

March 10, 2003

**Technical Memorandum
Wind/Big Horn Basin Plan**

Subject: Compacts and Decrees
Prepared By: BRS Engineering: Douglas Beahm, PE, PG

This memorandum contains the following sections:

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Section 1 - Introduction

Within the Wind River, Clarks Fork, and Big Horn basins, surface water usage and flow is regulated by the Yellowstone River Compact of 1950 and the GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM and all other sources, State of Wyoming, February 24, 1988.

The Yellowstone River Compact is included in Appendix A.

A summary of the Big Horn General Adjudication from the Wyoming State Engineer’s Office 1999 Annual Report is included in Appendix B.

Section 2 - Yellowstone Compact

The Yellowstone River Compact between the states of Wyoming and Montana divides the waters of four tributaries, two of which pertain to this planning process, to the Yellowstone River. To all tributaries the following rules apply.

1. Existing rights as of January 1, 1950 are recognized.
2. No water can be diverted out of the Yellowstone River Basin without consent from all states.
3. Existing and future stock water reservoirs up to a capacity of 20 acre-feet are exempted from provisions of the compact.

The unappropriated waters in the tributaries, after meeting for existing water rights (1950) and supplemental supply for existing rights, are allocated as follows:

| | |
|---------------------|--------------------------|
| Wind River/Big Horn | 80% Wyoming, 20% Montana |
| Clarks Fork | 60% Wyoming, 40% Montana |

Section 3 - Big Horn General Adjudication

The Wind River Reservation Tribes were awarded by the courts 500,000 acre feet of surface water annually for beneficial use. Within this allocation, approximately 209,000 acre feet is reserved for future developments on the reservation.

A summary of the adjudication is included in Appendix B.

APPENDIX A

YELLOWSTONE RIVER COMPACT

ARTICLE 6
YELLOWSTONE RIVER COMPACT

41-12-601. Generally.

Ratification and approval is hereby given to the Yellowstone River Compact as signed at the city of Billings, in the state of Montana, on the 8th day of December, A. D. 1950, by L. C. Bishop, the state engineer of the state of Wyoming, and all of the above named assistant commissioners, under and in accordance with the authority of section 71-2601, Wyoming Compiled Statutes, 1945, which compact was also signed by the duly authorized commissioners of the states of Montana and North Dakota, and approved by the representative of the United States, which Yellowstone River Compact is in full as follows:

YELLOWSTONE RIVER COMPACT

The state of Montana, the state of North Dakota, and the state of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said states and between persons in one (1) and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, acknowledging that in future projects or programs for the regulation, control and use of water in the Yellowstone River basin the great importance of water for irrigation in the signatory states shall be recognized, have resolved to conclude a compact as authorized under the act of congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st congress, first session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective commissioners:

For the state of Montana:

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

For the state of North Dakota:

I. A. Acker

Einar H. Dahl
J. J. Walsh

For the state of Wyoming:

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

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

Article I

(a) Where the name of a state is used in this compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, appropriators, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River system under the authority of said state.

(b) Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory state, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River system under the authority of said state, shall be subject to the terms of this compact. Where the singular is used in this article, it shall be construed to include the plural.

Article II

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

(b) The terms "commission" and "Yellowstone River compact commission" mean the agency created as provided herein for the administration of this compact.

(c) The term "Yellowstone River basin" means areas in Wyoming, Montana, and North Dakota drained by the Yellowstone River and its tributaries, and includes the area in Montana known as Lake Basin, but excludes those lands lying within Yellowstone National Park.

(d) The term "Yellowstone River system" means the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone National Park.

(e) The term "tributary" means any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof, but excluding those which are within or contribute to the flow of streams within the Yellowstone National Park.

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

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

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

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

(k) The term "stock water use" shall mean the use of water for livestock and poultry.

Article III

(a) It is considered that no commission or administrative body is necessary to administer this compact or divide the waters of the Yellowstone River basin as between the states of Montana and North Dakota. The provisions of this compact, as between the states of Wyoming and Montana, shall be administered by a commission composed of one (1) representative from the state of Wyoming and one (1) representative from the state of Montana, to be selected by the governors of said states as such states may choose, and one (1) representative selected by the director of the United States geological survey or whatever federal agency may succeed to the functions and duties of that agency, to be appointed by him at the request of the states to sit with the commission and who shall, when present, act as chairman of the commission without

vote, except as herein provided.

