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## WYOMING'S *BIG HORN* GENERAL STREAM ADJUDICATION

*Jason A. Robison\**

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## I. INTRODUCTION

“The seat may be warm now, Mr. Master, but the chair in which you sit is truly the hot seat. . . . The stakes in this case are very, very high.”<sup>1</sup> Special Master and former Wyoming Congressman Teno Roncalio was the recipient of this message. It came from Wyoming Attorney General John Troughton on January 26, 1981. The setting was Judge Ewing Kerr’s courtroom in Cheyenne, Wyoming. It was the first day of a sixteen-month trial over a matter that, more than any other, would distinguish a general stream adjudication that had been initiated by the State of Wyoming four years prior and ultimately would span the next four decades—an adjudication of water rights in the Wind-Big Horn Basin (colloquially, the “*Big Horn* adjudication”). The issue at hand concerned the existence, nature, and scope of a water right held by the Eastern Shoshone and Northern Arapaho tribes on Wyoming’s sole Indian reservation, the Wind River Reservation, under the Second Treaty of Fort Bridger (1868). Counsel for the United States, Regina Slater, could not have agreed more fully with the attorney general’s assessment of the height of the stakes and the temperature of the special master’s seat. “Your Honor, this morning begins what the United States regards as probably one of the most important cases that has ever occurred in the history of the United States in relation to the Shoshone and Arapahoe Tribes and the Wind River Indian Reservation,” Ms. Slater explained. “This case . . . will resolve, hopefully, the rights of the Tribes to the water that is necessary for them to continue as a viable community of people in the area which has been their home since well before the history books record the Treaty of 1868.”<sup>2</sup> Attorney General Troughton did not dispute this remark or dismiss it offhand. He acknowledged that the tribes had been “given hope by the federal government in 1868 . . . that under the Winters Doctrine sufficient water for the purposes of the reservation

<sup>1</sup> Trial Transcript 50 (January 26, 1981), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/O5W4SS0000.pdf> [hereinafter Trial Transcript].

<sup>2</sup> *Id.* at 37.

were employed by the creation of the reservation.”<sup>3</sup> The rub in his view was that “non-Indians were given similar hope.”<sup>4</sup> The same federal officials who had “held out hope under the Winters Doctrine to the Indian tribes,” according to the attorney general, also had “held out hope to the non-Indian irrigators under the Carey Acts, the Homestead Acts, and the Reclamation Acts.”<sup>5</sup>

This initial dialogue before Special Master Roncalio captured the essence of this defining phase of the *Big Horn* adjudication, setting the stage not just for the sixteen-month trial over which the special master would preside, but also a subsequent appeal that would arrive at the U.S. Supreme Court eight years later.<sup>6</sup> “For the first time in their history, the Shoshone and Arapahoe Tribes are poised to build a sustained and productive reservation agricultural economy” asserted tribal advocate Susan Williams at oral argument before the Court.<sup>7</sup> “This is what their ancestors envisioned in 1868 and what the tribes must do in 1989 to alleviate staggering unemployment and poverty-related social ills on this reservation.”<sup>8</sup> Although the tribes should not be restricted from using water afforded by their water right for purposes other than agriculture in Ms. Williams’s view,<sup>9</sup> unemployment among tribal members was seventy percent at the time, so “expanded agriculture and related business, even if only as subsistence [could] make a real difference.”<sup>10</sup> On the other hand, what impacts would the tribes’ water use have on the lives and livelihoods of non-Indian parties? Counsel for the State of Wyoming, Michael White, painted a grim picture. It could result in a “gallon-for-gallon” reduction for state water rights holders he argued, pointing to an observation made by the state district court that “holders of state awarded water rights will find their formerly valuable water rights worthless.”<sup>11</sup> These were

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<sup>3</sup> *Id.* at 56.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> A copy of the Supreme Court oral argument transcript—and a recording of the oral argument—can be accessed at Oyez, IIT Chicago-Kent College of Law, *Wyoming v. United States*, [http://www.oyez.org/cases/1980-1989/1988/1988\\_88\\_309](http://www.oyez.org/cases/1980-1989/1988/1988_88_309) (last visited March 17, 2015) [hereinafter *Supreme Court Transcript*].

<sup>7</sup> *Id.* at 20.

<sup>8</sup> *Id.*

<sup>9</sup> Responding to a query regarding whether the tribes’ water right “should incorporate or be used to maintain instream flows,” Ms. Williams replied that the water right had been set aside in 1868 “primarily for agricultural purposes,” but that in modern times the tribes “should not be subject to any restrictions as to transfer of uses because no other water rights holder in the country is so similarly restricted.” *Id.* at 20. It was former Chief Justice Rehnquist with whom Ms. Williams shared this exchange. Susan Williams, *Results Following Litigation: The Wind River Tribes/Big Horn River*, in *THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL 171* (Barbara Cosens and Judith V. Royster eds. 2012).

<sup>10</sup> *Supreme Court Transcript*, *supra* note 6, at 19.

<sup>11</sup> *Id.* at 20–21.

weighty concerns leveraged by counsel on both sides. Adding further to their gravity were multiple questions and remarks from the Justices suggesting their disposition of the case very well could alter the Court's existing legal doctrine governing tribal water rights nationally.<sup>12</sup>

There are proverbial miles to go to fulfill the essential purpose of this article—which is to illuminate the *Big Horn* adjudication's thirty-seven-year history—but these vignettes provide probative initial illustrations of the proceeding's relevance, historically and prospectively, within the State of Wyoming, the American West as a region, and the corpus of U.S. jurisprudence that addresses intersovereign relations over water resources. It would be an impossible task to recount the adjudication's history in a comprehensive manner in the pages that follow. Their content is drawn mainly from primary sources contained in a digital archive created for the *Big Horn* adjudication by the State of Wyoming.<sup>13</sup> These materials are abundant—and earnestly commended to any serious student of the adjudication—yet even so do not themselves shed light on the full scope of economic, environmental, political, and social factors that collectively have made up the context in which the adjudication has been situated.<sup>14</sup> In this regard, the narrative that follows espouses the view that law (water law and otherwise) is “organic”—that it is “part of a time and a place, the product of a specific time and actual place”<sup>15</sup>—and it is my sincere hope that the discussion below offers a useful jumping-off point for those who wish to learn more about the inner workings of the *Big Horn* adjudication and its surrounding context. This account of these matters begins in Part II with an overview of the geography, hydrology, and complex land ownership pattern of the Wind-Big Horn Basin. Part III then transitions from the physical to the legal landscape, canvassing seminal U.S. water law doctrines that had come into existence prior to the adjudication's commencement and served as its backdrop. Part IV, in turn, chronicles the adjudication's history. It surveys the thirty-seven-year period spanning from the State of Wyoming's initiation of the adjudication in January 1977 to Judge Robert Skar's issuance of an order concluding the adjudication in September 2014.<sup>16</sup> Part V draws the article to a

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<sup>12</sup> For a more detailed discussion of the case, *Wyoming v. United States*, see *infra* notes 272–94 and accompanying text

<sup>13</sup> Washakie County, Big Horn Adjudication, Chronological Court Record, <http://bhrac.washakiecounty.net/Searches.aspx?SearchIndex=BHCR> (last visited March 17, 2015).

<sup>14</sup> For an excellent contextual perspective on the *Big Horn* adjudication, see GEOFFREY O'GARA, *WHAT YOU SEE IN CLEAR WATER: INDIANS, WHITES, AND A BATTLE OVER WATER IN THE AMERICAN WEST* (2000).

<sup>15</sup> CHARLES F. WILKINSON, *FIRE ON THE PLATEAU: CONFLICT AND ENDURANCE IN THE AMERICAN WEST* 81 (1999).

<sup>16</sup> Since Judge Skar's issuance of the final order concluding the *Big Horn* adjudication, two appeals have been filed in the Wyoming Supreme Court challenging very narrow decisions made regarding two state law-based water rights (permits) at issue in Phase III of the adjudication. These appeals have been filed by Ms. Betty Whitt and Mr. Frank E. Mohr, respectively, and they are currently pending as of the time of this writing. For updates on the Whitt appeal, see Wyoming Judicial Branch, Clerk's Office Supreme Court, Wyoming Appellate E-Filing, <https://efiling>.

close with reflections on the adjudication's overarching significance and the path that lies ahead.

## II. WIND-BIG HORN BASIN

### A. *Of Mountains, Plains and Rivers*

Encompassing an area of nearly 22,900 square miles in Wyoming's northwestern corner—equivalent to twenty-three percent of the state's overall land base—the Wind-Big Horn Basin comprises a landscape defined by a breathtaking combination of broad, rolling plains and high mountains.<sup>17</sup> It is a basin rimmed by alpine stretches of the Rocky Mountains that inspired Albert Bierstadt's nineteenth-century paintings of the American West such as *Lander's Peak*.<sup>18</sup> Included among these majestic mountains are the Wind River Range in the southwest, the Big Horn Range in the northeast, the Absaroka (formerly Yellowstone) Range in the east, and the lower-lying Owl Creek and Bridger ranges dividing the Wind and Big Horn basins in the south.<sup>19</sup> While the basin is home to Wyoming's highest peak—Gannett Peak (13,804 feet)—its elevation drops to nearly 3,500 feet where the Big Horn River crosses into Montana.<sup>20</sup> Falling within the bookends of this roughly 10,000 feet of topographical relief is a plethora of alpine tundra, high-mountain forests, sagebrush-covered rolling hills, flat, tree-lined river valleys, and irrigated meadows.<sup>21</sup>

Although referred to throughout this article as the “Wind-Big Horn Basin,” the hydrology of this area is slightly more nuanced and involves a total of five sub-basins: the Wind River Basin, Big Horn Basin, Clarks Fork Basin, Yellowstone

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[courts.state.wy.us/public/caseView.do?csIID=16935](http://courts.state.wy.us/public/caseView.do?csIID=16935) (last visited May 5, 2015). For updates on the Mohr appeal, see Wyoming Judicial Branch, Clerk's Office Supreme Court, Wyoming Appellate E-Filing, <https://efiling.courts.state.wy.us/public/caseView.do?csIID=17057> (last visited May 5, 2015). Because of the discrete focus of these appeals on two specific permits—amidst the literally thousands of water rights addressed in the proceeding—this article treats Judge Skar's final order as effectively closing the *Big Horn* adjudication.

<sup>17</sup> WYOMING WATER DEVELOPMENT COMMISSION, WIND-BIGHORN BASIN PLAN UPDATE 10, 13 (2010), *available at* <http://waterplan.state.wy.us/plan/bighorn/2010/finalrept/finalrept.pdf> [hereinafter PLAN UPDATE].

<sup>18</sup> The Metropolitan Museum of Art, Hellbrunn Timeline of Art History, *The Rocky Mountains, Lander's Peak* (1863), <http://www.metmuseum.org/toah/works-of-art/07.123> (last visited March 17, 2015).

<sup>19</sup> For a useful map of these and other physiographic features of the basin, see WYOMING STATE GEOLOGICAL SURVEY, WIND/BIGHORN RIVER BASIN WATER PLAN UPDATE, GROUNDWATER STUDY LEVEL 1 (2008-2011): AVAILABLE GROUNDWATER DETERMINATION TECHNICAL MEMORANDUM 3-20 fig. 3-2 (2012), *available at* <http://waterplan.state.wy.us/plan/bighorn/2010/finalrept/gw-finalrept.pdf> [hereinafter GROUNDWATER STUDY].

<sup>20</sup> *Id.* at 3-21.

<sup>21</sup> *Id.* at 3-21; PLAN UPDATE, *supra* note 17, at 13–14.

Basin, and Madison/Gallatin Basin.<sup>22</sup> These five sub-basins collectively make up the State of Wyoming's "Water Division III."<sup>23</sup> By way of overview, the Wind River Basin (approximately 7,900 square miles) occupies the southern portion of this drainage area, the Big Horn Basin (approximately 12,500 square miles) spans across the northern portion, and the Clarks Fork, Yellowstone, and Madison/Gallatin basins (approximately 2,500 square miles collectively) comprise the northwest corner.<sup>24</sup> Most notable among the basin's watercourses are the Wind River and Big Horn River, which as a matter of hydrology, though not in name, are the same river. With its headwaters in the high mountains of the Wind River Basin's western rim, the Wind River leaves the basin flowing northward through the Wind River Canyon in the Owl Creek Range, and becomes the Big Horn River at a point called "Wedding of the Waters" just south of Thermopolis, Wyoming.<sup>25</sup> From Wedding of the Waters, the Big Horn River meanders north through the Big Horn Basin to the Montana state line, taking in flows from many tributaries.<sup>26</sup> Most of the water flowing in the Wind-Big Horn system originates as winter snowfall and spring and summer thunderstorms, and there is wide variation in average annual precipitation across the basin.<sup>27</sup> These averages range from six to ten inches in interior areas to up to seventy inches on peaks of 10,000 feet elevation or higher.<sup>28</sup> In addition to serving as the source of surface flows, this precipitation finds its way into more than 150 groundwater aquifers and confining units within the basin.<sup>29</sup> Ultimately, as a major contributor to the Missouri River drainage system, the basin's flows meander hundreds of miles from their Rocky Mountain area of origin to their terminus in the Gulf of Mexico.<sup>30</sup>

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<sup>22</sup> For a map of these five sub-basins, see PLAN UPDATE, *supra* note 17, at 11 fig. 4.

<sup>23</sup> For a map of the State of Wyoming's four water divisions, see State Engineer's Office, Board of Control, <http://seo.wyo.gov/agency-divisions/board-of-control> (last visited March 17, 2015).

<sup>24</sup> GROUNDWATER STUDY, *supra* note 19, at 3-18, 3-21, 3-24. The collective surface area of the Clarks Fork, Yellowstone, and Madison/Gallatin basins (2,500 square miles) has been calculated by subtracting the combined surface area of the Wind River and Big Horn basins (20,400 square miles) from the overall surface area of the drainage basin (22,883 square miles).

<sup>25</sup> *Id.* at 3-21; PLAN UPDATE, *supra* note 17, at 11 fig. 4.

<sup>26</sup> PLAN UPDATE, *supra* note 17, at 11 fig. 4. For lists of tributaries of the Wind and Big Horn rivers, see GROUNDWATER STUDY, *supra* note 19, at 3-23 tbl. 3-1 (Wind River), 3-24 tbl. 3-2 (Big Horn River).

<sup>27</sup> GROUNDWATER STUDY, *supra* note 19, at 3-21.

<sup>28</sup> *Id.* For a useful map of basin precipitation, see PLAN UPDATE, *supra* note 17, at 16 fig. 6.

<sup>29</sup> See generally GROUNDWATER STUDY, *supra* note 19, at 7-101 to 7-178 (providing detailed discussion of physical and chemical characteristics of basin's aquifers and confining units). As with average annual precipitation, there is wide variation in estimated annual aquifer recharge, with recharge rates ranging from as low as .25 inches per year in the basin's interior to up to 50 inches per year in the high mountains. *Id.* at 5-38 fig. 5-2. See also *id.* at 6-90 fig. 6-7 (displaying recharge rates as a percentage of precipitation).

<sup>30</sup> *Id.* at 3-21.



### *B. Of Lines, Maps and Ownership*

Superimposed on the landscape and waterscape of the Wind-Big Horn Basin, as painted in sweeping strokes above, is a complex land ownership pattern with interwoven federal, tribal, private, and state components.<sup>31</sup> More than 200 years of U.S. history make up the seams of this patchwork pattern and the associated “drawing of lines on a map [and] definition and allocation of ownership” through which it has come into being.<sup>32</sup> It is a pattern that, as will become evident below, held much significance within the *Big Horn* adjudication, serving largely to explain the diverse, numerous, and competing types of water rights requiring reconciliation.

Federal lands pervade the Wind-Big Horn Basin, constituting sixty-four percent of the basin’s land base—without accounting for the Wind River Indian Reservation—and thereby making the federal government the basin’s “majority” landowner.<sup>33</sup> Traced to their historical root, these federal lands derive from what has been called an “imperial fire sale” held on April 30, 1803, involving President Thomas Jefferson as the buyer and French Emperor Napoleon Bonaparte as the seller: the Louisiana Purchase.<sup>34</sup> Although the precise boundaries of the territory that the United States purchased for \$15 million were unclear at the time, subsequent instruments in the form of the Convention of 1818 between the United States and Great Britain, and the Adams-Onís Treaty in 1819 between the United States and Spain, would clarify the northern, western, and southwestern boundaries of the Louisiana Territory.<sup>35</sup> Situated on the eastern slope of the Continental Divide,<sup>36</sup> the Wind-Big Horn Basin was positioned directly along

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<sup>31</sup> For a useful map of the land ownership pattern in the basin, see Wyoming Water Development Office, Wyoming State Water Plan, Wind/Bighorn River Basin Plan Executive Summary, <http://waterplan.state.wy.us/plan/bighorn/2003/execsumm.html> (last visited March 17, 2015).

<sup>32</sup> PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 27 (1987).

<sup>33</sup> PLAN UPDATE, *supra* note 17, at 12, 13 fig. 5. For a useful map of federal lands within the basin, see *id.* at 71 fig. 30.

<sup>34</sup> RICHARD WHITE, *IT’S YOUR MISFORTUNE AND NONE OF MY OWN: A NEW HISTORY OF THE AMERICAN WEST* 62 (1991). An excellent map identifying the chronology of the Louisiana Purchase and other treaties and agreements forged by the United States and England, France, Mexico, and Spain in the nineteenth century—*i.e.*, in the course of U.S. territorial expansion—can be found in U.S. DEPARTMENT OF THE INTERIOR, U.S. GEOLOGICAL SURVEY, *THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA, TERRITORIAL ACQUISITIONS* (2005), [http://nationalmap.gov/small\\_scale/printable/images/pdf/territory/pagetaq3.pdf](http://nationalmap.gov/small_scale/printable/images/pdf/territory/pagetaq3.pdf) (last visited March 17, 2015).

<sup>35</sup> Clyde A. Milner II, *Introduction and Chronology*, in *THE OXFORD HISTORY OF THE AMERICAN WEST* 158 (Clyde A. Milner et al. eds. 1996); WHITE, *supra* note 34, at 62.

<sup>36</sup> PLAN UPDATE, *supra* note 17, at 10.



the territory's western border, thus fitting squarely within the terms of a deal that for less than four cents per acre added over 800,000 square miles to the United States and doubled its size.<sup>37</sup>

The contemporary concentration of federal lands in the Wind-Big Horn Basin reflects the historical fact that the United States has reserved for various purposes most of the lands over which it assumed ownership two centuries ago. Established on March 1, 1872, as a “public park or pleasuring-ground for the benefit and enjoyment of the people,”<sup>38</sup> the first federally administered national park in U.S. history, Yellowstone National Park, extends across eleven percent of the basin (2,512 square miles) in its northwest corner.<sup>39</sup> Abutting Yellowstone's eastern and southern borders are Shoshone National Forest and Bridger-Teton National Forest. The former was designated on March 30, 1891, as part of the first national forest in U.S. history—the “Yellowstone Park Timber Land Reserve”<sup>40</sup>—and the latter was established as two separate reserves, the Teton and Bridger National Forests, in 1897 and 1911, respectively.<sup>41</sup> Big Horn National Forest was similarly created in 1897 and arches across the basin's northeastern rim.<sup>42</sup> A total area of 4,759 square miles (twenty-one percent of the basin) falls within these national forests.<sup>43</sup> Complementing these two classes of federal lands are 6,952 square miles of lands administered by the Bureau of Land Management, which make up thirty percent of the basin.<sup>44</sup> Also noteworthy in this vein are

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<sup>37</sup> DEREK HAYES, HISTORICAL ATLAS OF THE AMERICAN WEST 65 (2009); Walter Nugent, *Comparing Wests*, in THE OXFORD HISTORY OF THE AMERICAN WEST 812 (Clyde A. Milner et al. eds., 1996).

<sup>38</sup> An Act to set apart a certain Tract of Land lying near the Head-waters of the Yellowstone River as a public Park, 17 Stat. 32 (1872). In accord with the quoted text, section 2 of this Act charged the Secretary of the Interior with adopting regulations to “provide for the preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition.” *Id.*

<sup>39</sup> PLAN UPDATE, *supra* note 17, at 12 tbl. 2; WHITE, *supra* note 34, at 410. The National Park Service also administers Big Horn Canyon National Recreation Area, which is located adjacent to Yellowtail Dam on the Big Horn River and encompasses more than 120,000 acres. National Park Service, Big Horn Canyon National Recreation Area, Management, <http://www.nps.gov/bica/parkmgmt/index.htm> (last visited March 17, 2015).

<sup>40</sup> The establishment dates and subsequent history of these national forests (and others) are accounted for exhaustively in appendix one of RICHARD C. DAVIS, ENCYCLOPEDIA OF AMERICAN FOREST AND CONSERVATION HISTORY (1983). The Forest History Society has posted an electronic copy of this appendix at <http://www.foresthistory.org/ASPNET/places/National%20Forests%20of%20the%20U.S.pdf> (last visited March 17, 2015).

<sup>41</sup> *Id.* at 8, 49. These two forests were administratively combined into the Bridger-Teton National Forest in 1973. *Id.* at 8, 49.

<sup>42</sup> *Id.* at 7.

<sup>43</sup> PLAN UPDATE, *supra* note 17, at 12 tbl. 2, 13 fig. 5.

<sup>44</sup> *Id.*

332 square miles of lands (equivalent to two percent of the basin)<sup>45</sup> encompassed within Bureau of Reclamation projects like the Boysen Unit, Riverton Unit, and Shoshone Project.<sup>46</sup>

Omitted from the discussion of federal lands thus far is again the State of Wyoming's sole Indian reservation: the Wind River Reservation. It encompasses 2,417 square miles of the Wind River Basin (equivalent to eleven percent of the overall basin's land base) and is jointly occupied by the Eastern Shoshone and Northern Arapaho tribes.<sup>47</sup> As expressed by the U.S. Supreme Court in 1938,<sup>48</sup> the reservation falls in "the choicest and best-watered portion of Wyoming," within a basin known as the "Warm Valley" that had been a favorite hunting and trapping area of American Indian tribes, including the Shoshone, long before formation of the treaty creating the reservation.<sup>49</sup> That treaty was the Second Treaty of Fort Bridger, which was formed by the United States, Eastern Shoshone Tribe, and Bannock Tribe on July 3, 1868, and ratified by Congress roughly eight months later.<sup>50</sup> It followed on the heels of a predecessor instrument, the First Treaty of Fort Bridger, that had been formed in 1863 and delineated as "Shoshonee country" a 44,672,000-acre tract spanning across portions of Colorado, Idaho, Utah, and Wyoming.<sup>51</sup> By the Second Treaty of Fort Bridger, the Shoshone Tribe

<sup>45</sup> *Id.*

<sup>46</sup> U.S. Department of the Interior, Bureau of Reclamation, Boysen Division, [http://www.usbr.gov/projects/Project.jsp?proj\\_Name=Boysen%20Division](http://www.usbr.gov/projects/Project.jsp?proj_Name=Boysen%20Division) (last visited March 17, 2015); U.S. Department of the Interior, Bureau of Reclamation, Riverton Unit, [http://www.usbr.gov/projects/Project.jsp?proj\\_Name=Riverton%20Unit](http://www.usbr.gov/projects/Project.jsp?proj_Name=Riverton%20Unit) (last visited March 17, 2015); U.S. Department of the Interior, Bureau of Reclamation, Shoshone Project, [http://www.usbr.gov/projects/Project.jsp?proj\\_Name=Shoshone%20Project](http://www.usbr.gov/projects/Project.jsp?proj_Name=Shoshone%20Project) (last visited March 17, 2015).

