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**Comment: Chasing the Wind: Wyoming
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Beneficial Use for Instream Flow Protection,
But Empowers State to Administer Federal
Indian Reserved Water Right Awarded to the
Wind River Tribes**

by

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COMMENT

Chasing The Wind: Wyoming Supreme Court Decision in *Big Horn III* Denies Beneficial Use for Instream Flow Protection, But Empowers State to Administer Federal Indian Reserved Water Right Awarded to The Wind River Tribes

ABSTRACT

The June 5, 1992 decision of the Wyoming Supreme Court in Big Horn III reversed a state district court determination that was favorable to the Wind River Tribes regarding use and administration of their federal Indian reserved water right. First, the state supreme court reversed the state district court determination that the Wind River Tribes could change the usage of their federal Indian reserved water right from a future use for irrigation to a present use for instream flow protection. The state supreme court also reversed the state district court determination that the Tribal Water Board could administer both federal Indian reserved and state water rights within the Wind River Indian Reservation. Rather, the state supreme court reestablished the Wyoming State Engineer as administrator of federal Indian reserved and state water rights within the Wind River Indian Reservation. Analysis of the Big Horn III decision leads to the conclusion that the Winters doctrine limits the Wind River Tribes use of their implied federal Indian reserved water rights to the sole agricultural purpose of the Second Treaty of Fort Bridger as interpreted by the state supreme court in the Big Horn I decision. The disparate rationales employed by the state supreme court in Big Horn III provide the parties with added incentives to reach a negotiated settlement to the conflict regarding their sovereign interests in water use and administration. The author recommends that the parties negotiate a settlement so that: 1) The Second Treaty of Fort Bridger is amended to express a homeland purpose for the Wind River Indian Reservation; 2) The Wind River Tribes may use their Winters water right for the accomplishment of a homeland purpose; 3) Use of the Winters water right will be specified via a compact to provide Wind-Big Horn River appropriators with certainty regarding water use; 4) Administration of the Winters water right and state water rights is coordinated between the Tribal Water Board and the state engineer.

The Wyoming Supreme Court, by a turbulent three to two decision in *Big Horn III*¹, reversed a state district court decision that the Eastern Shoshone and Northern Arapaho ("Wind River Tribes") could change the use of their federal Indian reserved water right to an instream flow use.² The Wind River Tribes' federal Indian reserved water right was quantified by the practicably irrigable acreage ("PIA")³ standard for future irrigation projects. Additionally, the state supreme court reversed the state district court decision that the tribal Wind River Water Resources Control Board ("Tribal Water Board") administered both the reserved water right and state water rights within the Wind River Indian Reservation ("WRIR"). Instead, the state supreme court established the Wyoming State Engineer as the administrative authority for the Wind River Tribes' federal Indian reserved water right and state water rights within the WRIR.

The state supreme court justices wrote separate opinions which trace various analytical paths through the maze created by the "shotgun marriage" of state and federal water law necessitated by the sixteen-year general adjudication to clarify rights to use the water within the Wind-Big Horn River system. Although the court arrived at the proper resolution of the maze, none of the justices followed the correct analytical path (according to the following analysis).

The correct analytical path through the *Big Horn III* maze begins with the *Winters* doctrine and leads to a two part conclusion.⁴ First, the Wind River Tribes' federal Indian reserved water right is limited to the amount necessary to accomplish the sole agricultural purpose of the WRIR.⁵ Second, the State Engineer is an appropriate administrator of all water rights in the Wind-Big Horn River system, but should jointly

1. *In Re The General Adjudication of All Rights to Use Water In the Big Horn River System*, 835 P.2d 273 (Wyo. 1992) [hereinafter *Bighorn III*.]

2. Instream flow in this context refers to a water right used to ensure a minimum stream flow rate through a section, or reach, of a stream channel. The water right protects the minimum stream flow rate from diminution by subsequent later priority water appropriations that divert water from the stream for use.

3. PIA is the amount of acreage capable of sustaining irrigated agriculture regardless of historic land use patterns.

4. The federal reserved water rights doctrine was first applied by the United States Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908). The Court implied a reservation of water within the treaty establishing the Fort Belknap Indian Reservation even though the treaty did not expressly reserve water from appropriation pursuant to state law. The priority date of the federal reserved water right under the *Winters* doctrine is the date of the federal legislation or treaty establishing the reservation of land. Subsequent decisions by the Court have determined that the amount of a federal reserved water right is limited to the amount necessary to accomplish the purpose(s) of the reservation.

5. See discussion of *Big Horn I* *infra*.

administer water rights with the Tribal Water Board on the "diminished" portion of the WRIR.⁶ Although this conclusion of the maze is analytically correct, it does not resolve the conflict between the parties concerning control of the Wind River Tribes' federal Indian reserved water right. Resolution of the conflict involves a choice between continuing litigation in the hope of obtaining a satisfactory decree, or fashioning a mutually agreeable negotiated settlement.

The parties had three options following the Wyoming Supreme Court decision in *Big Horn III*. The option to petition the United States Supreme Court for a *writ of certiorari* has been forsaken by the parties. Two options remain: the parties may opt to continue hostile litigation as the general adjudication proceeds to the next issue, the status of *Walton* water rights on the WRIR⁷; or the parties may opt to use the *Big Horn III* decision as a goad to negotiate a resolution to the conflict over the federal Indian reserved right to use water from the Wind-Big Horn River system. The conclusions drawn from this analysis of the *Big Horn III* decision lead to the recommendation that the negotiation option is the better of the two for both parties.

A MAZING MAP

This analysis of the Wyoming Supreme Court decision in *Big Horn III* begins with a brief review of the general adjudication of rights to use water within the Wind-Big Horn River system. The decisions in *Big Horn I*⁸ and *Big Horn iii*⁹ are briefly presented because they formed the core issues which confronted the state supreme court in *Big Horn III*.¹⁰ Following an analysis of the *Big Horn III* decision is the recommendation that the tribal, state and federal governments negotiate a resolu-

6. See Recommendations *infra*.

7. *In Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981), the court concluded that a proportionate share of a tribe's federal reserved water right remains with land owned by individual allottees and to subsequent non-Indian fee owners. The priority date remains that of the reservation, but the federal reserved water right must have either been put to use by the allottee prior to the transfer to the non-Indian owner, or by the non-Indian owner within a reasonable time after the transfer.

8. *In Re General Adjudication of All Rights to Use Water in Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd sub nom. Wyoming v. United States*, 492 U.S. 406 (1989), *reh. denied*, 492 U.S. 938 (1989).

9. *In Re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, State of Wyoming, Civil No. 4993, slip op. (Wyo. Fifth Judicial Dist. Ct. Washakie County, Mar. 12, 1991), reprinted in 18 Indian L. Rep. (Am. Indian Law. Training Program) 5073 (Apr. 1991).

10. The issue in *In Re General Adjudication of All Rights to Use Water in the Big Horn River and All Other Sources*, State of Wyoming, 803 P.2d 63 (Wyo. 1990) (*Big Horn II*) concerned *Walton* rights and is not discussed in detail within this analysis of *Big Horn III*.

tion to the conflict regarding application and administration of the rights to use water in the Wind-Big Horn River system.

WHERE THE WIND FLOWS AND THE BIG HORN ROAMS

The wind blows to the south and turns to the north; round and round it goes, ever returning on its course. All streams flow into the sea, yet the sea is never full. To the place the streams come from, there they return again. Eccles. 1:6-7.

The Wind River watershed is located in northwestern Wyoming (see map Appendix A). The tributaries feeding the Wind River have their source in the Absaroka and Wind River mountains. The Wind River flows southeastward through the WRIR until it becomes the Big Horn River at the confluence with the Little Wind River. The Big Horn River roams northward through the arid intermountain basin between the eastward Big Horn mountains and westward Absaroka mountains. The Greybull and Shoshone rivers contribute to the flow of the Big Horn River before it exits Wyoming and joins the Yellowstone River, which joins the Missouri River, which in turn joins the Mississippi River flowing into the Gulf of Mexico. The Wind-Big Horn River watershed and the Clark's Fork of the Yellowstone River watershed (which is not tributary to the Big Horn River) form Water Division No. 3; both watersheds are subject to the general adjudication of water rights.

HISTORICAL SKETCH OF THE WIND RIVER

Tribes And Wyoming Water Law

The Eastern Shoshone were originally a hunter-gatherer society with an attachment to land in what is now the western portion of Wyoming and the eastern portions of Idaho and Utah.¹¹ The range of the Eastern Shoshone extended to the Powder River basin in northeastern Wyoming by virtue of bison hunting.¹² Hunting in the Powder River basin brought the Eastern Shoshone into hostile contact with the Sioux and the Northern Arapaho who were allied with the Sioux.¹³

11. D. Shimkin, *Eastern Shoshone*, in 11 Handbook of North American Indians, Great Basin 308 (W. D'Azevedo, vol. ed., W. Sturtevant, gen. ed., 1986).

12. *Id.* at 309-310. Bison were the primary source of food for the Eastern Shoshone, but fish from the Wind River were the second principle source during the period between late February and early June.

13. R. Clemmer & O. Stewart, *Treaties, Reservations, and Claims*, in 11 Handbook of North American Indians, Great Basin 525, 529 (W. D'Azevedo, vol. ed., W. Sturtevant, gen. ed., 1986).