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

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

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

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

(f) In case of the failure of the representatives of Wyoming and Montana to unanimously agree on any matter necessary to the proper administration of this compact, then the member selected by the director of the United States geological survey shall have the right to vote upon the matters in disagreement and such points of disagreement shall then be decided by a majority vote of the representatives of the states of Wyoming and Montana and said member selected by the director of the United States geological survey, each being entitled to one (1) vote.

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

Article IV

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

Article V

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

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

(i) Clarks Fork, Yellowstone River

(A) To Wyoming sixty percent (60%)
To Montana forty percent (40%)

(B) The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.

(ii) Bighorn River (Exclusive of Little Bighorn River)

(A) To Wyoming eighty percent (80%)
To Montana twenty percent (20%)

(B) The point of measurement shall be below the last diversion from the Bighorn River above its junction with the Yellowstone River, and the inflow of the Little Bighorn River shall be excluded from the quantity of water subject to allocation.

(iii) Tongue River

(A) To Wyoming forty percent (40%)
To Montana sixty percent (60%)

(B) The point of measurement shall be below the last diversion from the Tongue River above its junction with the Yellowstone River.

(iv) Powder River (Including the Little Powder River)

(A) To Wyoming forty-two percent (42%)
To Montana fifty-eight percent (58%)

(B) The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

(c) The quantity of water subject to the percentage allocations, in paragraph (b) (i), (ii), (iii) and (iv) of this article V, shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

(i) The total diversions, in acre-feet, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana developed after January 1, 1950, during the period from October 1st to that given date;

(ii) The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

(iii) The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date;

(iv) The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

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

(e) There are hereby excluded from the provisions of this compact:

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

(ii) Devices and facilities for the control and regulation of surface waters.

(f) From time to time the commission shall reexamine the allocations herein made and upon unanimous agreement may recommend modifications therein as are fair, just, and equitable, giving consideration among other factors to:

- (i) Priorities of water rights;
- (ii) Acreage irrigated;
- (iii) Acreage irrigable under existing works; and
- (iv) Potentially irrigable lands.

Article VI

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

Article VII

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

(b) Each claim hereafter initiated for an appropriation of water in one (1) signatory state for use in another signatory state shall be filed in the office of the state engineer of the signatory state in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the state engineer of the signatory state in which the water is to be used.

(c) Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudications shall be confirmed in that state by the proper authority. Each adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used.

(d) The use of water allocated under article V of this compact for projects constructed after the date of this compact by the United States of America or any of its agencies or instrumentalities, shall be charged as a use by the state in which the use is made: provided, that such use

incident to the diversion, impounding, or conveyance of water in one (1) state for use in another shall be charged to such latter state.

Article VIII

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

Article IX

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

Article X

No water shall be diverted from the Yellowstone River basin without the unanimous consent of all the signatory states. In the event water from another river basin shall be imported into the Yellowstone River basin or transferred from one (1) tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly, the state having the right to the use of such water shall be given proper credit therefor in determining its share of the water apportioned in accordance with article V herein.

Article XI

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

Article XII

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

Article XIII

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

Article XIV

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

Article XV

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

Article XVI

(a) Nothing in this compact shall be deemed:

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

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

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

Article XVII

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

Article XVIII

No sentence, phrase, or clause in this compact or in any provision thereof, shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact.

IN WITNESS WHEREOF the commissioners have signed this compact in quadruplicate original, one (1) of which shall be filed in the archives of the department of state of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the governor of each signatory state.

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

Commissioners for the state of Montana:

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

Commissioners for the State of North Dakota:

| | |
|---------------|-------------------|
| I. A. Acker | /s/ I. A. Acker |
| Einar H. Dahl | /s/ Einar H. Dahl |
| J. J. Walsh | /s/ J. J. Walsh |

Commissioners for the State of Wyoming:

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

I have participated in the negotiation of this compact and intend to report favorably thereon to the congress of the United States.

/s/ R. J. Newell
R. J. Newell
Representative of the
United States of America.

41-12-602. When binding; notice of ratification.

