstone River Compact,” Dec. 31, 1942, Subject File, Yellowstone River Compact, 1937-1971, box/folder 7, Hans L. Bille Papers, 1955-1973, MC219, Montana Historical Society, Helena, Montana.

<sup>28</sup> Article VII, “Yellowstone River Compact,” Dec. 31, 1942, Subject File, Yellowstone River Compact, 1937-1971, box/folder 7, Hans L. Bille Papers, 1955-1973, MC219, Montana Historical Society, Helena, Montana.

<sup>29</sup> R.E. McNally to Wyoming State Engineer L.C. Bishop, Jan. 14, 1943, materials provided by North Dakota.

precipitation, and regional requirements. After considerably more review of previous interstate water cases (notably, the U.S. Supreme Court's 1922 decision in *Wyoming v. Colorado*, 259 U.S. 419), McNally concluded: "I feel compelled to conclude that at least insofar as Tongue River and Powder River [both of which are tributaries of the Yellowstone River] are concerned, I must oppose this matter of interstate administration. I would want to limit the powers of the Interstate Commission so that each state would administer its own laws and its own water."<sup>30</sup>

34. Yet there was no getting around the fact that this version of the compact gave the actual allocations of water to the commission created by the agreement. The "solution" to the conundrum of how to deal with Montana's older claims by providing for ten-year reviews and adjustments to the interstate allocations under Article V had been a radically new approach to the years-long priorities problem. Many parties nonetheless believed that all the clause did was to leave the entire issue up in the air, and as a result, they believed this version of the compact left too many questions unanswered. One of these questions, to Montana negotiator P.F. Leonard, even dealt with whether prior rights would be sacrosanct. Leshar Wing tried to clarify this point, and in so doing, he also underscored that the prior rights being protected were to be considered permanent allocations — blocks of water — that would not vary over time in relation to individuals' changed circumstances or the evolution of water law. Wing wrote to Leonard on January 30, 1943:

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

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<sup>30</sup> R.E. McNally to Wyoming State Engineer L.C. Bishop, Jan. 14, 1943, materials provided by North Dakota.

*which they are permitted to deplete the stream comprise the allotments.*  
[Emphasis added.]<sup>31</sup>

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

Present vested rights within each state and between states relating to the beneficial use of the water of the Yellowstone River system are recognized by this Compact. All rights to the beneficial use of the water of the Yellowstone River system, heretofore and hereafter established under the laws of any signatory state will be satisfied solely from the proportion of the water allotted to that state. . . . Indian treaty rights pertaining to the waters of the Yellowstone River Basin are not affected by this Compact and are excluded therefrom.

36. D'Ewart then declared emphatically: "It would appear to me that it would be hard to write an article more definitely recognizing vested rights within State boundaries. This Compact does not affect vested rights within state boundaries." D'Ewart added that a further safeguard to the sanctity of each state's administration of rights and laws within its boundaries were the provisions in Article VIII permitting lower states to build reservoirs in upper states but only under the upper state's existing laws.<sup>32</sup>

37. Yet even this explanation did not quell all objections in both Montana and Wyoming, particularly due to the uncertainty over how much authority the compact commission would have over interstate allocations as each decade went by. As a result, ratification failed

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<sup>31</sup> Lesh S. Wing to P.F. Leonard, Jan. 30, 1943, materials provided by North Dakota.

<sup>32</sup> Wesley A. D'Ewart, "Yellowstone River Compact" [analysis of compact], Feb. 1943, materials provided by North Dakota.

when Wyoming irrigators in the Tongue and Powder basins – both of which are tributaries of the Yellowstone River – succeeded in having the Wyoming approval delete references to those two streams in the compact itself. In other words, the Tongue and Powder were not to be covered by the agreement at all,<sup>33</sup> and with only a partial interstate accord accomplished, the entire compact version died.