The Northern Arapaho were displaced by Anglo-American settlement from the Red River area of Minnesota and relocated to an area that included the Powder River basin of Wyoming.¹⁴ The Northern Arapaho depended upon bison and other game animals for survival on the high plains.¹⁵

The Eastern Shoshone were the balance of power in the transition zone between the great basin and the high plains.¹⁶ As a powerful enemy of the Sioux, the Eastern Shoshone were receptive to alliances with the United States and were the only great basin tribe never to be militarily defeated or displaced from their homelands.¹⁷

As early as 1858, the Eastern Shoshone chief Washakie had requested a reservation on the Henry's Fork River; a tributary of the Snake River in northeastern Idaho.¹⁸ This request was not acted upon, but a subsequent request by Washakie in 1867 led to the establishment of the WRIR.¹⁹ The Eastern Shoshone did cede a parcel of land located in the southeastern portion of the WRIR to the United States due to the gold mining activity in the vicinity of South Pass City, Wyoming.²⁰ However, disruption of the Eastern Shoshone lifestyle was minimal until the United States Army escorted the Northern Arapaho onto the WRIR in 1878.²¹

Although the Eastern Shoshone and Northern Arapaho were hostile to one another due to their respective alliances, Washakie allowed the Northern Arapaho to stay on the WRIR until they had recovered from their ordeal of military defeat and imprisonment.²² There is no doubt that Washakie considered the situation to be a temporary one, but the Northern Arapaho permanently settled on the WRIR.²³

14. See generally V. Trenholm, *The Arapahos, Our People* 9 (1970).

15. *Id.*

16. Clemmer & Stewart, *supra* note 13, at 529.

17. *Id.* at 529-530.

18. *Id.* at 530. It is interesting to note that in his request for a reservation on the Henry's Fork River, Washakie also requested a farm for the Eastern Shoshone.

19. *Id.* Treaty Between the United States of America and the Eastern Band of Shoshones and the Bannock Tribe of Indians, July 3, 1868, 15 Stat. 673 [hereinafter 1868 Treaty]. This was the second treaty between the Eastern Shoshone and the U.S. which was negotiated at Fort Bridger. The westward construction of the Union Pacific Railroad during 1867 and 1868 had encroached upon portions of Eastern Shoshone territory established under the first treaty between the parties, Treaty Between the United States of America and the Eastern Band of Shoshones and the Bannock Tribe of Indians, July 2, 1863, see H.R. Exec. Doc. No. 86, 38th Cong., 1st Sess. 1195 (1864) [hereinafter 1863 Treaty].

20. H.R. Exec. Doc. No. 21, 42d Cong., 3rd Sess. (1872). Also known as the Brunot Agreement which was entered into on September 16, 1872.

21. *Id.*

22. A. Debo, *A History of the Indians of the United States* 241 (1970).

23. *Id.* Washakie complained to the United States in 1891 that:

The Wind River Tribes' agricultural economy on the WRIR was prosperous by the early 1880s.²⁴ By 1884, the last bison herd had left the Wind River vicinity and the agricultural economy collapsed.²⁵ When Wyoming entered into statehood in 1890, the economy on the WRIR was struggling, but was the most successful of the agricultural reservations.²⁶

In 1888, Elwood Mead moved to Wyoming from Colorado and became the territorial engineer.²⁷ Wyoming adopted Mead's approach to water management in which the State Engineer through the Board of Control functions as a quasi-judicial administrator of prior appropriation water rights.²⁸ The Board of Control is comprised of the superintendents of each of the four major hydrologic divisions within Wyoming and the

At the time the Arapahos came to this Res. we did not tell them they could come here and stay nor did we give them any land. They and the Sioux had been fighting the soldiers and got whipped; they came up here and we have allowed them to live here since, thinking they would not hurt the land by living on it, we do not think that this would give them any right to the land.

24. Clemmer & Stewart, *supra* note 13, at 541.

25. *Id.*

26. *Id.*

27. C. Wilkinson, *Aldo Leopold and Western Water Law*, 24 Land & Water L. Rev. 1, 7 (1989). Mr. Mead had become frustrated with Colorado's refusal to adopt state administration of water rights; rather, Colorado adopted a judicial approach to water rights management. The wisdom of this non-judicial approach to water right administration was espoused by Chief Justice Potter of the Wyoming Supreme Court in *Farm Investment Co. v. Carpenter*, 61 P. 258, 267 (Wyo. 1900) (quoting C. Kinney, *A Treatise on the Law of Irrigation* § 493, at 666 (1894)):

In the state of Wyoming, at least, there will no longer be the ludicrous spectacle of learned judges solemnly decreeing the right to from two to ten times the amount of water flowing in a stream, or, in fact, amounts so great that the channel of the stream could possibly carry them; thus practically leaving the question at stake as unsettled as before.

28. Wyo. Const. art. VIII, § 2 (effective July 10, 1890 upon Congress' admission of Wyoming into the Union). See also Wyo. Const. art. VIII, § 5. The State Engineer and the Board of Control are expressly authorized to administer water rights within the state. Wyoming follows the prior appropriation doctrine first developed in the California mining camps during the mid-1800s gold rush. The essence of the prior appropriation doctrine is that the first person to appropriate water has a better right to the amount of water applied to a beneficial use than all subsequent appropriators of water from the same source(s) of supply. It does not matter whether the subsequent "junior" appropriations are upstream or downstream of the "senior" appropriation; the priority system based on the date of first appropriation and application to beneficial use governs the movement of water within the basin between competing water users. When a "senior" appropriator's water right is not being delivered to the established place of appropriation, a call on the system will enjoin "junior" appropriators from appropriation until the "senior" appropriator's water right is satisfied in full. However, if the appropriated amount of water cannot physically reach the "senior's" place of appropriation due to evaporation, conveyance loss into the streambed, or other factors, the "juniors" will not be enjoined from appropriation because the "senior" has demanded a "futile call" for water.

State Engineer.²⁹ The Board of Control serves as decision maker and first line of appeal for contests to water right determinations.³⁰

The Wind River Tribes ceded land adjacent to Big Horn Hot Springs in the vicinity of Thermopolis, Wyoming in 1897.³¹ The Wind River Tribes ceded approximately one and one-half million acres of land north of the Wind River to the United States in 1905.³² Pursuant to provisions in the 1905 Act, and according to the assimilation sentiment of the period,³³ federal agents routinely applied for state water rights for use by the Wind River Tribes on land within the "diminished" and "ceded" portions of the WRIR.³⁴ The United States restored certain lands in the "ceded" and "diminished" portions of the WRIR during the 1940s.³⁵ However, land within the "ceded" portion of the WRIR was further withdrawn for the Riverton Irrigation Project in 1953.³⁶

The preceding human events formed the contours of a reservoir of pent-up conflict concerning water resource control. Rumbblings of discontent from the Wind River Tribes regarding expanding non-Indian water use within the external boundaries of the WRIR caused concern within State government. The Wyoming Legislature responded to the rumbblings of discontent in 1977 when it enacted a general stream adjudication statute, which was instantly applied to Water Division No. 3.³⁷ The State action breached the dam and the conflict over the rights

29. *Id.* The four divisions of the Board of Control are: Division I, North Platte River basin; Division II, Powder River and Belle Fourche River basins; Division III, Wind-Big Horn River and Clarks Fork of the Yellowstone River basins; Division IV, Snake River and Green River basins.

30. *Id.*

31. S. Exec. Doc. No. 169, 55th Cong., 2d Sess. (1898). Also known as the First McLaughlin Agreement, or Thermopolis Purchase which was entered into on February 5, 1898. Thermopolis, Wyoming is located on the Big Horn River immediately adjacent to the northeast corner of the WRIR.

32. 33 Stat. 1016 (1905) [hereinafter 1905 Act]. Land held in trust by the United States for the Tribes south of the Wind River has been denoted as the "diminished portion" of the Wind River Indian Reservation by Wyoming Supreme Court Justice Thomas in *Big Horn I*, 753 P.2d at 119.

33. Debo, *supra* note 22, at 299. See also W. Canby, Jr., *American Indian Law* 19-22 (2nd ed. 1988).

34. See Wyoming's Petition for Writ of Certiorari to the Supreme Court of Wyoming at 13 n.11, *Big Horn I*, 753 P.2d 76. It was the State's contention that all of the water rights necessary for accomplishing the agricultural purposes for the WRIR were accounted for via application of water pursuant to state water right appropriations.

35. See *Big Horn I*, 753 P.2d at 84. Part of the reacquired land in the diminished portion of the WRIR had been granted to non-Indians under the policies of the General Allotment Act of 1887, 24 Stat. 388 (Feb. 8, 1887). Also known as the Dawes Act, it was repealed by the Indian Reorganization Act, 48 Stat. 984-986 (Jun. 18, 1934).

36. 67 Stat. 592 (Aug. 15, 1953).

37. Wyo. Stat. § 1-1054.1 (enacted Jan. 22, 1977) (currently Wyo. Stat. § 1-37-106 (Supp.

to use water from the Wind-Big Horn River System has rushed on ever since.