Said compact shall not be binding or obligatory upon any of the high contracting parties thereto unless and until the same shall have been ratified by the legislature of each of the said states and approved by the congress of the United States. The governor of Wyoming shall give notice of the ratification and approval of said compact by the Wyoming legislature to the governors of the states of Montana and North Dakota and to the president of the United States.

41-12-603. Diversions from the Yellowstone River Basin; definitions.

(a) Unless the context requires otherwise, in W.S. 41-12-603 through 41-12-607 the following definitions apply:

(i) "Basin" means the Yellowstone River Basin as defined in the Yellowstone River Compact, W.S. 41-12-601;

(ii) "Compact" means the Yellowstone River Compact provided for in W.S. 41-12-601;

(iii) "Compact water" means any water in the basin that is allocated to Wyoming, Montana or North Dakota by the terms of the compact or whose appropriation is in any manner regulated by the terms of the compact.

41-12-604. Diversions from the Yellowstone River Basin; authority to approve.

The state engineer may consent on behalf of the state of Wyoming to diversions of water from the basin pursuant to Article X of the compact, including diversions of water allocated under the terms of the compact to the other signatory states of Montana and North Dakota.

41-12-605. Diversions from the Yellowstone River Basin; application; notice.

(a) Any person proposing to divert compact water allocated to Wyoming from the basin for use in Wyoming, whether the point of diversion is in Wyoming, Montana or North Dakota, shall file an application with the state engineer. The application must state the name and address of the applicant, describe the proposed point of diversion, the point of use, the ultimate use and facts tending to show that:

(i) The diversion and ultimate use of the water is for a beneficial use of water;

(ii) The diversion and ultimate use of water will not adversely affect the water rights of other persons;

(iii) The proposed means of diversion, construction and operation are adequate;

(iv) The diversion and ultimate use will not interfere with other planned uses or developments for which a water right with a senior priority date has been applied for or permit issued;

(v) The diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states;

(vi) The diversion and ultimate use of the water are in the public interest of Wyoming; and

(vii) The applicant intends to comply with the laws of the signatory states to the compact.

(b) Any person proposing to divert compact water allocated to Montana or North Dakota for use out of the basin, whether the point of diversion is in Wyoming, Montana or North Dakota, shall file an application with the state engineer. The application must state the name and address of the applicant, describe the proposed point of diversion, the point of use, the ultimate use and facts tending to show that:

(i) The proposed means of diversion, construction and operation are adequate;

(ii) The diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states; and

(iii) The applicant intends to comply with the compact.

(c) The state engineer shall publish a reasonable summary of the application for three (3) consecutive weeks in at least three (3) newspapers of general circulation within the state and if the proposed point of diversion is within Wyoming, publish the notice in at least one (1) newspaper of general circulation in the county where the diversion point is to be located.

41-12-606. Diversions from the Yellowstone River Basin; objections; public hearing.

(a) An objection to an application must be filed with the state engineer by the date specified in the published notice.

(b) The objector to an application shall state his name and address and any facts tending to show how the objector will be affected by the application.

(c) If the state engineer receives a valid objection to an application, the state engineer shall hold a public hearing within sixty (60) days from the date set by the state engineer for filing objections. Service of the notice of the hearing must be made by certified mail upon

the applicant and the objector.

(d) Cost of the public hearing shall be borne by the applicant only in those cases of an application made pursuant to W.S. 41-12-605(a).

41-12-607. Diversions from the Yellowstone River Basin; criteria for approval; terms.

(a) The state engineer may conduct whatever other studies he deems necessary to adequately evaluate an application.

(b) The state engineer may issue his approval of an application proposing to divert compact water allocated to Wyoming if:

(i) The diversion and the ultimate use of the water are for a beneficial use of water;

(ii) The diversion and ultimate use of water will not adversely affect the water rights of other persons;

(iii) The proposed means of diversion, construction and operation are adequate;

(iv) The diversion and ultimate use will not interfere unreasonably with other planned uses or developments for which a water right application has been filed or a permit issued;

(v) The diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states;

(vi) The diversion and ultimate use of the water are in the public interest of Wyoming; and

(vii) The applicant signs an agreement to comply with the laws of the signatory states to the compact in construction, operation and maintaining all facilities associated with the diversion and ultimate use of the water.

