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THE ROCKY ROAD TO WATER FOR ENERGY

HENRY LOBLE*
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I. INTRODUCTION, SCOPE, AND PURPOSE

A few short years ago, America awoke to the stunning realization that it had an acute petroleum and natural gas shortage, and that its energy future appeared to rest in the hands of Mideast turbaned sheiks and potentates, the heads of governments of small South American countries and our Northern border neighbors sometimes called "the blue-eyed Arabs."¹ The energy crisis was upon us with what seemed to be lightning-like suddenness. It appeared immediately obvious that we must turn to development of our own energy resources. National attention focused upon the vast strip-pable coal reserves in Montana, Wyoming, North Dakota, and to a lesser extent, South Dakota. These highly desirable and low sulphur coal deposits could be used for electric steam generating plants, gasification plants (the conversion of coal into natural gas) and liquefaction plants (the conversion of coal into liquid petroleum products). The use of coal for these purposes required water which appeared to be available from the river networks which comprise the Missouri River Basin. The Yellowstone River Basin in Montana and Wyoming, the western Dakota tributaries of the upper Missouri River, and the main stem of the Missouri River to some, at least, appeared to contain a vast reservoir of water resources which should be ample to develop our energy needs. Lawyers whose interests and those of their clients lie in the field of mineral and water law immediately began to scrutinize the legal framework surrounding the use of water in the states of Montana, Wyoming, and North Dakota.²

Legal scrutiny revealed that appropriation and use of water for

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1. A representative of the Montana Power Company has indicated that the Canadians have raised the wholesale price of natural gas more than 650 percent in the last two and one-half years. Great Falls Tribune, January 29, 1976.

2. South Dakota has some peripheral interest, but in this article it is not accorded the importance of the other three states. South Dakota is considered to contain only "poten-

energy development was not nearly as simple as had been assumed. Furthermore, apprehensive state legislators and members of Congress proceeded immediately to make water appropriation even more legally difficult. Nightmares of diminishing waters and enormous strip mining drag lines gobbling up top soil, wildlife, farmers, crops and recreational values spurred lawmakers, environmentalists, and ecologists into a fever of activity to stop, slow down, or add to the problems of mineral and water development.

The scope of this article is an examination of the procedures involved and the problems posed by appropriation of waters for energy in Montana, Wyoming, and North Dakota. The general areas of interest require comment upon state laws and court decisions, federal laws and court decisions, the interstate nature of the streams involved, the reserved water right claims of the federal government and of the Indians upon a similar doctrine, the uncertainty of the ownership of water in federal reservoirs, and last, but by no means least, the environmental concerns.

The coal resources in the Northern Great Plains Region (parts of Wyoming, Montana, North Dakota and South Dakota) are enormous. The Northern Great Plains Resource Program of the Department of Interior estimates this coal resource at 1,524 billion tons, of which 80.2 billion tons are surface minable, and of the latter figure 64.2 billion tons are classified as recoverable.³ The historic (1898-1972) average annual flow of the Upper Missouri River Basin is 28,321,000 acre-feet, of which 13,591,000 acre-feet are estimated to be available for additional development.⁴

Numerous studies have been made of the coal and water resources in this area.⁵

The rivers and streams which, in general, comprise these water resources are: (1) the Yellowstone River in Montana and North

tial additional stripping coal deposits" which are not classified by the Department of the Interior as either known stripping coal deposits or known, but less well defined, stripping coal deposits. See NORTHERN GREAT PLAINS RESOURCES PROGRAM, SURFACE MINERAL COAL DEPOSITS plate B-3 (1994).

3. NORTHERN GREAT PLAINS RESOURCES PROGRAM, EFFECTS OF COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS 5, 6 (1975).

4. *Id.* at 79.

5. *E.g.*, DEPARTMENT OF INTERIOR, WESTWIDE STUDY REPORT ON CRITICAL WATER PROBLEMS FACING THE ELEVEN WESTERN STATES (April, 1975); DEPARTMENT OF INTERIOR WATER FOR ENERGY MANAGEMENT TEAM, REPORT ON WATER FOR ENERGY IN THE NORTHERN GREAT PLAINS AREA WITH EMPHASIS ON THE YELLOWSTONE RIVER BASIN at VII-1 (Jan., 1975); MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, WATER RESOURCES DIVISION, YELLOWSTONE RIVER BASIN WATER RESOURCES SITUATION REPORT (1975); MONTANA ENERGY ADVISORY COUNCIL, COAL DEVELOPMENT INFORMATION PACKET (Dec., 1974); COAL-ENERGY DEVELOPMENT IN THE NORTHERN GREAT PLAINS (J. Davidson, Study Coordinator, Oct. 1973); NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE (June, 1973); WYOMING STATE ENGINEER'S OFFICE, WYOMING FRAMEWORK WATER PLAN (May, 1973); BUREAU OF RECLAMATION, DEPARTMENT OF INTERIOR, REPORT ON RESOURCES OF EASTERN MONTANA BASINS (AUG., 1972); BUREAU OF RECLAMATION, DEPARTMENT OF INTERIOR, APPRAISAL REPORT ON MONTANA-WYOMING AQUEDUCTS (April, 1972); NORTH CENTRAL POWER STUDY (prepared by major North Central power suppliers, Oct., 1971).

Dakota and its interstate tributaries in Montana and Wyoming (The Clarks Fork, Big Horn, Tongue, and Powder Rivers); (2) the western Dakota tributaries of the Upper Missouri River which are the Little Missouri (North and South Dakota), the Cannonball (North Dakota), the Knife (North Dakota) and Heart (North Dakota) Rivers; and (3) the main stem Missouri River (Montana, North Dakota, and South Dakota).

Numerous federal reservoirs store waters which are potentially available for development of energy. These are: Boysen Reservoir, Wind River, Wyoming; Yellowtail Reservoir (Wyoming and Montana) Big Horn River, Montana; Fort Peck Reservoir, Missouri River, Montana; Lake Sakakawea, Missouri River, North Dakota; Lake Oahe, Missouri River, North and South Dakota; Lake Tschida, Heart River, North Dakota; Shadehill Reservoir, Grand River, South Dakota and numerous potential federally funded storage reservoirs on the Yellowstone or its tributaries that might be built.⁶ Indicating the interest in water for energy, water option contract applications in acre-feet per year, for the foregoing reservoirs and potential reservoirs, total 2,529,000 as of October, 1974.⁷

The latest available estimate is that the total consumptive water requirement, including pollution control, for a 1,000 megawatt coal-fired power plant ranges between 12,000 and 15,000 acre-feet per year. A Lurgi-based process gasification plant for a 250 million cubic feet per day (MMCFD) plant is 8,000 to 12,000 acre-feet per year. A "best estimate" for the Northern Great Plains would appear to be 9,500 acre-feet per year for a 250 MMCFD plant.⁸ This represents a substantial decrease in the 1973 estimate of water requirements for power plants of 19,000 acre-feet per year for 1,000 megawatts generated, and 30,000 acre-feet per year for gasification plants producing 250 MMCFD.⁹ The 1973 report of the National Water Commission presents figures for water requirements for power plants that appear to be substantially larger.¹⁰

An engineering report available to the authors of this article indicates an annual water requirement of 15,000 acre-feet per year for a coal gasification plant of 250 MMCFD, 15,000 acre-feet per year for a 75,000 barrel per day coal liquefaction plant, and 15,000

6. NORTHERN GREAT PLAINS RESOURCES PROGRAM, EFFECTS OF COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS table IV-9 at 71. This publication lists Moorhead, Powder River, Montana, as a potential federal reservoir. However, it is no longer considered a federal project, and Intake Water Company, a subsidiary of Tenneco, Inc., has applied to the Montana Department of Natural Resources and Conservation and the Wyoming State Engineer to construct this dam and reservoir.

7. *Id.*

8. *Id.* at 71-72.

9. *Id.* at 70.

10. REPORT OF NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE tables 5-12 at 172-74 (June, 1973).

acre-feet per year for a coal-fired steam electric plant with a capacity of 1,000 megawatts (1 gigawatt).¹¹ Another reliable engineering source available to the authors estimates gasification plant water requirements are now 7,500 acre-feet per year for a 250 MMCFD Lurgi operation. One source estimates nearly 2.5 million acre-feet of fresh and waste water are needed annually to meet cooling requirements for electric power loads by the year 2000. It has been estimated that the power plant capacity of Montana will grow from 1,874 megawatts in 1972 to 6,654 megawatts in the year 2,000, and that the capacity for Wyoming will measure from 1,540 megawatts to 17,287 for the same years.¹² No doubt North Dakota's will be comparable.

A study summarizing critical water problems facing the eleven western states states:

The overall requirements for fresh water related to energy resource development in the West will, of course, depend upon the rate of that development. By the year 2000, they could very well amount to over 3.3 million acre-feet—2.5 million acre-feet for thermal power cooling requirements, 0.6 million acre-feet for coal gasification, and .26 million acre-feet for oil shale processing.¹³

The total unallocated water supply in the Upper Missouri River Basin appears to be ample, through the year 2000, to meet all projected needs and uses, including a high degree of energy development.¹⁴

Applications are currently pending before the North Dakota Water Conservation Commission and State Engineer for water use permits for two proposed 250 MMCF gasification plants. One application, recently assigned to ANG Coal Gasification Company, proposes to construct a gasification plant near the town of Beulah, in Mercer County, North Dakota. The other application, by the Natural Gas Pipeline Company of America, proposes a plant to be built in Dunn County, North Dakota.

A proposal for the design, construction and operation of a coal gasification demonstration plant in Wyoming was proposed by a joint venture comprised of Texaco, Inc., Natural Gas Pipeline Company of America, Montana-Dakota Utilities Co., and Pacific Gas and Electric Company. This proposal has been submitted to the

11. Cameron Engineers, Inc., Denver, Colorado.

12. DEPARTMENT OF THE INTERIOR, WESTWIDE STUDY REPORT ON CRITICAL WATER PROBLEMS FACING THE ELEVEN WESTERN STATES 75 (April, 1975).

13. *Id.* at 10.

