

VOLUME NO. 38

OPINION NO. 18

WATER AND WATERWAYS - Yellowstone River Compact;
WATER AND WATERWAYS - Applicability of Article X to Little
Bighorn River.
MONTANA CODE ANNOTATED - Section 85-20-101.

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

14 May 1979

Honorable Ted Schwinden
Lieutenant Governor
State Capitol
Helena, Montana 59601

Dear Lieutenant Governor Schwinden:

You have requested my opinion on the following question:

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

I have reviewed the memorandum prepared by the Department of Natural Resources on the question, as well as materials submitted by the Attorney General of Wyoming relating to the legislative history of the Compact, and it is my opinion that Article X of the Compact, which requires the approval

of each signatory state before water may be diverted out of the Yellowstone River basin, applies fully to the Little Bighorn River, and that Montana therefore must give its approval before water from that river may be diverted outside the Basin.

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

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

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

I find no ambiguity or conflict between the exclusion of the

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

It is my conclusion that the terms of the Compact, when read according to their plain meaning, are clear and unambiguous in their inclusion of the Little Bighorn under the provisions of Article X. However, even assuming that resort to the Compact's legislative history is necessary, I find that history to be fully consistent with my conclusion. Three aspects of the legislative history are said to suggest that the Little Bighorn is not covered by the Compact. Initially, the report of the deliberations of the Senate Committee on Interior and Insular Affairs on the bill providing congressional ratification of the Compact is said to evidence an intent to exclude the Little Bighorn. The language in question is found on page 2 of the report, S. Rep. No. 883, 82nd Cong., 1st Sess. (1951). There, under the heading of "Apportionment of Use of Water," the following statement appears:

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

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

Attention is also drawn to the checkered history of exclusion and inclusion of the Little Bighorn in prior drafts of the Compact. The original 1942 draft expressly included the Little Bighorn, then known as the "Little Horn," and apportioned all its water to the State of Wyoming. This approach met with strenuous protests from Federal and Indian representatives, and the 1942 draft as adopted by the Commissioners simply made no apportionment of the Little Bighorn, on the theory that any attempted allocation would be deemed pre-empted by federally created Indian treaty rights. See United States v. Powers, 94 F.2d 783 (9th Cir. 1938), aff'd 305 U.S. 527 (1939). This theory apparently carried through to the 1949 version which was finally adopted by the signatory states and ratified by Congress. This history carries little weight as far as Article X is concerned, since the protection of Indian treaty rights afforded by the exclusion of the Little Bighorn from Article V is in fact aided by the provisions of Article X, which obviously make it more difficult to impair Indian water rights by exporting water from the region.

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

I conclude that the Compact is clear on its face. Wyoming may not divert Little Bighorn River water out of the Yellowstone Basin without the consent of the states of Montana and

North Dakota. The fact that the waters of the Little Bighorn were not apportioned under Article V of the Compact does not alter the coverage of Article X, nor does the legislative history indicate an intention contrary to my conclusion.

THEREFORE, IT IS MY OPINION:

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

Very truly yours,

MIKE GREELY
Attorney General