(c) The state engineer may approve an application proposing to divert compact water allocated to Montana or North Dakota as described in W.S. 41-12-605(b) if the diversion will not adversely affect the property rights or interests of an appropriator located in Wyoming and if the diversion and ultimate use of water will not exceed the allocated share under the compact of any of the signatory states.

(d) The state engineer may approve an application subject to such terms, conditions, restrictions and limitations as the state engineer considers necessary to meet the application criteria listed in W.S. 41-12-605 and this section.

(e) The state engineer's approval of an application pursuant to this act [§§ 41-12-603 through 41-12-607] shall not constitute approval for an out of state use of the water pursuant to W.S. 41-3-105 and 41-3-115.

APPENDIX B

**BIG HORN GENERAL ADJUDICATION
SPECIAL PROJECT DIVISION
WYOMING STATE ENGINEER'S OFFICE
1999 ANNUAL REPORT**

Wyoming State Engineer's Office 1999 Annual Report

SPECIAL PROJECTS DIVISION

BIG HORN GENERAL ADJUDICATION

W.S. 1-37-106, General Adjudication Statute, gave authorization to initiate the process through a judicial determination of the rights to use water of all persons on any river system. Subsequently in 1977, the State filed suit for the determination of water rights in the Big Horn River system and all other sources.

"It is anticipated that this adjudication will be finally concluded, excepting appeals to appellate courts, by or before December 31, 1988. The parties should make every effort to meet this goal."

--Judge Alan B. Johnson, District Judge, Fifth Judicial District, 1985

It is not an affront to his intelligence that the Judge could not foresee the tremendous complexity and consumption of human effort required by this case. By 1992, it became painfully evident that all parties had grossly underestimated the demands of the adjudication. And now more than 10 years after Judge Johnson's predicted conclusion, although completion is within sight, we are still far away.

Judge Hartman has expressed more than once his desire to see the adjudication wrapped up by April 2003. Remaining legal issues and their attendant factual matters include appurtenancy of fee land reserved rights and final decision on Walton right claims as reported recently by the Special Master. There are also numerous technical or administrative tasks that must be accomplished as each decision is handed down. Some of these are ordered by the court (e.g., cancellation of underlying state rights where reserved rights were awarded) while others are necessary functions to maintain proper records at the State Engineers Office (e.g., incorporating decreed rights in the Division 3 tabulation book). Lastly, there is a desire to have a document that wraps up all phases of the adjudication - a final decree. In preparation of the next biennium and in keeping with the 2003 goal of the district court, the staff developed a comprehensive plan for the Big Horn General Adjudication. It is expected to begin implementation of the plan by the fall of 1999.

General History, Past Accomplishments and Present Condition

The official birth date of the adjudication is January 24, 1977, when Wyoming filed its complaint in the District Court of the Fifth Judicial District. The case was filed two days after enactment of Wyoming's adjudication statute in an attempt to provide the state with further security and jurisdiction over potential federal claims for water. By far the most impressive claims and complex issues concerned the Wind River Tribes, who submitted federal reserved right claims for 739,000 acre-feet of water for numerous uses. The largest claim was for irrigation of 147,111 acres of historically irrigated and future projects lands, equaling a total diversion requirement of 708,058 acre-feet.

Trial for Tribal reserved rights (Phase I) was completed in December 1981, with the subsequent district court decisions ending in 1985. The Wyoming Supreme Court entered its first judgment and decree (Big Horn I) in 1988, awarding the Tribes nearly 500,000 acre-feet of water for irrigation uses only: 290,490 acre-feet for 54,216 acres of historically irrigated land and 209,372 acre-feet for 53,760 acres of future irrigation project lands. The United States Supreme Court affirmed the decision in 1989. A pending Consent Decree will establish appurtenancy to 28,137 acres and 157,668 acre-feet of 1868 rights, about 63 percent of the current in-use reserved right award.