<sup>47</sup> PLAN UPDATE, *supra* note 17, at 12 tbl. 2, 13 fig. 5. Both tribes maintain websites that provide information about their histories and governmental institutions and programs. Eastern Shoshone Tribe, <http://easternshoshonetribe.org/> (last visited March 17, 2015); Northern Arapaho Tribe, <http://www.northernarapaho.com/> (last visited March 17, 2015). For useful historical sources, see HENRY EDWIN STAMM, *PEOPLE OF THE WIND RIVER: THE EASTERN SHOSHONES, 1825-1900* (1999); LORETTA FOWLER, *THE ARAPAHO* (1989); VIRGINIA COLE TRENHOLM, *THE ARAPAHOS, OUR PEOPLE* (1970); VIRGINIA COLE TRENHOLM & MAURINE CARLEY, *THE SHOSHONIS, SENTINELS OF THE ROCKIES* (1964).

<sup>48</sup> *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 114 (1938) (*Shoshone II*).

<sup>49</sup> *THE WIND RIVER RESERVATION, 1865-1910: HISTORICAL PHOTOGRAPHS AND ANECDOTES 1* (1984). For an insightful description of the Eastern Shoshone's selection of the Warm Valley for the reservation, see O'GARA, *supra* note 14, at 184 (quoting testimony of Shoshone Elder Starr Weed during Phase I of *Big Horn* adjudication).

<sup>50</sup> Treaty with the Eastern Band Shoshoni and Bannock, 15 Stat. 673 (1868) [hereinafter Second Treaty]. The Bannock Tribe resides with the Northern Shoshone Tribe—as part of the federally recognized Shoshone-Bannock Tribes—on the Fort Hall Reservation in southeastern Idaho, which was also established by the Second Treaty of Fort Bridger in 1868. Shoshone-Bannock Tribes, History of the Shoshone-Bannock Tribes, <http://www.shoshonebannocktribes.com/shoshone-bannock-history.html> (last visited March 17, 2015).

<sup>51</sup> Treaty with the Eastern Shoshoni, 18 Stat. 685 (1863) [hereinafter First Treaty]. A useful map of the original 44,672,000-acre tract can be found in *THE WIND RIVER RESERVATION*, *supra* note 49, at 7.

“relinquished to the United States [this] reservation of 44,672,000 acres,” as it has been described by the Supreme Court, “and accepted in exchange a reservation of 3,054,182 acres in Wyoming.”<sup>52</sup> The Second Treaty of Fort Bridger specified the boundaries of this reservation, restricted access to and settlement within it, and contained a promise that the tribe would make the reservation their “permanent home” and “make no permanent settlement elsewhere.”<sup>53</sup> The U.S. military subsequently moved the Northern Arapaho Tribe onto the reservation ten years after the treaty had been formed.<sup>54</sup> At the time of this writing, slightly more than 4,000 Eastern Shoshone tribal members and 9,800 Northern Arapaho tribal members reside on the reservation.<sup>55</sup>

To be clear, the existing boundaries of the Wind River Indian Reservation are not those originally established by the Second Treaty of Fort Bridger, but rather constitute a “diminished reservation” whose diminution is attributable to a series of land purchase agreements that took place after the reservation had been created in 1868.<sup>56</sup> The first such agreement was the Brunot Agreement (or Lander Purchase) in 1872.<sup>57</sup> It changed the reservation’s southern boundary by ceding back to the United States 700,642 acres of land located south of the Popo Agie River for monetary compensation.<sup>58</sup> Next to follow in this series was the First McLaughlin Agreement (or Thermopolis Purchase) in 1897.<sup>59</sup> Again in exchange for cash payment, this agreement ceded to the United States 55,040 acres of land in and around Thermopolis, Wyoming, including the Big Horn Hot Springs.<sup>60</sup> Last in this line, and most significant in terms of the cession size, was the Second

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<sup>52</sup> *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 485 (1937) (*Shoshone I*). Although the First Treaty of Fort Bridger expressly defined and described the boundaries of “Shoshonee country” in Article 4, nowhere in the treaty do the terms “reserve,” “reservation,” or the like appear in relation to the 44,672,000-acre tract. First Treaty, *supra* note 51, Art. 4. Nonetheless, in two different opinions in the 1930s, Justices Cardozo and Butler plainly do refer to the tract defined by the First Treaty as a “reservation” that had been “set apart for the Shoshone Tribe” and later “relinquished” or “ceded” to the United States in the Second Treaty. *Shoshone I*, 299 U.S. at 485; *Shoshone II*, 304 U.S. at 113–14.

<sup>53</sup> Second Treaty, *supra* note 50, at Arts. 2, 4.

<sup>54</sup> *Shoshone I*, 299 U.S. at 487–88. See also THE WIND RIVER RESERVATION, *supra* note 49, at 14.

<sup>55</sup> Eastern Shoshone Tribe, History, <http://easternshoshonetribe.org/about-us/> (last visited March 17, 2015); Northern Arapaho Tribe, Location, <http://www.northernarapaho.com/location> (last visited March 17, 2015).

<sup>56</sup> In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 753 P.2d 76, 84 (Wyo. 1988) (*Big Horn I*).

<sup>57</sup> An act to confirm an agreement made with the Shoshone Indians (eastern band) for the purchase of the south part of their reservation in Wyoming Territory, 18 Stat. 291 (1874).

<sup>58</sup> *Id.* at Arts. I–II. See also *Shoshone I*, 299 U.S. at 487; *Big Horn I*, 753 P.2d at 83.

<sup>59</sup> Agreement with the Shoshone and Arapahoe Tribes of Indians in Wyoming, 30 Stat. 93 (1897).

<sup>60</sup> *Id.* at Arts. I–III. See also *Shoshone I*, 299 U.S. at 489; *Big Horn I*, 753 P.2d at 84.

McLaughlin Agreement formed in 1905.<sup>61</sup> It entailed a transfer of 1,480,000 acres that the United States agreed to broker for sale under the homestead, townsite, coal, and mineral land laws.<sup>62</sup> The United States would either reimburse the tribes with the funds raised by these sales or, alternatively, expend these funds on the tribes' behalf for particular purposes, including securing water rights under state law and constructing and extending an irrigation system on the diminished reservation.<sup>63</sup> Cessions took place under this agreement until 1934, and in 1940 the Secretary of the Interior began restoring unceded lands to tribal ownership.<sup>64</sup> The Secretary also later reacquired ceded (and other) lands in the diminished reservation that previously had passed into private ownership. The size of the reservation has remained fairly stable since 1953,<sup>65</sup> and currently encompasses about 2,268,000 acres according to the Bureau of Indian Affairs.<sup>66</sup> Of this total acreage, 1,820,766 acres consist of trust land, including 1,719,566 acres of tribal land and 101,200 acres of allotted land.<sup>67</sup>

As is apparent from the discussion above, private landholdings of various types also are interspersed throughout the Wind-Big Horn Basin, making for the patchwork pattern of land ownership already mentioned. In total, 4,857 square miles of private lands exist within the basin, which equates to twenty-one percent of the land base.<sup>68</sup> The vast majority of these lands fall within the Wind River Basin and Big Horn Basin as opposed to the three smaller northwestern sub-basins noted earlier: Clarks Fork, Yellowstone, and Madison/Gallatin.<sup>69</sup> Although de minimis private lands can be found within the national forests identified above—Big Horn, Bridger-Teton, and Shoshone—a fair amount of these lands do exist within the Wind River Indian Reservation and across large swaths of

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<sup>61</sup> An act to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming and to make appropriations for carrying the same into effect, 33 Stat. 1016 (1905) [hereinafter Second McLaughlin Agreement].

<sup>62</sup> *Id.* at Arts. I–II. See also *Shoshone I*, 299 U.S. at 489; *Big Horn I*, 753 P.2d at 84.

<sup>63</sup> Second McLaughlin Agreement, *supra* note 61, at Arts. III–IV. The provision of this agreement calling for expenditures to secure state water rights, Article III, predated by approximately four years the Supreme Court's landmark decision in *Winters v. United States*, 207 U.S. 564 (1908). As discussed fully in Part III, *Winters* held that treaties like the Second Treaty of Fort Bridger could implicitly reserve water rights for tribes under federal law.

<sup>64</sup> *Big Horn I*, 753 P.2d at 84.

<sup>65</sup> *Id.*

<sup>66</sup> U.S. Department of the Interior, Bureau of Indian Affairs, Wind River Agency, <http://www.bia.gov/WhoWeAre/RegionalOffices/RockyMountain/WeAre/WindRiver/> (last visited March 17, 2015).

<sup>67</sup> Email from Ramon Nation, Deputy Superintendent, Wind River Agency, Bureau of Indian Affairs (January 5, 2015) (on file with author).

<sup>68</sup> PLAN UPDATE, *supra* note 17, at 12 tbl. 2, 13 fig. 5.

<sup>69</sup> This pattern can be gleaned by cross-referencing the hydrological and land ownership maps in (1) PLAN UPDATE, *supra* note 17, at 11 fig. 4, and (2) Wyoming Water Development Office, *supra* note 31.

public lands administered by the Bureau of Land Management.<sup>70</sup> The genesis of some of these lands can be traced to Congress's sale of them to non-Indians under the disposal era laws just mentioned (*e.g.*, 1862 Homestead Act), while other tracts originated due to Congress's allotment of commonly held reservation land to individual tribal members.<sup>71</sup>

With seventy-five percent and twenty-one percent of the Wind-Big Horn Basin in federal and private ownership, respectively, only a sliver of the basin's lands (four percent or 961 square miles) are owned by the State of Wyoming.<sup>72</sup> These lands consist of parks in various parts of the basin, including Boysen State Park near Wind River Canyon, Buffalo Bill State Park outside Cody, Hot Springs State Park in Thermopolis, and Sinks Canyon State Park just south of Lander.<sup>73</sup> To the extent that the small proportion of state-owned lands within the basin may surprise some readers, it can be explained by again going back to the Louisiana Purchase in 1803 and tracing the territorial and statehood acts that succeeded it. As highlighted earlier, the Wind-Big Horn Basin fell along the western edge of the 800,000 square-mile expanse covered by the Louisiana Purchase, as this expanse was later clarified by the Convention of 1818 and the Adams-Onis Treaty.<sup>74</sup> Following the federal government's assumption of ownership over this area, the lands encompassed within the basin became part of five different organized territories between 1803 and 1868, the latter bookend representing the year in which the Territory of Wyoming was established.<sup>75</sup> The sole provision of the Wyoming Territorial Act focusing on public land ownership concerned set asides for school lands from the township grid.<sup>76</sup> Thirty-two years later, the

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<sup>70</sup> Wyoming Water Development Office, *supra* note 31.

<sup>71</sup> See Second Treaty, *supra* note 50, at Art. 6 (providing for individual ownership of agricultural tracts by tribal members and their families and for culling out of such tracts from reservation land previously held in common); Second McLaughlin Agreement, *supra* note 61, at Art I (providing for allotment to individual tribal members of tracts within ceded portion of reservation or, alternatively, selection of new allotted tracts within diminished reservation by individual tribal members). For a fuller discussion of allotment, see *infra* notes 120–30 and accompanying text.

<sup>72</sup> PLAN UPDATE, *supra* note 17, at 12 tbl. 2, 13 fig. 5.

<sup>73</sup> *Id.* at 11 fig. 4.

<sup>74</sup> See *supra* notes 33–37 and accompanying text.

<sup>75</sup> These five organized territories included the Louisiana Territory (1805-1812), Missouri Territory (1812-1821), Nebraska Territory (1854-1861), Dakota Territory (1861-1863), Idaho Territory (1863-1864), and again Dakota Territory (1864-1868). The congressional acts establishing these territories can be found at 8 Stat. 331 (1805), 8 Stat. 743 (1812), 10 Stat. 277 (1854), 12 Stat. 239 (1861), and 12 Stat. 808 (1863). A map identifying how the Wyoming Territory was carved out from portions of the Dakota, Idaho, Nebraska, and Utah territories between 1861 and 1868 can be found in Craig Cooper, *A History of Water Law, Water Rights & Water Development in Wyoming* 20 (2002), available at [http://wwdc.state.wy.us/history/Wyoming\\_Water\\_Law\\_History.pdf](http://wwdc.state.wy.us/history/Wyoming_Water_Law_History.pdf).

<sup>76</sup> An act to provide a temporary Government for the Territory of Wyoming, 15 Stat. 178, 183 (1868).

Wyoming Statehood Act addressed public lands located within the state in a broader manner, granting specific types and quantities of these lands to the State of Wyoming upon its admission to the Union.<sup>77</sup> Transfers of public lands outside the narrow confines of these grants were not contemplated by the Act, however, as stated explicitly in Section 2: “[T]he State of Wyoming shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act . . . .”<sup>78</sup> In this manner, the federal government generally retained ownership of basin lands that it had acquired in 1803 through the Louisiana Purchase, leaving the State of Wyoming with a marginal interest.

### III. LEGAL LANDSCAPE

Just as the physical features of the Wind-Big Horn Basin—mountains, plains, rivers, and aquifers—defined the landscape and waterscape that would be subject to the *Big Horn* adjudication, so too would a body of jurisprudence that had evolved for over a century prior to the adjudication’s commencement define the legal rules governing the basin’s water resources. These rules set pillar-like parameters that would control how these precious flows would be allocated as well as by whom such decisions would be made. Extensive and often contentious line drawing had attended the historical formation of this corpus—line drawing that at bottom controlled access to the natural resource on which human habitation of, and virtually all forms of commerce within, the American West depended. The discussion below surveys the evolution of the legal rules comprising the adjudication’s backdrop in two strands: (1) those defining the diverse types of water rights that would inform the adjudication’s allocation-related decisions (“allocational jurisprudence”), and (2) those addressing the forum in which the existence, nature, and scope of these water rights would be decreed (“jurisdictional jurisprudence”).

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<sup>77</sup> An act to provide for the admission of the State of Wyoming into the Union, and for other purposes, 26 Stat. 222 (1890). Provisions of this Act addressing public lands and land grants included Section 2 (disclaiming any effect of the Act on Yellowstone National Park), Section 4 (providing for set asides for school lands), Section 6 (granting fifty sections of public lands for public buildings at state capital), Section 7 (entitling state to portion of proceeds from public land sales), Section 8 (vesting previously conferred university lands in state), Section 10 (granting 90,000 acres of land for agricultural college), and Section 11 (granting additional 500,000 acres of lands to state for specified purposes). *Id.* at 222–24.

<sup>78</sup> *Id.* at 224.



## A. Allocational Jurisprudence

### 1. Prior Appropriation Doctrine

The California Gold Rush of 1849 marks the entry point for this overview of existent water rights at the *Big Horn* adjudication's onset.<sup>79</sup> Out of this monumental event in U.S. history emerged the dominant legal doctrine utilized to allocate water resources in the western United States—more specifically, in the seventeen contiguous states located west of the Hundredth Meridian.<sup>80</sup> This doctrine is termed “prior appropriation.”<sup>81</sup> It is a doctrine whose genesis in U.S. law postdated legal rules that had been utilized for water allocation by Spanish and later Mexican communities in the U.S. Southwest for more than two centuries prior to the Treaty of Guadalupe Hidalgo's formation in 1848 at the close of the Mexican-American War.<sup>82</sup> It is also a doctrine that over the latter half of the nineteenth century throughout the western states and territories generally (though not wholly) supplanted a water law doctrine called riparianism that previously had taken hold in states located east of the Hundredth Meridian.<sup>83</sup> Rich histories accompany both Spanish and Mexican water law and riparianism, but for sake of brevity these predecessors are noted here only as context for what had become, eighty years before the *Big Horn* adjudication's commencement, the exclusive legal scheme for water allocation within Wyoming.

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<sup>79</sup> As described by Chief Justice Lucien Shaw of the California Supreme Court in the early twentieth century, “[n]o more spectacular migration of human beings was ever known in history than that of 1849 from all parts of the world to the gold-bearing lands of California.” Lucien Shaw, *The Development of the Law of the Waters in the West*, 10 CAL. L. REV. 443, 444 (1922).

<sup>80</sup> The Hundredth Meridian is a hydrological line that runs north to south through the middle of the Dakotas to Texas. Annual precipitation averages less than twenty inches westward of this line, although there is a good deal of variation in precipitation patterns across the seventeen contiguous western states. U.S. DEPARTMENT OF THE INTERIOR, U.S. GEOLOGICAL SURVEY, THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA, PRECIPITATION (2005), available at [http://nationalmap.gov/small\\_scale/printable/images/pdf/precip/pageprecip\\_us3.pdf](http://nationalmap.gov/small_scale/printable/images/pdf/precip/pageprecip_us3.pdf).

<sup>81</sup> Excellent sources on the history of the prior appropriation doctrine include DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY, 1848-1902 11–38 (1992); CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 231–35 (1992); Donald J. Pisani, *Enterprise and Equity: A Critique of Western Water Law in the Nineteenth Century*, 18 W. HIST. Q. 15 (1987); ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS 59–85 (1983).

<sup>82</sup> Excellent sources on Spanish and Mexican water law in the American West, including its treatment by U.S. courts after the Treaty of Guadalupe Hidalgo, include NORRIS HUNDLEY, JR., THE GREAT THIRST: CALIFORNIANS AND WATER: A HISTORY 27–64 (rev. ed. 2001); Peter L. Reich, *The “Hispanic” Roots of Prior Appropriation in Arizona*, 27 ARIZ. ST. L.J. 649 (1995); Peter L. Reich, *Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850*, 69 WASH. L. REV. 869 (1994); MICHAEL C. MEYER, WATER IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY, 1550–1850 (1984).

<sup>83</sup> Excellent sources on the history of riparianism include THEODORE STEINBERG: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND (2003); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 31–62 (1977).



It was again James Marshall's fever-inducing discovery of gold at Sutter's Mill on January 24, 1848, that precipitated the landmark event of U.S. history that gave rise to prior appropriation.<sup>84</sup> The doctrine initially originated as an extralegal scheme for allocating surface water among Forty-Niners working claims in the foothills of the Sierra Nevada Mountains. Roughly five years after these trespassers on the public domain had espoused prior appropriation as their informal system, the California Supreme Court would transmogrify it into formal legal doctrine in the seminal case of *Irwin v. Phillips*.<sup>85</sup> Leaving many dots associated with the doctrine's subsequent diffusion across the western states and territories unconnected for now, it suffices to say that prior appropriation spread as a legal transplant across the region during the half-century following *Irwin v. Phillips*.<sup>86</sup> Some western states and territories abided by the Colorado Supreme Court's historic 1882 decision in *Coffin v. Left Hand Ditch Co.*, regarding prior appropriation as their exclusive water law doctrine, and disavowing any application of riparianism (retrospective or prospective) within their borders.<sup>87</sup> Other states and territories followed the trail blazed by the California Supreme Court in the epic case of *Lux v. Haggin* in 1886.<sup>88</sup> Prior appropriation and riparianism would co-exist in these jurisdictions—albeit for a limited time in most instances.<sup>89</sup> The federal government's attitude toward prior appropriation's genesis and diffusion initially was one of acquiescence. After the Civil War, however, Congress expressly sanctioned the doctrine, and water rights that had been acquired under it, in the 1866 Mining Act, the 1870 Amendment to that Act, and the Desert Land Act of 1877.<sup>90</sup> It was in this incremental manner that “the customs of the miners [became] the law of western waters.”<sup>91</sup>

Reflecting the nature of its birthplace among the Forty-Niners, prior appropriation's key doctrinal tenets have remained twofold in the roughly 160 years since the California Gold Rush. First, the existence and scope of water rights founded on the doctrine, “appropriative rights,” hinge on ongoing “beneficial use” of water resources afforded to holders of these rights—in short, “use it or

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<sup>84</sup> WHITE, *supra* note 34, at 191.

<sup>85</sup> 5 Cal. 140 (1855).

<sup>86</sup> See, e.g., DUNBAR, *supra* note 81, at 73–85.

<sup>87</sup> *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882). This singular recognition of prior appropriation and disavowal of riparianism came to be known as the Colorado Doctrine. See, e.g., DUNBAR, *supra* note 81, at 81–84.

<sup>88</sup> *Lux v. Haggin*, 69 Cal. 255 (1886).

<sup>89</sup> This dual recognition of prior appropriation and riparianism came to be known as the California Doctrine. See, e.g., DUNBAR, *supra* note 81, at 84–85.

<sup>90</sup> See, e.g., *id.* at 76–77.

<sup>91</sup> *Id.* at 85.

lose it.”<sup>92</sup> Second, if inadequate water supplies exist to satisfy all parties whose appropriative rights attach to a water source, temporal priority governs which parties will be entitled to use available water. “First in time, first in right” is the shorthand expression of this tenet.<sup>93</sup> Parties with appropriative rights that bear older (“senior”) priority dates are authorized to make full use of the water resources to which they are entitled before holders of appropriative rights with more recent (“junior”) priority dates are entitled to any remainder.

Wyoming’s legal history exemplifies prior appropriation’s doctrinal evolution as surveyed here.<sup>94</sup> Legislation involving the doctrine was fairly abundant across the territorial period, elapsing from 1868 to 1890,<sup>95</sup> with prior appropriation’s tenets appearing in various forms in statutes enacted by the territorial legislature in 1869, 1876, 1886, and 1888.<sup>96</sup> This trajectory continued with the Wyoming Constitution’s formation in 1889.<sup>97</sup> After declaring “[t]he water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state . . . to be property of the state,”<sup>98</sup> Article VIII of the constitution provided in relation to water rights that “[p]riority of appropriation for beneficial uses shall give the better right.”<sup>99</sup> This article established a “Board of Control” charged with supervising the “waters of the state” and “their appropriation, distribution, and diversion.”<sup>100</sup> Positioned as president of the Board of Control would be a “State Engineer” appointed by the governor who would be charged with “general supervision of the waters of the state and of the officers connected with its distribution.”<sup>101</sup> Seven years after these provisions had been formulated, in 1896, the Wyoming Supreme Court disavowed any application of riparianism within the state, historically or prospectively, in the seminal case of *Moyer v.*

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<sup>92</sup> *Id.* at 61 (discussing miners’ extension of beneficial use and temporal priority tenets from mineral resources to water resources). *See, e.g.*, WYO. STAT. ANN. § 41-3-101 (2013) (“Beneficial use shall be the basis, the measure and limit of the right to use water at all times . . .”).