14. DEPARTMENT OF THE INTERIOR WATER FOR ENERGY MANAGEMENT TEAM, REPORT ON WATER FOR ENERGY IN THE NORTHERN GREAT PLAINS AREA WITH EMPHASIS ON THE YELLOWSTONE RIVER BASIN at VII-1 (Jan., 1975).

United States Energy Research and Development Administration (ERDA) and is dependent upon the selection of the project by ERDA and the funding for such a project by the United States Congress.¹⁵

The foregoing, in summary, demonstrates the need for water in energy development and defines the scope of this article as to area and water resource; i.e. Montana, Wyoming, and North Dakota, and the Upper Missouri River Basin including the major tributary, the Yellowstone River.

The purpose of this article is to highlight the problems and procedural complexities involved in making water legally available in this area for energy development. Its purpose is not to solve or attempt to solve such problems, but, rather, to indicate their existence. All areas of the law, including water law, have become so complex that it is sometimes difficult for the diligent lawyer to even recognize that there is a problem. This article attempts to aid in problem recognition in the field of water appropriation for industrial use in this geographical area. Generally speaking, definitive answers do not exist, anyway.

Having set the energy stage, we will next discuss the problems and procedures which are encountered in attempting to procure the water necessary for mineral development.

II. WATER RIGHTS PROBLEMS

A. STATE LAWS

1. *Laws Common to More Than One State*

Both Montana¹⁶ and Wyoming¹⁷ prohibit the diversion of water from Montana or Wyoming, respectively, for use in another state, without legislative consent. North Dakota does not appear to prohibit diversion of its water out of the state except as provided by Article X of the Yellowstone River Compact,¹⁸ which prohibits the diversion of water out of the Yellowstone River Basin without the unanimous consent of all signatory states to the Compact.¹⁹ Montana, Wyoming and North Dakota are the signatory states to the Compact.

Montana, Wyoming, and North Dakota have adopted the prior appropriation doctrine as distinguished from the riparian doctrine.²⁰

North Dakota recognized both the riparian and the appropriation

15. Great Falls Tribune, January 21, 1976.

16. MONT. REV. CODES ANN. § 89-846 (1964).

17. WYO. STAT. ANN. § 41-10.5 (Supp. 1975).

18. Yellowstone River Compact, ch. 624, art. X, 65 Stat. 663 (1951).

19. See generally N.D. CENT. CODE tit. 61 (1960).

20. MONT. REV. CODES ANN. § 89-866 (Supp. 1975); N.D. CENT. CODE ch. 61-04 (Supp. 1975); WYO. STAT. ANN. § 41-2 (1959).

doctrines of water use until 1963. After 1963, no further riparian rights to the use of water could be acquired in North Dakota.²¹

All three states have a permit system whereby application to appropriate water is made to and granted by a department of state government.²²

The three states have varying statutes which deal with similar problems such as plant siting, water quality, flood control, etc., but the statutory differences are such as to require individual comment for each state.

A note of caution is advised for each lawyer dealing in this area: he should be alert to factual situations which may bring into play state laws, and even federal laws, which might not ordinarily be applicable. Also, of course, carried to its ultimate, the operation of electric generating plants, gasification plants, and liquefaction plants may bring the operator within the ambit of air pollution, land use, and solid waste management laws, but these are beyond the scope of this article.

2. Montana

Only recently did Montana enact laws which require application to a central state agency for a permit to appropriate water.²³ Prior to the enactment of a permit system, Montana did not require the filing of a notice of water right appropriation in any central place, and, as a matter of fact, did not even require the filing of a notice at all, nor did Montana water rights necessarily rest on any written document. In Montana one could, prior to July 1, 1973, acquire a water right simply by diversion and application to a beneficial use.²⁴ Such a right was called a "use right," and there was no requirement that it be evidenced by any writing of any kind.²⁵ In addition, a potential water appropriator could, after posting, file a notice of water appropriation in the county where his water supply was located, proceed to commence and complete his diversion works in accordance with statutory requirements, and have a water right which related back to the time his notice was posted.²⁶ As a consequence, such water right notices abound, helter-skelter, throughout the records of the various county clerks and recorders of the 56 Montana counties, and the claims made for water under such notices are of-

21. *Volkman v. City of Crosby*, 120 N.W.2d 18, 22 (N.D. 1963); Beck & Hart, *The Nature and Extent of Rights in Water in North Dakota*, 51 N.D.L. REV. 251-64 (1974); see 1 WATERS AND WATER RIGHTS 80 (R. Clark ed. 1967).

22. MONT. REV. CODES ANN. § 89-880 (Supp. 1975); N.D. CENT. CODE ch. 61-04 (Supp. 1975); WYO. STAT. ANN. § 41-201 (1959).

23. MONT. REV. CODES ANN. § 89-868 (Supp. 1975) (effective 1973).

24. *Clauson v. Arrington*, 123 Mont. 1, 212 P.2d 440 (1949).

25. *Id.*

26. §§ 6-8, [1885] LAWS OF MONT. 181-32, amended, ch. 228, § 3, [1921] 487, repealed by ch. 452, § 46, [1973] 1143.

ten astonishing. There is no way that one can tell by looking at these written notices whether they are necessarily valid or even being used, nor is there any way to tell the amount of water which was validly appropriated under the notice, as contrasted to the amount claimed in the notice. More reliance can, of course, be placed upon water rights adjudicated in Montana's courts. Every permit now issued by the Department of Natural Resources and Conservation under Montana law is subject to all Montana water rights in existence as of July 1, 1973.²⁷ Thus the concept of "caveat emptor" prevails, and the mere issuance of such a permit by the department is no guarantee that it has any certain priority of any kind.

Aside from the "existing rights" which were established in Montana prior to July 1, 1973, water rights are now obtained there by application to the Department of Natural Resources and Conservation in Helena, accompanied by the required filing fee.²⁸ Notice is given by the Department and a hearing may be held.²⁹ The requirement for issuance of a permit is a determination by the department that (1) there are unappropriated waters in the source of supply, (2) the rights of a prior appropriator will not be adversely affected, (3) the proposed means of diversion or construction are adequate, (4) the proposed use of water is a beneficial use, (5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved, and (6) in the case of an applicant for an appropriation of 15 cubic feet per second or more, he must prove by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected.³⁰ As mentioned above, any permit or final certificate is subject to all water rights in existence prior to July 1, 1973.³¹ An appeal can be had to the Board of Natural Resources and Conservation from the decision of the department; appeal may also be had to a state district court, and eventually to Montana's Supreme Court.³²

The Montana Major Facility Siting Act (often referred to in Montana as the Utility or Plant Siting Act) requires a Certificate of Environmental Compatibility and Public Need to be issued by the Department of Natural Resources and Conservation prior to the construction of a facility capable of either generating electricity, transporting electricity, producing gas, producing liquid hydrocarbon products, enriching uranium minerals, utilizing coal, using geo-

27. MONT. REV. CODES ANN. § 89-880(4) (Supp. 1975).

28. MONT. REV. CODES ANN. § 89-886(1) (Supp. 1975).

29. MONT. REV. CODES ANN. §§ 89-881, 89-883 (Supp. 1975).

30. MONT. REV. CODES ANN. § 89-885 (Supp. 1975).

31. MONT. REV. CODES ANN. § 89-886 (1) (Supp. 1975).

32. MONT. REV. CODES ANN. §§ 89-8-100, 89-878 (Supp. 1975).

thermal resources, or transporting gas, water or liquid hydrocarbon products to or from any facility.³³

The Act requires the payment of a large filing fee based upon the estimated construction cost of the plant. For instance, if a plant were to cost \$100 million, a filing fee of \$615,000 would be required.³⁴

The department is to use the filing fee to conduct an "intensive study and evaluation of the proposed facility and its effects" utilizing certain statutory criteria as a minimum standard.³⁵ Input into the study also comes from other agencies of the state such as the Departments of Health and Environmental Sciences, Highways, Community Affairs, Fish and Game, and the Public Service Commission.³⁶ A public hearing is held on the proposed study pursuant to the contested case procedures of the Montana Administrative Procedure Act.

The Montana Legislature enacted a statute effective April 29, 1975, which provides that the Department of Natural Resources and Conservation shall "not accept or act upon any application" for a Certificate of Environmental Compatibility and Public Need until the Governor of Montana has submitted a long term, comprehensive, state energy conversion policy plan to the next legislature and it has an opportunity to respond to the policy plan with appropriate legislation.³⁷ This act suspends any action on such an application until the upcoming legislature adjourns, which will not be until April or May, 1977, at the earliest.

Montana has a Flood Plain Management Act which requires the Department of Natural Resources and Conservation to designate flood plain areas, defined as areas adjoining a water course which would be covered by flood waters during a 100 year frequency.³⁸ Once the flood plain is designated, land use regulations will prohibit the construction of artificial obstructions of a non-conforming use within the flood plain. An example of a non-conforming use would be a "structure or excavation that will cause water to be diverted from the established floodway, cause erosion, obstruct the natural flow of water, or reduce the carrying capacity of the floodway."³⁹

Montana also has a water quality act⁴⁰ and a Montana Environmental Policy Act⁴¹ which will be alluded to in the discussion of environmental matters later in this article.

Montana has adopted a moratorium upon the appropriation of

33. MONT. REV. CODES ANN. ch. 70-8 (Supp. 1975).

34. MONT. REV. CODES ANN. § 70-806(2)(a) (Supp. 1975).

35. MONT. REV. CODES ANN. § 70-807 (Supp. 1975).

36. MONT. REV. CODES ANN. § 70-807(2) (Supp. 1975).

37. MONT. REV. CODES ANN. § 70-825 to 70-827 (Supp. 1975).

38. MONT. REV. CODES ANN. ch. 89-35 (Supp. 1975).

39. MONT. REV. CODES ANN. § 89-3506(4)(b) (Supp. 1975).

40. MONT. REV. CODES ANN. ch. 69-48 (1970).

41. MONT. REV. CODES ANN. ch. 69-65 (Supp. 1975).

any water from the Yellowstone River Basin in quantities larger than a reservoir with a total planned capacity of 14,000 acre-feet or for a flow rate greater than 20 cubic feet per second. This was a three-year moratorium when first enacted and expires March 11, 1977.⁴² During the moratorium, any city, county, or state subdivision can reserve water in accordance with the statutory procedure,⁴³ and when perfected, such a water reservation takes precedence over a previously filed and pending application to which the moratorium applies. This, of course, would include most applications for industrial water use. With respect to these reservations, the act provides that particular emphasis shall be placed on applications to reserve water for agricultural, municipal and minimum flow purposes for the protection of existing rights and aquatic life.⁴⁴

It is interesting to note that the moratorium act expressly provides that the United States and any agency thereof may not apply for a reservation of water in the basin. This apparently forecloses the United States from making any reservation of water under state law in the Yellowstone River Basin.