GENERAL ADJUDICATION OF THE WIND-BIG HORN RIVER SYSTEM

And I saw that all labor and all achievement spring from man's envy of his neighbor. This too is meaningless, a chasing after the wind. Eccles. 4:4

The general adjudication began on January 24, 1977 when Wyoming sued the United States in state district court.³⁸ The general adjudication suit was authorized by state law³⁹ and made possible by the McCarran Amendment⁴⁰ which waived the sovereign immunity of the United States in general adjudication water right lawsuits. The Shoshone and Northern Arapaho successfully intervened into the general adjudication by arguing that their interests were not adequately represented by the United States.

The general adjudication involved in excess of 20,000 claims for water rights and was trifurcated into three distinct phases.⁴¹ The first phase involved the adjudication of federal Indian reserved water rights.⁴² The second phase of the suit adjudicated all federal non-Indian reserved water rights within Water Division No. 3.⁴³ The parties entered into a stipulated interlocutory decree for phase two federal non-Indian reserved water rights in the Big Horn and Shoshone National Forests and Yellowstone National Park.⁴⁴ The third phase of the general adjudication is proceeding and concerns the adjudication of all claims to water appropriated under state law and *Walton* water rights within Water Division No. 3. The decisions in *Big Horn I*, *Big Horn III* and *Big Horn III* arose from the first phase of the general adjudication.

1992)).

38. *In Re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Sources*, State Wyoming, Civil No. 4993 (Wyo. Fifth Judicial Dist. Ct. Washakie County filed Mar. 12, 1991). It should be noted that all activity related to the general adjudication of the Wind-Big Horn River system in the state district court is referenced by Civil No. 4993.

39. Wyo. Stat. § 1-37-106 (Supp. 1992).

40. 43 U.S.C. § 666 (1988). See also *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

41. See generally *Big Horn III*, 835 P.2d at 275. The claims for water rights do not correspond to the number of parties having an interest in the general adjudication suit.

42. *Big Horn I*, 753 P. 2d at 85.

43. *Id.*

44. *Id.*

BIG HORN I

The naive inherit folly, and he who troubles his own house will inherit the wind. Prov. 14:18a & 11:29a.

The Wyoming state district court determined that the 1868 Treaty established the WRIR as an agricultural reserve rather than a tribal homeland.⁴⁵ The 1868 Treaty did not expressly reserve water in the Wind-Big Horn River system from appropriation pursuant to state law.⁴⁶ Contrary to Wyoming's argument, the district court applied the Winters doctrine which implied a reservation of water within the 1868 Treaty for an amount necessary to accomplish the agricultural purpose of the WRIR.⁴⁷

The state district court determined that the amount of water necessary to accomplish the agricultural purpose of the WRIR was the quantity of water historically diverted for irrigation use and the quantity of water required for future irrigation projects within the WRIR.⁴⁸ The state district court awarded the Wind River Tribes approximately one-half million acre-feet of water from the Wind-Big Horn River system as the quantity of their federal Indian reserved water right.⁴⁹ Approximately two fifths of the total award was quantified according to the PIA standard for future irrigation projects within the WRIR.⁵⁰

The state district court refused to quantify the Wind River Tribes' reserve water right on the basis of a reservation purpose for fisheries protection and enhancement, mineral development, industrial develop-

45. *Big Horn I*, 753 P.2d at 95. The sole agricultural purpose for the WRIR as interpreted by the state district court contrasts with a homeland purpose which would incorporate diverse purposes for the WRIR.

46. *Id.* at 91.

47. *Id.*

48. *See generally id.*

49. Wyoming's Petition for a Writ of Certiorari to the Supreme Court of Wyoming at 9, *Big Horn I*, 753 P.2d 76. Note: acre-feet is the standard measure for irrigation water rights. One acre-foot of water is the amount of water necessary to cover an acre of land to a depth of one foot.

50. *Big Horn I*, 753 P. 2d at 103. The PIA standard for quantifying federal reserved water rights is an analysis to determine the arability of land, the engineering, and economic feasibility of proposed irrigation projects within a federal reservation. The arability analysis determines whether the land is able to support irrigated agriculture. Engineering feasibility analysis determines whether the infrastructure necessary to irrigate the arable lands is reasonably possible according to current engineering practices. Economic feasibility determines whether the arable land base and the engineering feasibility analysis comprise an economically feasible irrigation project. The state district court accepted most of the Tribes' PIA claims and these became the basis for the "future" federal reserved water right for approximately 189,000 acre-feet of water from the Wind-Big Horn River system.

ment, wildlife or aesthetic preservation.⁵¹ Quantification of the federal Indian reserved water rights for these uses did not accord with the court defined agricultural purpose of the WRIR.⁵² The district court further determined that groundwater was not part of the Wind River Tribes' federal Indian reserved water right award.⁵³ Both the Wind River Tribes and the State petitioned to the Wyoming Supreme Court for a *writ of certiorari* to review the state district court decision.

Arguing before the Wyoming Supreme Court, the State challenged the validity of the PIA quantification standard and the amount of the Wind River Tribes' federal Indian reserved water right. The Wind River Tribes, on the other hand, challenged the district court conclusion that the State Engineer should monitor their federal Indian reserved water right.

The Wyoming Supreme Court in *Big Horn I* affirmed the state district court award of approximately one half million acre-feet of water from the Wind-Big Horn River system.⁵⁴ The state supreme court affirmed the reasoning of the lower court determination that the WRIR was created solely for the purpose of tribal agriculture.⁵⁵

In the *Big Horn I* opinion, the majority concluded that federal water law did not preempt state oversight of the Wind River Tribes' federal Indian reserved water right.⁵⁶ The state supreme court based this determination on case law that supported limited state regulation of water sources that were not confined within a reservation.⁵⁷ The state supreme court expressly stated that the Wyoming State Engineer should monitor and enforce the Wind River Tribes' federal Indian reserved water right against injury from state water right appropriators.⁵⁸ In performing this task, the State Engineer would apply federal water law rather than state water law.⁵⁹ If the State Engineer failed to enforce the Wind River Tribes federal Indian reserved water right the district court would

51. *Id.* at 98, 99.

52. *Id.* at 99.

53. *Id.* at 100. But see P. Graening, Note, *Judicial Failure to Recognize a Reserved Groundwater Right for the Wind River Indian Reservation, Wyoming*, 27 *Tulsa L.J.* 1 (1991). Author argues for inclusion of groundwater resources within the Wind River Tribes' federal Indian reserved water right award.

54. *Big Horn I*, 753 P.2d at 112.

55. *Id.* at 99.

56. *Id.* at 114.

57. *Id.* at 114, 115.

58. *Id.* at 115. The state supreme court did distinguish between state engineer "monitoring" and "administration." The term "administration" implied a power to enforce the court decree against any violations committed by the Wind River Tribes. Enforcement was a matter for the state district court not the state engineer.

59. *Id.*

provide enforcement. Conversely, should the Wind River Tribes violate the state district court decree regarding their federal Indian reserved water right, the State Engineer could seek redress before the district court.⁶⁰ Wyoming was dissatisfied with the state supreme court decision in *Big Horn I* and petitioned the United States Supreme Court for a writ of certiorari.

The United States Supreme Court granted Wyoming's petition for a writ of certiorari, but limited review to the issue of whether the PIA standard was appropriate for quantifying the amount of the Wind River Tribes federal Indian reserved water right.⁶¹ The State argued that the historic irrigation practices of the Wind River Tribes were sufficient to accomplish the purpose of the WRIR.⁶² Moreover, there was no need for a federal Indian reserved water right based on future irrigation projects for PIA lands within the WRIR.⁶³ Included within this argument was the proposition that the excessive amount of the PIA based federal Indian reserved water right would be used by the Wind River Tribes for secondary uses that were extraneous to the agricultural purpose of the reservation.⁶⁴ An equally divided Supreme Court affirmed the *Big Horn I* decision of the state supreme court without opinion.⁶⁵

BIG HORN iii

Whoever watches the wind will not plant; whoever looks at the clouds will not reap. Eccles. 11:4

Big Horn iii was spawned in April, 1990, one year after the United States Supreme Court affirmed the judgment of the Wyoming Supreme Court in *Big Horn I*. The Tribal Water Board issued the Shoshone and

60. *Id.* But see *infra* note 146.

61. 488 U.S. 1040 (1989). See also *cert. denied sub nom. Shoshoni Tribe and Northern Arapaho Tribe of the Wind River Indian Reservation v. Wyoming*, 492 U.S. 926 (1989) (Wind River Tribes petition for certiorari denied by the Supreme Court).

62. *Wyoming v. United States*, 488 U.S. 1040 (1989).

63. *Id.*

64. *Id.*

65. *Wyoming v. United States*, 492 U.S. 406 (1989). Justice O'Connor did not take part in the decision. Presumably, Justice O'Connor did not take part in the decision due to a conflict of interest that was discovered during or after oral arguments. Justice O'Connor, Remarks following address at the University of New Mexico School of Law (Feb. 5, 1993). See also, P. Sly & C. Maier, *Indian Water Settlements and EPA*, 5 Nat. Resources & Env't 25 (1991) for an insight into "judicial pique" with the Winters water right quantification method via the PIA standard and subsequent use of the Wind River Tribes federal Indian reserved water right during oral arguments before the U.S. Supreme Court. However, the U.S. Supreme Court split affirmation of *Big Horn I* without opinion is without precedential value.