<sup>93</sup> DUNBAR, *supra* note 81, at 61.

<sup>94</sup> Excellent historical surveys of Wyoming water law can be found in LAWRENCE J. MACDONNELL, TREATISE ON WYOMING WATER LAW (2014) and Cooper, *supra* note 75. The provisions of the Wyoming Statutes governing water resources appear in Title 41. These statutes can be accessed at Wyoming Legislative Service Office, Statutes, <http://legisweb.state.wy.us/statutes/statutes.aspx> (last visited March 17, 2015).

<sup>95</sup> An act to provide a temporary Government for the Territory of Wyoming, 15 Stat. 178 (1868); An act to provide for the admission of the State of Wyoming into the Union, and for other purposes, 26 Stat. 222 (1890).

<sup>96</sup> MACDONNELL, *supra* note 94, at 1–8; Cooper, *supra* note 75, at 10–17.

<sup>97</sup> MACDONNELL, *supra* note 94, at 8–10; Cooper, *supra* note 75, at 17–18.

<sup>98</sup> WYO. CONST. art. VIII, § 1.

<sup>99</sup> *Id.* § 3.

<sup>100</sup> *Id.* § 2.

<sup>101</sup> *Id.* § 5.

*Preston*.<sup>102</sup> The court subscribed to the view previously espoused by other law-announcing courts, including the U.S. Supreme Court two decades earlier, that appropriative rights and the obligation to protect them had “existed anterior to any legislation upon the subject.”<sup>103</sup> Many more details could be shared regarding prior appropriation’s history in Wyoming, but it is again enough to say that the doctrine had become the state’s exclusive water law regime eighty years before the *Big Horn* adjudication.<sup>104</sup>

## 2. *Reserved Rights Doctrine*

Prior appropriation, of course, was not the only operative water law doctrine in the American West at the *Big Horn* adjudication’s onset, however—far from it. Another doctrine rooted in federal law—the “reserved rights” doctrine—also occupied the field. This doctrine’s evolution can be traced to the seminal cases of *Rio Grande* and *Winans* decided by the U.S. Supreme Court around the turn of the twentieth century.<sup>105</sup> For purposes of this piece, however, it was the Court’s landmark decisions in *Winters* and *Arizona v. California* that spawned the legal rules of greatest import to *Big Horn*.<sup>106</sup> *Winters* involved an 1888 agreement that created the Fort Belknap Indian Reservation in Montana,<sup>107</sup> and the then novel issue of whether this instrument implicitly had reserved flows from the Milk River and its tributaries for use by the Gros Ventre and Assiniboine Tribes when establishing the reservation.<sup>108</sup> Did these tribes hold a reserved water right under federal law stemming from the 1888 Agreement? Historians have produced

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<sup>102</sup> 44 P. 845 (Wyo. 1896).

<sup>103</sup> *Id.* at 847. As described by the court, “the imperative and growing necessities of our conditions . . . , to say nothing of the other beneficial uses . . . to which water has been and may be applied, have compelled the recognition, rather than the adoption, of the law of prior appropriation.” *Id.* This text and the court’s view regarding the precedent extralegal origin of appropriative rights mirrored the Colorado Supreme Court’s decision in *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446–47 (1882). In turn, the Colorado Supreme Court had relied in *Coffin* on an earlier decision of the U.S. Supreme Court interpreting the 1866 Mining Act as reflecting a “voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, [rather] than the establishment of a new one.” *Broder v. Notoma Water & Mining Co.*, 101 U.S. 274, 276 (1879) (emphasis omitted).

<sup>104</sup> Article XIII of the Wyoming Constitution applied prior appropriation to surface water—“natural streams, springs, lakes or other collections of still water”—but over half a century would pass before the doctrine was extended to groundwater through legislation enacted in 1945, 1947, and 1957. MACDONNELL, *supra* note 94, at 51, 53, 55–56; Cooper, *supra* note 75, at 64–65, 71–72.

<sup>105</sup> *United States v. Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690 (1899); *United States v. Winans*, 198 U.S. 371 (1905).

<sup>106</sup> *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963).

<sup>107</sup> 25 Stat. 113 (1888).

<sup>108</sup> *Winters*, 207 U.S. at 575–77.

rich scholarship on *Winters* and the broader context surrounding it,<sup>109</sup> but the Court's short answer to this question was "yes."<sup>110</sup> Founded on *Winters*, Indian reserved rights thus serve to fulfill the particular purpose(s) for which individual Indian reservations were created—*e.g.*, agriculture in the case of the Fort Belknap Reservation.<sup>111</sup> They resemble appropriative rights in that they bear priority dates that either stem from the creation date of the reservation or in some cases from "time immemorial."<sup>112</sup> On the other hand, they differ from appropriative rights in that their existence does not hinge on ongoing beneficial use of the water resources to which they attach—*i.e.*, non-use of these resources does not subject Indian reserved rights to potential abandonment or forfeiture.<sup>113</sup> *Winters* did not clarify the precise standard according to which Indian reserved rights would be quantified, but the Court addressed this issue roughly sixty years later in the principal case of the *Arizona v. California* litigation, announcing that the practicably irrigable acreage (PIA) standard applied in the case of reservations that had been created for agricultural purposes.<sup>114</sup> This standard entails quantifying the scope of reserved rights by assessing the acreage of land on a given reservation that is deemed practicably irrigable based upon the factors of arability, engineering feasibility, and economic feasibility.<sup>115</sup>

In addition to laying a foundation for Indian reserved rights, *Winters* also served as the basis for a related branch of the reserved rights doctrine dealing with water rights held by the United States for federal lands other than Indian reservations.<sup>116</sup> *Arizona v. California* was the case that extended *Winters* in this

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<sup>109</sup> Such scholarship includes JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE *WINTERS* DOCTRINE AND ITS SOCIAL AND LEGAL CONTEXT, 1880S-1930S (2000); Norris Hundley, Jr., *The "Winters" Decision and Indian Water Rights: A Mystery Reexamined*, 13 W. HIST. Q. 17 (1982); Norris Hundley, Jr., *The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle*, 9 W. HIST. Q. 454 (1978). See also THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE *WINTERS* CENTENNIAL 53-77 (Barbara Cosens and Judith V. Royster eds., 2012) (containing remarks of Patricia Limerick and John Shurts on *Winters* in its historical context). The *Winters* centennial compilation also contains re-creations of the oral arguments in *Winters*, *Arizona v. California*, and *U.S. v. New Mexico*—the "primary cases of the reserved rights doctrine." *Id.* at 22-52.

<sup>110</sup> *Winters*, 207 U.S. at 576-77 (holding that there was a reservation of waters under the 1888 agreement and that Montana's subsequent admission into the Union in 1889 did not repeal this reservation).

<sup>111</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1180 (2005) [hereinafter COHEN'S HANDBOOK].

<sup>112</sup> *Id.* at 1179. To elaborate, "[i]f water was reserved for uses or purposes that did not exist before the reservation was established, the priority date is the date the reservation was created." *Id.* Conversely, "if water was reserved for the continuation of an aboriginal practice, the priority date is time immemorial." *Id.*

<sup>113</sup> *Id.* at 1169.

<sup>114</sup> *Arizona v. California*, 373 U.S. 546, 600-601 (1963).

<sup>115</sup> COHEN'S HANDBOOK, *supra* note 111, at 1185.

<sup>116</sup> An excellent survey of federal reserved rights can be found in Michael C. Blumm, *Reserved Water Rights*, in WATER AND WATER RIGHTS 37-52.1 to 37-82 (Amy K. Kelley ed., 2012).

manner. In a single paragraph near the end of the majority's almost sixty-page opinion, the Court placed its imprimatur on a conclusion that had been reached by Special Master Simon Rifkind earlier in this epic lawsuit: "the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments," including the national forest, national recreation area, and national wildlife refuges involved in the case.<sup>117</sup> This holding gave rise to federal reserved rights as a counterpart to Indian reserved rights, with the former bearing similar key features to the latter—namely, (1) priority dates tethered to the creation date of the relevant federal reservation, and (2) legal existence that does not depend upon ongoing beneficial use. Quantification of federal reserved rights, however, is a feature that distinguishes these two strands of the reserved rights doctrine. The seminal cases of *Cappaert* and *U.S. v. New Mexico* grappled with this distinction in the decade following *Arizona v. California*.<sup>118</sup> Because the Court decided *U.S. v. New Mexico* one year after the *Big Horn* adjudication had begun, my coverage of its implications for quantifying federal reserved rights is included in the next Part. For now, it is worth highlighting that the Court described in *Cappaert*—which was decided in 1976 approximately one year before the adjudication commenced—that the legal scope of federal reserved rights encompassed "only that amount of water necessary to fulfill the purpose of the reservation, no more."<sup>119</sup>

Beyond appropriative rights, Indian reserved rights, and federal reserved rights, one final dimension of the allocational jurisprudence that existed at the *Big Horn* adjudication's genesis deserves mention. This dimension concerns water rights held by different types of parties who, in one form or another, acquired private interests in lands located on Indian reservations that had been subject to allotment. Such allotment occurred, in some instances, by the express provisions of treaties creating reservations. Article 6 of the Second Treaty of Fort Bridger—again, the treaty establishing the Wind River Indian Reservation—offers one example. Tailored to tribal members who were the head of a family and desired "to commence farming," this article authorized allotment of tracts of up to 320 acres to these individuals, "which tract shall cease to be held in common" and "may be held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it."<sup>120</sup> This article similarly provided for allotment of tracts of up to 80 acres to tribal members over

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<sup>117</sup> See *Arizona*, 373 U.S. at 601 (recognizing reserved rights for Lake Mead National Recreation Area, Havasu Lake National Wildlife Refuge, Imperial National Wildlife Refuge, and Gila National Forest).

<sup>118</sup> *United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976).

<sup>119</sup> *Cappaert*, 426 U.S. at 141. See also *id.* (describing district court's injunction curtailing groundwater pumping as "very appropriately" tailored to "minimal need" for fulfilling purposes of federal reservation).

<sup>120</sup> Second Treaty, *supra* note 50, at Art. 6.

eighteen years of age who were not the head of a family.<sup>121</sup> In addition to treaty provisions of this sort, allotment also occurred in a systematic manner under the General Allotment Act of 1887.<sup>122</sup> It involved two key measures: (1) allotment of parcels of commonly owned reservation land to individual tribal members, and (2) opening of commonly owned reservation land not allotted to individual tribal members (often deemed “surplus”) to entry and purchase by non-Indians under the disposal era statutes.<sup>123</sup> From a national perspective, of the 140-million acres of reservation land that existed at the dawn of the allotment era, 90-million acres had passed to non-Indians upon the era’s close in 1934.<sup>124</sup>

What were the respective water rights, if any, held by Indian allottees, non-Indian successors to these allottees, and non-Indians that took up “surplus” lands on ceded portions of reservations? The U.S. Supreme Court and lower federal courts grappled with different aspects of this multi-part question in several major cases leading up to the *Big Horn* adjudication.

With regard to Indian allottees, the Court held in the 1939 case of *Powers* that “when allotments of land were duly made for exclusive use [of tribal members] and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.”<sup>125</sup> Although the Court declined to address “the extent or precise nature” of the water rights held by the Indian allottees in the case, it made clear that these rights indeed did extend from the reserved right held by their tribe (Crow) under an 1868 treaty.<sup>126</sup>

As for the water rights of non-Indian parties that purchased Indian allotments (“non-Indian successors”), the Ninth Circuit developed seminal jurisprudence in this area during the first few years of the *Big Horn* adjudication as described in the next Part.<sup>127</sup> One pre-*Big Horn* decision by the District Court for the Eastern

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<sup>121</sup> *Id.*

<sup>122</sup> 24 Stat. 388 (1887). As described by the Ninth Circuit in *Colville*, “[t]he General Allotment Act represented the shift in federal objectives from segregation of Indians on reservations to assimilation of them in non-Indian culture and society.” *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 49 (9th Cir. 1981).

<sup>123</sup> *Colville*, 647 F.2d at 49.

<sup>124</sup> BARTON H. THOMPSON, JR., ET AL., *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 1104 (5th ed. 2013).

<sup>125</sup> *United States v. Powers*, 305 U.S. 527, 532 (1939).

<sup>126</sup> *Id.* at 533. See also Blumm, *supra* note 116, at 37–50 (describing in relation to *Powers* that “the Supreme Court long ago recognized . . . Indian allottees obtain a ratable portion of the tribal reserved water right.”).

<sup>127</sup> These cases included *Colville*, 647 F.2d at 49; *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984); *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

District of Idaho, however, is notable: *Hibner*.<sup>128</sup> Predating *Big Horn* by a half century, the court in this case addressed, in relevant part, the nature and extent of water rights held by non-Indian successors who had purchased allotments in a ceded portion of the Fort Hall Indian Reservation. A non-Indian successor “acquires, as under other sales, the title and rights held by the Indians,” concluded the court, and “there should be awarded to such purchaser the same character of water right with equal priority as those of the Indians.”<sup>129</sup> The Indian allottees’ water rights thus passed to their non-Indian successors in the court’s view, and the priority date of the tribe’s reserved right persisted through this transfer. That said, the court then went on to describe how the “status” of these water rights changed due to this transaction, such that the amount of water use permitted by a non-Indian successor would be based on the “actual acreage that was under irrigation at the time title passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation.”<sup>130</sup>

Last but not least in this area of the allocational jurisprudence are the water rights of non-Indians who acquired title to “surplus” lands opened for entry under the disposal era laws. *California Oregon Power* is the relevant precedent.<sup>131</sup> Announced by the U.S. Supreme Court in 1935, it addressed whether a patent issued in 1885 under the Homestead Act of 1862 carried with it a common law riparian right for the patentee (*i.e.*, as opposed to title to the land alone).<sup>132</sup> The Court held “no.” It construed the Desert Land Act of 1877—and potentially the Mining Act of 1866 and its 1870 Amendment<sup>133</sup>—as having effected a “severance of all waters upon the public domain, not theretofore appropriated, from the land itself.”<sup>134</sup> Accordingly, “following the act of 1877, if not before,”<sup>135</sup> a patent issued “in a desert-land state or territory, under any of the land laws of the United States, carried with it . . . no common law right to the water flowing through or bordering upon the lands conveyed.”<sup>136</sup> Rather, patentees seeking to obtain water

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<sup>128</sup> *United States v. Hibner*, 27 F.2d 909 (E.D. Idaho 1928). In reaching its decision in *Hibner*, the district court relied on an opinion released by the Ninth Circuit seven years earlier in *Skeem v. United States*, 273 F. 93, 96 (1921) (holding that Indian allottees held water rights stemming from tribe’s reserved right under 1898 treaty, and that allottees retained water rights despite their non-occupation and leasing of parcels to non-Indians).

<sup>129</sup> *Hibner*, 27 F.2d at 912.

<sup>130</sup> *Id.*

<sup>131</sup> *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

<sup>132</sup> *Id.* at 151.

<sup>133</sup> *See id.* at 155 (“If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters in so far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877 . . .”).

<sup>134</sup> *Id.* at 158.

<sup>135</sup> *Id.* at 163.

<sup>136</sup> *Id.* at 158.



rights would have to proceed under the legal doctrine of their respective state, as the disposal era statutes themselves did not afford a basis for these parties' water rights under federal law.

### B. *Jurisdictional Jurisprudence*

Whereas the preceding material conveys a general sense of existent types of water rights at the time of the *Big Horn* adjudication's commencement, a related matter concerns whether federal or state courts were the proper forum for addressing the existence, nature, and scope of these water rights. Nevada Senator Pat McCarran thought the latter in relation to reserved rights. With the enactment of an appropriations rider called the "McCarran Amendment" in 1952, he secured federal legislation that (as later interpreted by the Supreme Court) brought state courts to the forefront in shaping and applying the reserved rights doctrine.<sup>137</sup> Taken together, this amendment and the Supreme Court's decisions construing it made up a jurisdictional backdrop to the *Big Horn* adjudication that arguably was as important as its allocational counterpart.

Stated broadly, the McCarran Amendment's general aim was to address the co-existence of appropriative and reserved rights in river systems throughout the American West. It was by waiving the federal government's sovereign immunity, so as to enable it to be sued in state court proceedings called "general stream adjudications," that the amendment pursued this goal.<sup>138</sup> More specifically, the amendment provided, in relevant part:

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.<sup>139</sup>

Under these particular circumstances, the United States would be precluded from invoking sovereign immunity as a defense and would be "subject to the judgments, orders, and decrees of the court having jurisdiction."<sup>140</sup> As described

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<sup>137</sup> The McCarran Amendment is codified at 43 U.S.C. § 666 (2013).

<sup>138</sup> For an excellent and exhaustive overview of the history of general stream adjudications, see John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. L. REV. 352, (2005) (*Dividing Western Waters I*); John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. L. REV. 299 (2006) (*Dividing Western Waters II*).

<sup>139</sup> 43 U.S.C. § 666(a)(1)–(2) (2013).

<sup>140</sup> *Id.* § 666(a).

by Senator McCarran himself, the amendment's purpose was thus "to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream."<sup>141</sup> Such joinder was necessary, in the senator's view, "because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."<sup>142</sup>

Not only had Congress enacted the McCarran Amendment more than two decades prior to the onset of the *Big Horn* adjudication, but the Supreme Court also had handed down several major decisions interpreting and applying the amendment. *Dugan v. Rank* clarified in 1963 that a "private suit" to determine water rights between a group of water users along California's San Joaquin River and the United States and local Bureau of Reclamation officials did not constitute a "general adjudication of 'all of the rights of various owners on a given stream'" as required to invoke the amendment.<sup>143</sup> Announced eight years later, the Court came to a contrary conclusion in *Eagle County*, construing the amendment's phrase "rights to the use of water of a river system" as sufficiently broad to embrace reserved rights held by the federal government for the White River National Forest in Colorado, and thereby allowing the United States to be joined in an adjudication of the Eagle River System.<sup>144</sup> The State of Wyoming joined ten other western states in filing amici briefs in this case.<sup>145</sup> The Court reiterated its holding in *Eagle County* in a companion case, *Water Division No. 5*, which concerned a more far-reaching state court adjudication in Colorado involving reserved rights held by the United States for four national forests and a host of other federal lands.<sup>146</sup> Moving forward, *Colorado River*, which was decided by the Court in 1976, extended these federal reserved rights holdings to Indian reserved rights.<sup>147</sup> "[V]iewing the Government's trusteeship of Indian rights as ownership," the Court proclaimed, "the logic of [*Eagle County* and *Water Division No. 5*] clearly extends to such rights."<sup>148</sup> *Colorado River* also clarified that federal courts shared concurrent jurisdiction with state courts over reserved rights claims—*i.e.*, the

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<sup>141</sup> United States vs. District Court in and for the County of Eagle, 401 U.S. 520, 525 (1971).

<sup>142</sup> *Id.* A useful overview of the McCarran Amendment's legal history can be found in *Dividing the Waters I*, *supra* note 138, at 449–56. See also MICHAEL J. YBARRA, WASHINGTON GONE CRAZY: SENATOR PAT MCCARRAN AND THE GREAT AMERICAN COMMUNIST HUNT (2004) (providing biography of Senator McCarran).

<sup>143</sup> *Dugan v. Rank*, 372 U.S. 609, 618–619 (1963).

<sup>144</sup> United States v. District Court in and for the County of Eagle, 401 U.S. 520, 523–24 (1971).

<sup>145</sup> *Id.* at 521.

<sup>146</sup> United States v. District Court in and for Water Division No. 5, 401 U.S. 527, 527–28 (1971).

<sup>147</sup> Colorado River Water Conservation District v. United States, 424 U.S. 800, 810 (1976).

<sup>148</sup> *Id.*

McCarran Amendment had not repealed federal jurisdiction.<sup>149</sup> At the same time, however, the Court enunciated factors related to “wise judicial administration” that might justify federal dismissal of reserved right suits in lieu of concurrent state proceedings.<sup>150</sup> Most important among these factors was the McCarran Amendment’s “clear federal policy” of avoiding “piecemeal adjudication of water rights in a river system.”<sup>151</sup>

#### IV. *BIG HORN* GENERAL STREAM ADJUDICATION

It was against the backdrop of the allocational and jurisdictional jurisprudence outlined above that the State of Wyoming commenced the *Big Horn* adjudication in 1977. Thirty-seven years later, in 2014, a final order concluding the adjudication would issue. The U.S. Supreme Court and lower federal courts would render several significant reserved rights and jurisdictional decisions across this time period building on the preceding precedents. One might view the litigation spawned by the *Big Horn* adjudication itself as a salient part of the evolution of this legal doctrine. Important milestones within this litigation appear throughout the discussion below and collectively constitute an extensive body of law consisting of special master reports, district court judgments and decrees, Wyoming Supreme Court opinions, and one U.S. Supreme Court per curiam decision. All told, the state and federal judicial officials who were responsible for moving the adjudication along at the ground level within the State of Wyoming, including issuing numerous and often intensely contested rulings underlying the appellate decisions that comprise the law of the case, included no less than six judges and six special masters. The judges and their respective tenures consisted of Harold Joffe (1977–1983), Ewing Kerr (1977), Alan Johnson (1983–1986), Gary Hartman (1986–2008), Nancy Guthrie (2008–2010), and Robert Skar (2010–2014). The special masters and their respective tenures included Teno Roncalio (1979–1985), Carolyn Patterson (1985–1986), Terrance Dolan (1986–1993), Nancy Guthrie (1993–1994), William Schwartz (1994–1997), and Ramsey Kropf (1994–2014).

As will become clear from the material that follows, the *Big Horn* adjudication ultimately assumed a three-phase structure that would frame its entire duration. The initial section below begins by examining foundational procedural matters vetted during the first three-and-a-half years of the proceeding to form this three-phase structure. With this background laid out, the remaining four sections survey the adjudication’s three phases and its eventual closure by the district court. Each phase focused on distinct yet interconnected types of water rights—specifically, (1) the Indian reserved right and derivative water rights of Indian and non-Indian parties, (2) federal reserved rights, and (3) appropriative rights. Notwithstanding

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<sup>149</sup> *Id.* at 809.