A corporation authorized to do business in Montana has a power of eminent domain that may be exercised on behalf of certain public uses. Sites for reservoirs necessary for collecting and storing water have been defined in the past as such a public use.

A 1973 amendment to the eminent domain statute provides that "such reservoir sites must possess a public use . . . as the highest and best use of the land."⁴⁵ The precise definition of the term "highest and best use of the land" is certainly open to considerable debate in these environmental 70's. Traditionally, "highest and best use" is a term often used in condemnation law to determine just compensation to be paid for condemned land.⁴⁶ The definition has traditionally been one of economic terms. However, it is arguable in an environmental or social sense that "highest or best use of the land" should be determined with reference to such criteria as aesthetics, wildlife preservation, social impact and urbanization on the surrounding area and general impact on the environmental ecosystem and biosphere.

The Montana Water Resources Act authorizes the Department of Natural Resources and Conservation with the consent of the Board of Natural Resources and Conservation to construct, operate and maintain a system of water works to develop, store and dis-

42. MONT. REV. CODES ANN. § 89-8-105 (Supp. 1975).

43. MONT. REV. CODES ANN. §§ 89-8-105, 89-8-107 (Supp. 1975).

44. MONT. REV. CODES ANN. § 89-8-107 (Supp. 1975).

45. MONT. REV. CODES ANN. §§ 93-9902(4), (5) (Supp. 1975).

46. *State Highway Comm'n. v. Jacobs*, 150 Mont. 322, 326, 435 P.2d 274, 277 (1967); *United States v. Easement & Right of Way 100 Feet Wide*, 447 F.2d 1317, 1319 (6th Cir. 1971).

tribute water for beneficial purposes including industrial use.⁴⁷ The department has the authority to acquire land, water rights, easements, franchises and other property necessary for the construction, operation and maintenance of this system of works by purchase, exchange or condemnation.⁴⁸ The State of Montana has the authority to be both a supplier and a competitor for industrial water.

3. Wyoming

For many years Wyoming law has required applications to be made to the state engineer for permits to appropriate water.⁴⁹ The state engineer has a duty to approve the application if he determines that the proposed use is a beneficial use, does not tend to impair the value of existing rights or is not detrimental to the public welfare.⁵⁰ The state engineer may require such additional information to enable him to "properly guard the public interests."⁵¹ After the state engineer has made his decision, an applicant aggrieved by that decision may appeal to the Board of Control, and any party aggrieved by its decision can appeal to state district court.⁵²

Wyoming water law recognizes preferred water uses. Preferred water uses shall have preference rights in the following order: (1) water for drinking purposes for both man and beast, (2) municipal purposes, (3) steam engine use and general railway use, water for culinary, laundry, bathing, refrigerating (including the manufacture of ice), for steam and hot water heating plants, and steam power plants, and (4) industrial purposes, although the preferred use of steam power plants and industrial purposes shall not be construed to give the right of condemnation.⁵³

The Wyoming Industrial Development Information and Siting Act is not directed specifically at large industrial users of water.⁵⁴ However, the facility regulated by this Act potentially could be a large water user. The Act requires a permit to be obtained from the Industrial Siting Council before the commencement of construction of a facility is allowed. A facility is defined as an energy generating and conversion plant capable of either generating 100 megawatts of electricity, producing 100 million cubic feet of synthetic gas per day, producing 50,000 barrels of liquid hydrocarbon products per day, or capable of enriching uranium minerals.⁵⁵

An application for such a permit requires the inclusion of a substantial amount of data including information relating to the con-

47. MONT. REV. CODES ANN. § 89-101.2 (Supp. 1975).

48. MONT. REV. CODES ANN. § 89-104 (Supp. 1975).

49. WYO. STAT. ANN. § 41-201 (1957).

50. WYO. STAT. ANN. § 41-203 (1957).

51. WYO. STAT. ANN. § 41-205 (1957).

52. WYO. STAT. ANN. § 41-216 (1957).

53. WYO. STAT. ANN. § 41-3 (1957).

54. WYO. STAT. ANN. §§ 35-502.75 to -502.94 (Supp. 1975).

55. WYO. STAT. ANN. § 35-502.76 (Supp. 1975).

struction of a facility, an inventory of discharges and emissions and the effect on human, animal and plant life.⁵⁶ Additionally an evaluation of plans for alleviating certain specified social, economic and environmental impacts resulting from the facility is required. A required initial fee, not to exceed \$100,000, is determined by the estimated cost of investigating, reviewing and processing the application.⁵⁷ After a public hearing is held an additional fee based upon the estimated cost of the facility can be required from the applicant by the council for intensive study and evaluation.⁵⁸ For a \$100 million facility, the additional fee could be as much as \$500,000. The State Office of Industrial Siting Administration is to make the additional study and evaluation. The study is to include research on certain statutory topics including hydrologic studies of the impact of the facility on water resources.⁵⁹ A public hearing must be held pursuant to the contested case procedures of the Wyoming Administrative Procedure Act.

In 1975 Wyoming established a Water Development Program designed to "foster, promote and encourage the optimum development of the state's human, industrial, mineral, agricultural, water and recreational resources."⁶⁰ The program is administered by the Department of Economic Planning and Development.⁶¹ The Department is authorized to contract for the sale, lease or furnishing and delivery of water service, water rights, water storage, hydroelectric power and to take any action necessary to carry on any duties or powers under the Act.⁶² The administrator of the Division of Water Development of the Department of Economic Planning and Development at the direction of the governor or at the request of the Interdepartmental Water Conference is to file applications in the name of the State of Wyoming for permits to appropriate water and to construct dams and other works and to take other steps necessary to acquire, maintain or preserve the priority of any right essential to any project which is or may become a project of the Wyoming water development program.⁶³ As can be seen, these statutes allow the state of Wyoming to be in direct competition for waters that are capable of being used for industrial purposes.

Wyoming does not have any moratoriums on surface or water applications in effect presently. However, on April 1, 1975, a moratorium expired which had prohibited the appropriation of under-

56. WYO. STAT. ANN. § 35-502.81 (Supp. 1975).

57. WYO. STAT. ANN. § 35-502.81(b) (Supp. 1975).

58. WYO. STAT. ANN. § 35-502.83 (Supp. 1975).

59. WYO. STAT. ANN. § 35-502.84 (Supp. 1975).

60. WYO. STAT. ANN. § 41-1.42 (Supp. 1975).

61. WYO. STAT. ANN. § 9-160.19 (Supp. 1975).

62. WYO. STAT. ANN. § 9-160.29 (Supp. 1975).

63. WYO. STAT. ANN. § 41-1.46 (Supp. 1975).

ground water that exceeded 6,000 acre-feet to be used for industrial purposes unless the appropriation was approved by the legislature.⁶⁴

Wyoming prohibits the appropriation of its water for use outside of the state without legislative consent.⁶⁵ Recently, the Wyoming Legislature approved a proposal of Energy Transportation Systems, Inc., a Delaware corporation, to appropriate up to 20,000 acre-feet annually of underground water from the Madison or Bell Sand formations for use in a coal slurry pipeline extending from Wyoming to Arkansas.⁶⁶

4. North Dakota

North Dakota requires an application to be made to the state engineer for a permit to appropriate water before any person or corporation is allowed to commence any construction.⁶⁷ If the state engineer determines from the available evidence and records that there is unappropriated water available, he is to endorse his approval on the application and the applicant receives a conditional water permit.⁶⁸ If the state engineer is of the opinion that no unappropriated water is available or if approval of the application would be "contrary to the public interest," then he is to reject the application, leaving an applicant the right to appeal to the district court.⁶⁹

In the event that the "use of water for different purposes conflicts," then "such uses shall conform" to an established priority list as follows: (1) domestic use, (2) livestock use, (3) irrigation and industry and (4) fish, wildlife and outdoor recreational uses.⁷⁰

North Dakota has a State Water Conservation Commission which is generally empowered to investigate, regulate, construct, and supervise dams and other projects which in its judgment may be necessary or advisable.⁷¹ The Commission is authorized to provide for storage, development, distribution, and sale of water for irrigation, municipal and industrial purposes.⁷² The Commission is also authorized to reserve water by filing in the state engineer's office a declaration of intention to store, divert or control the unappropriated waters of a particular stream with the priority date vesting upon filing.⁷³ The state engineer, subject to the approval of the Commission, may grant water rights to any person, corporation, state or

64. Ch. 25, § 3, [1974] SESS. LAWS OF WYO. 109.

65. WYO. STAT. ANN. § 41-10.5(b) (Supp. 1975).

66. WYO. STAT. ANN. § 41-10.5(d) (Supp. 1975).

67. N.D. CENT. CODE § 61-04-02 (Supp. 1975).

68. N.D. CENT. CODE § 61-04-06 (Supp. 1975).

69. N.D. CENT. CODE § 61-04-07 (Supp. 1975).

70. N.D. CENT. CODE § 61-01-01.1 (Supp. 1975).

71. N.D. CENT. CODE § 61-02-04 (Supp. 1975).

72. N.D. CENT. CODE §§ 61-02-14(1)(k), (2)(a) (Supp. 1975).

73. N.D. CENT. CODE § 61-02-30 (Supp. 1975).

federal agency or political subdivision.⁷⁴ This, of course, makes the state of North Dakota a potential supplier of water for industrial use as well as a potential competitor of industry for that water.

The state engineer and the Commission have separate statutory existence but appear to have overlapping authority. We have been informed that the two agencies cooperate very closely with one another. According to one North Dakota lawyer, the state engineer's office is the "chief executive office" of the Water Commission.