Northern Arapaho an instream flow permit for the Wind River.⁶⁶ The stated purposes of the Wind River Tribes' instream flow permit were for fisheries protection and enhancement, recreation, groundwater recharge and benefits accruing to downstream irrigators.⁶⁷

During the 1990 irrigation season, the flow of the Wind River fell below the 252 cfs minimum required by the instream flow permit.⁶⁸ The Wind River Tribes requested that the State Engineer enforce their instream flow right against upstream water appropriators having junior priority state water rights.⁶⁹ The State Engineer chose not to enforce the Wind River Tribes' instream flow permit and refused to close the headgates of the state water right appropriators.⁷⁰

The State Engineer's refusal to enforce the Wind River Tribes' instream flow permit was based on a two step interpretation of the federal Indian reserved right awarded to the Wind River Tribes in *Big Horn I*. The first step of the interpretation was that the future federal Indian reserved water right could not be changed to an instream flow use until it had been diverted and beneficially used to irrigate the future projects.⁷¹ The diversion requirement was tied to the nature of the federal Indian reserved water right as evidenced by the state supreme court's use of the phrase "right to divert, or to have water diverted" in *Big Horn I*.⁷²

The second step of the State Engineer's interpretation was that once "actual" diversion and irrigation had been accomplished the Wind River Tribes could change the use of their federal Indian reserved water right to a secondary instream flow use pursuant to state law.⁷³ The basis

66. See *infra* Appendix B: Tribal Water Board Permit No. 90-001 for three reaches (segments or sections) of the Wind River from April through September, 1990. Instream flows establish a minimum flow rate within the natural channel of the stream. The minimum flow rate is the volume of water, measured in cubic feet, flowing through the stream channel in one second, or cubic feet per second ("cfs"). Tribal Water Board Permit No. 90-001 was superseded by Permit No. 91-001 which specified minimum instream flow rates through four reaches covering the entire main stem of the Wind River throughout its traverse of the WRIR. Approximately 87,600 acre-feet of water from the Wind River Tribes' "future" federal Indian reserved water right would be transferred to supply the minimum instream flow pursuant to Permit No. 91-001. Telephone interview with Craig Cooper, Superintendent, Water Division No. 3, State Board of Control, Riverton, Wyoming (April 2, 1993).

67. See *infra* Appendix B.

68. See generally *Big Horn iii*, Civil No. 4993, *slip op.* at 1.

69. *Id.*

70. *Id.*

71. *Id.* at 9, 10.

72. *Id.* at 9.

73. Appellant's Reply Brief at 13, 14, *Big Horn III*, 835 P.2d 273.

for this interpretation was the Supreme Court decision in *United States v. New Mexico*.⁷⁴

The Court in *New Mexico* determined that any secondary use of a federal reserved water right, a use not towards accomplishment of the original purpose for the reservation, must be accomplished pursuant to state law.⁷⁵ Although a non-Indian federal reserved water right was involved in *New Mexico*, the Ninth Circuit Court of Appeals has extended the principle to an Indian federal reserved water right in *United States v. Adair*.⁷⁶ However, because the Wind River Tribes had by-passed the requirements under *New Mexico* and *Adair*, the State Engineer refused to enforce what he believed to be an unlawful instream flow permit.

Because the State Engineer refused to enforce their federal Indian reserved water right, the Wind River Tribes petitioned the state district court for enforcement of their federal Indian reserved water right.⁷⁷ The state responded to the Wind River Tribes and filed a motion urging the court to determine certain administrative matters.⁷⁸ The motions comprised two main issues of contention: First, whether the federal Indian reserved water right awarded to the Wind River Tribes in *Big Horn I* could be changed to an instream flow use, and second, whether a special master or the State Engineer should administer the federal Indian reserved water right.⁷⁹

With respect to the first issue, the district court determined that although the federal Indian reserved water right was quantified according to the agricultural purpose of the WRIR, the Wind River Tribes could dedicate their federal Indian reserved water right for instream flow.⁸⁰ A twofold rationale supported this conclusion by the district court. First, the scope of the state supreme court decision in *Big Horn I* did not extend to usage of the federal Indian reserved water right, and therefore did not control the previous decision of the district court that the Wind River Tribes were entitled to use the federal Indian reserved water right for

74. *United States v. New Mexico*, 438 U.S. 696 (1978).

75. See *id.*

76. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied sub nom. *Oregon v. United States*, 467 U.S. 1252 (1983). The Ninth Circuit held that a *Winters* water right for fisheries could not be changed to forestry and wildlife uses unless these new uses were within the primary purpose for the reservation. Because the forestry and wildlife uses were not within the primary purpose for the reservation, the change of use was denied as an attempt to avoid state law regarding change of use for the *Winters* water right contrary to the principles asserted in *New Mexico*.

77. *Big Horn iii*, No. 4993, slip op. at 2, 3.

78. *Id.* at 3, 4.

79. *Id.* at 2-4.

80. *Id.* at 18.

instream flow.⁸¹ Second, the United States Supreme Court in *Arizona v. California*⁸² determined that the PIA method of quantifying federal Indian reserved water rights was not a restriction on the use of the federal Indian reserved water right.⁸³

According to the preceding rationale, the district court concluded that the term "divert" in the *Big Horn I* decision did not limit the Wind River Tribes to an irrigation use of their future federal Indian reserved water right pursuant to the principle adopted by the Court in *Arizona*.⁸⁴ The district court determined that the Wind River Tribes could change the use of their future federal Indian reserved water right without regard to state water law because the instream flow use was appropriate under the "agricultural homeland" purpose of the WRIR.⁸⁵ However, the district court placed a limitation to prevent the Wind River Tribes from arbitrarily dedicating their future federal Indian reserved water right to instream flow.⁸⁶

The limitation imposed upon the Wind River Tribes by the district court was that any change of use must be "physically possible to accomplish."⁸⁷ This limitation restrained the Wind River Tribes in two ways: first, the Wind River Tribes were required to specify which future project land, water source and annual diversion amount served as the source of the instream flow and; second, the measure of the instream flow was limited to the amount of water consumptively used for irrigating the future project land.⁸⁸

The limitation imposed on the Wind River Tribes did not pose a barrier to a change of use for their federal Indian reserved water right from future irrigation to a present protection of instream flow. Thus, the first issue before the district court was decided in favor of the Wind River Tribes.

The second issue in *Big Horn iii*; whether the State Engineer or a special master should administer the federal Indian reserved water right, was decided by the district court in favor of the Wind River Tribes.⁸⁹ The district court reasoned that the State Engineer had not assumed a neutral role in administering the Wind River Tribes' federal Indian

81. *Id.* at 6.

82. *Arizona v. California*, 439 U.S. 419 (1979) (supplemental stipulated decree.)

83. *Id.* at 422.

84. *Big Horn iii*, No. 4993, slip op. at 8.

85. *Id.* at 16.

86. *Id.* at 12.

87. *Id.*

88. *Id.* "Consumptive use" is the amount of irrigation water that is diverted from the stream less the amount that returns to the stream system as drainage from the irrigated land. Consumptive use is also referred to as "net irrigation requirement."

89. *Id.* at 14.

reserved water right.⁹⁰ The court chose not to appoint a special master, but rather selected the Tribal Water Board as the administrator of the federal Indian reserved water rights awarded to the Wind River Tribes in *Big Horn I*.⁹¹ Furthermore, the court determined that the Tribal Water Board was the administrator of all state water rights within the WRIR.⁹²

As a result of the state district court decision, the State and other appropriators of state water rights affected by the judgment petitioned for a *writ of certiorari* in the state supreme court. The petition was granted, and the resulting decision became *Big Horn III*.

BIG HORN III

I have seen a grievous evil under the sun: wealth hoarded to the harm of its owner, or wealth lost through some misfortune... This too is a grievous evil: As a man comes, so he departs, and what does he gain, since he toils for the wind? Eccles. 5:13, 14a & 16.

The Wyoming Supreme Court in *Big Horn III* reversed the decision of the state district court in *Big Horn iii*. The issues confronting the state supreme court appeared to be straightforward, but the contorted analytical paths taken by the justices in their separate opinions indicate the maze created by the interplay between federal and state water law on the WRIR.

Two issues confronted the state supreme court in *Big Horn III*. The first issue was whether the Wind River Tribes could change the use of their federal Indian reserved water right from a future diversion for irrigation to a present use for instream flow without regard for state law.⁹³ The second issue was whether the Tribal Water Board or the State Engineer would administer both the federal Indian reserved water right and state water rights within the WRIR.⁹⁴

Justices Macy and Thomas formed the core of the majority in reversing the state district court on both of the issues faced by the state supreme court. Justice Golden dissented to the reversal of the district court on both issues. Justice Cardine joined with the majority on the first issue, but dissented from the majority's determination of the second issue. Justice Brown dissented to the majority regarding the first issue, but joined the majority on the second issue (see Fig. 1).