<sup>150</sup> *Id.* at 817–20.

<sup>151</sup> *Id.* at 819.

their distinct coverage, however, there was a good deal of temporal overlap between the phases. Because of this dynamic, in an effort to canvass the adjudication as clearly as possible, the discussion considers each phase in full before circling back chronologically to the next one.

## A. Foundations

### 1. Commencement

Slightly less than a year passed after the Supreme Court decided *Colorado River* in 1976 before the *Big Horn* adjudication arose.<sup>152</sup> Its genesis can be traced to a dispute during the previous year between tribal authorities and the City of Riverton, Wyoming, over the city's planned drilling of groundwater wells to augment supplies for Riverton Municipal Airport and an industrial park.<sup>153</sup> Contending this groundwater was subject to their reserved right under *Winters*, the tribes informed the city they objected to drilling of the wells. This objection raised a foundational issue about the tribes' reserved right. On January 14, 1977, House Bill 188 was introduced in the Wyoming Legislature in response to this issue. Passing the House and Senate during the following week—without amendment and with literal or virtual unanimity in both chambers—Governor Ed Herschler signed the bill into law as W.S. § 1-37-106 on January 22, 1977.<sup>154</sup> This statute authorized the State of Wyoming, acting through the Attorney General, to “institute an action to have determined in a general adjudication the nature, extent, and relative priority of the water rights of all persons in any river system

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<sup>152</sup> As described by the Wyoming Supreme Court twenty-five years later: “The purpose of the adjudication was to resolve the issue of what water rights the federal government reserved for the Wind River Indian Reservation’s benefit.” In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 48 P.3d 1040, 1043 (Wyo. 2002) (*Big Horn VI*).

<sup>153</sup> Teno Roncalio, Special Master, Report Concerning Reserved Water Right Claims by and on Behalf of the Tribes of the Wind River Indian Reservation 7 (December 15, 1982), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/12151982RoncRep.pdf> [hereinafter Roncalio Report]. As described several years later by Special Master Roncalio in his report: “It was obvious that an adjudication was at last necessary which would once and for all quantify, define, and integrate the rights of all people, Indian and non-Indian, to the use of waters in Water Division 3.” *Id.* at 8. See also Williams, *supra* note 9, at 170 (providing description of adjudication’s genesis from tribes’ Supreme Court advocate Susan Williams). A slightly different (but not necessarily opposing) angle on the adjudication’s genesis appears in Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 LAND & WATER L. REV. 1, 29 n.101 (“A principal reason for the filing of the [*Big Horn* adjudication] was because of concern in the 1970’s that the mineral development boom in Wyoming would require water resources that were subject to Indian reserved water rights claims.”).

<sup>154</sup> Roncalio Report, *supra* note 153, at 14. See also O’GARA, *supra* note 14, at 175 (quoting former Wyoming legislator Walt Urbigkit’s description of the statute as “the fastest law ever enacted in history.”)

and all other sources . . . .”<sup>155</sup> It then went on to prescribe the duties of a court conducting such a general adjudication: (1) “[c]ertify to the state board of control those legal and factual issues which the court deems appropriate for the board to determine”; (2) “[c]onfirm those rights evidenced by previous court decrees, or by certificates of appropriation, or by certificates of construction” that had been issued by the Board of Control; (3) “[d]etermine the status of all uncanceled permits to acquire the right to the use of the water of the state of Wyoming and adjudicate all perfected rights” under these permits; (4) “[d]etermine the extent and priority date of and adjudicate any interest in or right to use the water of the river system and all other sources not otherwise represented” by the foregoing decrees, certificates, and permits; and (5) “[e]stablish . . . one or more tabulations or lists of all water rights and their relative priorities on the river system and all other sources.”<sup>156</sup>

Two days after passage of the adjudication statute, Wyoming Attorney General Frank Mendicino filed a complaint pursuant to it on January 24, 1977, in the District Court of the Fifth Judicial District in Washakie County.<sup>157</sup> Tracking the adjudication statute’s text, the complaint provided that “[t]his is a suit for the general adjudication of the nature, extent, and relative priority of the water rights of all persons in the Big Horn River System . . . and all other sources in Water Division Number Three . . . .”<sup>158</sup> As delineated by the complaint, the water resources subject to the adjudication encompassed “the Big Horn River, all surface streams and rivers tributary thereto, including but not limited to the Wind River, and all ground and underground tributary thereto,” as well as “all other surface and ground waters underlying or within Water Division Number Three.”<sup>159</sup> With regard to the water rights associated with these sources, the complaint’s prayer incorporated the statutory text. It requested that the court (1) “[c]onfirm those rights evidenced by previous court decrees, by certificates of appropriation, or by certificates of construction” previously issued by the Board of Control; (2) “[d]etermine the status of all uncanceled permits to acquire the right to the use of the water of the State of Wyoming and adjudicate all perfected rights” under

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<sup>155</sup> WYO. STAT. ANN. § 1-37-106(a) (2013). The statute defined “general adjudication” as “the judicial determination or establishment of the extent and priority of the rights to use water of all persons on any river system and all other sources within the state of Wyoming.” *Id.* § 1-37-106(a)(i)(A).

<sup>156</sup> *Id.* § 1-37-106(a)(i)(A)(1)-(5).

<sup>157</sup> In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, Complaint (January 24, 1977), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/9VK3VS0000.pdf> [hereinafter Complaint]. The adjudication statute provided that “[w]hen the water rights to be determined are located in more than one (1) county, the general adjudication may be brought in any of the counties.” WYO. STAT. ANN. § 1-37-106(a)(iv) (2013).

<sup>158</sup> Complaint, *supra* note 157, at 1.

<sup>159</sup> *Id.*

these permits that had not been adjudicated; and (3) “[d]etermine the extent and priority date of and adjudicate any interest in or right to use the water of the River System and all other sources in Water Division Number Three . . . not otherwise represented” by the foregoing decrees, certificates, or permits.<sup>160</sup> The complaint also requested that the court “find and order” the United States had waived its sovereign immunity and had consented to be joined in the adjudication via the McCarran Amendment.<sup>161</sup>

The State of Wyoming would not wait long for its requests to be answered. On the same day the complaint was filed—again, January 24, 1977—Fifth District Judge Harold Joffe issued an order initiating the *Big Horn* adjudication. Responding to the complaint, the court found and ordered, in relevant part, that “this action is a general adjudication of all water rights on the Big Horn River System and all other sources in Water Division Number Three,” and that “the United States of America by its enactment of [the McCarran Amendment] has waived its sovereign immunity and consented to be joined in the action.”<sup>162</sup> Word of the adjudication’s commencement followed in a notice issued by the court one week later.<sup>163</sup>

## 2. *Forum and Jurisdiction*

Roughly a year would be invested after the *Big Horn* adjudication’s commencement into addressing issues concerning whether federal or state court was the proper forum for the action, and whether the United States indeed had waived its sovereign immunity, and had consented to be joined in the action, based upon the McCarran Amendment’s relationship to the adjudication statute. Something of a back-and-forth rally took place across this period stemming from a sequence of requests for removal, remand, and dismissal of the adjudication.

Having received Judge Joffe’s order of January 24, 1977, initiating the adjudication, the United States one month later petitioned for removal of the action from state to federal court—*i.e.*, from the District Court of the Fifth

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<sup>160</sup> *Id.* at 4.

<sup>161</sup> *Id.* at 5.

<sup>162</sup> Order (Jan. 24, 1977), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/OIIGVW0000.pdf>.

<sup>163</sup> Notice of Water Adjudication for Big Horn River System and All Other Sources of Water Water Division Number Three State of Wyoming (Feb. 1, 1977), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/72VGZ70000.pdf>. The notice identified the four types of state law-based water rights and interests that had been addressed in the complaint: decrees, certificates, non-defaulted permits, and defaulted but uncanceled permits. It then stated that the United States had been joined in the adjudication, in both its proprietary and trustee capacities, and explained that “[t]he water rights which may be asserted by the United States may well be entitled to earlier priority dates than some or all” of the state law-based water rights and interests. *Id.*

Judicial District of Washakie County to the U.S. District Court for the District of Wyoming in Cheyenne.<sup>164</sup> The United States raised a host of arguments in support of removal that proved pervasive throughout this foundational period, including that the adjudication's "primary purpose" was "to determine Federal rights," and that "the hastily prepared machinery established for a determination of these rights by the State of Wyoming [did] not provide an adequate forum for their determination."<sup>165</sup> Questions of federal law concerning the nature and extent of the reserved rights involved in the adjudication, as well as the McCarran Amendment's applicability or inapplicability to the adjudication statute, warranted removal according to the United States.<sup>166</sup> Only the U.S. District Court would have "the expertise required for addressing such critical [federal] questions," and the McCarran Amendment did not prohibit the court from exercising concurrent jurisdiction as established in *Colorado River*.<sup>167</sup> In contrast, to permit the state's Board of Control to address reserved rights claims—as special master in the adjudication—would be inappropriate and exceed the bounds of the McCarran Amendment, as the board had "no experience in determining Federal rights" and was "an administrative creature of the State."<sup>168</sup> Rather, "[t]his Court and a master appointed by this Court would provide the appropriate neutral tribunal for an adjudication of these rights."<sup>169</sup>

U.S. District Judge Ewing T. Kerr initially obliged the United States' petition, ordering removal of the adjudication to federal court one day after the petition's filing.<sup>170</sup> This outcome would not withstand the test of time, however—or, more specifically, a motion to remand the case to state court filed by the State of Wyoming the following month.<sup>171</sup> Characterizing the petition for removal as a "procedural device to circumvent the clear intent and purpose of the McCarran Amendment," the state contended removal would "emasculate" the amendment's purpose and "undermine the efforts of the western states to adjudicate and administer

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<sup>164</sup> Petition for Removal (February 22, 1977), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/HCP2WR0000.pdf>.

<sup>165</sup> Memorandum in Support of Petition for Removal 2 (February 22, 1977), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/4VMJQ20000.pdf>. With regard to its allegations of haste, the United States quoted remarks attributed to Wyoming Attorney General Frank Mendicino in the *Casper Star Tribune* describing that "a special bill was passed to allow for this adjudication because 'we were concerned that if it became apparent that we were about to file in state court, the Government might sue us in federal court.'" *Id.*

<sup>166</sup> *Id.* at 5–7.

<sup>167</sup> *Id.* at 3.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Order (February 23, 1977), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/XU1VY90000.pdf>.

<sup>171</sup> Motion to Remand (March 25, 1977), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/T7PTWJ0000.pdf>.



water rights within their boundaries.”<sup>172</sup> Implicit “concurrent nonremovable jurisdiction” existed under the Supreme Court’s precedents according to the state, and the factors enunciated in *Colorado River* supported a remand.<sup>173</sup> The state asserted no well-founded argument could be made that the adjudication statute exceeded the McCarran Amendment’s scope. Rather, sufficient judicial control existed over the adjudication,<sup>174</sup> as required by the amendment, despite the statutory provision authorizing certification of legal and factual issues to the Board of Control.<sup>175</sup>

At the end of the day, the state got the better of this removal-and-remand exchange, with Judge Kerr remanding the case to Wyoming’s Fifth Judicial District Court on May 24, 1977,<sup>176</sup> in line with the state’s arguments.<sup>177</sup> These arguments would not sit idle for long, however, as they would be called back into service and supplemented three months later in response to motions for dismissal filed by the United States<sup>178</sup> and the tribes.<sup>179</sup> The United States sought dismissal of the adjudication on one familiar and one unfamiliar ground. The former concerned the already broached issue of whether the adjudication statute’s provision for certifying legal and factual questions to the Board of Control rendered the proceeding insufficiently judicial so as to fall outside the McCarran Amendment.<sup>180</sup> In conjunction with this ground, the United States reiterated its skepticism about the board’s ability to serve as an “impartial forum” for reserved rights claims.<sup>181</sup> To these existing arguments the United States added a new ground: jurisdiction was lacking due to a provision of the Wyoming Constitution disclaiming “all right and title to the unappropriated public lands” within the state’s boundaries and “to all lands lying within [these boundaries] owned or

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<sup>172</sup> *Id.* at 2, 4, 24.

<sup>173</sup> *Id.* at 6–11.

<sup>174</sup> *Id.* at 21. Nor did the state deem the “expeditious manner” in which the adjudication was filed relevant to the court’s “determination of the capability of the Wyoming system to conduct these proceedings.” *Id.* at 22.

<sup>175</sup> WYO. STAT. ANN. § 1-37-106(a)(i)(A)(1) (2013).

<sup>176</sup> Order (May 31, 1977), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/MMO7T90000.pdf>.

<sup>177</sup> Findings of Fact and Conclusions of Law 2–5 (May 31, 1977), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/GXY6AP0000.pdf>.

<sup>178</sup> Motion to Dismiss the Complaint (August 22, 1977), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/683S5J0000.pdf>.

<sup>179</sup> Motion of the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation for Leave to File a Brief Amicus Curiae, and Amicus Curiae (August 18, 1977), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/XFLLWT0000.pdf> [hereinafter Tribes Motion].

<sup>180</sup> Memorandum of Points and Authorities in Support of Defendant United States’ Motion to Dismiss 12, 27 (August 22, 1977), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/683S5J0000.pdf> [hereinafter Dismissal Memorandum].

<sup>181</sup> *Id.* at 15.

held by an Indian or Indian tribes.”<sup>182</sup> “[S]aid Indian land shall remain under the absolute jurisdiction and control of the [C]ongress of the United States” declared the provision,<sup>183</sup> which the United States construed as precluding state jurisdiction over both Indian lands *and* water reserved in connection with such lands.<sup>184</sup> The tribes supplemented the United States’ two bases for dismissal with a third in an *amicus* brief. Its essence was twofold: (1) the tribes were indispensable parties to the litigation because their water rights were at issue and the United States was unable to provide adequate representation as their trustee, yet (2) the tribes could not be joined in the adjudication because they had not waived their sovereign immunity and the McCarran Amendment did not effect such a waiver.<sup>185</sup> The tribes accordingly asserted that the court should dismiss the case for lack of jurisdiction over a necessary party.<sup>186</sup>

As had been the case with its motion to remand, the State of Wyoming avoided dismissal of the *Big Horn* adjudication on the foregoing grounds. The state’s counterarguments prompted an order from the district court denying dismissal on February 6, 1978,<sup>187</sup> and an accompanying letter opinion roughly two months before.<sup>188</sup> With regard to the adjudication statute’s certification provision, the court concluded it did not preclude jurisdiction under the McCarran Amendment. To the contrary, “[t]he fact that the Court under the state statute retains complete control over the proceedings . . . fulfills the ‘suit’ requirement of the amendment.”<sup>189</sup> It was likewise this judicial control that in the court’s view negated the United States’ argument regarding the Board of Control’s alleged bias.<sup>190</sup> Nor was the court persuaded that it lacked jurisdiction over the tribes’ water rights due to the Wyoming Constitution’s disclaimer provision.<sup>191</sup> Finally, the court rejected the ground for dismissal alleged by the tribes in their *amicus* brief, regarding the tribes as already parties to the adjudication “inasmuch as the United States is a proper party in its own proprietary capacity and as trustee for

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<sup>182</sup> WYO. CONST. art. XXI, § 26.

<sup>183</sup> *Id.*

<sup>184</sup> Dismissal Memorandum, *supra* note 180, at 19.

<sup>185</sup> Tribes Motion, *supra* note 179, at 7.

<sup>186</sup> *Id.*

<sup>187</sup> Order (February 6, 1978), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/MSYFH30000.pdf>. This order also disposed of two related motions that had been filed by the State of Wyoming for judgment on the pleadings and partial summary judgment. The state’s counterarguments are set forth in Brief in Opposition to the Defendant United States’ Motion to Dismiss (September 28, 1977), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/KCF49L0000.pdf>.

<sup>188</sup> Letter Opinion (December 19, 1977), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/T9YZ0N0000.pdf>.

<sup>189</sup> *Id.* at 2, 4.

<sup>190</sup> *Id.* at 2.

<sup>191</sup> *Id.* at 2, 7.

the Tribes.”<sup>192</sup> Appointment of private counsel for the tribes would be the proper course of action, according to the court, for any conflict of interest between the tribes and the United States.<sup>193</sup> Having devoted a year to the foregoing issues of forum and jurisdiction, it would be this matter of the tribes’ participation and representation in the adjudication that would move to the forefront.

### 3. *Tribal Intervention*

On August 14, 1978, the Eastern Shoshone and Northern Arapaho tribes of the Wind River Indian Reservation moved to intervene in the *Big Horn* adjudication as defendants.<sup>194</sup> This motion precipitated a three-month period of briefing that ultimately would place the parties into a configuration that (although unanticipated at the time) would persist for nearly four decades.

Reiterating their belief that the court had “no jurisdiction to adjudicate their water rights,” the tribes nonetheless sought to intervene in the adjudication as a matter of right. They assertedly met all three requirements for such intervention under the Wyoming Rules of Civil Procedure: (1) their reserved right was at issue in the litigation, (2) an adverse judgment from the court could impede their ability to defend this right, and (3) the United States would not adequately represent their interests.<sup>195</sup> Underlying the tribes’ concerns about inadequate representation was a perceived conflict of interest stemming from the United States’ assertion of “water rights on behalf of its Forest Service and its Bureau of Reclamation.”<sup>196</sup> The tribes alleged that the latter agency had attempted in the past “to market waters impounded in the Boysen Reservoir on the Wind River Reservation for a variety of uses, not for the benefit of the tribes.”<sup>197</sup>

Although not identical, the responses of the other two sovereigns to the tribes’ motion to intervene were similar, both focusing on the issue of inadequate representation and its bearing on the tribes’ participation and representation in the adjudication. No objection to intervention by the tribes came from the United States, although it contested the tribes’ assertions regarding inadequate representation and suggested permissive intervention, rather than intervention of

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<sup>192</sup> *Id.* at 3.

<sup>193</sup> *Id.* at 3, 5.

<sup>194</sup> Motion of the Shoshone and Arapahoe Tribes to Intervene as Defendants (August 14, 1978), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/1QFEZK0000.pdf>.

<sup>195</sup> Memorandum in Support of Motion of the Shoshone and Arapahoe Tribes to Intervene as Defendants 1–2 (August 14, 1978), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/6HDK280000.pdf>.

<sup>196</sup> *Id.* at 2.

<sup>197</sup> *Id.*

right, would be appropriate.<sup>198</sup> The State of Wyoming drew a slightly harder line, indicating that it had “absolutely no objection to participation in this adjudication by the Tribes,” but that intervention of right would be “totally inappropriate.”<sup>199</sup> Central to this argument was the state’s position that no showing had been made “that representation has been inadequate in the past or that any conflict of interest exists that could render it inadequate in the future.”<sup>200</sup> “Instead, we have only speculation by the Tribes concerning the possibility of a conflict over Boysen Reservoir.”<sup>201</sup> In the event any conflicts of interest were shown, substitution of counsel would be the “better solution” contended the state, although permissive intervention would be a “viable alternative.”<sup>202</sup> Ultimately, however, the court should not allow “any form of intervention, or even substitution of counsel” in the state’s view, absent a stipulation from attorneys for the United States that they were unable to represent the tribes’ interests adequately.<sup>203</sup>

In an order issued on November 21, 1978, Judge Joffe put this matter to rest, granting the tribes permissive intervention into the *Big Horn* adjudication.<sup>204</sup> The court’s order specified that intervention was permitted for several interconnected purposes, including “[t]o submit claims to federal reserved water rights held in trust for the Tribes” and “[t]o attack competing water claims by other parties.”<sup>205</sup> Dovetailing with these purposes was a complementary one that would prove even more relevant in the immediate future: “[t]o oppose the Board of Control as a Special Master for matters not yet referred to it.”<sup>206</sup>

#### 4. *Certification and Referral*

“With [the] jurisdictional matters disposed of, and the parties to the action aligned, the next issue concerned the question of whether or not the adjudication should be certified to the Board of Control of the State of Wyoming for trial.”<sup>207</sup>

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<sup>198</sup> Response of the United States to the State of Wyoming’s Memorandum in Opposition to Tribal Intervention (October 2, 1978), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/FS1V9S0000.pdf>.

<sup>199</sup> Memorandum in Opposition to Motion of the Shoshone and Arapahoe Tribes to Intervene as Defendants 1 (September 13, 1978), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/11HYV80000.pdf>.

<sup>200</sup> *Id.* at 7.

<sup>201</sup> *Id.*

<sup>202</sup> Reply of the State of Wyoming to the Memorandum of the Shoshone and Arapahoe Tribes in Support of Their Motion to Intervene 2 (October 16, 1978), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/5UEDIS0000.pdf>.

<sup>203</sup> *Id.* at 3.

<sup>204</sup> Order Granting Intervention 1 (November 21, 1978), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/CN34930000.pdf>.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> Roncalio Report, *supra* note 153, at 20.

This procedural synopsis comes from the report of the gentleman who (setting aside the Board of Control) would serve as the first special master in the *Big Horn* adjudication: former Wyoming Congressman Teno Roncalio. Judge Joffe would appoint Special Master Roncalio to this position on May 4, 1979, roughly six months after the tribes had intervened in the adjudication. In turn, a little over a year after the special master had been appointed, the federal, state, tribal, and other parties would agree to the three-phase framework mentioned above that would structure the entire proceeding.

Rooted in the certification provision of the adjudication statute, the State of Wyoming filed motions in April and August of 1978 to certify various matters involving water rights and interests in the Wind-Big Horn Basin to the Board of Control, as the board had lost jurisdiction over these matters upon the adjudication's commencement.<sup>208</sup> The United States unsuccessfully opposed both motions, and its grounds harkened back to the jurisdictional disputes. An initial response requested a denial or stay of the state's motion pending completion of discovery on the board's appointment as special master, querying why the state was "so unwilling to have an impartial Special Master appointed . . . ."<sup>209</sup> A subsequent response echoed these positions but went further, contending that appointment of the board would be inappropriate because "no member of [it] has legal training," and proposing that the court "appoint a neutral and qualified Special Master, not the State Board of Control or the State Engineer nor any state or federal agency . . . ."<sup>210</sup> Alternatively, the United States proposed permitting the board to act on the specific matters addressed in the state's motions, and revisiting the propriety of certification afterward.<sup>211</sup> Judge Joffe did just this in an order issued August 22, 1978.<sup>212</sup>

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<sup>208</sup> Motion for Certification to the Board of Control (April 20, 1978), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/WGH52K0000.pdf> (noting sixteen applications for changes in water rights on which board sought to act); Motion for Certification to the Board of Control (August 14, 1978) *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/MOT73O0000.pdf> (noting twenty-six requests on which board was unable to act).