In late 1988, the State Engineer's Office (SEO) began the court-ordered task of canceling all state rights that overlapped awarded federal reserved rights in Phase I. This effort required the dissection of the decree into

1,351 individual tracts of land, and development of databases. It also included the detailed analysis of over 800 adjudicated and unadjudicated water rights. Tabulation and mapping of each of these components was necessary to ensure accurate analysis and documentation of the reserved rights. This analysis ultimately required countless SEO staff hours to revise all affected state records, and notify hundreds of landowners whose water rights have changed. In conjunction with review by other parties and hearings before the court, this endeavor took seven years; there are still adjustments to be made due to interactions and conflicts with Phase III.

In the meantime, non-Tribal federal reserved rights (Phase II) were settled rather quickly, with a Partial Interlocutory Decree entered in early 1983. This document contains a potpourri of tables listing innumerable claims for stock ponds, instream flows, seeps, springs, wells and domestic uses that were never verified before entering the decree. The State and all other parties to the case were aware of this at settlement, and that substantiation of those claims was necessary before a final decree could be completed. Proof of those claims has trickled in since 1994 and the Surface Water Division, in addition to their daily responsibilities, has processed some 300 claims. There is now an accumulated backlog of 420 claims, with another 580 expected over the next year.

Phase III involves the fate of existing state rights. Field inspections to determine whether state permitted lands should be adjudicated or eliminated were initiated in the late 1980s and is nearing completion. Of the nearly 4,000 permits examined, only 42 remain to be investigated in the field. The Division 3 staff has reviewed and reported to the Court some 3,100 permits. Recent amendment to Phase III procedures has allowed the SEO to more efficiently handle review of large irrigation projects, but the process still requires on-the-ground verification. Aged reports—those that have a 5-year gap between fieldwork and reporting—are often sent back by the Court for reinvestigation due to ownership changes. A backlog of 698 permits, plus the 42 waiting inspection, need SEO review and reporting to the court.

The portion of the adjudication concerning the so-called Walton rights (successor rights to Indian allottee federal reserved rights) includes claims dating back to 1982. Walton rights are actually a part of Phase I. As the "technical arm of the court," the SEO was required to investigate 423 claims. An affirmative decision on a Motion for Summary Judgment concerning claims that did not stem from an allotment, as well as withdrawal by several claimants, reduced the caseload to 256 claims. These remaining claims required field inspections and records research, providing the Court with a factual account on each claim. Since the Tribes contested every claim, the State was obliged to participate in settlement of claims and review all analyses performed by the Tribes' technical experts. The State also took the lead role in contesting Tribal Walton claims for additional 1868 water and administrative issues contradictory to the law of the case that threatened the State Engineer's current role as administrator of all water in Wyoming. The District Court's decision on the final group of claimants and administrative issues is expected late this year.

Quantification of ground water uses by the Tribes and off-reservation is nearing completion, too. A list of Tribal wells and ground water uses is expected to be submitted to the court August 3, 1999. Non-Indian ground water use is part of Phase III and was completed in 1996. Over 7,730 stock and domestic wells and 742 larger wells for irrigation, municipal and other uses were reported to the court. This effort required 543 field inspections, resulting in the issuance of 452 Certificates of Record.

The judicial decisions have set off, and will continue to necessitate, an extraordinary amount of administrative and technical activities that the court required the state to undertake at its own expense.

What lies before us

Each phase of the adjudication is in a different stage of completion. An action plan has been created to assist in securing necessary budget and personnel, and to facilitate logistics. There are numerous activities already underway that need finalization, and new tasks that we anticipate beginning this year.

The remainder of this proposal is dedicated to identifying how to complete each phase, what resources are available or needed, and what work needs to be done. Plans specific to each phase and have been developed to address current and future responsibilities and accomplish them within four years. Implementation of the plan will begin September 1, 1999.

CURRENT ACCOMPLISHMENTS

PHASE I - Walton Claims

From the 423 original Walton claims that were filed in 1992, 149 were disposed of by the Wyoming Supreme Court in Big Horn V, leaving 274 claims that were "Purist" claims derived from allotments. This year's efforts continued with settlement of the remaining Walton claims which included review and analysis of proposed prehearing memorandums, findings of fact and conclusions of law and the Special Master's Reports and Recommendations. In addition to settlement of the facts, extensive work was completed on mapping the

Legal briefing on the global legal issues was completed in late 1998. These legal issues are: a) whether federal or state law control the perfected Walton right; b) ownership of the water if the Walton right is abandoned; c) the water duty of the perfected Walton right; d) whether the perfected Walton right is appurtenant to the land; and e) administration of a perfected Walton right. After the Court decision on Walton right claims (anticipated in late 1999), cancellation of underlying state rights needs to be performed. Final workable databases and maps for SEO records and use need to be developed. There is also some missing data from Sky Phifer's clients that he needs to produce for the State regarding the remand Walton appellants.