### **E. The 1944 Compact**

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

It is my theory that the only purpose of a compact is to divide the water at the State line in order to avoid the conflicts by reason of the State line. The compact can not [*sic*] settle or determine questions within the boundaries of a State. I do not believe that the commissioners appointed under a compact would have authority to come into the State of Montana and divide water or interstate tributaries at the point where such tributaries join the Yellowstone River in Montana. The compact commissioners have no business attempting to measure or divide waters that have their source within or supply from territory entirely within the State of Montana. Any attempt to do so would be unlawful and would lead to confusion and discord and I do not believe it has ever been attempted previously.<sup>34</sup>

39. Wyoming State Engineer L.C. Bishop concurred that the protection of existing uses and water rights within each state was vital and that each state had to maintain complete

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<sup>33</sup> "House in Wyoming Acts on Bill on River Compact," *Helena Independent*, Feb. 16, 1943; "North Dakota Senate Votes Water Compact," *Billings Gazette*, Feb. 17, 1943; "Water Pact Voted by Wyoming House," *ibid.*, Feb. 18, 1943; "Wyoming Senate Okehs Yellowstone Compact," *ibid.*, Feb. 19, 1943; "Water Compact Rejected by Montana Senate," *ibid.*, Feb. 20, 1943; "North Dakota Governor Vetoes Bill Designed to Ratify Water Pact," *ibid.*, March 4, 1943; Montana State Engineer Fred E. Buck telegram to North Dakota State Engineer John T. Tucker, Feb. 19, 1943, file 04-01-00, YCC Correspondence, 1943, Montana State Department of Natural Resources and Conservation, Helena, Montana; "Montana Senate Rejects Compact," *Bismarck Tribune*, Feb. 20, 1943.

<sup>34</sup> P.F. Leonard to H.D. Comstock, Regional Director, U.S. Bureau of Reclamation, June 29, 1944, file: General Correspondence, 1940-1949, Yellowstone River (1943-44), Series 01.01.01, box 126, General Correspondence, 1940-1949, Yellowstone River – Z, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.



control over water laws as well as rights within its boundaries in order to protect that state's water users. Explaining the situation to Comstock on November 4, 1944, Bishop wrote that Wyoming's Tongue River water users would never accept any agreement whereby their claims might be compromised in favor of an allocation to Montana. "The people on Tongue River," Bishop declared, "will not agree to any compact whereby there is a possibility that some of their late water rights will be effected [*sic*]."<sup>35</sup>

40. These concerns subsequently doomed yet a new version of the compact – which in many respects resembled the 1942 compact draft – although the 1944 version continued to assert in Article VI:

Present vested rights within each State and between States relating to the beneficial use of the waters of the Yellowstone River System are recognized by this Compact and shall be administered by the proper officials of the respective States. All rights to the beneficial use of the waters of the Yellowstone River System, heretofore and hereafter established under the laws of any signatory State shall be satisfied solely from the portion of the water allotted to that State as provided in Article V.<sup>36</sup>

Despite this recognition of each state's existing rights and uses, Wyoming Governor Lester C. Hunt vetoed the 1944 compact in late February 1945. Hunt cited his belief that Wyoming's interests in each Yellowstone tributary were not adequately protected.<sup>37</sup>

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<sup>35</sup> Wyoming State Engineer L.C. Bishop to H.D. Comstock, Regional Director, U.S. Bureau of Reclamation, Nov. 4, 1944, file: General Correspondence, 1940-1949, Yellowstone River (1943-44), Series 01.01.01, General Correspondence, 1886-1983, box 126, Records of the Wyoming State Engineer, Record Group 0037, Wyoming State Archives, Cheyenne, Wyoming.

<sup>36</sup> Article VI, Yellowstone River Compact (December 1944 draft), box/folder: 124/11, Yellowstone Compact Commission, 1945-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana.

<sup>37</sup> Wyoming Governor Lester C. Hunt to Wyoming Secretary of State William Jack, Feb. 27, 1945, box/folder: 124/11, Yellowstone Compact Commission, 1945-1948, Sam C. Ford Administration, 1941-1948, Montana Governors' Records, 1889-1962, MC35, Montana Historical Society, Helena, Montana. See also "Water Pact Bill Vetoed by Hunt," *Billings Gazette*, March 2, 1945; "Wyoming Governor Vetoes Water Pact," *Bismarck Tribune*, March 9, 1945.

## **F. The 1950 Compact and Contemporaneous Explanations**

41. Due to the biennial nature of the three states' legislatures, several years transpired before negotiators for Montana, North Dakota, and Wyoming returned to compact discussions, and by this time, it had become obvious that no settlement that extended or recognized priorities across state lines would be satisfactory to all parties. In addition, negotiators also had given up on the idea of a powerful commission that could change interstate allocations. At first, correspondence among the parties discussed the possibility of ratifying the previously-defeated 1944 compact. Yet the primary goal of the interstate deliberations – protecting existing uses and rights within individual states before any allotments of supplemental supplies or new stored waters were assigned – remained foremost in most negotiators' minds. Indeed, as Montana's efforts to more clearly determine its existing uses and rights through the county-by-county studies (which had started several years earlier and all of which are posted online now) reached fruition, Montana's compact negotiators told Wyoming's leaders that with the new and better defined information in hand, Montana now would insist on a greater allocation of water in any revised compact negotiations to cover the state's existing uses and rights. Montana State Engineer and compact negotiator Fred E. Buck made this point to Wyoming State Engineer L.C. Bishop on January 2, 1948:

At the time the present Compact was agreed upon we had no definite data as to the amount of the land being irrigated in Montana, but since then we have completed our water resources surveys and I am sure that the results of these surveys will show without a doubt that Montana is entitled to a larger percentage of the first block of water [today, called "Tier I" water] than is shown in the present [1944] Compact.<sup>38</sup>

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

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<sup>38</sup> Montana State Engineer Fred E. Buck to Wyoming State Engineer L.C. Bishop, Jan. 2, 1948, materials provided by North Dakota.

Montana is anxious to cooperate with Wyoming in this matter of a compact. I am inclined to agree with Mr. Buck that if a new compact is opened up, Montana would have to insist on a larger percentage of the first block of water ["Tier I" water] based on Montana's more exact information as regards irrigated areas.<sup>39</sup>

43. For similar reasons, everyone now realized that no state was willing to relinquish any aspect of its sovereignty to an administrative body charged with allocating flows among the states, even after a decade-by-decade review of new information. Nor was anyone willing to accept regulation of priorities across the state line if it meant either state surrendering jurisdiction over its own laws and water rights. As P.F. Leonard, a Montana negotiator, explained at the November 29, 1949, compact talks, "the water being divided is that which crosses the State line, not that which exists at any other point."<sup>40</sup>

44. A similar view was expressed by the Yellowstone River Compact Commission's Engineering Committee, which had been created by the compact negotiators in late 1949.<sup>41</sup> Explaining in its final report to the full negotiating commission, the Engineering Committee noted that there were too many unknown facts relating to either state's priorities for such a trans-boundary administration of priorities to work:

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

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<sup>39</sup> Congressman Wesley A. D'Ewart to Wyoming State Engineer L.C. Bishop, March 24, 1948, materials provided by North Dakota.

<sup>40</sup> "Yellowstone River Compact Commission, Minutes of Meeting, Nov. 29, 1949," Montana Attorney General's Office, Helena, Montana.

<sup>41</sup> "Yellowstone River Compact Commission, Minutes of Meeting, Nov. 29, 1949," Montana Attorney General's Office, Helena, Montana. See also "Group Is Named to Engineering Committee, Will Seek to Allocate Yellowstone River Use," *Independent Record* (Helena), Nov. 30, 1949: "Negotiations Reopened at Meet Here to Formulate Water Pact," *Billings Gazette*, Nov. 30, 1949.

adjustication [*sic*] proceedings, and other factors. It would be difficult to arrive, for example, at a definition of a water right that could be applied in all three states.<sup>42</sup>

45. By the spring of 1950, a new draft compact had been circulated. W.J. Burke of the Bureau of Reclamation, who had authored the draft, explained that he had considered previous efforts to formulate a compact as well as the work of the Engineering Committee, and the "only principle that I can deduce from the report of the engineering committee is that existing appropriative rights in each State shall be recognized both as to validity and enjoyment and that the stream flows after depletion by existing appropriative rights shall be apportioned on a rate basis that shall be determined by taking the total of the interstate potential acreage as the base and the total of the intrastate potential as the percentage."<sup>43</sup>

46. Several months later, Wyoming's commissioners met to be certain they all agreed on fundamental principles in any final compact, and subsequently, Wyoming's R.E. McNally wrote to W.J. Burke on August 17, 1950, to relay the results of the Wyoming caucus. McNally indicated that he and other Wyoming commissioners had "reached a tentative agreement on most of the important questions which will arise when the Drafting Committee meets." McNally then stated that one of those issues involved the question of the treatment of prior water rights under the proposed compact. This, in turn, he noted, raised the topic of whether prior water rights and uses (which nearly all previous compact versions had attempted to safeguard, although the means had been uncertain) were to be protected as they then existed under water laws of the day or whether they might be subject to variations in individuals' status or changes in water laws over

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<sup>42</sup> Yellowstone River Compact Commission, Engineering Committee, "Report of the Engineering Committee: Yellowstone River Compact Commission," Jan. 19, 1950 (unpaginated), North Dakota State Water Commission Library, Bismarck, North Dakota.