<sup>209</sup> Memorandum in Opposition to the State of Wyoming's Motion for Certification to the Board of Control 1–2 (May 10, 1978), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/K4F4WU0000.pdf>.

<sup>210</sup> Response of the United States to Motion for Certification of August 11, 1978, at 1, 3 (August 18, 1978), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/8AW58E0000.pdf>.

<sup>211</sup> *Id.* at 3–4.

<sup>212</sup> First Order of Certification and Referral to Wyoming State Board of Control (August 22, 1978), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/1RJGQ0000.pdf>. The court later amended this order to modify the due date for a report from the board. Order (December 29, 1978), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/2T2GD000000.pdf>.

Approximately nine months passed between the court's issuance of its initial order of certification and referral to the Board of Control in August 1978 and its subsequent order appointing Special Master Roncalio in May 1979. The latter emerged after several months of briefing from the parties on the propriety of the board's serving as special master. Such an arrangement would not deny due process to any party due to bias or impartiality argued the state, describing the board as "admirably equipped, through the training, knowledge, and experience of its members" to assist the court with the adjudication.<sup>213</sup> The United States and the tribes had a different perspective. Contending that the state's proprietary and governmental interests in the litigation made it inappropriate for the board to serve as special master, the United States moved in February 1979 for appointment of a "neutral Master" who was "neither a state nor a federal employee" nor had any "personal interest in the outcome of this litigation."<sup>214</sup> The tribes made a similar motion at this time, requesting the court to appoint "someone who is an attorney, with judicial, academic or other experience in federal and state water law, including reserved rights, and who is not a present or former employee of the Tribes, or the State of Wyoming."<sup>215</sup> Three suggestions offered by the tribes fit these criteria: (1) Professor Robert Emmet Clark of the University of Arizona College of Law; (2) Mr. Teno Roncalio, a former Wyoming Congressman from 1961–1967 and 1971–1978; and (3) Judge Robert Vogel, who previously had served as a Justice of the North Dakota Supreme Court.<sup>216</sup> In a letter dated March 23, 1979, Judge Joffe informed the parties that Teno Roncalio had been selected and invited objections to this appointment.<sup>217</sup> An order appointing the special master followed on May 4, 1979.<sup>218</sup>

Less than three weeks elapsed before Special Master Roncalio's charge was laid before him. It came in the form of an order of certification and referral

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<sup>213</sup> State of Wyoming's Brief in Support of Its Motion for Certification to the Board of Control 1–2 (February 21, 1979), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/BCS9TE0000.pdf>.

<sup>214</sup> Motion for Appointment of Master 1 (February 26, 1979), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/31JZ610000.pdf>.

<sup>215</sup> Motion of the Shoshone and Arapahoe Tribes for the Appointment of a Neutral Special Master (February 22, 1979), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/M3VZ7X0000.pdf>.

<sup>216</sup> The Shoshone and Arapahoe Tribes' Suggestions for Special Master (March 12, 1979), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/PGINFQ0000.pdf>.

<sup>217</sup> Letter from Judge Harold Joffe to All Attorneys of Record (March 23, 1979), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/GOIYY70000.pdf>.

<sup>218</sup> Order Appointing Special Master (May 4, 1979), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/FX4FO60000.pdf> [hereinafter Appointment Order]. *See also* O'GARA, *supra* note 14, at 175–76 (describing Special Master Roncalio's background and appointment).

whose content closely tracked the adjudication statute and complaint.<sup>219</sup> Subject to eventual review by the district court, it would be the special master's task (1) to determine the status of existing water rights evidenced by previously issued certificates and court decrees as well as (2) to determine the status of all uncanceled permits to acquire water rights, and to adjudicate any interest or right arising under these permits.<sup>220</sup> Also falling within the special master's charge was the obligation to determine "the extent and priority date of and adjudicate any other interest in or right to use the water of the Big Horn River System within Water Division No. 3" not otherwise represented by the foregoing certificates, decrees, and permits, including "any appropriative or reserved rights of the Arapaho Tribe, Shoshone Tribe, or of the United States . . . ."<sup>221</sup> The order imposing this labor on the special master called for a report to be submitted by January 1, 1982, containing a tabulation or list of the water rights just noted.<sup>222</sup> As an immediate milestone in this process, the court ordered the parties' first meeting to take place roughly three months later.<sup>223</sup>

The trial before Special Master Roncalio in the *Big Horn* adjudication would not begin until January 1981—approximately a year and a half after the special master's appointment—and it was in conjunction with a host of pretrial matters addressed during this interim period that the parties would develop the adjudication's procedural framework.<sup>224</sup> Among other notable matters that emerged at this stage were pleadings and briefing regarding the precise boundaries of the federal lands located within the Wind-Big Horn Basin, including the Wind River Indian Reservation. The major parties entered into a series of stipulations to resolve these boundary issues.<sup>225</sup> Added to these stipulations was another forged on June 23, 1980, that "cleared the decks for launching the trial upon the claims of the United States, as trustee for the Tribes," after a roughly nine-month time lag due to discovery.<sup>226</sup> This stipulation provided, in relevant part, that "[n]either the United States nor the Tribes [would] raise objections to provisional confirmation of adjudicated rights until *after* the reserved rights and any of the water rights

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<sup>219</sup> First Order of Certification and Referral to Master Teno Roncalio and Setting of First Meeting of the Parties (May 22, 1979), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/X87VPG0000.pdf> [hereinafter Certification and Referral Order]. The date noted in this order for the parties' first meeting was changed from August 6 to 7 in an order issued one week later.

<sup>220</sup> *Id.* at 1–2.

<sup>221</sup> *Id.* at 1–2.

<sup>222</sup> *Id.* at 2.

<sup>223</sup> *Id.*

<sup>224</sup> Roncalio Report, *supra* note 153, at 21–24.

<sup>225</sup> *Id.* at 21–22. Special Master Roncalio included the stipulation regarding the boundaries of the Wind River Indian Reservation as appendix one of his report. *Id.* at 349–63.

<sup>226</sup> *Id.* at 26 n.23, 27.



under Federal law of the United States and the Tribes [have] been determined by the Master and District Court.<sup>227</sup> Founded on this stipulation, the *Big Horn* adjudication would proceed in three phases over the next four decades: (1) Phase I addressing the reserved right held by the tribes and derivative water rights held by Indian and non-Indian parties, (2) Phase II concerning reserved rights held by the federal government for federal lands other than the Wind River Indian Reservation, and (3) Phase III evaluating appropriative rights rooted in state law.

### *B. Phase I: Indian Reserved Right and Walton Rights*

Over the course of a roughly fourteen-year period extending from February 1988 to June 2002, the Wyoming Supreme Court issued five opinions and one substantive order, and the U.S. Supreme Court released one per curiam decision, to address the diverse legal issues presented in the *Big Horn* adjudication regarding the existence, nature, and scope of the reserved right held by the Eastern Shoshone and Northern Arapaho tribes, as well as derivative water rights held by Indian and non-Indian parties. This legal corpus from the two law-announcing courts framed Phase I of the adjudication. It was underpinned by a host of decrees and judgments from the district court judges, and reports from the special masters, who invested considerable hours and pages into addressing the water rights at issue in this stage of the proceeding. The survey of this phase that appears below begins with a case dubbed its “headwaters,” *Big Horn I*, as affirmed by the U.S. Supreme Court in *Wyoming v. United States*, and then progresses through four other cases and one order, *Big Horn II-VI*, collectively labeled its “tributaries.” These appellate decisions structure the narrative in order to streamline it. Brief references and citations to the district judges’ and special masters’ underlying rulings are also included.

#### *1. Headwaters*

##### *a. Big Horn I: Reserved Right and Walton Rights*

Released by the Wyoming Supreme Court on February 24, 1988, *Big Horn I* articulated in what proved to be a long-lasting manner the existence, nature, and scope of the reserved right held by the Eastern Shoshone and Northern Arapaho Tribes, as well as derivative water rights held by Indian and non-Indian parties stemming from their ownership of lands in the diminished and ceded portions of the Wind River Indian Reservation.<sup>228</sup> *Big Horn I* constituted the headwaters

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<sup>227</sup> *Id.* at 25–26 (emphasis added).

<sup>228</sup> For an overview of *Big Horn I* from the tribes’ Supreme Court advocate Susan Williams, see Williams, *supra* note 9, at 170–72. Other useful discussions of *Big Horn I* include Walter Rusinek, *A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine*, 17 *ECOLOGY L.Q.* 355, 382–92 (1990); Lynnette J. Boomgarden, Note, *Quantification of Federal Reserved Indian Water Rights—“Practically Irrigable Acreage” Under Fire: The Search for a Better Legal Standard*, 25 *LAND & WATER L. REV.* 417, 423–24 (1990).

of Phase I in that its holdings in these respects served as precedents from which later cases—namely, *Big Horn II-VI*—would branch off during the next decade and a half.

Treating as a front bookend Special Master Roncalio's Phase I trial begun on January 26, 1981, judicial officials proceeded to invest more than seven years into the parties' competing claims regarding the tribes' reserved right, and various parties' derivative water rights, before the Wyoming Supreme Court released *Big Horn I*.<sup>229</sup> In a nutshell, prior to the case's arriving at the higher court, Special Master Roncalio had offered his conclusions concerning these claims in two reports issued in December 1982 and June 1984,<sup>230</sup> Judge Joffe had issued his decision pertaining to the special master's first report in May 1983,<sup>231</sup> and Judge Johnson had entered an amended judgment and decree and an order disposing of these claims in May 1985.<sup>232</sup> Settlement negotiations involving federal, state, and tribal officials, as well as attorneys for private parties, likewise had taken place between June 1984 and February 1986, eventually coming to a halt pending the Wyoming Supreme Court's decision in *Big Horn I*.<sup>233</sup> It was from Judge Johnson's rulings that the *Big Horn I* appeal was taken. These rulings generally concerned the core issues of whether the tribes held a reserved right, what attributes that

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<sup>229</sup> A transcript of the first day of the Phase I trial can be found at <http://bhrc.washakiecounty.net/DocumentCenter/BHCR/O5W4SS0000.pdf>. See also O'GARA, *supra* note 14, at 177–82 (describing certain aspects of Phase I trial before Special Master Roncalio).

<sup>230</sup> Roncalio Report, *supra* note 153; Teno Roncalio, Special Master, Supplemental and Final Report (June 1, 1984), available at <http://bhrc.washakiecounty.net/DocumentCenter/BHCR/4-1-2014o.PDF>.

<sup>231</sup> Harold Joffe, District Judge, Decision Concerning Reserved Water Right Claims by and on Behalf of the Tribes of the Wind River Indian Reservation, Wyoming (May 10, 1983), available at <http://bhrc.washakiecounty.net/DocumentCenter/BHCR/JoffeDec05101983.pdf>. See also O'GARA, *supra* note 14, at 182–85 (describing proceedings before Judge Joffe during his review of Special Master Roncalio's report).

<sup>232</sup> Amended Judgment and Decree (May 15, 1985), available at <http://bhrc.washakiecounty.net/DocumentCenter/BHCR/11112t.pdf>; Order Denying Treaty Priority Date, Modifying and Correcting Findings of Fact and Conclusions of Law, Ruling on Certain Specified Claims, and Deferring Acceptance of Recommended Final Decree in the Special Master's Supplemental and Final Report (May 15, 1985), available at <http://bhrc.washakiecounty.net/DocumentCenter/BHCR/Y3V88V0000.pdf>.

<sup>233</sup> S. Jane Caton, Assistant Attorney General, Wyoming Attorney General's Office, Report to the Governor and Wyoming State Legislature: Big Horn River General Adjudication Progress and Current Status 5–7, 14 (1987) (on file with author). According to Ms. Caton, the settlement proposals generally were structured to “allow the Tribes to develop part of their reserved water rights now, defer other parts[,] and receive benefits in return for this deferral.” *Id.* at 13–14. Apparently a major purpose of the settlement negotiations was “to identify water development projects that might be of mutual benefit to Indian and non-Indian residents of the Basin.” *Id.* at 14. See also Randall T. Cox, Assistant Attorney General, State of Wyoming, Summary of Big Horn River System Adjudication 5 (1984) (describing settlement negotiations and proposals in similar terms) (on file with author).

right bore if it existed, and to what extent individual parties held derivative water rights. The Wyoming Supreme Court structured the *Big Horn I* opinion in a linear manner around these issues, and the discussion below is similarly organized to provide an overview of the court's holdings.<sup>234</sup>

*Existence of Reserved Right.* “Is there a reserved water right for the Wind River Indian Reservation?” The Wyoming Supreme Court posed this question as a heading at the outset of its analysis and proceeded to offer an affirmative answer to it. “The treaty establishing the Wind River Indian Reservation . . . is silent on the subject of water for the reservation,” described the court, “[y]et both the district court and the special master found an intent to reserve water. We affirm.”<sup>235</sup> Initially referencing the diligent work performed by Special Master Roncalio, Judge Joffe, and Judge Johnson on this threshold matter, the court primarily invested its remarks into refuting various arguments asserted by the state for not recognizing a reserved right for the reservation. Neither the equal footing clause of Wyoming’s Act of Admission, nor the water-related provisions of Article 8 of the Wyoming Constitution, evidenced “an intent by Congress not to reserve water for the reservation,” concluded the court.<sup>236</sup> The same could be said with respect to the Second McLaughlin Agreement.<sup>237</sup> On these bases and others, the court was not dissuaded from holding, as had the special master and the district court judges, that the Second Treaty of Fort Bridger implicitly reserved water for the Wind River Indian Reservation.

*Purposes of Reservation.* But for what purposes exactly had the Wind River Indian Reservation been established? The justices turned next to this question. It was paramount given its bearing on quantification of the reserved right.<sup>238</sup> Yet it was perhaps slightly more vexing than the threshold question had been in that Special Master Roncalio had answered it one way (a permanent homeland),<sup>239</sup> while both district court judges had answered it another (agriculture alone).<sup>240</sup>

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<sup>234</sup> In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 753 P.2d 76 (Wyo. 1988) (*Big Horn I*). Before addressing these issues on the merits, the court rejected the argument that had been raised earlier regarding the disclaimer clause in Article 21, Section 26 of the Wyoming Constitution precluding state court jurisdiction over the adjudication. *Id.* at 86–88.

<sup>235</sup> *Id.* at 91.

<sup>236</sup> *Id.* at 92.

<sup>237</sup> *Id.* See also *id.* at 93 (rejecting argument that United States’ acquisition of state water permits for Indian land after 1905 evidenced congressional intent not to reserve water for tribes).

<sup>238</sup> *Id.* at 94 (“[T]he amount of water impliedly reserved is determined by the purposes for which the reservation was created.”).

<sup>239</sup> As construed by Special Master Roncalio, the principle purpose of the treaty was “to provide the Indians with a homeland where they could establish a permanent place to live and to develop their civilization just as any other nation throughout history has been able to develop its civilization.” *Id.* (internal quotations omitted).

<sup>240</sup> *Id.* at 95 (“On the very face of the Treaty, it is clear that its purpose was purely agricultural.”).

A similar 3-2 split occurred on the court. “Considering the well-established principles of treaty interpretation, the treaty itself, the ample evidence and testimony addressed, and the findings of the district court,” explained the three-justice majority, “we have no difficulty affirming the finding that it was the intent at the time to create a reservation with a *sole* agricultural purpose.”<sup>241</sup> Notably, although the majority used the term “sole” in this quotation of its holding, the term “primary” appears elsewhere in the opinion—*e.g.*, “the treaty encouraged only agriculture, and that was its primary purpose,” and “the primary activity was clearly agricultural.”<sup>242</sup> As discussed in the next section, the U.S. Supreme Court had attached legal significance to the term “primary” a decade earlier in its landmark decision *U.S. v. New Mexico* addressing quantification of federal reserved rights.<sup>243</sup> While acknowledging the questionable applicability of this term to Indian reserved rights, the majority in *Big Horn I* nonetheless used it in the foregoing places.<sup>244</sup> Ultimately construing the treaty as reflecting a singular agricultural purpose, the majority held that the reserved right extended to water for agricultural, commercial, domestic, livestock, and municipal uses, but not for fisheries, industrial and mineral development, or wildlife and aesthetics.<sup>245</sup> In contrast, two dissenting justices would have followed Special Master Roncalio’s lead, holding that Congress’s purpose in establishing the reservation had been to create a tribal homeland, and that the reserved right encompassed any water use considered appropriate to that homeland as it progressed and developed.<sup>246</sup>

*Groundwater and Exports.* Having recognized the existence of the reserved right based on the Second Treaty of Fort Bridger, and having construed the treaty’s purpose as just described vis-à-vis the quantity of the right, the court then addressed two related issues before turning to quantification. An initial issue concerned groundwater. Did the reserved right attach to it? “The logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater. . . . Certainly the two sources are often

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<sup>241</sup> *Id.* at 96 (emphasis added). In reaching its holding, the court relied in part on the U.S. Supreme Court’s construction of the treaty fifty years earlier in *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 117–18 (1938) (describing how various treaty provisions “plainly evidence purpose on the part of the United States to help to create an independent permanent farming community upon the reservation.”).

<sup>242</sup> *Big Horn I*, 753 P.2d at 97–98.

<sup>243</sup> *United States v. New Mexico*, 438 U.S. 696, 700–702 (1978).

<sup>244</sup> *Big Horn I*, 753 P.2d at 96.

<sup>245</sup> *Id.* at 98–99.

<sup>246</sup> *Id.* at 119 (Thomas, J., dissenting); *id.* at 135 (Hanscum, J., dissenting). Although in accord with regard to the homeland purpose of the reservation, the dissenting justices disagreed about whether exportation of water by the tribes comported with this purpose. Justice Hanscum would have taken that “additional step” given the proper circumstances, whereas Justice Thomas was unwilling to assume that “using the reserved water as a salable commodity was contemplated in connection with the implied reservation of the water.” *Id.* at 119, 135.

interconnected.”<sup>247</sup> This statement by the court seemed to settle the matter at first blush, but not so. Notwithstanding its decision in *Cappaert* twelve years earlier,<sup>248</sup> the U.S. Supreme Court had not (and has not since) squarely ruled on this issue, such that the Wyoming Supreme Court elected to come out the other way. It ultimately held that the reserved right did *not* extend to groundwater.<sup>249</sup> A subsequent issue to which the court turned involved exportation—*i.e.*, whether the tribes could sell or lease water afforded by their reserved right, including for export off the reservation. In this vein, the court left intact the district court’s holding that on-reservation sales and leases were permissible, but it did not weigh in on exports. Apparently the tribes had not sought permission to export, and the United States had conceded no federal law permitted it.<sup>250</sup>

*Quantification of Reserved Right.* Quantification of the tribes’ reserved right was the next matter at hand. The court initially waded into this issue by affirming the practicably irrigable acreage (again, PIA) standard as the proper method for quantification. In line with *Arizona v. California*, which the special master and district court judges had followed, the scope of the reserved right under this standard was based upon “the amount of water necessary to irrigate all of the reservation’s practicably irrigable acreage.”<sup>251</sup> This acreage involved two types of lands on the Wind River Indian Reservation: (1) future lands (lands “not yet developed for irrigation, but which were [asserted as] practicably irrigable acreage”),<sup>252</sup> and (2) historic lands (“practicably irrigable acres currently and/or historically irrigated on the reservation”).<sup>253</sup> The court closely reviewed the arability, engineering feasibility, and economic feasibility analyses that had been undertaken for both types of lands. It generally upheld these analyses and

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<sup>247</sup> *Id.* at 99.

<sup>248</sup> *Id.* The Ninth Circuit had indicated in *Cappaert* that the federal reserved right at issue in that case for Devil’s Hole National Monument attached to groundwater. *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974). Although the U.S. Supreme Court subsequently upheld the Ninth Circuit’s holding regarding the existence of the reserved right, it expressly noted that it considered the water to which that right attached to be surface water. *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (“No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater. . . . Here, however, the water in the pool is surface water.”).

<sup>249</sup> *Big Horn I*, 753 P.2d at 100. The state did not appeal a ruling in the amended judgment and decree issued by Judge Johnson on May 15, 1985, that the tribes were entitled to continue then-existing amounts of groundwater use. *Id.* Roughly a decade after *Big Horn I*, the tribes engaged in settlement conferences with the United States and the state to resolve the tribes’ groundwater rights—specifically, those associated with pre-May 15, 1985 wells—eventually entering into a stipulation with these parties that the court subsequently approved in a consent decree in 2001. Consent Decree Related to Pre-May 15, 1985 Groundwater Uses (December 3, 2001), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/YFAYZ50000.pdf>.

<sup>250</sup> *Big Horn I*, 753 P.2d at 100.

<sup>251</sup> *Id.* at 101.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 106.

concluded as follows: (1) 107,976 acres of practicably irrigable acreage existed on the reservation (54,216 acres of historic lands, 53,760 acres of future lands), and (2) a 499,862 acre-feet reserved right (290,490 acre-feet for historic lands, 209,372 acre-feet for future lands) was appropriate based upon this PIA.<sup>254</sup> Stemming from *U.S. v. New Mexico*, which again is discussed below, the court rejected arguments that the reserved right award, as quantified in this manner, violated the “sensitivity doctrine”—*i.e.*, that the award had been made without sufficient “sensitivity to its impact upon those who [had] obtained water rights under state law . . . .”<sup>255</sup> The court expressed uncertainty about whether this doctrine indeed applied to the reserved right’s quantification,<sup>256</sup> and it ultimately held no violation had occurred even assuming the doctrine were applicable.<sup>257</sup>

*Priority Date and Walton Rights.* The reserved right’s priority date was a final feature touched on by the court, and it was here that the justices addressed a subject that proved to be as critical as it was contentious as Phase I progressed—the relationship between the tribes’ reserved right and derivative water rights of Indian and non-Indian parties. The court began by confirming that the tribes’ lands on the diminished portion of the Wind River Indian Reservation carried a reserved right with a priority date of July 3, 1868.<sup>258</sup> How, if at all, did the historical allotment of the reservation affect this priority date for Indian allottees and their successors? With respect to Indian allottees, the court held that allotment did not affect the priority date at all, as the Supreme Court had stated in *Powers* no evidence existed that “Congress intended allottees be denied participation in the use of reserved water rights.”<sup>259</sup> A similar but not identical situation existed for non-Indian successors. *Hibner* had foreshadowed the modern rule a half-century prior,<sup>260</sup> and a trio of Ninth Circuit decisions from the early

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<sup>254</sup> These figures are drawn from the court’s analysis in *id.* at 101–11. One notable way in which the court did find fault with Special Master Roncalio’s analysis concerned his 10% reduction of the reserved right award for future lands based upon a margin of error in the arable land base. *Id.* at 105. One acre-foot equals 325,851 gallons or 1,233 cubic meters. U.S. Geological Survey, Water Science Glossary of Terms, <http://water.usgs.gov/edu/dictionary.html> (last visited March 17, 2015).