90. *Id.*

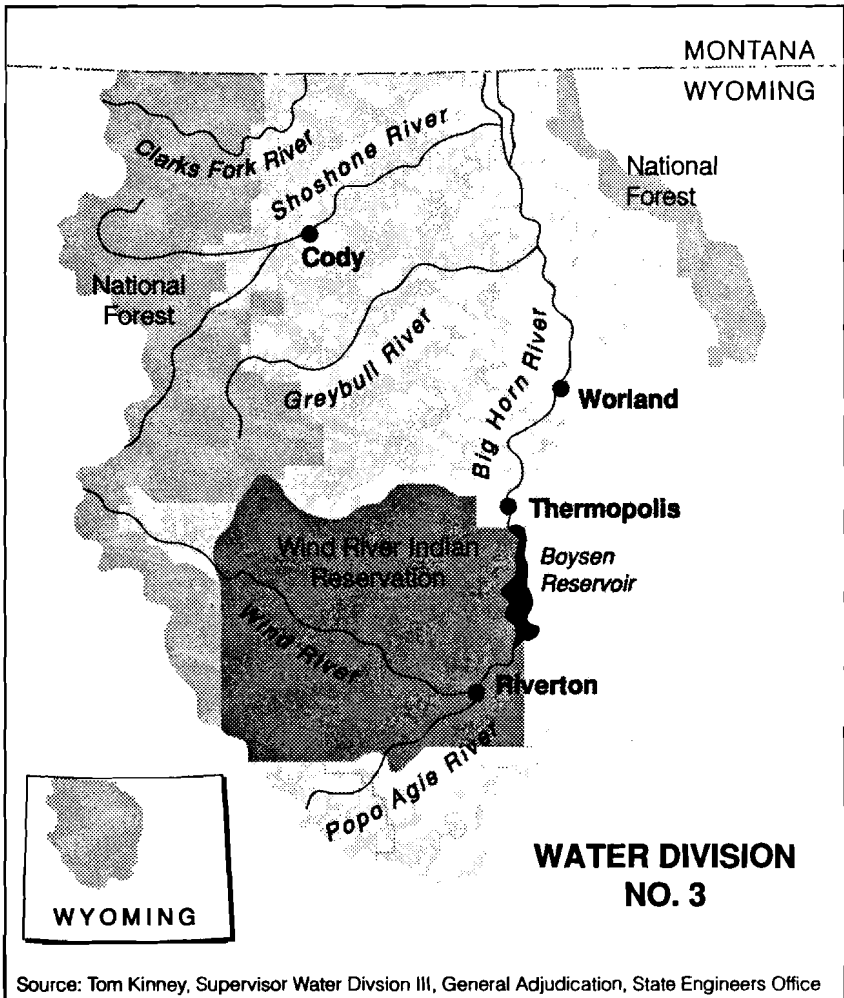
91. *Id.*

92. *Id.*

93. *Big Horn III*, 853 P.2d at 275.

94. *Id.*

	ISSUE #1: instream flow.		ISSUE #2: administration.	
Decision:	Wind River Tribes cannot change their "future" federal Indian reserved water right to a present instream flow use.		State Engineer "administers" state water rights and federal Indian reserved water right on WRIR.	
Majority:	Macy Thomas Cardine	Under state water law. Under tribal or fed. law.	Macy Thomas Brown	Under state law. Under federal water law.
Dissent:	Brown Golden	Under fed. law.	Cardine Golden	



Source: Tom Kinney, Supervisor Water Division III, General Adjudication, State Engineers Office

Carol Cooperrider

BIG HORN III ANALYSIS

The analysis of Big Horn III has been structured to follow the organization of the decision depicted in Figure 1. The analysis begins with an examination of the Wyoming Supreme Court decision concerning the Wind River Tribes attempt to change their "future" federal Indian reserved water right to a present use for instream flow protection. The second portion of the analysis regards the administration of water rights within the WRIR and the larger Wind-Big Horn River system. Both portions of the analysis are subdivided so as to discuss the rationales of the majority, concurring and dissenting opinions of the justices. Each portion of the analysis also contains a brief statement of the impact of the court's decision on the Wind River Tribes and state appropriators.

1. Change Of Beneficial Use Of The Wind River Tribes' Future Federal Indian Reserved Water Right To A Present Instream Flow Protection Denied

The state supreme court decision in *Big Horn III* denied the Wind River Tribes' attempt to change the beneficial use of their future federal Indian reserved water right to a present use for instream flow protection. The opinions of Justices Macy and Thomas anchored the majority opinion. Justice Cardine joined with the majority holding, but for different reasons. Justices Brown and Golden joined together dissenting to the holding of the majority.

A. Rationales Employed By Justices Macy And Thomas To Form The Core Of The Majority

Justices Macy and Thomas required that any change of use to instream flow must be pursuant to state law.⁹⁵ Justice Macy based his reasoning on the *Winters* doctrine as modified by the United States Supreme Court in *New Mexico* and applied to Indian federal Indian reserved water rights in *Adair*.⁹⁶ According to Justice Macy's analysis, the Wind River Tribes' federal Indian reserved water right is limited by the agricultural purpose of the WRIR and any non-agricultural use of the federal Indian reserved water right is a secondary purpose which must be accomplished pursuant to state water law.⁹⁷ Justice Thomas generally agreed with this analysis by Justice Macy.⁹⁸ However, the logical consequences of this line of reasoning are problematic for the Wind River Tribes.

95. *Id.* at 301.

96. *See generally id.* at 278, 279.

97. *Id.*

98. *Id.* at 283.

The problem with the position taken by Justices Macy and Thomas is that under Wyoming instream flow law, only the state can own the instream flow water right.⁹⁹ State ownership of all instream flow rights is founded upon the Wyoming Constitution which declares that all water within natural streams is state property.¹⁰⁰ By definition, instream flow rights remain in the natural stream and therefore, are state property.

The state owns the water right for a second reason; the state is the applicant for the instream flow permit.¹⁰¹ The process for acquiring an instream flow permit begins with an analysis conducted by the Wyoming Game and Fish Commission concerning the fisheries habitat within the applicable stream reaches.¹⁰² The fisheries analysis is reported to the Wyoming Water Development Commission for hydrologic feasibility analysis.¹⁰³ The Water Development Commission submits an application for an instream flow permit to the State Engineer's Office.¹⁰⁴ After an independent review of the application, the State Engineer may issue an instream flow permit with a current priority date.¹⁰⁵ Under Wyoming's instream flow regime, the State has complete legal ownership of an instream flow right and complete control over the administrative procedures necessary to acquire an instream flow water right.¹⁰⁶

State ownership contradicts and destroys the reserved characteristic of the Wind River Tribes' federal Indian reserved water right.¹⁰⁷ The essential benefit of the *Winters* doctrine, in this instance, is to reserve water for the Wind River Tribes from appropriation pursuant to Wyoming law. The *Winters* doctrine establishes a priority of use based on the 1868 Treaty rather than the date an application was filed for a state instream flow permit. Furthermore, the *Winters* doctrine protects the Wind River Tribes' future federal Indian reserved water right from abandonment pursuant to Wyoming law for lack of beneficial use.¹⁰⁸

99. Wyo. Stat. § 41-3-1002(e) (Supp. 1992).

100. Wyo. Const. art. I § 31.

101. G. Fassett, *Wyoming's Instream Flow Law*, in *Instream Flow Protection in the West* 409, 410 (L. MacDonnell et al. eds., 1989). See generally Wyo. Stat. §§ 41-3-1001 to 41-3-1014 (Supp. 1992).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. See *infra* note 171 for discussion of preemption of state law.

108. D. Getches, *Water Law in a Nutshell* 319 (2nd. ed. 1990). See also Wyo. Stat. § 41-3-1011 (Supp. 1992), indicating that a state instream flow permit cannot be acquired by abandonment and is not subsequently subject to abandonment for nonuse. *But see* Wyo. Stat. § 41-3-1013 (Supp. 1992), indicating that state instream flow rights are subject to condemna-

This protection is vital if the Wind River Tribes are to retain their future federal Indian reserved water right.

B. Rationale Of Justice Cardine Concurring With The Majority

By contrast, Justice Cardine did not agree with Justices Macy and Thomas that a change of use must be pursuant to state law.¹⁰⁹ Rather, Justice Cardine required that the Wind River Tribes first divert their "paper" future federal Indian reserved water right and apply it to beneficial use before changing the use to instream flow pursuant to either tribal or federal water law.¹¹⁰ However, Justice Cardine would allow the Wind River Tribes to change the use of their "wet" federal Indian reserved water right for historically irrigated lands to an instream flow without regard to state water law.¹¹¹

The position taken by Justice Cardine is problematic due to his description of the Wind River Tribes' future federal Indian reserved water right as a "paper" water right as opposed to a "wet" water right.¹¹² A wet water right is one that is accompanied by an actual appropriation of water towards a beneficial use. By contrast, a paper water right is one that is on paper only. That is, a paper water right has no power to actually accomplish an appropriation of water. Paper water rights are those which are too junior in priority, or subject to abandonment for non-use, or those for diversions that are not physically capable due to destruction of the diversion facilities. In short, paper water rights are those that are only worth the paper their written on and have no power to accomplish a real property interest in appropriating water for the beneficial use of the appropriator. Therefore, in reality, the Wind River Tribes' future federal Indian reserved water right is more than a paper water right because it is not subject to abandonment for nonuse or other restrictions related to application to beneficial use.¹¹³ However, although the Wind River Tribes future federal Indian reserved water right is more than a paper water right, it is not yet a wet water right.¹¹⁴

tion for municipal beneficial use.

109. *Big Horn III*, 835 P.2d at 285-86.

110. *Id.*

111. *Id.* at 285.