The Commission has declared by a resolution dated November 19, 1975, that final action on applications for a water permit filed after November 19, 1975, for use with energy conversion facilities shall be suspended until July 1, 1977.⁷⁵

The United States or any person, corporation or association may exercise the right of eminent domain to acquire for public use any property or rights existing when found necessary for the application of water to beneficial uses.⁷⁶

North Dakota allows the assignment of a conditional or perfected water right to appropriate water for irrigation purposes to another entity (i.e., to an industrial purchaser) with the approval of the state engineer.⁷⁷

In 1975 the North Dakota Legislature enacted the North Dakota Energy Conversion and Transmission Facility Siting Act.⁷⁸ The Act provides that no energy conversion facility or transmission facility shall be constructed without a certificate of site compatibility.⁷⁹ An energy conversion facility is defined in fashion a similar to the definition in the Wyoming Industrial Development Information and Siting Act. The transmission facility definition includes "a gas or liquid transmission line and associated facilities designed for or capable of transporting . . . water from or to an energy conversion facility. . . ."⁸⁰ The North Dakota Public Service Commission is to administer this Act and is to initiate a public planning process to develop criteria and standards to prepare an inventory of potential energy conversion facility sites, transmission facility corridors and to guide the site suitability evaluation and selection process.⁸¹

An application for a certificate of site compatibility will be evaluated with reference to certain statutory considerations, but the Commission is not limited solely to those statutory considerations.⁸²

74. N.D. CENT. CODE § 61-02-30 (Supp. 1975).

75. N.D. STATE WATER CONSERVATION COMM'N. RES. No. 75-11-387.

76. N.D. CENT. CODE § 61-01-04 (1960).

77. N.D. CENT. CODE § 61-04-15 (1960).

78. N.D. CENT. CODE tit. 49-22 (Supp. 1975).

79. N.D. CENT. CODE § 49-22-02 (Supp. 1975).

80. N.D. CENT. CODE § 49-22-03(11)(c) (Supp. 1975).

81. N.D. CENT. CODE § 49-22-05 (Supp. 1975).

82. N.D. CENT. CODE § 49-22-09 (Supp. 1975).

Following a public hearing allowing "broad-spectrum citizen participation," the Commission may designate a suitable site or corridor from the established inventory or accept the site or corridor proposed by the applicant.⁸³ An application fee of \$5,000 to \$150,000 must accompany the application with additional fees to be paid by the applicant as are reasonably necessary for completion of the evaluation and selection process by the commission.⁸⁴ The total fees to be paid by an applicant for a \$100 million facility would not exceed \$150,000.

All land in North Dakota was scheduled to be within a water management district by July 1, 1974. The board of commissioners of a water management district has had in the past the authority to construct dams and regulate the waters impounded by such dams primarily for conservation and flood control purposes.⁸⁵ Additionally the board may now petition certain zoning authorities to assume jurisdiction over a flood plain for zoning purposes when such zoning is required to regulate and enforce the placement, construction and use of buildings and structures in order to protect and promote the health, safety and general welfare of the public lying within a flood plain area.⁸⁶ If the petitioned zoning authority does not act, then the board may make suitable recommendations for the establishment of a flood plain zone to all zoning authorities and governing bodies in the political subdivision having jurisdiction within the flood plain area.⁸⁷

B. FEDERAL LAWS

The federal government has largely left to the states the matter of granting or withholding of water right appropriations. This is modified, of course, by the reserved rights doctrine for federal claims and Indian claims to which reference will be made later in this article.

The Rivers and Harbors Act of March 3, 1899, particularly Section 10 thereof, prohibits construction activity that would create an obstruction in any of the navigable waters of the United States without a permit from the Secretary of Army issued through the Army Corps of Engineers.⁸⁸ Such activities as the excavation, dredging and filling portions of a navigable stream have required Section 10 permits from the Corps.⁸⁹ A Section 10 permit was required of

83. N.D. CENT. CODE §§ 49-22-10, 49-22-15 (Supp. 1975).

84. N.D. CENT. CODE § 49-22-22(1) (Supp. 1975).

85. N.D. CENT. CODE § 61-16-11 (1960).

86. N.D. CENT. CODE § 61-16-11(19) (Supp. 1975).

87. *Id.*

88. 33 U.S.C. § 403 (1970).

89. *F. D. Gleason Coal Co. v. United States*, 30 F.2d 22 (6th Cir. 1929). *See also Sierra Club v. Morton*, 514 F.2d 856, 864 n.9 (D.C. Cir. 1975).

an entity that diverted a substantial quantity of water from a navigable stream with a resulting lowering of the water level of the stream.⁹⁰ The Corps' jurisdiction over navigable waters historically has been based on traditional navigability definitions as set forth in several Supreme Court decisions.⁹¹ Consequently, there are some rivers which do not fall within the authority of the Corps of Engineers. For example, it is our understanding that the Corps of Engineers did not consider the Upper Yellowstone River above Intake, Montana, and the tributaries of the Big Horn, Tongue and Powder Rivers to be navigable, or to require a Section 10 permit. As mentioned above, these are a few of the principal rivers that have the potential of providing water for industrial energy purposes in the Northern Great Plains.

Section 13 of the River and Harbors Act (often separately referred to as the Refuse Act of 1899) prohibits the discharge of refuse into navigable waters.⁹² The permit authority of the Secretary of Army under this Act has been transferred to the Administrator of the Environmental Protection Agency pursuant to the Federal Water Pollution Control Act Amendments of 1972 (FWPCA).⁹³ The River and Harbors Act of 1899 was originally enacted to protect navigation but has been used frequently in the past few years to combat injuries to the environment. The recent amendments to FWPCA encompass activities regulated by the River and Harbors Act and will be discussed later under a separate heading relating to environmental laws.

The question of public access to waters and shorelands may possibly arise as a problem.⁹⁴

Additionally, the National Wild and Scenic Rivers System Act⁹⁵ may potentially close off certain streams which are capable of supplying industrial water. No rivers in the area are presently designated as part of the Wild and Scenic Rivers System, but several have characteristics that warrant such consideration and have been identified in legislation or various planning documents. For example, the Yellowstone River from Yellowstone National Park to Pompeys Pillar, the Wind River in Wyoming from its source to Boysen Reservoir and the Little Missouri in North Dakota from Marmarth,

90. *Sanitary Dist. v. United States*, 266 U.S. 405 (1925).

91. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921); *The Daniel Ball.*, 77 U.S. (10 Wall.) 557 (1870).

92. 33 U.S.C. § 407 (1970).

93. 33 U.S.C.A. §§ 1342, 1345 (Supp. 1976).

94. See *Submerged Lands Act*, 43 U.S.C. §§ 1301-43 (1970); NATIONAL WATER COMMISSION, PUBLIC ACCESS RIGHTS IN WATERS AND SHORELANDS 47 (National Tech. Info. Service (1971)).

95. 16 U.S.C. §§ 1271-87 (1970).

North Dakota to Garrison Reservoir (Lake Sakakawea) have been considered.⁹⁶

C. INTERSTATE PROBLEMS

This problem is epitomized by the statement of the Wyoming State Engineer:

Although the Wyoming Constitution declares water to be the property of the State, as a practical matter Wyoming is limited in the amount that she can deplete the stream-flows because of the water rights established in other states.

The State's leaders realized many years ago that downstream states developing faster than Wyoming might establish prior water rights that could stifle future Wyoming development. Interstate stream compacts, which are agreements regarding the diversion of water among states, were negotiated on most of Wyoming's streams.⁹⁷

Although many of the streams situated in areas of concern for this article are interstate in character, only one interstate water compact, the Yellowstone River Compact (1950),⁹⁸ has been entered into which affects our study.⁹⁹ The Yellowstone River Compact was entered into between Montana, Wyoming, and North Dakota. It sets up a commission to administer the compact but North Dakota has no representative thereon. Montana and Wyoming each have a representative on the commission, and one other representative is selected by the director of the United States Geological Survey.¹⁰⁰

The Compact affirms and recognizes appropriate rights to waters of the Yellowstone River existing in all three states as of January 1, 1950, plus the rather ambiguous term "supplemental water supplies."¹⁰¹ The waters of the interstate tributaries of the Yellowstone, i.e., the Clarks Fork, Big Horn, Tongue and Powder Rivers, are allocated between Wyoming and Montana. Existing rights in the states of Montana and North Dakota below Intake, Montana as of January 1, 1950, are recognized, and during the period May 1 to December 30, inclusive, of each year, lands within Mon-

96. DEPARTMENT OF THE INTERIOR WATER FOR ENERGY MANAGEMENT TEAM, REPORT ON WATER FOR ENERGY IN THE NORTHERN GREAT PLAINS AREA WITH EMPHASIS ON THE YELLOWSTONE RIVER BASIN at I-8 (Jan., 1975).

97. WYOMING WATER PLANNING PROGRAM, STATE ENGINEER'S OFFICE, WYOMING FRAMEWORK WATER PLAN 34 (May, 1973).

98. Yellowstone River Compact, ch. 629, 65 Stat. 663 (1971); MONT. REV. CODES ANN. § 89-903 (1964); N.D. CENT. CODE § 61-23-01 (1960); WYO. STAT. ANN. § 41-511 (1959).

99. Henry Loble, one of the authors of this article, has written a paper entitled "Interstate Water Compacts and Mineral Development (With Emphasis on the Yellowstone River Compact)" which will be published by Matthew Bender & Company in the 1975 issue of the Rocky Mountain Mineral Law Institute.

100. Yellowstone River Compact, ch. 629, art. III, 65 Stat. 663 (1951).

101. *Id.* at art. V.

tana 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.¹⁰² The Compact provides a procedure for one state to divert and appropriate water in the other for beneficial use in the appropriating state.¹⁰³ No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory states. If a state brings water into the Yellowstone River Basin from another basin, that state is entitled to credit for such imported water.¹⁰⁴

As is customary in compacts of this kind, it is expressly provided that nothing in the Compact affects 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.¹⁰⁵ However, the use of allocated water for projects constructed after the Compact date by the United States of America or any of its agents or instrumentalities shall be charged as a use by the state in which the use is made, with the proviso that such use incident to the diversion, impounding or conveyance of water in one state for use in another shall be charged to such latter state.¹⁰⁶ Significantly it is provided that nothing in the Compact 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 the Compact¹⁰⁷.