<sup>43</sup> W.J. Burke to R.J. Newell, Chairman, Yellowstone River Compact Commission, April 20, 1950, file 04-01-00, YCC Correspondence, Montana State Department of Natural Resources and Conservation, Helena, Montana.

time. As McNally explained, the actual water supplies to satisfy the rights and uses that existed under each state's laws on January 1, 1950, were those that were to be protected:

We will submit for consideration Paragraph A of Article V in the following words: "A. All existing rights to the beneficial use of the waters of Clarks Fork Basin, Yellowstone River, Big Horn River Basin (exclusive of Little Horn River), Tongue River Basin, and Powder River Basin (inclusive of Little Powder River), respectively, in the States of Montana and Wyoming valid under the laws of those States, respectively, as of January 1, 1940 [this is a typographical error and should be '1950' in light of what McNally says later in his letter], are hereby recognized and shall be and remain unimpaired by this compact."<sup>44</sup>

47. As explained earlier, McNally indicated that the protected rights were those sanctioned by existing laws of the time and were not subject to alterations due to individual circumstances or changes in water law; McNally expressly stated that the water uses and rights being permanently protected were those "valid under the laws of those States, respectively, as of January 1, 1950." Moreover, this language was to apply to all streams covered by the compact. McNally made this clear when he wrote, "This phraseology, we think, should be made applicable to all of the rivers involved in these negotiations."<sup>45</sup>

48. This particular point had been underscored a few months earlier in late May 1950 when I.A. Acker, North Dakota's principal negotiator, had sent a draft portion of what became Article V of the final compact to R.J. Newell, the chairman of the Yellowstone River Compact Commission. Acker had noted that that Yellowstone Basin streams flowing from Montana into North Dakota ought be treated exactly the same as those shared by Wyoming and Montana. As Acker wrote, "I cannot conceive of any objection to the amendment suggested by me. The amendment merely provides for the same recognition of so-called vested rights as was insisted

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<sup>44</sup> R.E. McNally to W.J. Burke, Regional Counsel, U.S. Bureau of Reclamation, Aug. 17, 1950, file 04-01-00, YCC Correspondence, 1950, Montana State Department of Natural Resources and Conservation, Helena, Montana.

<sup>45</sup> R.E. McNally to W.J. Burke, Regional Counsel, U.S. Bureau of Reclamation, Aug. 17, 1950, file 04-01-00, YCC Correspondence, 1950, Montana State Department of Natural Resources and Conservation, Helena, Montana.

upon by Mr. McNally and others at the last meeting of the Compact Commission, with reference to tributary streams.”<sup>46</sup>

49. Moreover, as deliberations continued in the late summer and fall of 1950, it became increasingly clear that almost no one continued to support an administration of interstate waters on any of the Yellowstone River’s tributaries according to priorities regardless of state lines. While some continued to believe that strict adherence to priorities across the Montana-Wyoming boundary would bring Montanans more water (as well as constitute an “equitable” apportionment), this position was roundly rejected by the majority of the compact negotiators, who backed complete sovereignty by each state over its own waters – no matter how an interstate allocation might take place. For instance, North Dakota’s I.A. Acker tried to persuade Montana’s P.E. Leonard of the futility of the trans-boundary priority idea in a September 23, 1950, letter. Acker pointed to the recent U.S. Supreme Court decision in *Hinderlider v. La Plata River and Cherry Creek Ditch Company*, 304 U.S. 92 (1938), which, according to Acker, declared that states sharing an interstate stream had a mutual right to an equitable apportionment of that stream, notwithstanding priorities along the entire length of the stream. Acker explained what this meant:

In other words, under the rule of equitable division between states, the right of prior beneficial use of water in each state would apply to the portion of flow “equitably” allocated to it. Under the rule suggested by you at our meeting last August, state lines would be ignored and determination of priority would involve consideration of water-rights along the entire length of a stream. It is quite obvious, however, that if the question of priority of water-rights must be adjudicated on the basis of time of appropriation for beneficial use, without regard to state lines, administration would be very difficult.

Under the rule suggested by Mr. McNally, the maxim “first in time first in right” would, as to an appropriator in Wyoming, apply to the share of the flow of a stream allocated to Wyoming and likewise the priority of a

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<sup>46</sup> I.A. Acker, Counsel for the [North Dakota] State Water Conservation Commission, to R.J. Newell, Chairman, Yellowstone Compact Commission, May 22, 1950, materials provided by North Dakota.

water-right in Montana would concern only the water "equitably" allocated to that state.