<sup>255</sup> *Big Horn I*, 753 P.2d at 111 (quoting *United States v. New Mexico*, 438 U.S. 696, 718 (Powell, J., dissenting)).

<sup>256</sup> *Id.* (“It is thus not clear whether the sensitivity doctrine, requiring the quantification of reserved water rights with sensitivity to the impact on state and private appropriators, applies here.”).

<sup>257</sup> *Id.* at 112. Earlier in its opinion, the court similarly rejected an argument that the sensitivity doctrine applied to the issue of congressional intent to reserve water, and also described that the special master and district court had been sufficiently sensitive to existing water rights even if the doctrine did apply. *Id.* at 94.

<sup>258</sup> See *id.* at 112 (noting priority date generally as 1868). As mentioned previously, July 3, 1868, was the date on which the Second Treaty of Fort Bridger was executed. *Id.* at 91.

<sup>259</sup> *Id.* at 112 (quoting *United States v. Powers*, 305 U.S. 527, 533 (1939)).

<sup>260</sup> *United States v. Hibner*, 27 F.2d 909, 912 (E.D. Idaho 1928).



1980s had emerged since this time.<sup>261</sup> The cornerstone of this trio was *Colville*, and it was from this case that the term “Walton rights” originated to refer to water rights held by non-Indian successors—Walton was the non-Indian successor’s name. *Colville*’s specific holding was that reserved rights held by allottees—*i.e.*, pro rata shares of these rights extending from tribes’ reserved rights—passed to non-Indian successors. These rights carried the reserved right priority date and afforded a non-Indian successor a “ratable share” of the reserved right based upon the proportion of irrigable acreage owned by the non-Indian successor within the reservation.<sup>262</sup> This ratable share marked the outer limit of a non-Indian successor’s water right. The precise quantity of use permitted depended upon (1) the amount of water being appropriated by the Indian allottee at the passage of title plus (2) any additional water appropriated by a non-Indian successor with “reasonable diligence” after this time.<sup>263</sup> The Wyoming Supreme Court adhered to the Ninth Circuit’s approach in *Colville* and instructed that the non-Indian successors who had appealed in *Big Horn I* should be awarded water rights on remand in accordance with the foregoing rule.<sup>264</sup> After addressing the water rights of Indian allottees and their successors, the court further held that the 1868 priority date extended to reacquired lands in the ceded and diminished portions of the reservation.<sup>265</sup>

*Monitoring.* Only one issue remained for the court to address following its pronouncements regarding the existence, nature, and scope of the tribes’ reserved right and derivative water rights. Did the State Engineer possess authority to monitor the tribes’ reserved right as embodied in the district court’s decree? The court held in the affirmative and took pains to distinguish “monitoring” from “administration” when explicating its holding.<sup>266</sup> It clarified that the State Engineer’s role was not to apply state water law on the Wind River Indian Reservation, but rather to enforce the reserved right as decreed “under principles of federal law.”<sup>267</sup> Further, the court explained that, if the State Engineer were to find the tribes had violated the decree, he or she would be obligated to “turn to the courts” for its enforcement and not “simply close the headgates.”<sup>268</sup> On

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<sup>261</sup> *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). The Ninth Circuit requested the U.S. Supreme Court to review its treatment of non-Indian successors’ water rights in *Colville*, but on two occasions the Court denied certiorari. *Big Horn I*, 753 P.2d at 113. The other Ninth Circuit cases in this trio were *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984), and *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

<sup>262</sup> *Colville*, 647 F.2d at 51.

<sup>263</sup> *Id.*

<sup>264</sup> *Big Horn I*, 753 P.2d at 113.

<sup>265</sup> *Id.* at 114.

<sup>266</sup> *Id.* at 115 (describing how State Engineer’s “[i]ncidental monitoring of Indian use” under decree had “carelessly been termed ‘administration’ of Indian water”).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*



the other hand, although describing that “state water appropriators [were] not in a position to jeopardize the decreed rights of the Tribes,” the court stated that if such conflicts were to arise “the United States and the Tribes [must] first turn to the state engineer to exercise his authority over the state users to protect their reserved water rights before they seek court assistance.”<sup>269</sup> In the justices’ view, Article 1, Section 31 of the Wyoming Constitution dispelled any fears that the State Engineer might execute this duty in an unfair manner. This provision obligated the state to “equally guard all of the various interests involved” when providing for water use,<sup>270</sup> and the State Engineer had sworn to uphold it.<sup>271</sup>

### *b.* Wyoming v. United States

Following the Wyoming Supreme Court’s decision and a subsequent denial of rehearing, *Big Horn I* eventually made its way to the U.S. Supreme Court.<sup>272</sup> The State of Wyoming filed a petition for certiorari on August 18, 1988,<sup>273</sup> and the Eastern Shoshone and Northern Arapaho tribes, as well as the City of Riverton, filed cross-petitions.<sup>274</sup> Only the State of Wyoming’s petition ultimately would be granted.<sup>275</sup> It posed three questions. An initial query concerned the existence of a reserved right for the Wind River Indian Reservation: “Can a Federal reserved water right impliedly exist for the Reservation despite an express Congressional requirement that the Reservation’s water rights be obtained under state law?”<sup>276</sup>

<sup>269</sup> *Id.*

<sup>270</sup> WYO. CONST. art. I, § 31.

<sup>271</sup> *Big Horn I*, 753 P.2d at 115.

<sup>272</sup> Special Master Roncalio prepared an insightful piece on *Wyoming v. United States* several years after the U.S. Supreme Court issued its per curiam decision. Teno Roncalio, *The Big Horns of a Dilemma*, in *INDIAN WATER IN THE NEW WEST* 209–14 (Thomas R. McGuire et al. eds., 1993). For other useful discussions of *Wyoming v. United States*, see Rusinek, *supra* note 228, at 394–404; Boomgarden, *supra* note 228, at 424–25.

<sup>273</sup> 1988 WL 1094117 (U.S.) [hereinafter Wyoming Petition]. As described several years later by Special Master Roncalio, “[n]ine western states, and a host of other water entities, filed *amicus* briefs supporting the Wyoming effort, a cause celebre to many water users in the West.” Roncalio, *supra* note 272, at 209. See also Rusinek, *supra* note 228, at 397–98 (discussing positions of amici supporting and opposing Wyoming).

<sup>274</sup> As described by the tribes’ Supreme Court advocate Susan Williams, “the tribes had decided not to appeal because the award of water [in *Big Horn I*] was so large and some language from the special master indicated that the tribe could use that award for other uses within the reservation.” Williams, *supra* note 9, at 171. The tribes’ decision to file a cross-petition apparently stemmed from concerns that “the Supreme Court would alter the PIA standard.” *Id.* According to Ms. Williams, the tribes’ cross-petition focused on the “restriction on groundwater” imposed in *Big Horn I* and the tribes’ authority to “transfer use of water on the reservation.” *Id.* See also Rusinek, *supra* note 228, at 394 (listing six issues for which tribes sought review in cross-petition).

<sup>275</sup> The Court denied the tribes’ and City of Riverton’s petitions on July 3, 1989. 492 U.S. 926 (1989).

<sup>276</sup> Wyoming Petition, *supra* note 273, at 1.

Following this query was a second question regarding the PIA standard:

In the absence of any demonstrated necessity for additional water to fulfill reservation purposes[,] and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation set aside for a specific tribe?<sup>277</sup>

Complementing these inquiries was a third concerning the reserved right's priority date: "What priority date should be accorded a reserved water right, if any, for practicably irrigable lands which were ceded by the Reservation's Tribes, if those lands later were restored to and made a part of the reservation by the United States or were reacquired by Indians from non-Indians?"<sup>278</sup> Granting the state's petition roughly five months after it had been filed, the Court limited its review to the second question noted here.<sup>279</sup> It was the Wyoming Supreme Court's quantification of the tribes' reserved right under the PIA standard that would be the focus of the U.S. Supreme Court's review.<sup>280</sup>

Oral argument took place on the state's PIA-related question on April 25, 1989, and readily apparent from the transcript is the fact that the Court's decision had the potential to shape the reserved rights doctrine profoundly.<sup>281</sup> Several colloquies between the Justices and advocates addressed the Court's initial adoption of the PIA standard in *Arizona v. California* and its persistence within the Court's jurisprudence. Should the Court retain or discard the PIA standard?<sup>282</sup> To what extent, if any, did it require an assessment of "whether additional irrigation

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<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 2.

<sup>279</sup> The Court's order granting certiorari can be found at 488 U.S. 1040 (1989).

<sup>280</sup> See also Wyoming Petition, *supra* note 273, at 11 ("The appropriate quantification standard for reserved water rights of an agricultural Indian reservation is an important question of federal law which has not been, but should be, settled by this Court."); Roncalio, *supra* note 272, at 211 (offering Special Master Roncalio's perspective that the PIA standard "was precisely what was under attack in Wyoming's 1989 appeal to the Supreme Court," and describing that he had also "faced this reality when appointed special master to the Big Horn case in 1979" and ultimately "could see no difference" in the standard's application to the Wind River Indian Reservation versus the Indian reservations to which the U.S. Supreme Court had applied the standard in *Arizona v. California*). Potential reasons for the Court's granting certiorari are discussed in Boomgarden, *supra* note 228, at 428.

<sup>281</sup> Supreme Court Transcript, *supra* note 6. The transcript itself does not identify the Justices by name in relation to their respective questions and remarks. For an engaging narrative of the oral argument in which the individual Justices are identified, see O'GARA, *supra* note 14, at 190–92.

<sup>282</sup> Supreme Court Transcript, *supra* note 6, at 14 (quoting colloquy in which unidentified Justice described *Arizona v. California* as containing "virtually no reasoning" and expressed skepticism about considering the special master's discussion of the PIA standard in *Arizona v. California* as later referenced in the Court's opinion).

projects are reasonably likely to be constructed” in the future?<sup>283</sup> Other colloquies concerned the PIA standard’s application to the Wind River Indian Reservation. Would the Court’s adherence to the standard in the case entail fidelity or disloyalty to Congress’s intent in 1868?<sup>284</sup> Yet other colloquies focused on attributes of Indian reserved rights that do not appear to have implicated the PIA standard directly—particularly, the distinction between reserved rights and appropriative rights in terms of the former not being lost by non-use.<sup>285</sup> And, finally, looming across all of these critical topics was a foundational matter emphasized by the Justices at least twice during the argument: the implicit and judicial nature of the reserved rights doctrine. In the words of one Justice not identified in the transcript: “The whole *Winters* doctrine is just an implication to Congress. Congress never said in so many words, we’re reserving a water right. That’s just what this Court said Congress must have intended. So, Congress has never spoken.”<sup>286</sup>

A draft opinion prepared by Justice O’Connor and circulated among her colleagues approximately six weeks after oral argument in *Wyoming v. United States* further demonstrated how the Court’s forthcoming decision potentially could work monumental changes in the reserved rights doctrine—in particular, per the question presented, the PIA standard.<sup>287</sup> Expressing agreement with the State of Wyoming’s argument that “quantification of Indian reserved rights must entail sensitivity to the impact on state and private appropriators of scarce water under state law,” the draft opinion suggested that such sensitivity should inform the PIA determination.<sup>288</sup> A degree of pragmatism was called for in this

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<sup>283</sup> *Id.* at 10. *See also id.* (“Does one have to take into the calculus whether any of these projects to make [acreage] irrigable will be constructed?”).

<sup>284</sup> *See id.* at 15 (containing remark by unidentified Justice expressing difficulty with believing that “in 1868 Congress, no matter what the size of the Indian population that was contemplated to be on the [reservation], should be deemed to have said we’re giving enough water to irrigate every inch of arable land.”).

<sup>285</sup> *See id.* at 16 (quoting colloquy in which unidentified Justice expressed concern reserved rights would not be subject to diminution for non-use, and described that “doesn’t have to be” in “the very nature of a reserved water right . . . [T]here is no doctrine of water law that elevates one right over another to that extent.”).

<sup>286</sup> *Id.* at 16. *See also id.* at 18 (quoting exchange between unidentified Justice and tribes’ Supreme Court advocate Susan Williams in which Ms. Williams responded affirmatively to question posed by Justice that “the *Winters* doctrine was just an intent that this Court attributed to Congress, wasn’t it? Congress didn’t say in so many words, in the reservations we’re setting aside water.”).

<sup>287</sup> A copy of Justice O’Connor’s draft opinion is attached as an appendix to Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 725–60 (1997) [hereinafter Draft Opinion]. Justice Brennan prepared a lengthy draft dissent. *Id.* at 741–60.

<sup>288</sup> *Id.* at 737. *See also* Williams, *supra* note 9, at 171 (providing description from tribes’ Supreme Court advocate Susan Williams that “there was a lot of concern” among the Justices at oral argument about the impact of the tribes’ reserved right on “non-Indians who had been using water,” and that some Justices “indicated concern with the sensitivity doctrine.”).

regard—pragmatism that would entail integrating into PIA analysis a “practical assessment—a determination apart from theoretical economic and engineering feasibility—of the *reasonable likelihood* that future irrigation projects, necessary to enable lands which have never been irrigated to obtain water, will *actually* be built.”<sup>289</sup> Beyond integrating this sensitivity doctrine into PIA analysis, the draft opinion also highlighted two unresolved issues involving key features of Indian reserved rights. The first issue was “whether such rights are subject to forfeiture for nonuse”—a topic broached at oral argument as noted above—and the second issue was “whether they may be sold or leased for use on or off the reservation” (*i.e.*, after being quantified under the PIA standard).<sup>290</sup>

Neither the sensitivity doctrine’s role, if any, within PIA analysis, nor the two associated issues regarding the attributes of Indian reserved rights ultimately would be addressed by the Court in its final decision in *Wyoming v. United States*. Justice O’Connor recused herself from the case shortly after circulating the draft opinion,<sup>291</sup> and the remaining Justices split 4-4 on the PIA question, affirming the Wyoming Supreme Court’s decision on June 26, 1989, as an equally divided Court.<sup>292</sup> This one-line per curiam decision brought *Big Horn I* to a close. It made *Big Horn I* the first proceeding in which Indian reserved rights had been quantified since *Arizona v. California* twenty-six years earlier,<sup>293</sup> but in and of itself carried no precedential weight.<sup>294</sup>

## 2. Tributaries

### a. Big Horn III: Reserved Right—Use and Administration

Less than two years passed after the U.S. Supreme Court’s affirmance of *Big Horn I* before the parties were back in the Wyoming Supreme Court disputing critical issues involving the tribes’ reserved right. *Big Horn III* was the case in

<sup>289</sup> Draft Opinion, *supra* note 287, at 738 (emphasis in original). “Imagine the spawning of litigation [this] language would have generated,” described the tribes’ Supreme Court advocate Susan Williams two decades later upon the *Winters* centennial—“[t]hankfully it was not ever issued.” Williams, *supra* note 9, at 172.

<sup>290</sup> Draft Opinion, *supra* note 287, at 734.

<sup>291</sup> Justice O’Connor decided to recuse herself after learning that her family’s ranching corporation—of which she was a minority stockholder—had been named a party in the State of Arizona’s still-ongoing Gila River adjudication involving various Indian reserved rights claims. Mergen & Liu, *supra* note 287, at 684–85.

<sup>292</sup> *Wyoming v. United States*, 492 U.S. 406 (1989). For an insightful discussion of challenging legal issues that, in Special Master Roncalio’s view, would have arisen if the U.S. Supreme Court had reversed *Big Horn I* in *Wyoming v. United States*, see Roncalio, *supra* note 272, at 212–13.

<sup>293</sup> Boomgarden, *supra* note 228, at 426 (citing David H. Getches, *Foreword*, in AMERICAN INDIAN RESOURCES INSTITUTE, TRIBAL WATER MANAGEMENT HANDBOOK xv (1988)).

<sup>294</sup> See *Neil v. Biggers*, 409 U.S. 188, 192 (1972) (“Nor is an affirmance by an equally divided Court entitled to precedential weight.”).

which these issues came to a head.<sup>295</sup> It was preceded by a *Walton* rights-related decision, *Big Horn II*, by roughly a year and a half. Given that decision's distinct focus, however, it is covered below alongside its counterparts.

*Big Horn III*'s backstory traces to efforts by the tribes after *Big Horn I* to dedicate a portion of their reserved right—specifically, its future lands component—to instream flows for tribal fisheries and related non-consumptive uses along the Wind River.<sup>296</sup> The tribes undertook a number of measures to this end, adopting a tribal water code, creating a water resources control board, and subsequently issuing a tribal instream flow permit in April 1990 that dedicated a prescribed amount of water from the Wind River for instream flow purposes.<sup>297</sup> These purposes included fisheries restoration and enhancement, recreational uses, and groundwater recharge by downstream irrigators and other water users.<sup>298</sup> Shortly after issuing this permit, the tribes submitted a complaint to the State Engineer about the impact of water diversions by appropriators with state law-based water rights on flow levels in the Wind River.<sup>299</sup> The tribes asserted that these levels had dropped below the specified flow volumes secured by their permit.<sup>300</sup> In response to this complaint, the State Engineer determined that the tribes' permit was unenforceable because their reserved right only extended to diversions of water, and that any change in the use of water afforded by the right had to be made following a diversion.<sup>301</sup> When the tribes later requested curtailment of appropriative rights held by Midvale Irrigation District, the State Engineer refused to honor this request on the ground that it was unlawful.<sup>302</sup> Litigation then ensued before Special Master Dolan and Judge Hartman, both of whom rendered decisions in the tribes' favor.<sup>303</sup> These decisions rested on several

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<sup>295</sup> In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 835 P.2d 273 (Wyo. 1992) (*Big Horn III*). An excellent discussion of *Big Horn III*'s milestones can be found in O'GARA, *supra* note 14, at 232–44. For additional useful scholarship, see Wes Williams, Jr., Note, *Changing Water Use for Federally Reserved Indian Water Rights: Wind River Indian Reservation*, 27 U.C. DAVIS L. REV. 501 (1994); Peggy Sue Kirk, Note, *Cowboys, Indians and Reserved Water Rights: May a State Court Limit How Indian Tribes Use Their Water?*, 28 LAND & WATER L. REV. 467 (1993); Berrie Martinis, Note, *From Quantification to Qualification: A State Court's Distortion of the Law in re General Adjudication of All Rights to Use Water in the Big Horn River System*, 68 WASH. L. REV. 435 (1993); Mark Squillace, *Transferring Indian Reserved Rights to Instream Flows: Lessons from the Big Horn Adjudication*, 4 RIVERS 48 (1993).

<sup>296</sup> *Big Horn III*, 835 P.2d at 275.

<sup>297</sup> *Id.* at 275–76.

<sup>298</sup> *Id.* at 276.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> Judgment and Decree 17–19 (March 11, 1991), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/GQVXO70000.pdf>; Report and Recommendation of the Special Master 19–20 (October 4, 1990), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/U80LAK0000.pdf>.

precedents, but especially noteworthy among them was a 1979 decree issued by the U.S. Supreme Court in *Arizona v. California*.<sup>304</sup> This decree declared that the PIA standard, as applied to quantify the water rights of the five Indian reservations at issue in that case, “shall constitute the means of determining [the] quantity of adjudicated water rights but shall *not* constitute a restriction of the usage of them to irrigation or other agricultural application.”<sup>305</sup> As will be seen shortly, notwithstanding this text from the Court’s decree, the Wyoming Supreme Court charted a different course in *Big Horn III*.

The issues in *Big Horn III* were thus twofold: (1) whether the tribes were authorized to use a portion of their reserved right, as established and quantified under the PIA standard in *Big Horn I*, for instream flows, and (2) whether the State Engineer should administer all water rights on the Wind River Indian Reservation (*i.e.*, state law-based appropriative rights as well as the tribes’ reserved right and derivative water rights based on federal law). The Wyoming Supreme Court resolved these issues in a “fractured” decision consisting of separate opinions from each justice.<sup>306</sup> A useful roadmap for these opinions appears in Justice Golden’s dissent.<sup>307</sup>

*Use of Reserved Water.* Turning initially to the issue of instream flows, Justice Macy wrote a majority opinion in which Justices Thomas and Cardine joined in separate concurrences. As an overview, the respective views of these justices were as follows. Justice Macy considered *Big Horn I* controlling in this realm, construing it as stating “clearly and unequivocally” that “the Tribes had the right to use a quantified amount of water on their reservation *solely* for agricultural and subsumed purposes and not for instream purposes.”<sup>308</sup> Justice Macy further concluded that (1) the tribes were required to comply with state law when seeking a change in use from agricultural to instream flow purposes, but (2) the tribes

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<sup>304</sup> *Arizona v. California*, 439 U.S. 419 (1979).

<sup>305</sup> *Id.* at 422 (emphasis added). The Court’s decree further provided that if the reserved rights were used for purposes other than “irrigation or other agricultural application, the total consumptive use for [each] Reservation shall not exceed the consumptive use that would have resulted if the diversions . . . had been used for irrigation of the number of acres specified for that Reservation . . . and for the satisfaction of related uses.” *Id.* at 422–23.

<sup>306</sup> Craig Alexander, *Results Following Litigation: The Wind River Tribes/Big Horn River*, in *THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL 177* (Barbara Cosens and Judith V. Royster eds., 2012) (referencing *Big Horn III* as a “fractured opinion” that “left the parties with no guidance and guaranteed continued litigation,” and describing “*Big Horn*’s use of the PIA standard” as a “restriction on use” as contrary to the U.S. Supreme Court’s 1979 decree in *Arizona v. California*). See also John C. Schumacher, *Wind River Litigation: Decades in the Making* 15 (2012) (“The Wyoming Supreme Court’s ruling in *Big Horn III* has something for everyone and nothing for anyone. . . . Its value as precedent is limited.”) (on file with author).

<sup>307</sup> In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 835 P.2d 273, 300–303 (Wyo. 1992) (*Big Horn III*).