The Yellowstone River Compact is clearly agriculturally oriented with repeated reference to water "for irrigation," "on new lands," "acreage irrigated," "acreage irrigable" and "potentially irrigable lands."¹⁰⁸

The Yellowstone River Compact was negotiated, ratified and consented to at a time when mineral development and extensive industrial use of water was not contemplated. This makes the Yellowstone River Compact a difficult instrument to work with in these areas.

Litigation is pending concerning the jurisdiction of Montana and

102. *Id.*

103. *Id.* at arts. VII, VIII, IX.

104. *Id.* at art. X.

105. *Id.* at art. XVI.

106. *Id.* at art. VII.

107. *Id.* at art. XVIII.

108. *Id.* at arts. V, VII.

Wyoming as concerns diversion of water in Wyoming for use in Montana.¹⁰⁹

Article X of the Yellowstone River Compact provides:

No water shall be diverted from the Yellowstone River basin without the unanimous consent of all the signatory states.

Litigation is pending concerning the constitutionality of this provision of the Compact.¹¹⁰

The rights of the United States of America, its agencies or instrumentalities, in and to the use of the waters of the Yellowstone River Basin, are specifically exempted from the provisions of the Compact.¹¹¹ There is also a specific article stating that the Compact is not to be construed or interpreted to adversely affect any rights to the use of the waters of the Yellowstone River and its tributaries owned by Indians, Indian tribes and their reservations.¹¹² In the past few years it has been made obvious that Indians do not relinquish the Indian claim to Yellowstone River Basin water in any way.¹¹³ This lends a substantial uncertainty to water rights affected by the Compact.

It is very difficult to read and understand the Yellowstone River Compact in relation to appropriation of Yellowstone River waters for energy development.

It would not be appropriate to do an extensive analysis of the Yellowstone River Compact here, but it should be carefully examined before a water right appropriation of any Yellowstone River water is attempted.¹¹⁴

Federal and Indian Reserved Rights and Claims

The problem is aptly stated in the Wyoming water plan for 1973 as follows:¹¹⁵

A conflict between State and Federal water rights could affect water resources development in Wyoming. The 'reserved water rights doctrine,' or 'reservation doctrine,' had its

109. *State ex. rel. Intake Water Co. v. Board of Nat. Res. & Conservation*, Civil No. 38781 (Mont. Dist. Ct.); *Utah Int'l, Inc. v. Intake Water Co.*, Civil No. 75-108-Blg (D. Mont.).

110. *Intake Water Co. v. Yellowstone River Compact Comm'n.*, Civil No. 1184 (D. Mont.).

111. *Yellowstone River Compact*, ch. 629, art. XVI, 65 Stat. 663 (1951).

112. *Id.* at art. VI.

113. *See, e.g., TRIBAL COUNCIL OF THE NORTHERN CHEYENNE RESERVATION RES. NO. 179(74)* (March 25, 1974); *Northern Cheyenne Tribe v. Tongue River Water Users Ass'n*, Civil No. 75-6-Blg (D. Mont.); *United States v. Tongue River Water Users Ass'n.*, Civil No. 75-20-Blg (D. Mont.); *United States v. Big Horn Low Line Canal Ass'n.*, Civil No. 75-34-Blg (D. Mont.).

114. For a more detailed analysis of the Yellowstone River Compact, see an article by Henry Loble, one of the authors, in the forthcoming issue of the proceedings of the 1975 ROCKY MOUNTAIN MINERAL LAW INSTITUTE as published by Matthew Bender & Company.

115. WYOMING WATER PLANNING PROGRAM, STATE ENGINEER'S OFFICE, THE WYOMING

conceptual beginnings in 1908, when the United States Supreme Court in the *Winters*¹¹⁶ case stated that the United States, in setting aside an Indian reservation, necessarily reserved the water without which the lands would be valueless. In subsequent decisions the Supreme Court held that the doctrine applied to other reservations or withdrawals of the public domain as well. The 1963 decision in *Arizona v. California*¹¹⁷ was the first case to actually allocate water for types of reservations other than Indian reservations. The court quantified the Indian rights, finding that the only feasible and fair way to measure them was by fixing the amount of water needed to irrigate all of the practicably irrigable land. The court also asserted that the United States had intended to reserve sufficient water for the future requirements of a national recreation area, two wildlife refuges, and a national forest.

The reservation doctrine is not easily analyzed or interpreted and there are numerous questions that arise relative to its basis and application. The foundation of the doctrine is the property clause of the United States Constitution. The basic elements of the reservation doctrine are as follows:

If the United States, by treaty, act of Congress, or executive order, reserves a portion of the public domain for a Federal purpose which will ultimately require water, and if at the same time the government intends to reserve unappropriated water for that purpose; then sufficient water to fulfill that purpose is reserved from appropriation by subsequent private users. The effect of the doctrine is twofold: (1) when the water is eventually put to use, the right of the United States will be superior to private rights for water uses from the same water source acquired after the date of the reservation; hence such private rights may be impaired or destroyed without compensation by exercise of the reserved right, and (2) the Federal use is not subject to state laws regulating appropriation and use of water.

Federal reservations in Wyoming include nine national forests, two national parks, and the Wind River Indian Reservation. A very significant amount of water in Wyoming is produced in the national forests, and the forest reservations predate many Wyoming water rights. The Wind River Indian Reservation predates all State water rights in the Bighorn River Basin as do the Crow and Northern Cheyenne Indian Reservations in Montana. These Federal reservations have not significantly affected other water users, although a few water developments may not have been undertaken because of fear of conflict with reserved water rights. The potential for damages does exist, especially on the Indian Reservations.

FRAMEWORK WATER PLAN (May, 1973). See also NATIONAL WATER COMMISSION, FEDERAL-STATE RELATIONS IN WATER LAW (Trelease, Frank J., 1972).

116. *Winters v. United States*, 207 U.S. 564 (1907).

117. *Arizona v. California*, 373 U.S. 546 (1963), enforced, 376 U.S. 340 (1964).

The State of Wyoming is not, of course, the only state with federal or Indian reservations. There are numerous Indian reservations, national forests, national monuments, national parks, national wild-life refuges, national resource lands, federally acquired lands, Bureau of Reclamation lands, national grass lands, and Corps of Engineers and other federal lands throughout Montana, Wyoming and the Dakotas.¹¹⁸

Moreover, many Indians contend that they have aboriginal water rights which predate the establishment of Indian reservations. They urge that the Winters Doctrine was grounded upon the aboriginal right of the Indians to the use of natural waters flowing through or existing upon their land, and that therefore Indian water rights were confirmed, not created, by the establishment of the Indian reservation. Furthermore, many Indians contend that pre-existing developments of water can be subordinated at any time to the prior and superior existing Indian water rights without compensation.¹¹⁹

The Northern Cheyenne Tribe of Indians in Montana, whose reservation is contiguous to the Tongue River, an interstate tributary of the Yellowstone River, has formally and through its Tribal Council resolved that the tribe

does hereby claim and assert the right of said Indians to, and does hereby notify all persons, firms, corporations, states and United States, and all agencies and political subdivisions of said states and of the United States that the Northern Cheyenne Tribe is entitled and now has and at all times had, the first, paramount and aboriginal right to the use of all waters herein referred to including all waters flowing or located in streams which have their source of water supply upon said Indian reservation or which have their source of water supply outside the boundaries of said Indian reservation, or both, including all sub-terranean waters herein referred to, and to all waters that may now or in the future be artificially augmented or created by weather modification, by desalination of present usable water supplies, by production of water supplies as a by-product of geothermal power development, or by other scientific or other type or means within the Northern Cheyenne Indian Reservation, State of Montana, and hereby further declares and *claims the aboriginal right to the appropriation, use and storage of all of said waters for the purpose of the use of said waters including, but not limited to domestic use, irrigation, manufacturing, development of natural resources and development of recreation projects and other facilities; . . .*¹²⁰

118. BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, NORTHERN GREAT PLAINS RESOURCES PROGRAM REGION surface ownership plate 10 (1974).

119. General Memorandum No. 73-49, Re: Final Report of the National Water Commission, July 9, 1973, Letter of Wilkinson, Cragun & Barker, Attorneys at Law, Washington, D.C.

120. NORTHERN CHEYENNE TRIBAL COUNCIL RES. No. 179(74) (March, 1976) (emphasis added).

As previously indicated in prior footnotes, cases are now pending in Montana which involve not only the Indian claims, but the claims of the United States of America under the reserved right doctrine.¹²¹ These important and possibly landmark decisions have been stayed pending the decision of the United States Supreme Court in *United States v. Akin*,¹²² which involves, among other things, the question of whether federal water rights can be adjudicated in state courts and, as well, a construction of the McCarran Amendment.¹²³ It is anticipated that a large number of additional defendants will be added in these pending cases involving the Tongue and Big Horn Rivers. According to *Montana Water News* of December, 1975:

At the last count there were approximately 1,900 defendants in the Tongue River case and 2,000 in the Big Horn River case who are landowners or claimants of water rights.

The *Water News* reported that counsel for the Montana Board of Natural Resources said that it is theoretically possible that the suit could negate many existing water rights and might potentially halt all further development of agricultural water projects. Another attorney is reported to have said, on behalf of Montana's Attorney General, that some Indian tribes claim water rights as far back as 1851 under federal treaties, which would be considerably earlier than Montana homesteaders filed water claims. The significance of these legal problems reaches into all states where such Indian claims can be made, including, of course, Wyoming and North Dakota.

The National Water Commission in its 1973 report,¹²⁴ phrased its view of the federal reserved water rights doctrine as follows:

It has been held by the U. S. Supreme Court that the withdrawal of land from entry (by Congress or other lawful means) for Federal use (e.g., for military posts, national parks, forests, and wildlife refuges) may also result in the acquisition of a Federal right to use water on the reserved

121. Northern Cheyenne Tribe v. Tongue River Water Users Ass'n., Civil No. 75-6--Blg (D. Mont.); United States v. Tongue River Water Users Ass'n., Civil No. 75-20-Blg (D. Mont.); United States v. Big Horn Low Line Canal Ass'n., Civil No. 75-43-Blg (D. Mont.).