I am inclined to agree with Mr. McNally that the waters of an interstate stream must first be equitably divided between the states through which it flows, and that the question of priority of water-rights must be decided in each state under its law, and should concern only priority as to the beneficial use of the quantity of water allotted to each state.<sup>47</sup>

50. Members of the Engineering Committee of the Yellowstone River Compact Commission clearly backed Acker's views of the sanctity of each state's laws and not the position of regulating priorities regardless of state lines. As Carl Myers, Chairman of the Engineering Committee, summarized in a draft letter to Compact Commission Chairman R.J. Newell, any attempt to administer existing rights or uses across state lines would be futile, although Myers also made it clear that such rights ought to be recognized and permanently protected within each compacting state. With regard to protecting existing rights and uses, Myers told members of the Compact Commission's Engineering Committee on September 19, 1950, that one of the basic principles underlying a compact draft that he was forwarding for the committee's consideration was that "Existing rights are to be undisturbed and not administered under the Compact."<sup>48</sup> The draft letter to Newell forwarded by Myers then added:

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

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<sup>47</sup> I.A. Acker, Counsel for the [North Dakota] State Water Conservation Commission, to P.F. Leonard, Sept. 23, 1950, materials provided by North Dakota.

<sup>48</sup> Carl Myers, Chairman, Engineering Committee, Yellowstone River Compact Commission, to Fred Buck, Early Lloyd, W.S. Hanna, and J.J. Walsh, Sept. 19, 1950 (with compact draft), file 04-01-00, YCC Correspondence, Montana State Department of Natural Resources and Conservation, Helena, Montana.

both States on an equivalent basis, and it might eventually involve adjudication proceedings in either or both States.<sup>49</sup>

### G. Approval of the 1950 Compact by Congress

51. Following the approval of the 1950 Yellowstone River Compact by the state negotiators, various federal officials offered their views on exactly what the agreement meant in preparation for ratification procedures by the three states and by Congress. For instance, on January 23, 1951, Elmer K. Nelson, an engineering consultant for the U.S. Senate Committee on Interior and Insular Affairs, which was then considering the proposed compact, wrote a memorandum to Senator Joseph C. O'Mahoney of Wyoming, who chaired the committee. Nelson reviewed the provisions of Article V, and in so doing, he offered his views regarding that article's sections to help O'Mahoney formulate his recommendations to the full U.S. Senate with regard to ratification. Nelson specifically stated with respect to water rights and uses prior to January 1, 1950, that the compact did not permit "calls" by juniors in order to satisfy senior claimants in upstream states:

Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory states. No regulation of the supply is mentioned for the satisfaction of these rights, *and it is clear, then, that a demand of one state upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing.* Where these rights have deficient supplies they would be supplemented by rights obtained from "unused and unappropriated waters" in the basin as of January 1, 1950, from the allocated waters under subsection B. North Dakota rights are covered specifically in subsection D. [Emphasis added.]<sup>50</sup>

52. Robert Newell, the federal delegate to the compact talks, also explained the meaning behind Article V, observing that that article did not contemplate any adjustments to pre-

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<sup>49</sup> Draft letter of Engineering Committee to R.J. Newell, Oct. 3, 1950, contained with letter from Carl L. Myers, Chairman, Engineering Committee, to Fred Buck, W.S. Hanna, Earl Lloyd, and J.J. Walsh, Oct. 3, 1950, materials provided by North Dakota.

<sup>50</sup> Elmer K. Nelson Memorandum to U.S. Senator Joseph C. O'Mahoney of Wyoming, Jan. 23, 1951, Montana Attorney General's Office, Helena, Montana.



1950 rights and uses even in light of possible future changes in individuals' circumstances or subsequent alterations in water law. Newell stressed the difficulties the negotiators had had in addressing how existing uses and rights would be handled across state lines, especially in light of each state's differing water laws. In so doing, Newell noted that the 1950 Yellowstone River Compact purposely did not attempt to divide among the states "water now appropriated and in use":

In earlier attempts to arrive at a compact and in the early meetings here reported, there was searching discussion as to whether the agreement sought on division of waters should include the water now appropriated and in use or should apply only to the unappropriated and unused balance which is available for further development. The latter principle was decided on (Art. V-A) for several reasons. First, it would be a huge and time-consuming task to determine and fix comparable values for existing rights in three States with differing water laws and practices in establishing water rights. Second, the basic fact that there is enough water if properly conserved by storage to take care of all existing and all feasible future developments points up the importance of arriving promptly at the simplest workable agreement that would permit such storage projects to proceed. When these are built, even the operation provisions of the compact are expected to become easy of administration.<sup>51</sup>