<sup>308</sup> *Id.* at 278 (emphasis added).



were legally incapable of doing so because only the state could hold instream flow rights under Wyoming law.<sup>309</sup> Justice Thomas agreed in his concurrence with Justice Macy's view regarding the controlling effect of state law, opining that the tribes were obligated to invoke state law "with respect to any change of use or the implementation of any right to instream flow."<sup>310</sup> Justice Cardine saw things similarly. "I would hold that a paper right, one that has never been applied to practicably irrigable acreage or subsumed uses, may not be transferred to instream flow," he explained, which would "prevent the transfer of future water to instream flow as applied for . . . in this appeal."<sup>311</sup>

Dissenting on the instream flows issue were Justices Brown and Golden. Contrary to Justice Macy's statements in the majority opinion, Justice Brown contended *Big Horn I* did not control this matter. Omitted from the host of issues addressed in that case was any "issue regarding changing part of the reserved right for agricultural purposes to a right to instream flow for fishery purposes."<sup>312</sup> Reliance on *Big Horn I* was ill-founded in Justice Brown's view, and existing authority—specifically, *Arizona v. California*—belied Justice Macy's conclusion.<sup>313</sup> This conclusion likewise could not be reconciled with the decrees that had been issued by Judges Joffe and Johnson leading up to *Big Horn I*, the state's petition for rehearing in that case, and the state's briefing in *Wyoming v. United States*.<sup>314</sup> In sum, "[t]he district court, this court, and the United States Supreme Court [had] recognized that the Tribes [were] entitled to dedicate their decreed water to instream flows" by Justice Brown's account.<sup>315</sup> Justice Golden held a similar opinion. He also referenced text in the Joffe and Johnson decrees suggesting the tribes were not restricted to agricultural uses simply because the reserved right had been quantified under the PIA standard.<sup>316</sup> Nor had the court addressed this issue in *Big Horn I*, as Justice Macy asserted had been clear and unequivocal, according to Justice Golden.<sup>317</sup> It was an issue *Big Horn I* did not reach, but that should be resolved in the tribes' favor under *Winters* and *Arizona v. California*. Justice Golden would have held the tribes were entitled to use water afforded by the reserved right "for any purpose they deem to be to their benefit," including instream flows.<sup>318</sup>

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<sup>309</sup> *Id.* at 279.

<sup>310</sup> *Id.* at 285.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 288–89.

<sup>313</sup> *Id.* at 289.

<sup>314</sup> *Id.* at 289–90.

<sup>315</sup> *Id.* at 290.

<sup>316</sup> *Id.* at 292.

<sup>317</sup> *Id.* at 293.

<sup>318</sup> *Id.* at 294.



*Administration of Reserved Right.* A similar 3-2 split occurred among the justices on the administration issue. “The court addressed the role of the state engineer as the administrator of the Tribes’ reserved water right in *Big Horn I*,” declared Justice Macy in the majority opinion, expressing his view that “unified administration by the state engineer of both reserved and state-permitted rights to Wyoming water is essential to effective water management within the Big Horn River System.”<sup>319</sup> Contrary to Judge Hartman’s ruling—which had authorized the tribes’ water resources control board to administer all water rights within the reservation—Justice Macy reiterated the constitutional underpinnings and contours of the administrative scheme announced in *Big Horn I*, faulted the district court for assertedly violating the Wyoming Constitution, and called for adherence to *Big Horn I*.<sup>320</sup> Justice Thomas concurred with this result. He regarded administration as the paramount issue and approached it in a geographical manner. With respect to the ceded portion of the reservation, he concluded the tribes lacked any “sovereign rights” to this area such that only the State Engineer could administer water rights within it.<sup>321</sup> In turn, although recognizing tribal sovereignty over the diminished reservation, Justice Thomas also favored the State Engineer serving as the sole regulatory authority in this domain, as “it would make little sense to divide the regulatory function [given] the clear interrelationship of the water courses and systems” in the ceded and diminished portions of the reservation.<sup>322</sup> Justice Brown shared this pragmatic concern. “A provision for dual management would be unworkable, exacerbate a power struggle, and invite continued litigation” in his view.<sup>323</sup> To avoid this outcome, the State Engineer should hold exclusive administrative authority.

Justices Cardine and Golden dissented from the majority’s conclusion. “I do not agree that Wyoming law governs the administration of Indian water rights,” described Justice Cardine, “[n]or do I agree that the State Engineer should administer the tribal water rights to the exclusion of the Tribes.”<sup>324</sup> As an alternative to the administrative scheme set forth in *Big Horn I*—and contrary to the pragmatic concerns of his colleagues—Justice Cardine would have held that the tribes and the State Engineer “jointly administer the water rights on the reservation and, in the event of disagreement, . . . turn to the court for resolution of their dispute.”<sup>325</sup> Justice Golden would have taken a further step. Initially contesting the notion that water afforded by the tribes’ reserved right constitutes “property of the state” over which the State Engineer must have control, Justice

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<sup>319</sup> *Id.* at 282–83.

<sup>320</sup> *Id.* at 280–83.

<sup>321</sup> *Id.* at 284.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 290.

<sup>324</sup> *Id.* at 287–88.

<sup>325</sup> *Id.* at 288.

Golden construed *Big Horn I* as designating the State Engineer essentially as a “water master” responsible for monitoring (rather than administering) the reserved right.<sup>326</sup> The State Engineer failed to fulfill this role in relation to the tribes’ instream flow permit according to Justice Golden, thereby depriving the tribes of the relief and protection contemplated by *Big Horn I*, and warranting substitution of the tribal water resources control board for the State Engineer by the district court.<sup>327</sup> Viewing water regulation as an “important sovereign power,” Justice Golden would have held that the “[t]ribes should monitor both Tribal rights and non-Indian rights on the reservation, turning to the courts for resolution of disputes.”<sup>328</sup>

In sum, although the Wyoming Supreme Court issued a splintered opinion to resolve the instream flow and administrative conflicts in *Big Horn III*, its upshot was that (1) the tribes were not authorized to dedicate water afforded by their reserved right to instream flows, and (2) the State Engineer was responsible for administering all water rights on the Wind River Indian Reservation.<sup>329</sup> Faced with this outcome, the tribes considered appealing *Big Horn III* to the U.S. Supreme Court—a decision that might have entailed a trajectory similar to what had occurred in *Big Horn I*—but eventually steered clear of this path due to concerns about the Court’s even-handedness and objectivity.<sup>330</sup> It was at this point in the adjudication—after roughly a dozen years had been invested into Phase I—that former Special Master Roncalio (then as a private attorney) posed a foreboding query: “Has the litigation ended? Who knows. How long are the big horns of this dilemma!”<sup>331</sup> Little did the former special master know it would require a doubling of this initial investment to resolve a related line of cases stemming from *Big Horn I*.

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<sup>326</sup> *Id.* at 296–97.

<sup>327</sup> *Id.* at 297–98.

<sup>328</sup> *Id.* at 300, 302.

<sup>329</sup> One year after the Wyoming Supreme Court handed down *Big Horn III*, the *Arkansas Law Review* published a thought-provoking brief prepared by tribal counsel in support of a petition for rehearing: B. Kevin Gover, Catherine Baker Stetson & Susan M. Williams, In re: *The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources in the State of Wyoming*, 46 ARK. L. REV. 237 (1993). To be clear, this brief was *not* filed in the Wyoming Supreme Court. See, e.g., O’GARA, *supra* note 14, at 243.

<sup>330</sup> Katharine Collins, *Fear of Supreme Court Leads Tribes to Accept an Adverse Decision*, HIGH COUNTRY NEWS, Oct. 19, 1992, at 1. See also O’GARA, *supra* note 14, at 243–44 (describing deliberations among tribes’ legal counsel and others regarding appeal, including reflections on *Big Horn I*). One commentator advocated as an alternative response to *Big Horn III* pursuing federal legislation that would have overruled the decision. Martinis, *supra* note 295, at 454 (asserting that “Congress has a duty to avoid further proliferation of the misapplication of legal doctrines espoused by the *Big Horn III* court,” and contending that “Congress should pass federal legislation to overrule the *Big Horn III* decision, and thereby remove the legal disparity created by the decision.”).

<sup>331</sup> Roncalio, *supra* note 272, at 213.

b. *Big Horn II and IV–VI: Walton Rights—  
Diffusion and Delineation*

Just as *Big Horn III* dovetailed with *Big Horn I*'s holdings regarding the composition and administration of the tribes' reserved right, so too did three subsequent opinions and one order from the Wyoming Supreme Court—*Big Horn II, IV, V, and VI*—address (and in some instances clarify) *Big Horn I*'s holdings concerning water rights held by parties derived, or alleged to have been derived, from the tribes' reserved right. These derivative water rights consisted of *Walton* rights and so-called “super *Walton* rights.” No less than sixteen years, from February 1988 to March 2004, would be invested into claims related to these water rights after *Big Horn I*.

The first in this “tributary” line of cases was *Big Horn II*.<sup>332</sup> It addressed a procedural issue: Were non-Indian successors of Indian allottees (*i.e.*, *Walton* claimants) who had not joined the appeal in *Big Horn I* nonetheless entitled to *Walton* rights based upon the court's holding in that case recognizing such rights?<sup>333</sup> In short, the Wyoming Supreme Court said “yes.” Issuing its opinion on November 30, 1990, the court held that “all parties who have appeared in the case, at least to the extent of filing an answer, and have not been subsequently dismissed,” were entitled to benefit from the court's holding regarding *Walton* rights in *Big Horn I*.<sup>334</sup>

Three years passed after *Big Horn II* before the next milestone, *Big Horn IV*, which came in the form of an order issued by Chief Justice Macy of the Wyoming Supreme Court on October 26, 1993.<sup>335</sup> To put *Big Horn IV* in context, slightly more than a year after *Big Horn II* had been decided, the district court issued an order adopting procedures for filing and objecting to *Walton* claims.<sup>336</sup> The district court referred to Special Master Dolan those *Walton* claims that had been remanded by *Big Horn II*—ten in total—and based on a report subsequently issued by the special master, the district court entered a decree disposing of these claims on July 30, 1992.<sup>337</sup> The district court certified this decree to the Wyoming

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<sup>332</sup> In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 803 P.2d 61 (Wyo. 1990) (*Big Horn II*).

<sup>333</sup> *Id.* at 61–62. To reiterate, *Big Horn I* held that the *Walton* claimants who joined that appeal should be awarded on remand *Walton* rights bearing 1868 priority dates for the practicably irrigable acreage they were able to show had been irrigated by their Indian predecessors at the time title passed or had been put under irrigation within a reasonable time after passage of title. *See id.* at 65.

<sup>334</sup> *Id.* at 69.

<sup>335</sup> Order Dismissing Appeal (October 26, 1993), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/2-26-14c.PDF> [hereinafter *Big Horn IV*].

<sup>336</sup> Order Adopting *Walton* Procedures (January 21, 1992), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/6-3-2014a.PDF>.

<sup>337</sup> Judgment and Decree (July 30, 1992), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/4-7-2014.PDF>.

Supreme Court for a final judgment on the remanded claims. Two months later, however, on September 28, 1992—the filing deadline for *Walton* claims under the adopted procedures—419 new claims were filed in the district court.<sup>338</sup> The tribes and the United States objected to these claims, and it was in this particular posture that Chief Justice Macy issued the order that constituted *Big Horn IV*. This order denied the district court's certification of its decree and instead required full adjudication of all *Walton* claims before the Wyoming Supreme Court would consider any subsequent decisions on them.<sup>339</sup>

*Big Horn V*, in turn, came into existence slightly less than two years after hearings began on the 419 *Walton* claims that precipitated *Big Horn IV*.<sup>340</sup> The case focused on claims for so-called “super-*Walton* rights” as referenced above. These water rights were premised on the notion that non-Indian parties who had acquired patents to parcels in the ceded portion of the Wind River Indian Reservation under the disposal era laws thereby acquired water rights appurtenant to these lands with an 1868 priority date because the tribes originally had owned the lands.<sup>341</sup> The district court rejected these claims, prompting an appeal, and the Wyoming Supreme Court followed suit. In the higher court's view, “[w]hen the tribes ceded their land to the United States for sale, the reserved right disappeared because the purpose for which it was recognized no longer pertained.”<sup>342</sup> More precisely, “[t]hat purpose no longer existed for lands acquired by others after they had been ceded to the United States for disposition,” with the effect that “the reserved water rights were eliminated as to those tracts.”<sup>343</sup> The clear implication of *Big Horn I* and *II* according to the court was that only “the Tribes, Indian allottees, and successors in title of Indian allottees” could hold water rights with an 1868 priority date.<sup>344</sup> *Big Horn V* thus precluded further extension of *Walton*-type claims and reduced the pending claims to 264.<sup>345</sup> This number dropped to 221 afterward due to claimants dismissing or withdrawing claims.<sup>346</sup>

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<sup>338</sup> Judgment and Decree on Remand—*Walton* Type Claims 2 (March 4, 2004), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/judgementedit12313.pdf> [hereinafter 2004 Decree].

<sup>339</sup> *Big Horn IV*, *supra* note 335, at 1 (granting motion to dismiss appeal due to abuse of discretion by district court in improvidently certifying case for review).

<sup>340</sup> See 2004 Decree, *supra* note 338, at 2 (describing how after *Big Horn IV* the district court “directed the Special Master to begin hearings on the 419 *Walton* right claims.”). For a useful discussion of *Big Horn V*, see Ryan H. Childs, Note, *Drawing the Line on Indian Reserved Water Rights: No “super-Walton” Rights in Wyoming’s Big Horn River System*, 31 LAND & WATER L. REV. 425 (1996).

<sup>341</sup> In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 899 P.2d 848, 849 (Wyo. 1995) (*Big Horn V*).

<sup>342</sup> *Id.* at 854.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 855.

<sup>345</sup> 2004 Decree, *supra* note 338, at 2.

<sup>346</sup> *Id.*

Decided after a nearly seven-year hiatus at the state supreme court level following *Big Horn V*, the last in this line of cases involving derivative water rights was *Big Horn VI*.<sup>347</sup> There was little rest for the special masters and the district court across this interim period. Individual *Walton* claims hearings were conducted, an order addressing pervasive legal issues that emerged from these hearings (“global *Walton* issues”) was issued, Special Master Kropf prepared a report and recommendation for the *Walton* claims, and Judge Hartman eventually entered an amended decree disposing of these claims on August 30, 2000.<sup>348</sup> *Big Horn VI* was an appeal from this decree. It revolved around the phrase “reasonable time” as it had been used in *Big Horn I* with respect non-Indian successors’ *Walton* rights. The court announced a different rule than had been applied by the special master and district court regarding *Walton* claims brought by parties that purchased land from Indian allottees who depended on water from the Wind River Irrigation Project—a Bureau of Indian Affairs project on the Wind River Reservation. Because of the prolonged construction of this project, ten to twenty years elapsed between these claimants’ land purchases and project water deliveries to their parcels.<sup>349</sup> Given this situation, the court held:

[I]n order to establish beneficial use of the reserved water within a reasonable time to retain the federal reserved right, [these] claimants must demonstrate their efforts to put the lands under irrigation within a reasonable time and with due diligence, as defined by state law, *after the federal project facilities became available to the properties*.<sup>350</sup>

On remand, the parties agreed to a stipulation that confirmed *Walton* rights for the *Big Horn VI* claimants, thereby resolving the last of the 221 claims that persisted in the wake of *Big Horn V*.<sup>351</sup> Issued on March 4, 2004, Judge Hartman’s post-*Big Horn VI* amended decree identified the collective *Walton* rights award resulting from these Phase I tributary cases as authorizing 89,574 acre-feet of annual diversions.<sup>352</sup>

Four years after *Big Horn VI* was decided, in 2008, the *Winters* centennial took place. A compilation of papers and remarks was prepared in conjunction

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<sup>347</sup> In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 48 P.3d 1040 (2002) (*Big Horn VI*).

<sup>348</sup> 2004 Decree, *supra* note 338, at 2–3.

<sup>349</sup> *Big Horn VI*, 48 P.3d at 1044.

<sup>350</sup> *Id.* at 1055 (emphasis added). Later in the opinion the court also held that that calculation of “reasonable time” begins at the point when an original allottee transfers title to an original grantee—*i.e.*, this calculation could not be restarted after this point due to a subsequent purchase of the parcel by an Indian party. *Id.* at 1056.

<sup>351</sup> 2004 Decree, *supra* note 338, at 3.

<sup>352</sup> This figure is set forth in *id.* on page 11 of the tabulation attached as Exhibit A.

with this landmark that offered rich insights into the milestones of Phase I of the *Big Horn* adjudication. Included within this compilation were entries from Susan Williams, again the tribes' advocate in *Wyoming v. United States*; Jeff Fassett, the State Engineer during nearly all of the Phase I litigation, including *Big Horn III*; and Craig Alexander, the head of the section of the U.S. Department of Justice that had represented the United States in these cases. Following a survey of the Phase I decisions by Ms. Williams,<sup>353</sup> Mr. Fassett characterized the long trail plainly: "Wyoming has been used as a poster child for how not to quantify reserved water rights—through pure, hard-fought litigation. We got off on the wrong foot and found it impossible to stop the litigation chain."<sup>354</sup> It was not that one could not discern any redeeming value in this phase suggested Mr. Fassett, "[b]ut clearly the hard-fought litigation left ill will among the parties. It damaged relationships. And it damaged the neighborhood."<sup>355</sup> Of related and equal importance, "clearly the result of our litigation is that we have a solution from the courts, not a solution by the parties."<sup>356</sup> To a similar effect were Mr. Alexander's remarks. "Adjudications involving Indian rights must have a settlement component if there is to be a resolution of a tribe's water needs," he described, "the *Big Horn* litigation provides an important cautionary tale about the dangers of trying to completely resolve water disputes through adjudication."<sup>357</sup> The contrasting approach to federal reserved rights in Phase II would directly reflect this dialogue about alternative methods for resolving water conflicts.

### C. Phase II: Federal Reserved Rights

Having traced the trajectory of the Indian reserved right claims, including the various derivate water rights claims, at issue in Phase I of the *Big Horn* adjudication, it is now necessary to circle back more than two decades to the order of certification and referral issued to Special Master Roncalio on May 22, 1979.<sup>358</sup> Beyond requiring the special master to address the Indian reserved right held by the Eastern Shoshone and Northern Arapaho tribes, that order also charged him

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<sup>353</sup> Williams, *supra* note 9, at 169–74.

<sup>354</sup> Gordon "Jeff" Fassett, *Results Following Litigation: The Wind River Tribes/Big Horn River*, in *THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL 174* (Barbara Cosens and Judith V. Royster eds., 2012). *See also id.* at 176 ("The result of this litigation was damaged relationships. But the relationships are healing due to time and the fact that interests have changed.").

<sup>355</sup> *Id.* at 174.

<sup>356</sup> *Id.* at 175.

<sup>357</sup> Alexander, *supra* note 306, at 176. *See also id.* at 177 ("Although settlement discussions tend to be time-consuming and costly, in the long term only settlements can bring the parties together in a way that creates the working relationships and agreements that are necessary to ensure water for the tribes' needs, as well as the needs of non-Indian water users.").

<sup>358</sup> Certification and Referral Order, *supra* note 219.

with disposing of federal reserved rights claims asserted by the United States.<sup>359</sup> As just alluded to, the dispute resolution method through which the parties addressed these latter claims bore a night-and-day relationship with the extensive litigation by which the former claims were resolved. The United States and the State of Wyoming ultimately negotiated a settlement of the federal reserved rights involved in Phase II of the *Big Horn* adjudication, embodying that settlement in a partial interlocutory decree entered roughly four years after Special Master Roncalio had been appointed, and effectuating it in a final decree twenty-two years later.

### 1. *Toward Settlement*

It should be noted at the outset that, nearly a year prior to Special Master Roncalio's appointment in May 1979,<sup>360</sup> the U.S. Supreme Court handed down another landmark decision in its federal reserved rights jurisprudence: *U.S. v. New Mexico*.<sup>361</sup> As already mentioned, this case addressed how federal reserved rights were to be quantified. The general existence of these rights could not be doubted in good faith after *Arizona v. California*,<sup>362</sup> and *Cappaert* had indicated that they encompassed in quantity "only that amount of water necessary to fulfill the purpose of the reservation, no more."<sup>363</sup> It was not until *U.S. v. New Mexico*, however, that the Court dealt with the quantification issue in a slightly more precise (albeit nuanced) way. The case emerged out of a general stream adjudication of the Rio Mimbres system in southwestern New Mexico in which the United States asserted reserved rights for the Gila National Forest.<sup>364</sup> Wyoming Attorney General Frank Mendicino—who had filed the complaint in the *Big Horn* adjudication in February 1977—joined attorney generals from seven other western states in filing an *amicus* brief.<sup>365</sup> Long story short, the Court announced in *U.S. v. New Mexico* a primary purposes/secondary uses distinction that governed the quantification of federal reserved rights, both in the case (*i.e.*, for national forests) and more broadly. "Where water is necessary to fulfill the very purposes for which a federal reservation was created," described the Court, "it is reasonable to conclude . . . that the United States intended to reserve the necessary water."<sup>366</sup> Conversely, "[w]here water is only valuable for a secondary use of the reservation . . . there arises the contrary inference that Congress intended . . . that

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<sup>359</sup> *Id.* at 2.

<sup>360</sup> Appointment Order, *supra* note 218.

<sup>361</sup> *United States v. New Mexico*, 438 U.S. 696 (1978).

<sup>362</sup> *Arizona v. California*, 373 U.S. 546, 601 (1963).

<sup>363</sup> *Cappaert v. United States*, 426 U.S. 128, 141 (1976).

<sup>364</sup> *New Mexico*, 438 U.S. at 697–98.

<sup>365</sup> *Id.* at 697.

<sup>366</sup> *Id.* at 702.



the United States would acquire water in the same manner as any other public or private appropriator”—*i.e.*, under state law.<sup>367</sup>

Exactly how *U.S. v. New Mexico* may have affected settlement negotiations between the United States and the State of Wyoming in Phase II of the *Big Horn* adjudication is unclear to this author, but the parties' eventual formation of their settlement was not a foregone conclusion. The United States filed its statement of federal reserved rights claims and an accompanying "legal parameters" document on March 10, 1980, and for the next two-and-a-half years these claims remained slated for trial.<sup>368</sup> Included among the United States' claims were those asserted for Yellowstone National Park (Middle Creek drainage), Big Horn Canyon National Recreation Area, Big Horn and Shoshone national forests, and various lands administered by the Bureau of Land Management in the Wind-Big Horn Basin.<sup>369</sup> Broadly speaking, the interim period between the United States' assertion of these claims and the parties' subsequent formation of a settlement was marked by a series of stipulations concerning the claims—and, in some cases, withdrawals of them<sup>370</sup>—and scheduling orders from Special Master Roncalio granting continuances of pretrial conferences and trial.<sup>371</sup> Notwithstanding these continuances and their role in facilitating settlement efforts, the special master eventually set trial for two weeks in December 1982 and one week in March

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<sup>367</sup> *Id.* See also *id.* at 700 (describing how in its earlier reserved rights cases the Court had "carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."). Bringing the primary purposes/secondary uses distinction to bear on the quantity of the United States' reserved rights for the Gila National Forest, a majority of the Court interpreted the Organic Act of 1897 as embodying two primary purposes: "to conserve the water flows, and to furnish a continuous supply of timber for the people." *Id.* at 707. The dissent discerned as a third primary purpose "improving and protecting the forest." *Id.* at 720 (Powell, J., dissenting).