122. 504 F.2d 115 (10th Cir. 1974), cert. granted, 421 U.S. 946 (1975).

123. McCarran Water Rights Suits Act, ch. 651, tit. II, § 208(a), 66 Stat. 549, 560 (1952) (codified at 43 U.S.C. § 666 (1970)). In the McCarran Amendment, congressional consent was given for the United States to be named as a defendant in any suit for the adjudication of rights to the use of water of a river system or the administration of such rights where it appears that the United States is the owner of any water rights.

In *United States v. District Court for the County of Eagle*, 401 U.S. 520 (1971), the United States Supreme Court held that in such lawsuits the United States has consented to the adjudication of its reserved water rights as well as its appropriated rights, and that these could be determined in a state court. It was held in an Idaho Supreme Court decision that federal claims must be quantified in the adjudication proceeding in which the United States is a party. *Avondale Irrig. Dist. v. North Idaho Properties, Inc.*, 96 Idaho 1, 523 P.2d 818 (1974).

124. REPORT OF NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 464 (June, 1973).

land.¹²⁵ Whether such reserved Federal water rights are created depends upon whether or not it was intended to create such water rights at the time the land was withdrawn. Such intent ordinarily must be based on implication, since withdrawal orders rarely mention water.

If a reserved Federal water right is determined to have been created, it has characteristics which are quite incompatible with State appropriation water law: (1) it may be created *without* diversion or beneficial use, (2) it is not lost by non-use, (3) its priority dates from the time of the land withdrawal and (4) the measure of the right is the amount of water reasonably necessary to satisfy the purposes for which the land has been withdrawn.

Reserved rights, which were not recognized until 1963 in *Arizona v. California*, create large uncertainties in the water budgets of Federal and State water resources planners and private investors. The privilege of the Federal Government to put to use in 1973 water attaching to land withdrawn in 1873, and thus cut off the supply of water which others had begun using during the intervening 100 years without notice of the Federal claim, creates substantial hardships.

The resource potentials of Indian reservations located in the Upper Missouri River Basin are immense. Most have vast reserves of Indian owned coal and other valuable minerals underlying or bordering the reservation and contain large surface areas which are suitable for further expansion in agricultural production.¹²⁶ A United States Department of the Interior study states that:

Preliminary surveys by consultants for the Indian tribes indicate that the Indian economic development requirements for water may involve a large portion of the existing annual flows of the Missouri River and its tributaries. Initial estimates, based on studies underway in the states of Montana and Wyoming, suggest that Indian requirements in the Yellowstone Sub-Basin and the Upper Missouri above the confluence of the Yellowstone River could reach an annual level of 2.6 million acre-feet of consumptive use by the year 2020. This would represent about 45 per cent of the average annual undepleted flow of the rivers at the North Dakota-Montana state line.¹²⁷

The concluding paragraph of the Declaration of Indian Rights to the Natural Resources in the Northern Great Plains prepared in the Northern Great Plains Resource Program appears prophetic when it states:

125. *Arizona v. California*, 373 U.S. 546 (1963).

126. NORTHERN GREAT PLAINS RESOURCES PROGRAM, EFFECTS OF COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS 136 (April, 1975); NORTHERN GREAT PLAINS RESOURCES PROGRAM, DECLARATION OF INDIAN RIGHTS TO THE NATURAL RESOURCES IN THE NORTHERN GREAT PLAINS STATES (June, 1974).

127. DEPARTMENT OF INTERIOR WATER FOR ENERGY MANAGEMENT TEAM, REPORT ON WATER

The Indian tribes of the Northern Great Plains and their leaders of today will not yield. They will fight to protect, preserve and conserve the resources which their forefathers gave their lives to retain.¹²⁸

D. WATER IN FEDERAL RESERVOIRS

Some uncertainty has arisen regarding the rights of the federal government to lease or option water from its federal reservoirs for mineral or energy development. The fundamental question is whether the state or the federal government has title to the unappropriated waters in reservoirs constructed by the federal government. The ancillary question is whether the state has the right to market the excess water for municipal and industrial purposes. Wyoming Governor Ed Herschler, appearing before the Subcommittee on Energy Research and Water Resources of the State Interior Committee in Billings, Montana, on August 26, 1975, said:

The present Federal proposal initially raises two basic legal questions: first, what congressional authorization do the Departments of the Interior and Army have for industrial water marketing from upper Missouri River Basin main stem reservoirs, and second, who owns the water in those reservoirs.

In his concluding remarks, Governor Herschler stated that it is the position of the State of Wyoming that an industrial water marketing proposal by the federal government is in derogation of states' rights and contrary to congressional intent. He further contended that any contracts entered into by the federal government with any state or individual are subject to further development of Wyoming's allocation under the Yellowstone River Compact. The Governor also cited in his statement before the subcommittee legal precedents for his position.¹²⁹ He added:

I find the contention that the federal government has gained ownership of state waters by diversion and impoundment in reclamation reservoirs to be contrary to the intention of Congress and the rulings of our highest courts.

There can be little doubt that the sentiments of Governor Herschler will be echoed by other state governors.

Commonly, of course, the constitutions of the various states de-

FOR ENERGY IN THE NORTHERN GREAT PLAINS AREA WITH EMPHASIS ON THE YELLOWSTONE RIVER BASIN at V-15 (Jan., 1975).

128. NORTHERN GREAT PLAINS RESOURCES PROGRAM, DECLARATION OF INDIAN RIGHTS TO THE NATURAL RESOURCES IN THE NORTHERN GREAT PLAINS STATES 24 (June, 1974).

129. *Ickes v. Fox*, 300 U.S. 82 (1937); *Fox v. Ickes*, 137 F.2d 30, *cert. denied*, 320 U.S. 792 (1943).

clare that all streams and water courses within the borders of the state belong to the state.¹³⁰

According to a United States Department of the Interior publication,¹³¹ some possible restrictions upon the use of water from federal reservoirs for energy purposes are as follows:

The Miscellaneous Water Act of 1920¹³² limits the use of municipal and industrial water from a reclamation single-purpose irrigation project to uses: (1) which cannot be practically served from another source; (2) which are approved by the project irrigators; and, (3) which are not detrimental to irrigation use.

Section 9(c) of the Reclamation Project Act of 1939¹³³ limits the use of industrial water from a conventional reclamation project to uses which will not impair the efficiency of the project for irrigation purposes.

Title III of the Water Supply Act of 1958¹³⁴ limits the use of industrial water provided under that Act to situations: (1) where an allocation of costs to the industrial purpose has been made; and, (2) where Congressional approval has been secured for any operational changes which would seriously affect the purposes for which the project was originally authorized.

Section 4(e) of the Federal Power Act¹³⁵ may require an FPC license for a fossil-fuel electric power plant's use of surplus water or water power drawn from government dams.

The National Historic Preservation Act of 1966,¹³⁶ the Historic Sites Act of 1935,¹³⁷ the Act of June 27, 1960,¹³⁸ the Antiquities Act of 1906¹³⁹ which require archeological surveys of federal programs or federally financed programs prior to the commencement of construction.

The amount of water available for appropriation for industrial use may be affected by the development of the Pick-Sloan Missouri Basin Program (P-SMBP) rights under Section 9 of the Flood Control Act of 1944,¹⁴⁰ which might require the limitation of non-project diversions or uses which may be made of navigable waters in the Missouri River Basin.¹⁴¹ It is estimated that all of the natural flow

130. MONT. CONST. art. IX; N.D. CONST. art. XVII, § 210; WYO. CONST. art. 8, § 1.

131. DEPARTMENT OF THE INTERIOR WATER FOR ENERGY MANAGEMENT TEAM, REPORT ON WATER FOR ENERGY IN THE NORTHERN GREAT PLAINS AREA WITH EMPHASIS ON THE YELLOWSTONE RIVER BASIN at I-9 (Jan., 1975).

132. 43 U.S.C. § 521 (1970).

133. 43 U.S.C. § 485h(c) (1970).

134. 43 U.S.C. § 370b (1970).

135. 16 U.S.C. § 797(e) (1970).

136. 16 U.S.C. § 470 (1970).

137. 16 U.S.C. §§ 461-70 (1970).

138. Pub. L. No. 86-523, § 1, 74 Stat. 220, amended by Pub. L. No. 93-291, § 1(1), 88 Stat. 174 (1974) (codified at 16 U.S.C.A. § 469 (1974)).

139. 16 U.S.C. §§ 431-33 (1970).

140. Ch. 665, § 9, 58 Stat. 887, 891.

141. DEPARTMENT OF INTERIOR WATER FOR ENERGY MANAGEMENT TEAM, REPORT ON WATER

of the Missouri River can be used for power generation purposes in 45 out of 50 years and that diversions which are not pursuant to the project plan of the P-SMBP would reduce power revenues needed to amortize the costs of the project and would intrude on the federal government's water rights.¹⁴²

Previous reference was made to the federal government's right to water for its reservations. There does not appear to be any clear cut answer as to the ownership of unappropriated waters impounded by federal reservoirs. On at least two occasions, the United States Supreme Court has held that the government's diversion, storage and distribution of water at federal reclamation projects does not vest title to the water in the United States. Rather, the appropriation is made under the Reclamation Act for the use of the landowners and not the government, and the water rights become the property of the land holders while the government remains simply a carrier and distributor of the water.¹⁴³ However, the dispute in these cases concerned water that had already been vested in the water appropriators for many years, and did not concern unappropriated water impounded by a federal reservoir.

The Supreme Court has also held that the federal government has jurisdiction under the property clause of the Constitution over unappropriated, non-navigable waters arising from or flowing under federal reserved lands.¹⁴⁴ The Court held that by reserving land for power purposes under the Federal Power Act, the federal government reserved so much of the unappropriated water as was necessary for the beneficial use of the federal property.

As we have seen, there are pending applications for 2,529,000 acre-feet per year for water option contracts from existing and potential federal reservoirs in the various states.¹⁴⁵ The casting of doubt upon the ability of the federal government to market this water poses serious problems for those relying upon it for energy development.