112. See J. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 *Land & Water L. Rev.* 1, 15 (1992).

113. See S. Brienza, *Wet Water v. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects*, 11 *Stan. Env'tl. L.J.* 151, 155 (1992).

114. *Id.* at 160.

C. Rationales Employed By Justices Brown And Golden To Form The Dissent

In their dissenting opinions, Justices Brown and Golden criticized the majority's reliance on the decision in *Big Horn I* as controlling the use of the Wind River Tribes' federal Indian reserved water right.¹¹⁵ *Big Horn I* primarily determined the quantification method for the federal Indian reserved water right and did not expressly link PIA quantification with a restriction on use of the federal Indian reserved water right. Review of *Big Horn I* by the United States Supreme Court was limited primarily to the appropriateness of the PIA quantification methodology. However, the second issue of Wyoming's petition for writ of certiorari did raise the issue of secondary uses of the federal Indian reserved water right.¹¹⁶ But these issues were decided against Wyoming when the equally divided United States Supreme Court affirmed *Big Horn I* without issuing an opinion.¹¹⁷ It is doubtful that the decision in *Big Horn I* serves as authority regarding the use of the Wind River Tribes' federal Indian reserved water right.¹¹⁸

Wyoming Supreme Court Justice Golden further based his dissent on the property aspects of the federal Indian reserved water right awarded to the Wind River Tribes in *Big Horn I*.¹¹⁹ When the State Engineer refused to enforce the federal Indian reserved water right against junior priority state appropriators, the Wind River Tribes were denied their property right without due process of law required by both

115. *Big Horn III*, 835 P.2d at 293. This follows the Wind River Tribes' argument that previous decisions by the state district court and supreme court were law of the case regarding their ability to apply the awarded federal Indian reserved water right to any beneficial uses. The Wind River Tribes further asserted that the state was collaterally estopped from raising the issue of type of use on this appeal. However, the previous court decisions concerned both the methodology for quantifying the Wind River Tribes' federal Indian reserved water right and the amount of that right. The portions of the previous court determinations regarding use of the Wind River Tribes' water right were not necessary to the final disposition of the issues at bar and therefore, cannot serve as a basis for defensive collateral estoppel. Furthermore, the dicta concerning use of the Wind River Tribes' water right does not impair the stability, sureness or permanence of the previous decisions and is thereby not a basis for asserting that these determinations are law of the case.

116. Wyoming Petition for Writ of Certiorari to the Supreme Court of Wyoming at 26, Wyoming v. United States, 492 U.S. 406 (1989).

117. Wyoming v. United States, 492 U.S. at 407.

118. Wyoming v. United States, 492 U.S. 406 (1989). See *supra* text accompanying note 65. U.S. Supreme Court review of the state supreme court decision in *Big Horn I* was narrowed to the issues involved with quantification of the *Winters* water right. Issues concerning use of the "future" federal Indian reserved water right by the Wind River Tribes were not squarely before the U.S. Supreme Court.

119. See generally *Big Horn III*, 835 P.2d at 294.

the federal and state constitutions.¹²⁰ Justice Cardine argued that the process due the Wind River Tribes is use of their federal Indian reserved water right for any purpose they desire.¹²¹

Justices Brown and Golden analyzed the Wind River Tribes right to change the use of their federal Indian reserved water right according to the *Winters* doctrine as extended in the supplemental decree of the Supreme Court in *Arizona*.¹²² In *Arizona* the Court held that the PIA standard for quantification does not implicitly limit the federal Indian reserved water right to irrigation or agricultural usage by the tribes.¹²³ However, both Justice Brown and Justice Golden ignored the fundamental *Winters* doctrine principle that a federal Indian reserved water right is limited to the amount necessary to accomplish the purpose of the federal reservation.¹²⁴

D. Impact Of Instream Flow Decision On The Wind River Tribes

The Wind River Tribes' future federal Indian reserved water right is in limbo between a "paper" and a "wet" water right. The Wind River Tribes do not have the resources to construct all of the future irrigation projects necessary to convert their future federal Indian reserved water right into a present wet water right. The Wind River Tribes have little incentive to obtain instream flow permits pursuant to state water law because they would relinquish ownership of their future federal Indian reserved water right to the state.¹²⁵ Their desire for instream flow cannot be satisfied by the state supreme court decision in *Big Horn III*.

E. Impact Of Instream Flow Decision On State Appropriators

Wyoming state water right appropriators should be satisfied that the Wyoming Supreme Court reversed the state district court decision which would have allowed the Wind River Tribes to apply their future federal Indian reserved water right to instream flow. State water right appropriators will not face the immediate impact of a senior priority tribal instream flow right constricting the already over appropriated Wind-Big Horn River system. However, the Wind River Tribes intense dissatisfaction with *Big Horn III* gives the state appropriators something to be nervous about as the general adjudication continues.

120. *Id.*

121. *Id.*

122. *Id.* at 289, 294.

123. *Arizona*, 439 U.S. at 422.

124. *Getches*, *supra* note 108, at 320 (citing to *Cappaert v. United States*, 426 U.S. 128 (1976) and *New Mexico*, 438 U.S. 696).

125. Wyo. Stat. § 41-3-1002(e) (Supp. 1992) and Wyo. Const. art I, § 31.

The Wind River Tribes may attempt to change the use of a portion of their federal Indian reserved water right historically used for irrigation to instream flow. The Wind River Tribes could then replace their reserved water right changed from historic irrigation use to instream flow use with a portion of their future irrigation federal Indian reserved water right.

Another scenario is also possible as the Wind River Tribes could construct part of their future irrigation projects and beneficially use a portion of their future federal Indian reserved water right for irrigation. The Wind River Tribes could then change the use of the beneficially applied future federal Indian reserved water right to instream flow. The changed future federal Indian reserved right water could be replaced with a historic federal Indian reserved water right to irrigate the new project.

The decision in *Big Horn III* does not preclude either of these differing scenarios. However, the affected state water right appropriators would have arguments from the majority's rationale in *Big Horn III* to pursue a claim against the Wind River Tribes in state court. The Wind River Tribes also would have plenty of arguments from *Big Horn III* as well. Together, the critical mass of confusion could combine and generate *Big Horn IV*.

2. Administration Of The Wind River Tribes' Federal Indian Reserve Water Right And State Water Rights Within The WRIR By The State Engineer

The uncertain status of the Wind River Tribes' federal Indian reserved water right is complicated by the confusion concerning administrative authority over water rights within the WRIR. One thing is certain, the tribal water agency does not have the sole authority to administer either state water rights or their federal Indian reserved water right within the WRIR.

A. Rationale Employed By Justice Macy For The Majority

Justice Macy of the Wyoming Supreme Court determined that the State Engineer was the proper authority to administer both the Wind River Tribes' federal Indian reserved water right and state water rights within the WRIR.¹²⁶ Justice Macy based his determination on separation of powers doctrine and the *Big Horn I* determination that the State Engineer had a duty to "monitor" the Wind River Tribes' federal Indian reserved water right.¹²⁷

126. *Big Horn III*, 835 P.2d at 283.

127. *Id.* at 282.

Justice Macy determined that the state district court violated the separation of powers doctrine by removing the State Engineer as the administrative authority over water rights within the WRIR.¹²⁸ According to Justice Macy, the state district court decision in *Big Horn iii* infringed upon the constitutional authority of the executive branch.¹²⁹ The Wyoming Constitution empowers the State Engineer to administer all water within the state which, by definition, is the property of the state.¹³⁰

In *Big Horn III*, Justice Macy reaffirmed the State Engineer's monitoring duties under the *Big Horn I* decision.¹³¹ The court in *Big Horn I* distinguished monitoring from administration.¹³² The State Engineer's duty to monitor the Wind River Tribes' federal Indian reserved water right is a lesser authority, requiring enforcement by the district court.¹³³ A greater authority is implied by administration, which is the term used by Justice Macy in *Big Horn III*.¹³⁴ It is uncertain what ramifications issue from Justice Macy's use of the term "administration", but it is certain that Justice Macy removed the Tribal Water Board as the administrator of water rights within the WRIR for constitutional and pragmatic reasons.¹³⁵

B. Rationale Employed By Justice Thomas For The Majority

Wyoming Supreme Court Justice Thomas agreed with the pragmatic rationale adopted by Justice Macy which led to the conclusion that the State Engineer was the proper administrator of water rights within the WRIR.¹³⁶ However, Justice Thomas focused his concurring opinion on the sovereignty struggle between the State of Wyoming and the Wind River Tribes.¹³⁷

Justice Thomas reasoned that the state is the sovereign over the "ceded" portion of the WRIR north of the Wind River.¹³⁸ (See map Appendix A). The northern portion of the reservation was subject to the allotment policies of the early 1900's and is a "checkerboard" mix of land ownership status.¹³⁹ According to this rationale, Justice Thomas

128. *Id.*

129. *Id.*

130. *Id.* at 281.

131. *Id.* at 283.

132. *Big Horn I*, 753 P.2d at 115. See *supra* note 58 and accompanying text.

133. *Id.*

134. *Big Horn III*, 835 P.2d at 275.

135. *Id.* at 282-83.

136. *Id.* at 284.

137. *Id.* at 283.

138. *Id.* at 284.