53. Secretary of the Interior Oscar L. Chapman used similar language to explain the Compact in a message to Congress endorsing ratification in September 1951. Noting that Article V set forth the apportionment of the Yellowstone Basin's waters among the states, Chapman wrote that the engineering advisors of the Compact Commission had determined

that little could be gained, from a water supply standpoint, by attempting, in the compact, the regulation and administration of existing appropriative rights in the signatory States. . . . Accordingly, paragraph A of Article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing to each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in

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<sup>51</sup> R.J. Newell, Federal Representative, Yellowstone River Compact Negotiations, "Report to the Congress by the Federal Representative on the Yellowstone River Compact," [March 16, 1951], Montana Attorney General's Office, Helena, Montana.

accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.<sup>52</sup>

54. In other words, Chapman – whose interpretation of the 1950 Yellowstone River Compact was fundamental to Congress's understanding of that agreement – reiterated the prevailing conclusion among the Compact's negotiators that water rights and uses as of January 1, 1950, would remain under the exclusive jurisdiction of the states within which they lay and would not be disturbed by changes in individuals' circumstances or the evolution of water laws.

### **Conclusion**

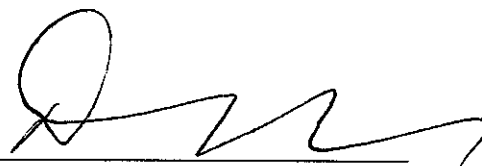
55. The research and document review and analysis that I have conducted, as described above, revealed no discussion of remedies for violation of the Yellowstone River Compact. It is my conclusion and opinion that the referenced documents show no contemplation by the negotiators of the Compact of a priority call across state lines. On the contrary, those documents suggest that the negotiators affirmatively rejected the concept of any interstate administration, including priority calls across state lines.

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<sup>52</sup> U.S. Congress, *Granting the Consent of Congress to a Compact Entered into by the States of Montana, North Dakota, and Wyoming Relating to the Waters of the Yellowstone River*, 82 Cong., 1 sess., S. Rpt. 883, Oct. 2, 1951, pp. 9-12.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 22, 2011.

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by several loops and a long horizontal stroke.

Douglas R. Littlefield

# **Exhibit 1**

## **Curriculum Vitae of Douglas R. Littlefield, Ph.D.**

**Douglas R. Littlefield, Ph.D.**  
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### **EDUCATION:**

- Ph.D. American history. University of California, Los Angeles, 1987. Dissertation: "Interstate Water Conflicts, Compromises, and Compacts: The Rio Grande, 1880-1938." Fields: history of California and the American West, water rights history, legal history, environmental history.
- M.A. American history. University of Maryland, College Park, 1979. Master's thesis: "A History of the Potomac Company and Its Colonial Predecessors." Fields: business history, colonial history, early republic history, trans-Appalachian West history, British history.
- B.A. English literature. Brown University, 1972.

### **CONSULTING AND EXPERT WITNESS EXPERIENCE:**

- 2008-present: Research historian and consultant for McAfee & Taft in Tulsa, Oklahoma (attorney Robert Joyce). Providing historical research, written report, and testimony regarding lead and zinc mining and land use in northeastern Oklahoma for use in *Quapaw Tribe of Oklahoma, et al., v. Blue Tee Corp, et al.*, U.S. District Court for the Northern District of Oklahoma, Civil Action No. 03-CV-486-CVE-PJC.
- 2006-2007: Research historian and consultant for Loeb & Loeb in Los Angeles (attorney Anthony Murray). Provided historical research and deposition testimony regarding the history of natural disasters (mudslides, floods, fires, earthquakes, etc.) in Southern California for use in *Dane W. Alvis, et al., v. La Conchita Ranch Company, et al.*, Ventura County (California), Superior Court Case No. CIV 238700.
- 2005-present: Research historian and consultant for the Stinson Beach County Water District in Marin County, California (counsel: Hanson, Bridgett, Marcus, Vlahos & Rudy of San Francisco). Providing historical research on the history of the water rights of the District.