As concerns Fort Peck Reservoir in Montana, there is a case pending which raises the question of whether the state or the federal government has the right to market the waters of Fort Peck for municipal and industrial purposes.¹⁴⁶ In addition, Montana has enacted a statute authorizing the Department of Natural Resources and

FOR ENERGY IN THE NORTHERN GREAT PLAINS AREA WITH EMPHASIS ON THE YELLOWSTONE RIVER BASIN at I-3 (Jan., 1975).

142. *Id.*

143. *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945); *Ickes v. Fox*, 300 U.S. 82, 95 (1937).

144. *Federal Power Comm'n. v. Oregon*, 349 U.S. 435 (1955).

145. NORTHERN GREAT PLAINS RESOURCES PROGRAM, EFFECTS OF COAL DEVELOPMENT IN THE NORTHERN GREAT PLAINS 71 (April, 1975).

146. *Dreyer Bros., Inc. v. Department of Nat. Res. Conservation*, No. 2838 (Mont. 7th Jud. Dist.).

Conservation to acquire water by purchase, option or agreement with the federal government from Fort Peck for the purpose of sale, rent or distribution for industrial use.¹⁴⁷ In the instance of the Fort Peck Reservoir, the federal government has apparently relinquished to the State of Montana the right to market Fort Peck water for industrial purposes. Conversations with counsel handling legal problems and litigation concerning the Fort Peck Reservoir indicate, however, that the federal government does not acknowledge that the state either owns or has the paramount right to market the water. Thus the federal government apparently does not concede state control, even though it is amenable to the marketing of Fort Peck Reservoir water by the state government.

Both Wyoming and North Dakota have statutory authorization to allow the Wyoming State Engineer and the North Dakota Water Conservation Commission to enter into contracts with the United States for resource planning and utilization purposes.¹⁴⁸ Each state also has authority to develop and market the water resources of the state.¹⁴⁹

E. ENVIRONMENTAL PROBLEMS

Mention has previously been made of some federal enactments in the water pollution area. The federal government has been active in water pollution control. The Water Resources Research Act of 1964¹⁵⁰ provided funds for the establishment of state water resource research institutions. The Water Resources Planning Act of 1965¹⁵¹ established a water resources council and regional commissions which were to encourage and prepare plans for the conservation, development and utilization of water and related land resources in river basins. Pursuant to this Act the Missouri River Basin Commission was created.¹⁵² National water quality standards programs were introduced by the Water Quality Act of 1965 as part of the Federal Water Pollution Control Act¹⁵³ and the Federal Water Pollution Control Act amendments of 1972.¹⁵⁴ The latter amendments define "pollution" as "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." The

147. MONT. REV. CODES ANN. § 89-125(8) (Supp. 1975).

148. N.D. CENT. CODE § 61-02-14(7) (Supp. 1975); WYO. STAT. ANN. § 41-1.6 (Supp. 1975).

149. See footnotes 60 & 70 and accompanying text *supra*.

150. 42 U.S.C. § 1961 (1970).

151. 42 U.S.C. § 1962 (1970).

152. Exec. Order No. 11658, 42 U.S.C. § 1962b (Supp. II, 1972). According to the Helena Independent Record, January 25, 1976, a critical water use study of the Yellowstone River Basin and adjacent coal areas began January 1, 1976. The study is to provide an analysis of the impacts of potential energy and agricultural developments on water and related land resources and is to be conducted under the leadership of the Missouri River Basin Commission.

153. Pub. L. No. 89-234, 79 Stat. 903.

154. Pub. L. No. 92-500, 86 Stat. 816.

report of the National Water Commission for 1973 at page 69 characterizes this definition as one in which:

. . . natural water quality appears to be regarded as a norm from which any deviation constitutes pollution. This is not a good standard on which to base the definition of pollution.¹⁵⁵

FWPCA¹⁵⁶ has as its goals the elimination of the discharge of pollutants into navigable waters by 1985 and the establishment of an interim water quality level by 1983¹⁵⁷. To reach these goals, FWPCA requires the issuance of a permit by the EPA (or properly qualified state agency) before any entity may discharge a pollutant into any navigable waterway,¹⁵⁸ and the issuance of a permit from the Army Corps of Engineers before any entity may discharge dredged or fill material into navigable waters.¹⁵⁹ The procedure for obtaining a permit includes the holding of a public hearing.

FWPCA eliminated the traditional navigability limitations on federal jurisdiction over water pollution.¹⁶⁰ A recent federal district court decision has ordered the Corps of Engineers to revoke, rescind and republish its rules and regulations which limited the Corps' permit jurisdiction under FWPCA.¹⁶¹ Under the mandate of this recent decision the Corps has published its proposed regulations. Under the proposed regulations activity falling within the term "discharge of fill material" includes:

Without limitation, the following activities: placement of fill that is necessary to the construction of any structure in a navigable water; the building of any structure or impoundment requiring rock, sand, dirt, or other pollutants for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; . . .¹⁶²

The implementation of these proposed rules will occur through a "phase-in approach." Permits will be required after July 1, 1976, for the discharge of dredged materials in "primary tributaries (the main stems of tributaries directly connecting to navigable waters of the United States), their contiguous or adjacent wet lands, and all lakes" and by July 1, 1977, permits will be required for the discharge of dredged materials in all navigable waters of the United States.¹⁶³

155. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 69 (June, 1973).

156. 33 U.S.C. §§ 1151-75 (1970), §§ 1251-1376 (Supp. II, 1972).

157. 33 U.S.C. § 1251(1) (Supp. II, 1972).

158. 33 U.S.C. § 1342 (Supp. II, 1972).

159. 33 U.S.C. § 1344 (Supp. II, 1972).

160. *United States v. Holland*, 373 F. Supp. 665, 671-72 (D. Fla. 1974).

161. *Natural Resources Def. Council v. Calloway*, 392 F. Supp. 685 (D.D.C. 1975).

162. 40 FED. REG. 31,325 (1975).

163. *Id.* at 31,321.

In seeking the appropriation of water, or in using water, consideration must be given to the federal enactments concerning pollution.

In addition, we have previously referred to NEPA.¹⁶⁴ NEPA requires all agencies of the federal government to utilize a systematic, inter-disciplinary approach to the decision-making process and to include a detailed statement reflecting the environmental consequences of every recommendation for major federal action which will significantly affect the quality of the human environment.¹⁶⁵ The term "major" in "major federal actions" and the terms "significantly affecting the quality of the human environment" have been practically deleted by judicial interpretation of the act.¹⁶⁶ Generally, whenever any federal license or permit is required, NEPA must be considered. An environmental impact statement may have to be prepared at the cost of the one who seeks the license or permit. For instance, a utility applying to the Federal Power Commission or the Atomic Energy Commission for a license to construct a power plant may have to comply with NEPA. The acquisition of a "Section 10" permit from the Corps of Engineers, previously referred to, may require compliance with NEPA. The laying of pipe or the building of structures on federal lands for which a permit or permission must be gained from the federal government may well require compliance with NEPA. Other examples will occur to those who request federal action in connection with any aspect of a water right appropriation.

In addition, many states have enacted laws which will have an impact, environmentally speaking, upon water right appropriations.

The Montana Natural Streambed and Land Preservation Act of 1975 requires notification of and approval by the board of supervisors of a conservation district or the board of county commissioners prior to the construction of any project (defined as a physical alteration or modification of a stream) on any natural perennial flowing stream.¹⁶⁷ Recently administrative rules have been promulgated which further define "project" to include "new dams and reservoirs" and "commercial, industrial and residential development."¹⁶⁸

Another 1975 Montana law requires a permit to be granted from certain governing bodies before any entity is allowed to do any work which will alter or diminish the course, current or cross sectional

164. Act of January 1, 1970, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-4347 (1970)).

165. 43 U.S.C. § 4331 (1970).

166. Friedman, *The Operational Impact of NEPA and Related Environmental Laws, Regulations, and Orders on Mineral Operations*, 19 ROCKY MOUNTAIN L. INST. 47, 51 (1974).

167. MONT. REV. CODES ANN. §§ 26-1510 to -1523 (Supp. 1975).

168. MONT. ADMIN. CODE § 26-2.2(2)-s250.

area of a natural lake or its shore.¹⁶⁹ The criteria to be considered in granting such a permit are whether the work will materially diminish water quality or fish and wildlife habitat, interfere with navigation or recreation, create a public nuisance or create a visual impact discordant with natural scenic values.¹⁷⁰

The Montana Major Facility Siting Act, previously referred to,¹⁷¹ requires an environmental impact statement based on stringent environmental assessments.

Montana's MEPA requirements are very similar to NEPA and appear to be modeled after NEPA. MEPA requires all agencies of the state government to utilize a systematic, interdisciplinary approach to their decision-making process, and to include a detailed statement reflecting the environmental consequences of every recommendation for major state action which will significantly affect the quality of the human environment.¹⁷² As yet, there have not been any Montana Supreme Court decisions construing MEPA. A 1975 amendment to MEPA allows the imposition of a fee by the state agency on any entity applying for a lease, permit, contract, license or certificate which will require the agency to compile an environmental impact statement.¹⁷³ On a plant estimated to cost \$100 million, the fee would be \$615,000, although no fee may be assessed against an entity also filing an application under the Major Facility Siting Act.¹⁷⁴

Whenever the Montana Department of Natural Resources and Conservation determines that a filing for a beneficial water use permit would require an environmental impact statement pursuant to MEPA and the application involves the use of 10,000 acre-feet of water per year or 15 cubic feet of water per second, then the applicant is required to pay the Department a fee based on the estimated cost of the appropriation and diversion facility.¹⁷⁵ The fee is based on percentages identical to those found in MEPA and in the Montana Major Facility Siting Act. As in MEPA, the fee is not necessary if a fee has been required by the Montana Major Facility Siting Act, and the Department is scheduled to study the use of water pursuant to that Act.¹⁷⁶ A similar exception from paying the required fee does not exist for a fee required to be paid pursuant to MEPA, although it is assumed that this is mere legislative "overkill" and will not be treated by the department as authorization to impose a

169. MONT. REV. CODES ANN. §§ 89-3701 to -3712 (Supp. 1975).

170. MONT. REV. CODES ANN. § 89-3704 (Supp. 1975).

171. MONT. REV. CODES ANN. ch. 70-8 (Supp. 1975).

172. MONT. REV. CODES ANN. § 69-6504 (Supp. 1975).

173. MONT. REV. CODES ANN. § 69-6518 (Supp. 1975).

174. *Id.*

175. MONT. REV. CODES ANN. § 89-8-102.2 (Supp. 1975).

176. *Id.*

fee for the preparation of an identical study under this statute as well as under MEPA.