139. See generally *id.* at 284 (referring to Justice Thomas' dissent in *Big Horn I*, 753 P.2d at 119-135).

determined that the Wind River Tribes retain sovereignty over the "diminished" trust portion of their reservation south of the Wind River.¹⁴⁰ However, Justice Thomas reasoned that pragmatism demanded a unified administrative authority vested in the State Engineer over both portions of the WRIR with the district court enforcing the Wind River Tribes' federal Indian reserved water right.¹⁴¹

C. Rationale Employed By Justice Brown Concurring With The Majority

Justice Brown concurred with the pragmatism of Justices Macy and Thomas in that the State Engineer is the proper administrator of water rights subject to the *Big Horn III* litigation.¹⁴² The majority reasoned that dual administration by the Wind River Tribes and the State Engineer was unworkable and would invite continuing litigation of the matter.¹⁴³

D. Rationale Employed By Justice Cardine To Form The Dissent

Justice Cardine dissented from the conclusion that the State Engineer should administer the Wind River Tribes' federal Indian reserved water right pursuant to state law.¹⁴⁴ Rather, Justice Cardine determined that the Wind River Tribes and the State Engineer should jointly administer water rights within the WRIR.¹⁴⁵ The state district court would resolve any disputes between the administrative authorities.¹⁴⁶ Justice Cardine viewed joint administration as the appropriate middle ground between the wasteful litigious win-all and lose-all extremes.¹⁴⁷

E. Rationale Employed By Justice Golden To Form The Dissent

Justice Golden also dissented from the majority, and concluded that the district court correctly established the Tribal Water Board as the administrator of all water rights within the WRIR.¹⁴⁸ Justice Golden reasoned that the district court did not violate the separation of powers doctrine because it did not remove the State Engineer from a constitution-

140. *Big Horn III*, 835 P.2d at 284.

141. *Id.* But see *infra* note 152.

142. *Id.* at 290.

143. *Id.*

144. *Id.* at 285.

145. *Id.*

146. *Id.* The question remains as to whether the state district court can enjoin the Wind River Tribes from diverting on the WRIR without a waiver of tribal sovereign immunity.

147. *Id.* at 288.

148. *Id.* at 296.

ally granted authority.¹⁴⁹ Rather, the court granted the State Engineer authority as river master to enforce the Wind River Tribes' federal Indian reserved water right pursuant to federal law.¹⁵⁰ Justice Golden further reasoned that the Wind River Tribes retained their inherent sovereign power to administrate all water rights within the WRIR and that this power should be exercised by the Wind River Tribes in light of the State Engineer's unwillingness to enforce their federal Indian reserved water right.¹⁵¹

F. Impact Of Administration Decision Within The Wind-Big Horn River System

Certainly, the Tribal Water Board no longer has the sole authority to administrate water rights within the WRIR. It remains unclear whether the State Engineer has full administrative authority, or a lesser duty to monitor the Wind River Tribes' federal Indian reserved water right. The uniform administration of the entire Wind-Big Horn River system has logical appeal for reason of decisive, efficient water resources management.¹⁵² However, any failure by the parties or the state courts to provide for equitable joint administration of the shared water resources, as urged by Justice Cardine would maintain the incentives for litigation as the general adjudication continues.

The practical result of the state supreme court decision in Big Horn III is that water right administration is more unified than under the district court decision in Big Horn iii. The state exclusively administers water rights on the northern "ceded" portion of the WRIR.¹⁵³ The state and the Tribal Water Engineer jointly administer private diversion ditches on the southern "diminished" portion of the reservation.¹⁵⁴ The Bureau of Indian Affairs exclusively administers its diversion facilities on the southern "diminished" portion of the WRIR.¹⁵⁵

149. *See generally id.*

150. *Id.* at 297-98.

151. *Id.* at 300.

152. *But see* S. Williams, *Indian Winters Water Rights Administration: Averting New War*, 11 Pub. Land L. Rev. 53, 62 (1990). Author supports sole administration by the Tribal Water Board because "two sovereigns simply cannot impose conflicting standards upon a geographically unified resource such as water."

153. Telephone Interview with Bobby Lane, Hydrographer, Water Division No. 3, State Board of Control, Riverton, Wyoming (Nov. 12, 1992).

154. *Id.*

155. *Id.*

CONCLUSIONS

Better one handful with tranquillity than two fistfuls with toil and chasing after the wind. Eccles. 4:6.

The Wyoming Supreme Court in *Big Horn III* solved the maze created by the interplay of state and federal water law necessitated by the general adjudication of rights to use water in the Wind-Big Horn River system. In their separate opinions, the justices traced disparate analytical paths towards resolution of the maze. However, none of the justices took the most appropriate analytical path. The most appropriate analytical path through the maze depends on a coherent application of the *Winters* doctrine to the issues which confronted the state supreme court in *Big Horn III*.

The *Winters* doctrine creates a necessary implication that water rights were reserved from state appropriation even though the federal document creating the reservation of land is silent regarding water.¹⁵⁶ The priority of the federal Indian reserved water right is the date of the treaty or legislation creating the federal reservation.¹⁵⁷

According to *Cappaert*¹⁵⁸ and *New Mexico*,¹⁵⁹ two non-Indian federal reserved water right cases, the amount of water reserved from state appropriation is limited to the amount of water necessary to accomplish the primary purpose(s) of the federal reservation.¹⁶⁰ The PIA method for quantifying the amount of the federal Indian reserved water right was established by the United States Supreme Court in *Arizona*.¹⁶¹ The PIA quantification method does not implicitly limit the use of the federal Indian reserved water right to irrigation under the supplemental decree in *Arizona*.¹⁶² However, the purpose of the reservation does limit the use of the federal Indian reserved water right.

The rationale employed by the United States Supreme Court in *New Mexico*¹⁶³ was extended to Indian reservations by *Adair*;¹⁶⁴ any use of the federal Indian reserved water right for purposes other than that for which the reservation was established must be made pursuant to

156. Getches, *supra* note 108, at 309.

157. *Id.* at 319.

158. See generally *Cappaert*, 426 U.S. 128.

159. See generally *New Mexico*, 438 U.S. 696.

160. Getches, *supra* note 108, at 320.

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

162. *Arizona*, 439 U.S. at 422.

163. *New Mexico*, 438 U.S. 696.

164. *Adair*, 723 F.2d 1394. But see P. Kirk, Note, *Water Law-Indian Law-Cowboys, Indians and Reserved Water Rights: May a State Court Limit How Indian Tribes Use Their Water?*, 28 Land & Water L. Rev. 467, 483-484 (1993).

state law. The limitation is an inherent characteristic of a water right reserved from appropriation pursuant to state law for accomplishing the purpose(s) of the federal reservation of land. The limitation is not a creature of the pressures applied to a federal Indian reserved water right from competing water rights appropriated and administered pursuant to the laws of the sovereign state.

Tribal federal Indian reserved water rights are property rights, and as such are subject to tribal sovereignty. The regulation of the federal Indian reserved water right is an exercise of sovereign power.¹⁶⁵ Sole tribal regulation of their federal Indian reserved water right has been upheld by the Ninth Circuit Court of Appeals for stream systems that are contained within the confines of the reservation in *Walton*.¹⁶⁶ State regulation has been upheld by the federal court in *Anderson* for stream systems that extend beyond the boundaries of the reservation.¹⁶⁷ The factual situation on the WRIR is analogous to the situation in *Anderson*.

Justice Thomas described the WRIR as having two distinct characteristics; a "ceded" portion north of the Wind River and a "diminished" portion south of the Wind River.¹⁶⁸ Historical events regarding the dealings between the Wind River Tribes and the United States support Justice Thomas' analysis.¹⁶⁹ The Wind River serves as a boundary between the "ceded" and "diminished" portions of the WRIR and is subject to regulation by the State Engineer according to the reasoning adopted in *Anderson*. However, the issue of State Engineer regulation of the Wind River Tribes' federal Indian reserved water right requires further analysis to determine whether state regulation has been preempted by federal law, or whether state regulation unduly infringes upon tribal sovereignty.

Federal water law concerning administration of water rights is far from comprehensive and does not represent a pervasive dominant regulatory system indicative of a strong federal interest in actual water use administration. However, Wyoming water law is excruciatingly explicit regarding the administration of state water rights by the State Engineer.¹⁷⁰ Both federal and Wyoming water law serve to ensure the

165. *Big Horn III*, 835 P.2d at 300 (J., Golden, dissenting) (citing *Colville Confederated Tribes*, 647 F.2d 42, 52. See *supra* text accompanying note 7.

166. *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985).

167. *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

168. *Big Horn III*, 835 P.2d at 284. See *supra* note 139.

169. *Id.*

170. See generally *Rice v. Rehner*, 463 U.S. 713 (1983). The *Rice* test for federal preemption analyzes three factors: (1) whether federal law so pervades the subject matter of the dispute so as to leave no void for state law to operate; (2) whether federal regulation is dominant over state regulation of the subject matter in dispute to protect an overwhelming federal interest; (3) whether the operation of state law conflicts, or is contrary to federal

beneficial application of water by avoiding waste through misuse of water resources. Upon analysis, State Engineer regulation of water rights on the Wind-Big Horn River system has not been preempted by the operation of federal water law.¹⁷¹

Water administration in the arid West is one of the preeminent acts of sovereignty by a legitimate government. Precedent pertaining to land use issues or judicial jurisdiction must be carefully employed to water conflicts so that the factual oddities of water resource control are analyzed honestly. As a usufructuary right, water rights are possessory only for a brief time until the water is reused by downstream appropriators. Legitimate administration of water resources must guarantee the beneficial use of water and protect the property rights of others according to the prior appropriation system.