- 2005: Research historian and consultant for the Lake Arrowhead Community Services District (counsel: Best, Best & Krieger of Riverside, California). Provided historical research and documentation on the history of water rights associated with Lake Arrowhead in southern California. Testified before the California State Water Resources Control Board concerning the District's pre-1914 water rights claims (and post-1914 claims).
- 2004 – 2006: Research historian and consultant for City of Santa Maria, California (counsel: Best, Best & Krieger of Riverside, California). Provided historical research and documentation on the history of water rights of the U.S. Bureau of Reclamation's Santa Maria Project (California) for use in *Santa Maria Valley Water Conservation District v. City of Santa Maria, Southern California Water Company, City of Guadalupe, et al.*, Santa Clara County (California) Superior Court, Case No. CIV 770214. Deposed and subsequently testified as an expert witness at trial.
- 2004 – Present: Research historian and consultant for City of Pocatello, Idaho (counsel: Beeman & Associates of Boise, Idaho, and White & Jankowski of Denver, Colorado). Providing historical research and documentation on the history of Pocatello's water rights for use in Snake River Basin Adjudication (*In Re: the General Adjudication of Rights to the Use of Water From the Snake River Drainage Basin Water System, State of Idaho v. United States; State of Idaho; and all unknown claimants to the use of water from the Snake River Drainage Basin Water System*, County of Twin Falls (Idaho) District Court, Case No. 39576. Provided affidavit testimony.
- 2003 – 2004: Research historian and consultant for U.S. Bureau of Reclamation (Mid-Pacific Region). Providing historical research and a report on the history of the water rights of the Friant Unit of the Bureau's Central Valley Project (California).
- 2002: Research historian and consultant for the Alameda County Water District (counsel: Hanson, Bridgett, Marcus, Vlahos & Rudy of San Francisco). Provided historical research on the history of the water rights of the District.
- 2001 – 2007: Research historian and consultant for Paloma Investment Limited Partnership (counsel: Mesch, Clark & Rothschild of Tucson, Arizona). Provided historical research and deposition regarding whether the Gila River was commercially navigable in 1912 when Arizona became a state for use in *Flood Control District of Maricopa County v. Paloma Investment Limited Partnership* and *Paloma Investment Limited Partnership v. Flood Control District of Maricopa County*, Maricopa County (Arizona) Superior Court, Case No. CV97-07081.
- 2000 – 2001: Research historian and consultant for Salt River Project, Arizona (counsel: Salmon, Lewis & Weldon of Phoenix, Arizona). Provided historical research and documentation on Zuni Indian water rights and land claims in Arizona and New Mexico for use in *In re the General Adjudication of All Rights to Use of Water in the Little Colorado River System and Source*, Apache County (Arizona) Superior Court, Case No. 6417.

- 2000 – 2001: Research historian and consultant for the Maryland Attorney General. Provided historical research and affidavit testimony on the 1785 “Mount Vernon” interstate compact between Maryland and Virginia for use in U.S. Supreme Court case of *Virginia v. Maryland*, No. 129 Original.
- 2000: Research historian and consultant for the Salt River Project, Arizona (counsel: Salmon, Lewis & Weldon of Phoenix, Arizona). Provided historical research and documentation on water rights of the Gila River, Arizona, for use in *In Re: The General Adjudication of All Rights to Use Water in the Gila River System and Source*, Maricopa County (Arizona) Superior Court, Case No. W1-203.
- 1998 – 2000: Research historian and consultant for the Idaho Attorney General. Provided historical research on whether the Salmon River and selected tributaries were commercially navigable in 1890 when Idaho became a state.
- 1998 – 1999: Research historian and consultant for the Idaho Coalition, a landowners’ group (counsel: John K. Simpson of Rosholt, Robertson & Tucker of Boise, Idaho, and Shawn Del Ysura of J.R. Simplot Company of Boise, Idaho). Provided historical research, and affidavit testimony on the impacts of various dams in the Columbia River and Snake River watersheds on anadromous fish for use in Snake River Basin Adjudication (*In Re: the General Adjudication of Rights to the Use of Water From the Snake River Drainage Basin Water System, State of Idaho v. United States; State of Idaho; and all unknown claimants to the use of water from the Snake River Drainage Basin Water System*, County of Twin Falls (Idaho) District Court, Case No. 39576.
- 1998 – 2000: Research historian and consultant for Sacramento Municipal Utility District of California (counsel: Ronald Aronovsky of Alden, Aronovsky & Sax of San Francisco). Provided research on land site history for use in *Sacramento Municipal Utility District v. California Department of Transportation, Sacramento Housing and Redevelopment Agency, et al.*, Sacramento County (California) Superior Court, Case No. 96AS04149.
- 1997 – 2005: Research historian and consultant for City of Las Cruces, New Mexico (counsel: Stein & Brockmann of Santa Fe, New Mexico). Provided historical research on the City’s water rights for use in *State of New Mexico v. Elephant Butte Irrigation District*, Dona Ana County (New Mexico) District Court, Case No. CV 96-888.
- 1997 – 2003: Research historian and consultant for Fort Hall Water Users’ Association, Idaho (counsel: Richard Simms of Hailey, Idaho). Provided historical research and report the Association’s water rights in relation to the Shoshone and Bannock Indian land cessions on the Fort Hall Indian Reservation in Idaho for use in *Fort Hall Water Users’ Association, et al., v. United States of America*, U.S. Court of Federal Claims, Case No. 01-445L.
- 1997 – 2004: Research historian and consultant for Kern Delta Water District (counsel: McMurtrey, Hartsock & Worth of Bakersfield, California). Providing historical research and report on Kern Delta’s water rights for use in *North Kern Water Storage District v. Kern Delta Water District, et al.*, Tulare County (California) Superior Court, Case No.