Montana has a water pollution act that requires a permit to be issued by the Department of Natural Resources and Conservation before any entity is allowed to discharge any pollution into state waters that will decrease the quality of the water below established Montana water quality standards.¹⁷⁷ If the existing water quality in some streams is of a higher standard than the current quality standards, the Board of Natural Resources and Conservation can require that the higher water quality be maintained.¹⁷⁸

In Montana an appropriator of more than 15 cubic feet of water per second is not permitted to change the purpose of the use of such appropriation right from an agricultural use to an industrial use.¹⁷⁹

Wyoming enacted a Stream Preservation Feasibility Study Act in 1973 to conduct studies, investigations, surveys and hearings to determine methods and criteria for preserving the scenic and recreational quality of Wyoming rivers and streams.¹⁸⁰ Recommendations for a preservation system were to be submitted to the Wyoming Legislature by January 1, 1975. The water resource plans developed from this study are also permitted to be used by the state engineer in determining the public interest in the supervision of the state water resources, the issuance of water right permits, and in the regulation and management of water use.¹⁸¹ The public interest as determined by the state engineer, is a part of the criteria utilized in the approval or disapproval of a water right application.¹⁸²

We understand from telephone conversations with personnel of the Wyoming Legislative Services Office that recommendations were made to the Wyoming Legislature as a result of the study, but that proposed legislation did not pass during the 1975 session.

As mentioned previously, the Wyoming Water Development Program was established in 1975 and authorizes the construction of projects and facilities for conservation, storage, distribution and operation of projects to develop and preserve Wyoming water and related land resources.¹⁸³

Although the Wyoming Industrial Development Information and Siting Act does not appear to be applicable to large scale water appropriations, per se, any energy generating and conversion plant utilizing a large quantity of water will have to comply with the

177. MONT. REV. CODES ANN. § 69-480 to -4827 (Supp. 1975).

178. MONT. REV. CODES ANN. § 69-4808.2(c) (iii) (Supp. 1975).

179. MONT. REV. CODES ANN. § 89-892(3) (Supp. 1975).

180. WYO. STAT. ANN. §§ 41-1.12 to 41-1.46 (Supp. 1975).

181. WYO. STAT. ANN. § 41-1.21 (Supp. 1975).

182. See note 50 and accompanying text *supra*.

183. See note 60 and accompanying text *supra*.

requirements of the Act. These requirements contemplate a comprehensive study being made of the environmental, social and economic consequences of the construction of the facility including the impact on water resources.¹⁸⁴

Wyoming does not appear to have an all inclusive environmental policy act similar to NEPA or MEPA.

The Wyoming Environmental Quality Act regulates air quality, water quality, land quality, and solid waste management.¹⁸⁵ Article 3 of the Act prohibits the threat or the actual discharge of pollution into the waters of the state, the alteration of any of the physical or chemical properties of the waters of the state and construction of any sewage system or public water supply without a permit issued by the appropriate state agency. The standards for the issuance of permits are to be established by rules and regulations. The Act is intended to take advantage of Section 402 of FWPCA¹⁸⁶ by which the federal permit system will be suspended in favor of a state regulated pollution permit system.¹⁸⁷ According to one commentator, however, the Water Quality Act may fall short of conforming to the federal requirements found in FWPCA.¹⁸⁸

North Dakota does not appear to have an all inclusive environmental policy act similar to NEPA or MEPA requiring environmental impact statements on all major state actions. However, it is our understanding that the State Water Commission and the state engineer have required certain environmental considerations to be included within applications for water permits and that recently promulgated administrative regulations delineate these requirements.

The North Dakota Energy Conversion and Transmission Facility Siting Act encompasses liquid transmission lines and associated facilities designed or capable of transporting water from or to an energy conversion facility and defines such transmission lines and associated facilities as transmission facilities.¹⁸⁹ Therefore, a water appropriation to be utilized at an energy conversion facility would require a permit for the construction of a transmission facility. The North Dakota Public Service Commission is required to inquire into substantial environmental considerations in their deliberations on the permit application, such as effects on public health and welfare, vegetation, animals, aesthetic values, scenic areas, and historic and archeologic sites.¹⁹⁰

184. See note 54 and accompanying text *supra*.

185. WYO. STAT. ANN. §§ 35-502.1 to -502.57 (Supp. 1975).

186. 33 U.S.C. § 1342 (Supp. II, 1972).

187. WYO. STAT. ANN. § 35-502.19 (Supp. 1975).

188. See Comment, *The Wyoming Water Quality Act and the Federal Water Pollution Control Act Amendments of 1972: A Comparison*, 9 LAND & WATER REV. 79, 93 (1974).

189. N.D. CENT. CODE § 49-22-03 (Supp. 1975).

190. N.D. CENT. CODE § 49-22-09 (Supp. 1975).

North Dakota has a water quality act designed to protect, maintain and improve the quality of the waters in the state.¹⁹¹ The state Water Pollution Control Board administers this act and may conduct studies, develop programs, hold hearings and issue orders relating to the control, prevention and abatement of pollution of surface waters.¹⁹² This act, however, designates the State Department of Health as the state water pollution control agency for all purposes of FWPCA and authorizes the department to take all action necessary or appropriate to secure the benefits of that and similar federal acts for the state.

The board of commissioners of a North Dakota water management district has authority to order or initiate appropriate legal action to compel the cessation of the destruction of native woodland bordering within two hundred (200) feet of a river bank.¹⁹³

The North Dakota Environmental Law Enforcement Act of 1975 provides authorization for any person, county, city, township or political subdivision aggrieved by a violation of any environmental statute to bring an action in the district court to enforce the statute.¹⁹⁴ The action may be brought against any person or agency engaged in the violation. A court is authorized to grant temporary or permanent equitable relief, award damages or enter any order deemed necessary to enforce compliance with any environmental statute.¹⁹⁵

Any person contemplating the appropriation of water for energy development in a situation where there is an environmental impact or the possibility of an environmental impact, will have to carefully consider whether one of the environmental organizations might commence an action against him, or whether some individual might begin one. Organizations such as the Sierra Club, Natural Resources Defense Council, Inc., Northern Plains Resource Council, or Environmental Defense Fund have been very active and successful in such litigation. These organizations utilize extraordinarily capable attorneys on a full time basis and should not be underestimated.¹⁹⁶

Noteworthy in this area is *Sierra Club v. Morton*.¹⁹⁷ The issue in the Morton case is whether the Departments of Interior, Defense, and Agriculture are engaged in a major federal action relating to the development of the coal resources of the Northern Great Plains, and whether they should be required by NEPA to issue a comprehensive environmental impact statement. The United States Court

191. N.D. CENT. CODE ch. 61-28 (Supp. 1975).

192. N.D. CENT. CODE §§ 61-28-01, 61-28-03 (Supp. 1975).

193. N.D. CENT. CODE § 61-16-11(18) (Supp. 1975).

194. N.D. CENT. CODE ch. 32-40 (Supp. 1975).

195. N.D. CENT. CODE § 32-40-11 (Supp. 1975).

196. Friedman, *The Operational Impact of NEPA and Related Environmental Laws, Regulations, and Orders on Mineral Operations*, 19 RKY. MT. MIN. L. INST. 47, 50 (1974).

197. 514 F.2d 856 (D.C. Cir. 1975).

of Appeals for the District of Columbia held that the attempts by these departments to control development of the coal reserves in Wyoming, Montana, North Dakota and South Dakota constitute a major federal action. The court remanded the case to the district court with instructions that the appellees (the various federal agencies) were to determine whether they would prepare a comprehensive impact statement for the Northern Great Plains. The case is now on appeal to the U. S. Supreme Court.

Of course, a requirement of a comprehensive, Northern Great Plains environmental impact study would require an enormous length of time to research and prepare, particularly in view of NEPA's extensive requirements for the preparation of an environmental impact statement. Depending upon the consideration that must be given to the NEPA required investigation of alternative proposals, the compilation of such a comprehensive impact statement for the Northern Great Plains might very well result in the creation of a national energy plan or policy by the federal administrative agencies.

III. CONCLUSION

Stresses test for weaknesses in any system. Crisis often brings to light problems which have always been there, even though latent. The energy crisis has performed this function for water right appropriation for energy development. In addition, hasty legislative or administrative action sometimes aggravates rather than helps.

Certainly, our energy crisis has made all water lawyers in this area of the country realize how complex the appropriation of large amounts of water for energy development has become. Much paper must be moved before any dirt can be moved. Montana farmers, not long ago, diverted and appropriated water with no one's permission, with a team of horses and a plow and the water flowing behind them in the furrow as they plowed. In order to get the proper course for their ditch, when the water slowed down, they plowed more downhill, and when the water flowed too fast, they angled more to the uphill side. Those days are gone forever, for all water users.

Litigation concerning water use, particularly for energy development, has vastly increased and the litigious pace will continue to grow. It behooves any lawyer whose clients intend to engage in this activity to prepare his legal plan and research his legal problems very, very carefully. Almost certainly, someone will test his opinion in court.

The authors of this article are, of course, more familiar with Montana law than with that of Wyoming and North Dakota. Nevertheless, it seems clear that Montana, of the three states, has the

most stringent and restrictive laws in the area of water right acquisition for energy development.

The federal reserve water claim doctrine and the Indian water claim doctrine combine to cast a vast uncertainty over all water rights in the Northern Great Plains. Until this uncertainty is relieved by the courts or by Congress, any water right which might be affected by these doctrines lacks dependability. One very real possibility is that a congressional solution may supplant historical state sovereignty over the waters within state boundaries.

The procedural complexities and problems to which we have alluded are making the energy crisis very difficult to resolve. To avoid reaching the dreadful day when, as some say, we "freeze to death in the dark," consideration may have to be given to reducing the paper work, cutting down on the delays, and devoting our time and money to the actual development of energy.