The Wind River Tribes' federal Indian reserved water right is the most senior appropriation on the Wind-Big Horn River system and has priority over all subsequent appropriators under the state regulatory regime. The State Engineer is under an obligation to enforce the Wind River Tribes' federal Indian reserved water right against impairment from unlawful diversions by "junior" appropriators. State regulation must be nondiscriminatory towards the Wind River Tribes' vested property interest in the use of their federal Indian reserved water right.¹⁷²

law. Reliance by the Wind River Tribes on the Court's rationale in *Montana v. United States*, 450 U.S. 544 (1981), that zoning authority must not threaten tribal political integrity, economic security, or welfare, is subject to the Court's subsequent rationale in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). In *Brendale*, the Court allowed non-tribal zoning authority over the "open" area of a reservation and restricted tribal zoning authority to the "closed" portion of the reservation. Although both *Montana* and *Brendale* will most likely be applied to cases involving the administration of *Winters* water rights, one author has stated that these cases arguably are not applicable to water rights administration because of the fluid nature of the resource as opposed to land use regulation. Williams, *infra* note 175.

But see *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985). Tribal court jurisdiction was extended to determine civil damages against a state school district in tribal court. Tribal court jurisdiction was a matter of sovereignty and was assumed if not expressly prevented by Congress. Compare with *Dry Creek Lodge, Inc. v. Arapaho & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied sub nom.* *Shoshone and Arapaho Tribes v. Dry Creek Lodge, Inc.*, 449 U.S. 1118 (1981). The Tenth Circuit allowed a non-Indian corporation on fee simple land within the WRIR to bring an Indian Civil Rights Act claim in federal court after the corporation was denied access to the tribal court.

171. Wyo. Const. art. VIII, 2; see *supra* text accompanying notes 27-29.

172. See generally *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). In *Cotton*, the Court analyzed state taxation of oil and gas activities on a reservation as follows: (1) whether state taxation was discriminatory; (2) whether the state was expressly preempted by Congress; (3) but, concurrent state and tribal jurisdiction is allowable if; (4) the state interest is more than merely to generate revenue, and; (5) the impact of state jurisdiction on tribal self-government is less weighty than the interest of the state served by concurrent

Both Wyoming and the Wind River Tribes have legitimate interests in exercising concurrent regulatory control over water rights from Wind-Big Horn River system. The State Engineer has an obligation to administrate water resources within the Wind-Big Horn River system so as to protect the rights of all water right appropriators and prevent wasteful misuse of scarce water supplies. The Wind River Tribes have a legitimate interest in controlling the application of their federal Indian reserved water right towards beneficial use according to the purpose of the WRIR.

Water rights administration is in essence a practice in pragmatism. As such, it is dependent upon the legitimate exercise of authority in accordance with technical expertise. Both the Tribal Water Board and the State Engineer have the necessary technical expertise to administer water rights. The State Engineer has a more thoroughly developed regulatory infrastructure than the Tribal Water Board does at this point in time. Shortcomings in the Tribal Water Board regulatory infrastructure are not insurmountable, and should not prevent tribal regulation of the federal Indian reserved water right on the "diminished" portion of the WRIR.

Dual administration by the Wind River Tribes' and the State does not represent an overwhelming technical difficulty. However, technical coordination between the Wind River Tribes' and the State is only one part of an equation for effective water rights administration. Policy coordination between the Wind River Tribes and the State is a critical factor for ensuring proper administration and protection of various water right appropriations within the Wind-Big Horn River system.

The vested interest of water appropriators pursuant to Wyoming water rights and the federal Indian reserved water right must be protected by appropriate, coordinated administrative decision making by the Wind River Tribes and the State. Administrative decision making in which water rights are applied as weapons to further objectives that have been defeated in past litigation will be a disservice to all water appropriators within the Wind-Big Horn River system.

RECOMMENDATIONS

The federal Indian reserved water right awarded to the Wind River Tribes in *Big Horn I* is limited to the purpose of the WRIR established by the 1868 Treaty.¹⁷³ The Wyoming Supreme Court affirmed the district court interpretation that the 1868 Treaty established an

state and tribal jurisdiction.

173. See *supra* text accompanying note 19.

agricultural purpose for the WRIR.¹⁷⁴ The decision of the state supreme court in *Big Horn I* is final because the Wind River Tribes' petition to the United States Supreme Court for a writ of certiorari was denied.¹⁷⁵ Therefore, the Wind River Tribes' future federal Indian reserved water right can only be used for the sole agricultural purpose of the WRIR. Dual administration of the federal Indian reserved water right by both the Tribal Water Board and the State Engineer is the most appropriate solution given the situation of the WRIR within Water Division No. 3. The Tribal Water Board through the Tribal Water Engineer should administrate the federal Indian reserved water right on the "diminished" portion of the WRIR. The State Engineer should administrate the federal Indian reserved water right in the "ceded" portion of the WRIR. The BIA should continue to administrate the distribution of water within the federal projects on the "diminished" portion of the WRIR. However, the federal role should be limited to project water distribution and not extend to administration of the Wind-Big Horn River system.¹⁷⁶

The State Engineer and the Tribal Water Engineer have established a good working relationship, but any conflicts arising between these administrators should be resolved by arbitration or similar dispute resolution device. The parties should foster the working relationships between the administrators so that the cooperative effort may extend to the political operators within Tribal and State and federal governments.

The Wyoming Supreme Court decision in *Big Horn III* creates an opportunity for the parties to negotiate an agreeable settlement which would, after ratification by Congress, avoid the certain disappointing results of future hostile litigation. The bargaining position of the Wind River Tribes is enhanced by their ownership of the federal Indian reserved water right which has the most senior priority within the Wind-Big Horn River system. A negotiated settlement between the parties should determine the use and administration of the Wind River Tribes' federal Indian reserved water right from the Wind-Big Horn River system.

174. *Big Horn I*, 753 P.2d at 95; see *supra* text accompanying note 45.

175. 488 U.S. 1040 (1989); see *supra* text accompanying note 61. But see S. Williams, *The Winters Doctrine on Water Administration*, 36 Rocky Mtn. Min. L. Inst. 24-1, 24-6 (1990). Author stated that the Wyoming Supreme Court affirmance of the state district court determination that the purpose of the WRIR was solely for agriculture rather than a homeland was an "incorrect ruling." The restrictive interpretation of the 1868 Treaty was, in the author's view, offset by the award of approximately one-half million acre-feet of *Winters* water rights to the Wind River Tribes.

176. *Id.* at 24-8. Author stated that no federal criteria or judicial limitations exist for administration of *Winters* water rights.

The federal government has a role as trustee for the Wind River Tribes and must also be included as a participant in any negotiated settlement between the Wind River Tribes and the state.¹⁷⁷ The policy of the Bush administration was to enter into negotiated settlements of tribal water rights disputes.¹⁷⁸ The federal role should also serve as a check on the Wind River Tribes beneficial use of their federal Indian reserved water rights.¹⁷⁹

The negotiated settlement should accommodate changing the express purpose of the WRIR from an agricultural reserve to a homeland for the Wind River Tribes. This change could be accomplished by Congressional amendment to the 1868 Treaty.¹⁸⁰ The amended 1868 Treaty would remove the restriction now imposed on the Wind River Tribes' federal Indian reserved water right by the Wyoming Supreme Court decision in *Big Horn III*. A negotiated settlement would afford water appropriators with a degree of certainty regarding water use from the Wind-Big Horn River system. Certainty is the one result that has eluded the parties involved with the Wind-Big Horn River litigation since 1977.

Chasing the wind is not solely a Wyoming pastime. Other federal Indian reserved water right lawsuits are on the horizon, but have not matured to the same extent as the Wind-Big Horn River litigation. For those who are concerned with federal Indian reserved water right conflicts, two fundamental questions remain unanswered by the Wyoming Supreme Court decision in *Big Horn III*: how do the chasers know when they have caught the wind and what do they have in hand once the chase is over?

Tom Kinney

177. See S. Williams, *Indian Winters Water Rights Administration: Averting New War*, 11 Pub. Land L. Rev. 53, 54-55 (1990). Author stated that the federal role is to "shepherd" and "protect" tribal water administration so as to ensure rational tribal decisions and avoid "jeopardiz[ing] the value of tribal water rights."

178. Puyallup Tribe of Indians Settlement Act, 55 Fed. Reg. 9223 (1989).

179. J. Walker & S. Williams, *Indian Reserved Water Rights*, 5 Nat. Resources & Env't 6, 80 (1991). The authors assert that tribal authorities should be given wide latitude by the federal government concerning regulation of federal Indian reserved water rights. The federal role should be limited to assure that the tribal authorities have acted rationally so as to prevent a wasteful use of their *Winters* water right.

180. An amendment to the 1868 Treaty should specifically express that the intent of Congress in 1868 was to establish a homeland for the Wind River Tribes, thus avoiding the possibility of a present date amendment inferring a present intent of Congress which might erode the rationale justifying an 1868 priority date for the Wind River Tribes' federal reserved water right.