- 96-172919. Testified in that case as an expert witness historian for ten days in the initial trial, which was remanded for additional testimony and evidence. Provided additional research and written reports on water rights for the remanded trial.
- 1996 – 1998: Research historian and consultant for Idaho Attorney General. Provided historical research on water rights in relation to the Deer Flat National Wildlife Refuge for use in Snake River Basin Adjudication (*In Re: the General Adjudication of Rights to the Use of Water From the Snake River Drainage Basin Water System, State of Idaho v. United States; State of Idaho; and all unknown claimants to the use of water from the Snake River Drainage Basin Water System*, County of Twin Falls (Idaho) District Court, Case No. 39576.
- 1995 – 1998: Research historian and consultant for U.S. Department of Justice. Provided historical documentation on the history of water rights on the Santa Margarita River at U.S. Marine Corps Base, Camp Pendleton, in southern California.
- 1995 – Present: Research historian and consultant for the Salt River Project (counsel: Salmon, Lewis & Weldon of Phoenix, Arizona). Providing historical documentation and reports on whether the Salt, Gila, and Verde rivers were commercially navigable in 1912 when Arizona became a state. Testified between 1997 and 2005 several times before the Arizona Navigable Stream Adjudication Commission regarding the navigability of the Salt, Verde, and Gila rivers. Testified on the same subject in 1998 and 1999 before the Arizona State Legislature.
- 1995 – 2001: Research historian and consultant for Nebraska Department of Water Resources (counsel: Simms & Stein of Santa Fe, New Mexico). Provided historical documentation and report on water rights and the history of *Nebraska v. Wyoming*, 325 U.S. 589 (1945), for use in U.S. Supreme Court case of *Nebraska v. Wyoming*, Original No. 108, regarding the apportionment of the waters of the North Platte River. Deposed in that case, but the case was settled before trial.
- 1993 – 1994: Research historian and consultant for Simms and Stein, attorneys specializing in water law in Santa Fe, New Mexico. Provided historical documentation and affidavit testimony on Arapaho and Shoshone land claims and cessions along the Wind River in Wyoming for use in *In Re: the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming*.
- 1991 – 2003: Research historian and consultant for Legal Counsel, Division of Water Resources, Kansas State Board of Agriculture (counsel: Montgomery & Andrews of Santa Fe, New Mexico). Provided historical research on water rights and history of apportionment of the Republican River and its tributaries among Kansas, Nebraska, and Colorado for use in U.S. Supreme Court case of *Kansas v. Nebraska and Colorado*, No. 126 Original, regarding the interstate apportionment of the Republican River. Provided affidavit testimony.
- 1991 – 1993: Research historian and consultant for Nickel Enterprises (Bakersfield, California; counsel: Anthony Murray of Carlsmith, Ball, Wichman, Murray, Case, Mukai & Ichiki of

Long Beach, California. Provided historical documentation and report on the navigability of the Kern River for use in *Nickel Enterprises v. State of California*, Kern County (California) Superior Court, Case No. 199557. Testified as an expert witness historian in this case for eleven days.

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

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

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

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

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

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

## **AWARDS AND OTHER PROFESSIONAL EXPERIENCE:**

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

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



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

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

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

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

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

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

## **PUBLICATIONS:**

### **Books:**

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

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

### **Articles:**

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

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

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

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

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

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

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

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

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

### **Book Reviews:**

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

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

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

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

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

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

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

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

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

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

## **PROFESSIONAL AFFILIATIONS:**

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