Upon perfection and award of the Walton rights, the determinations of overlap between Walton rights and State rights will be completed pursuant to orders from the Court. The overlap process of updating all State Engineer Office records for Walton Rights cannot begin until the Court processing of Walton claims has been

Phase I - Tribal reserved rights

Complementing the legal aspects of Walton is another legal effort driven by several appropriators seeking appurtenance of the tribal reserved rights. Tribal reserved rights have already been determined. The pending Consent Decree regarding appurtenance of 1868 rights for allotted and fee lands is the only current outstanding issue affecting closure of Phase I. The results of this decree will require correction of state records, recording the "permanent rights" at county offices, and database modifications. Current data quality needs to be reviewed to assure products for office and field use are accurate and available. Final workable databases and maps for SEO records and use need to be developed.

Phase I - Tribe's Groundwater Quantification

On October 16, 1992, the District Court ordered the Tribes to identify and quantify their 1985 ground water uses awarded by the Supreme Court. The Tribes were required to submit a list to the Court by April 1994, but received an extension of time until October 31, 1994. The Tribes were not able to meet the deadline of January 1998 and have now sought an extension until December 31, 1998. The District Court granted the extension. The staff review and analysis of the Tribe's proposed quantification continued until a stipulation was agreed upon by the parties. It is anticipated that a final tabulation will be generated by the fall of 1999.

PHASE II - Federal (non-Indian) Reserved Water Rights

Requests from the federal agencies to delete specific water rights from the decree continue to filter into the staff. As a result, a determination has been made by the parties to the Big Horn lawsuit, as well as the Court, that a complete revision of the Phase II Interlocutory Decree will be necessary. The staff responsibility will continue to increase during the analysis of the decree in order to provide the revised decree to the Court. Due

to past turnover at the Forest Service, the submission of 800 recordation permits will be delayed. We are hopeful that these permits will be submitted during the next biennium. This submission will impact the Surface and Ground Water Sections, and the Big Horn Adjudication staff.

PHASE III - Surface Water

Using the May 19, 1997 amended Court procedures, the staff persists at a consistent pace with the comprehensive review of all unadjudicated State water rights in Water Division III.

The field staff and the Tribes continue to jointly inspect the State permits located within the exterior boundaries of the WRIR. This includes all unadjudicated permits located either on Tribal or non-Indian lands. The joint inspections are proceeding in a timely fashion. The field personnel obtained ownership information, then scheduled on the ground inspections with individual appropriators, then conducted and prepared a detailed inspection report for 19 permits. The field staff also completed three reinspections due to requests of the court or a landowner.

The District Court increased the responsibility of the staff on July 26, 1993, due to the resignation of the Special Master. The staff continues its reporting to the court and is responsible for all uncontested cases in place of the Special Master in order to alleviate the burden on the Court. In addition, the staff participated in pre-hearing conferences to provide clarification and assistance in resolving disputes. These efforts, put forth by the staff, resolved the issues of concern and avoided the necessity for any hearings before the Court during this biennium. 70 surface water permits were reported to the District Court. Certificates of Appropriation issued from Court Orders totaled 91.

PHASE III - Ground Water

During this period, the efforts of the staff continued by reporting 13 ground water permits to the District Court. The staff also prepared a total of 18 Certificates of Appropriation of Ground Water to be recorded in the county clerk's office.

PROBLEM AREAS

Continuous efforts are being made after the Court orders are issued to integrate the decreed rights into the State Engineer records. This integration process involves a lengthy, detailed update of the actual permit records, stream cards, township cards, certificates being issued, amended and canceled, updates of the computer water rights database, microfilm all records involved, and so on. This process has impacted the flow of work throughout the State Engineer's office.

RECOMMENDATIONS

The staff will continue their dedication, hard work and patience while dealing with the appropriators and all parties involved in this complex water case.

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