<sup>368</sup> United States' Statement of Claims (March 10, 1980), available at <http://bhcr.washakiecounty.net/DocumentCenter/BHCR/14HRR90000.pdf> [hereinafter Statement of Claims]; Legal Parameters for United States' Statement of Claims (March 10, 1980), available at <http://bhcr.washakiecounty.net/DocumentCenter/BHCR/BAAOAH0000.pdf> [hereinafter Legal Parameters].

<sup>369</sup> Statement of Claims, *supra* note 368, at 16–33; Legal Parameters, *supra* note 368, at 16–30.

<sup>370</sup> Several of these stipulations and withdrawals are noted in the Final Phase Decree Covering the United States' Non-Indian Claims (November 29, 2005), available at <http://bhcr.washakiecounty.net/DocumentCenter/BHCR/BAAOAH0000.pdf> [hereinafter Final Decree]. See *id.* at 55–56 (stipulation addressing reserved rights claims for water-producing oil and gas wells), 58 (stipulation addressing reserved rights claims for Bureau of Reclamation projects), 59 (withdrawal of claims for reserved rights for East Fork and Whiskey Basin Elk Winter Ranges), 59–60 (withdrawal of reserved rights claims for instream flows along streams on Bureau of Land Management lands). See also *id.* at 90 (dismissal of reserved rights claims for flows at hydropower sites).

<sup>371</sup> Order Continuing Proceeding Concerning Federal Non-Indian Claims and Setting Trial Date for United States Rebuttal (January 21, 1982), available at <http://bhcr.washakiecounty.net/DocumentCenter/BHCR/PC2TP80000.pdf>; Order (May 13, 1982), available at <http://bhcr.washakiecounty.net/DocumentCenter/BHCR/3ATT2T0000.pdf>.

1983.<sup>372</sup> The order prescribing this schedule identified a host of interesting and contested issues raised by the parties regarding the federal reserved rights claims. Among other matters, these issues concerned the existence of federal reserved rights within the basin and state, the assessment of primary purposes under *U.S. v. New Mexico*, the quantification method for federal reserved rights, and the application of the reserved rights doctrine to groundwater.<sup>373</sup> At the end of the day, however, these issues would not be litigated.

A stipulation and agreement formed by the United States and the State of Wyoming on November 20, 1982—a little more than a week before trial was set to begin—changed forever the outcome of Phase II.<sup>374</sup> Referencing the parties' sustained efforts "to resolve their differences" over the federal reserved rights through negotiation, this document included a proposed partial interlocutory decree intended "to be a full and final resolution or means for resolution" of these claims (*i.e.*, "all non-Indian claims the United States has filed, or could have filed, for water rights based upon federal law in this adjudication").<sup>375</sup> The parties submitted the decree to the court contemporaneous with their execution of the stipulation and agreement, and they attached to the decree a package of documents addressing the procedure through which it would be reviewed by other parties in the adjudication. In an order issued two days later, the court approved the review procedure, establishing January 21, 1983, as a deadline for objections to the decree and February 9, 1983, as a hearing date for any such objections.<sup>376</sup> It was on the latter date that Judge Joffe eventually entered the partial interlocutory decree.<sup>377</sup>

## 2. Final Decree

Moving forward in time twenty-two years from the partial interlocutory decree's entry, the district court—specifically, Judge Hartman, toward the end of his tenure—approved and entered a final Phase II decree in the *Big Horn* adjudication on November 29, 2005.<sup>378</sup> The United States and the State of

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<sup>372</sup> Pre-Trial Conference Report and Order 4 (October 19, 1982), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/3-11-14a.PDF>.

<sup>373</sup> *Id.* at 1–3.

<sup>374</sup> This stipulation and agreement are attached as Exhibit C to the Partial Interlocutory Decree and Supporting Documents Regarding the United States' Non-Indian Claims (February 9, 1983), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/11112ab.pdf> [hereinafter Partial Interlocutory Decree].

<sup>375</sup> *Id.* at 1, 3.

<sup>376</sup> This order—entitled an "Order Approving Procedure for Consideration of Entry of Proposed Partial Interlocutory Decree"—is attached as Exhibit B to Partial Interlocutory Decree, *supra* note 374.

<sup>377</sup> Partial Interlocutory Decree, *supra* note 374, at 715.

<sup>378</sup> Final Decree, *supra* note 370.

Wyoming initially submitted this decree to the court and moved for its entry, and the court then circulated the decree to all parties and counsel of record without any objections being filed.<sup>379</sup> The decree's nuances are many, and it would go beyond this article's scope to canvass them, but a few broad remarks about salient features are in order.

The decree begins with a suite of general provisions. With the exception of the reserved right for the Wind River Indian Reservation, it constitutes "a final statement, quantification, and adjudication of all water rights which the United States has claimed or could have claimed . . . as part of [the *Big Horn* adjudication] under either federal or state law."<sup>380</sup> By the decree's terms, these rights "shall in the first instance be administered by the State of Wyoming," and the United States must "request the State Engineer to exercise his administrative authority" before "seeking judicial enforcement."<sup>381</sup> Also relevant to administration, the decree limits the types of water rights for which changes may be sought to those involving "discrete uses,"<sup>382</sup> further providing that such changes must be obtained from the Board of Control under state law.<sup>383</sup>

With regard to the substance of the rights contained in it, the decree initially specifies the boundaries and establishment dates of the federal reservations to which these rights attach.<sup>384</sup> It then goes on (1) to grant rights for some of these reservations,<sup>385</sup> (2) to outline the features of the granted rights, and (3) to identify several instances in which rights that had been asserted by the United States in its statement of claims were not granted for particular reasons.<sup>386</sup> Specific reservations for which the decree grants rights include Yellowstone National Park;<sup>387</sup> Big Horn

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<sup>379</sup> *Id.* at 1–2.

<sup>380</sup> *Id.* at 7.

<sup>381</sup> *Id.* at 7.

<sup>382</sup> *Id.* at 8. *See also id.* at 3 (defining "discrete use" as "a measurable and identifiable use of water on the Bighorn National Forest or Shoshone National Forest . . . and any other federal land.").

<sup>383</sup> *Id.* at 8.

<sup>384</sup> *Id.* at 10–44.

<sup>385</sup> *See, e.g., id.* at 49 (denying reserved rights claims for Big Horn Canyon National Recreation Area).

<sup>386</sup> *Id.* at 44–91.

<sup>387</sup> *Id.* at 44–49. These rights secure instream flows for Yellowstone National Park's Middle Creek drainage, including flows in Middle Creek and its tributaries, water levels of two unnamed lakes within the drainage, and flows of all of the drainage's springs and seeps. *Id.* at 44–48. The priority date of these rights is March 1, 1929. *Id.* at 49. The decree disavows any reservation of groundwater needed to maintain the national park in its natural condition, although it also expressly disclaims barring litigation over groundwater withdrawals. *Id.* at 48.

and Shoshone national forests;<sup>388</sup> various public water reserves,<sup>389</sup> stock drive-ways,<sup>390</sup> and water-producing oil and gas wells;<sup>391</sup> and wells<sup>392</sup> and reservoirs<sup>393</sup> on non-reserved lands managed by the Bureau of Land Management. Notably, although the decree describes all of the foregoing water rights as being “based on precepts of federal law,”<sup>394</sup> it only refers to those associated with the water-producing oil and gas wells as “reserved water right[s].”<sup>395</sup> Further, at several places in the decree, provisos appear indicating that a particular right being granted “shall be deemed to be and shall be administered and enforced as junior to any existing water right permitted or certificated under Wyoming Law, if the exercise, operation, or use of [the right] conflicts with the exercise, operation, or use of the right permitted or certificated under Wyoming law.”<sup>396</sup> Interested readers undoubtedly will find other provisions of the final decree worthy of review, but with this snapshot a transition from Phase II to Phase III is in line.

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<sup>388</sup> Multiple types of rights attach to the Big Horn and Shoshone national forests under the decree. Some of these rights entitle the United States “to pass certain amounts of water, measured in acre-feet, past specified points on certain natural streams in the Big Horn and Shoshone National Forests . . . .” *Id.* at 61. Table 7 of the decree identifies the specific elements of these rights. *Id.* Other rights entitle the United States to maintain springs and seeps subject to certain quantitative limitations. *Id.* at 73–74. A third variety of rights entitle the United States to use water for various “discrete uses.” *Id.* at 74–83. *See also id.* at 3 (defining “discrete use” generally as a “measurable and identifiable use of water” on the national forests). Tables 8, 9, 10, and 11 of the decree address these uses. *Id.* at 74, 78, 79, 83. A final strand of rights associated with the national forests allow for water uses for administrative purposes, fighting fires, and stock watering. *Id.* at 60–61, 84–90.

<sup>389</sup> *Id.* at 50–51. These rights are to be used “solely for drinking by human beings and wildlife and for stockwatering.” *Id.* at 51. Table 1 of the decree sets forth their specific elements. *Id.* at 50.

<sup>390</sup> *Id.* at 51–55. These rights allow for (1) maintenance of instream flows within stock drive-ways for stockwatering and drinking by human beings, and (2) storage of water in stock driveway reservoirs for the same purposes. *Id.* Tables 2 and 3 of the decree set forth the specific elements of these rights. *Id.* at 52–53.

<sup>391</sup> *Id.* at 55–56. Table 4 of the decree identifies the specific elements of these “reserved water right[s].” *Id.* at 56. Those attached to two of the wells, the Rose Dome and Sand Draw wells, are to be used solely for agricultural and domestic purposes. *Id.* at 56.

<sup>392</sup> *Id.* at 56–57. These rights are to be used solely for “providing drinking water for people, stock and wildlife,” and they bear a priority date of November 1, 1982. *Id.* at 57. Table 5 of the decree sets forth the quantities of use permitted under these rights. *Id.*

<sup>393</sup> *Id.* at 57–58. These rights similarly are to be used solely for “providing drinking water for people, stock and wildlife,” and they bear a priority date of November 1, 1982. *Id.* at 57. The decree prohibits storage of more than twenty acre-feet in the reservoirs. *Id.* Table 6 of the decree lists these rights. *Id.*

<sup>394</sup> *Id.* at 44.

<sup>395</sup> *Id.* at 56.

<sup>396</sup> Such provisos can be found in this form and similar ones in *id.* at 50 (public water reserves), 53 (stock driveway instream flows), 55 (stock driveway reservoirs), 62–64 (quantified water flow uses for Big Horn and Shoshone national forests), and 73–74 (springs and seeps in Big Horn and Shoshone national forests).

*D. Phase III: Appropriative Rights*

Phase III of the *Big Horn* adjudication resembled Phase II in that its milestones did not consist of a series of Wyoming Supreme Court decisions as with Phase I.<sup>397</sup> Overlapping in time with the other phases to an extent, Phase III was the longest-running of the group, spanning nearly thirty years in total—from May 1985 to September 2014. To clarify its focus, consider again the complaint filed by Wyoming Attorney General Frank Mendicino on January 24, 1977, to initiate the adjudication.<sup>398</sup> The complaint's text mirrored the adjudication statute in defining the water resources subject to the proceeding: "the Big Horn River, all surface streams and rivers tributary thereto, including but not limited to the Wind River, and all ground and underground tributary thereto," as well as "all other surface and ground waters underlying or within Water Division Number Three."<sup>399</sup> The breakdown of subject water rights also tracked the statute. In relevant part, the complaint asked the court (1) to "[c]onfirm those rights evidenced by previous court decrees, by certificates of appropriation, or by certificates of construction" previously issued by the Board of Control, and (2) to "[d]etermine the status of all uncanceled permits to acquire the right to the use of the water of the State of Wyoming and adjudicate all perfected rights" under these permits that had not been adjudicated.<sup>400</sup> These certificated and decreed rights, as well as the uncanceled permits, fell within Special Master Roncalio's charge in the order of certification and referral two years later.<sup>401</sup> Per the parties' stipulation, they were to be addressed after the special master and district court had determined the Indian and federal reserved rights, which ultimately took place in May 1985 after Judge Johnson issued the amended judgment and decree appealed in *Big Horn I*, and the United States and State of Wyoming negotiated the partial interlocutory decree for the federal reserved rights claims.<sup>402</sup>

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<sup>397</sup> The Wyoming Supreme Court did hand down one decision involving Phase III in 2004, *Big Horn VII*, which is the most recent appellate opinion that has been issued in the adjudication. In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 85 P.3d 981 (Wyo. 2004) (*Big Horn VII*) (denying claim for implied secondary rights to water in Buffalo Bill Reservoir brought by irrigators seeking to intervene in adjudication). As described *supra* note 16, two appeals involving discrete Phase III matters are currently pending before the Wyoming Supreme Court, both of which were filed after the district court entered its final order concluding the adjudication in September 2014.

<sup>398</sup> Complaint, *supra* note 157.

<sup>399</sup> *Id.* at 1.

<sup>400</sup> *Id.* at 4.

<sup>401</sup> Certification and Referral Order, *supra* note 219, at 1–2.

<sup>402</sup> Roncalio Report, *supra* note 153, at 25–26.

### 1. *Procedural Cornerstone*

What exactly happened in May 1985 once Phase III was set to move forward? The wheels began to turn with the laying of a procedural cornerstone by the district court in the form of the *Big Horn* Adjudication Phase III Procedures.<sup>403</sup> In a manner similar to the three-phase stipulation for the adjudication as a whole, these procedures would structure the entirety of Phase III. At the time of their adoption, they anticipated the adjudication would be “finally concluded, excepting appeals to appellate courts, by or before December 31, 1988,” and instructed parties to “make every effort to meet this goal.”<sup>404</sup> One might say Phase III proved to be the gift that kept on giving in this respect, however, as it would overshoot this mark by nearly twenty-six years, notwithstanding the appeals exception. The Phase III procedures would persist across this period, governing the duties and interactions of the district judges, special masters, Board of Control, and State Engineer in relation to thousands of matters. The procedures would evolve over this time frame—being amended four times before assuming a lasting shape in May 1997—but would consistently serve as the structural framework for this part of the adjudication.<sup>405</sup> Precisely what transpired in Phase III under the procedures perhaps can best be synthesized by considering the specific measures they called for in relation to the two types of water interests at issue—again, (1) certificated and decreed rights (“adjudicated certificates”) and (2) uncanceled permits that had been issued by the Board of Control but not adjudicated (“unadjudicated permits”).<sup>406</sup>

Turning initially to the adjudicated certificates, the Phase III procedures provided that the Board of Control would “report a list of all Certificates issued prior to January 1, 1977, to the Special Master.”<sup>407</sup> This cutoff date aligned with the adjudication’s commencement. “As no certificates have been issued during the pendency of this action,” explained the district court, “after January 1, 1977, none

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<sup>403</sup> Big Horn Adjudication Phase III—Procedures (May 15, 1985), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/EXWF5T0000.pdf>.

<sup>404</sup> *Id.* at 6.

<sup>405</sup> 1997 Amended Big Horn Adjudication Phase III—Procedures (March 31, 1997), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/6LKHST0000.pdf> [hereinafter Phase III Procedures]. These procedures were adopted in an Order Changing Phase III Procedures (May 19, 1997), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/ZKUUYF0000.pdf>. For additional amendments to the procedures, see Order Changing Phase III Procedures (July 26, 1993), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/QTHH650000.pdf>; Order (May 8, 1987), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/S7XFNS0000.pdf>; Amended Big Horn Adjudication Phase III—Procedures (January 21, 1986), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/MVSOZE0000.pdf>.

<sup>406</sup> For useful descriptions of the Board of Control’s adjudication process, including citations to the statutory provisions governing it, see MACDONNELL, *supra* note 94, at 108–10, 201–202.

<sup>407</sup> Phase III Procedures, *supra* note 405, at 4.

will be reported.”<sup>408</sup> The compilation of adjudicated certificates referenced in the Phase III procedures was called the “Tab Book,”<sup>409</sup> and as ultimately submitted by the board included roughly 27,000 certificates.<sup>410</sup> With this submission in hand, the procedures called for the court to “confirm all adjudicated certificates”—which took place in an order issued May 15, 1985—and for the special master to issue a subsequent order requiring all parties who sought to challenge these certificates to do so by year’s end (December 31, 1985).<sup>411</sup> After this deadline passed, the Phase III procedures dictated that the special master would schedule hearings on all contested certificates and make recommendations to the court regarding whether specific certificates should be confirmed or deemed abandoned.<sup>412</sup>

As for the unadjudicated permits, they numbered approximately 4,000 as set forth in the Phase III procedures, generally consisting of those issued to parties in Water Division III since the turn of the twentieth century that had not yet been adjudicated.<sup>413</sup> Roughly one quarter of these permits (1,200) had been partially adjudicated but described acreage in excess of the adjudication set forth in them—excess that had to be “proved up” or cancelled by the State Engineer.<sup>414</sup> The remaining three-quarters or so of the permits (2,709) had not been evaluated by the Board of Control and therefore needed to be adjudicated or cancelled.<sup>415</sup> Taken together, the Phase III procedures dictated that these permits would be “adjudicated by the Board of Control and special master in batches as they matured.”<sup>416</sup> In short, the procedures called for the staffs of the Board of Control and the State Engineer to investigate the status of all unadjudicated permits, and the special master to review the record of, and to schedule hearings as needed on, all contested permits recommended for adjudication or cancellation.<sup>417</sup> The district court would dispose of uncontested permits directly.<sup>418</sup> As with the adjudicated certificates, the court set December 31, 1984, as a general cutoff for

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<sup>408</sup> In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 85 P.3d 981, 986 (2003) (*Big Horn VII*).

<sup>409</sup> Phase III Procedures, *supra* note 405, at 4.

<sup>410</sup> *Big Horn VII*, 85 P.3d at 986.

<sup>411</sup> Phase III Procedures, *supra* note 405, at 4–5. See also *Big Horn VII*, 85 P.3d at 994. The district court’s initial confirmation of the adjudicated certificates thus was provisional due to the possibility of such challenges.

<sup>412</sup> Phase III Procedures, *supra* note 405, at 4. See also *Big Horn VII*, 85 P.3d at 994.

<sup>413</sup> Phase III Procedures, *supra* note 405, at 1.

<sup>414</sup> *Id.* at 2.

<sup>415</sup> *Id.*

<sup>416</sup> *Big Horn VII*, 85 P.3d at 994–95.

<sup>417</sup> Phase III Procedures, *supra* note 405, at 6.

<sup>418</sup> *Id.* at 6–7.



the scope of permits that would be handled in the adjudication.<sup>419</sup> This cutoff was needed for the adjudication to be “capable of completion.”<sup>420</sup>

## 2. *On the Ground, In the Trenches*

Going forward from the initial adoption of the Phase III procedures in May 1985, things generally played out on the ground in the manner contemplated by the procedures over the next three decades, although as noted earlier the procedures themselves evolved in various respects while being implemented. Actions undertaken on the adjudicated certificates on one hand, and the unadjudicated permits on the other, proceeded along parallel but separate tracks.

As for the 27,000 adjudicated certificates set forth in the Tab Book, they did not end up imposing the lion’s share of the administrative workload in Phase III. After their provisional confirmation by the district court in May 1985, only a handful of parties (perhaps as few as two) ended up challenging these certificates as involuntarily abandoned by the end-of-year cutoff.<sup>421</sup> Little effort was required. Beyond these nearly non-existent abandonment challenges, the other vein of administrative tasks involving the adjudicated certificates concerned petitions for changes to them—petitions for a change in point of diversion, type or place of use, or voluntary abandonment.<sup>422</sup> The Board of Control exercised its statutory authority to consider these petitions throughout Phase III, submitting reports to the district court with findings of fact, conclusions of law, and recommended interlocutory decrees.<sup>423</sup> The district court then reviewed the board’s reports and issued interlocutory decrees disposing of the petitions.<sup>424</sup>

It was the unadjudicated permits that proved to be the demanding matter over the course of Phase III. Although the Phase III procedures originally identified the existence of approximately 4,000 of these permits (as of February 1985),<sup>425</sup> this figure ended up being slightly more than 15,000 by the close of the phase.<sup>426</sup>

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<sup>419</sup> *Id.* at 4–5. An exception to this general cutoff existed for pre-1985 permits for which extensions had been granted such that beneficial use or reservoir completion would take place after December 31, 1988. Such permits could be excluded from the adjudication by order of the special master. *Id.* at 5.

<sup>420</sup> *Big Horn VII*, 85 P.3d at 995.

<sup>421</sup> Telephone Interview, Nancy McCann, Adjudication Manager, Wyoming State Board of Control (November 6, 2014) [hereinafter McCann Interview].

<sup>422</sup> See Phase III Procedures, *supra* note 405, at 20 (setting procedures for change applications).

<sup>423</sup> An example of a Board of Control report can be found at Petition to Set Aside Interlocutory Decree 13–18 (June 10, 2003), available at <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/ZTFQTS0000.pdf>.

<sup>424</sup> An example of one of these interlocutory decrees can be found in *id.* at 19–21.

<sup>425</sup> Phase III Procedures, *supra* note 405, at 1.

<sup>426</sup> Email from Nancy McCann, Adjudication Manager, Wyoming State Board of Control (November 7, 2014) (on file with author).

These unadjudicated permits consisted of 4,610 surface water permits and 10,500 groundwater permits.<sup>427</sup> Included among the surface water permits were 2,709 for ditches, 931 for enlargements, 660 for reservoirs, and 310 for stock reservoirs.<sup>428</sup> Roughly speaking, the Board of Control adjudicated less than thirty percent of these permits such that certificates were issued for them.<sup>429</sup> The remaining permits were cancelled.<sup>430</sup> With regard to the groundwater permits, the Board of Control adjudicated 7,731 de minimis wells (those with capacity rates of less than twenty-five gallons per minute) and 500 non-de minimis ones.<sup>431</sup> Certificates were issued exclusively for the latter wells, and again the remaining (non-adjudicated) 1,800 or so permits were cancelled.<sup>432</sup> The time period over which this labor occurred again extended twenty-nine years, from May 1985 to September 2014, although budgetary constraints and a related need to prioritize *Walton* rights claims at issue in Phase I briefly halted the process in the early 2000s.<sup>433</sup> Overall, if the total number of unadjudicated permits (15,110) addressed under the Phase III procedures is divided by the total time span (twenty-nine years), an average of 521 permits were disposed of annually.

The specific measure that eventually brought Phase III to its conclusion was an order issued on September 5, 2014, by Judge Skar.<sup>434</sup> The order terminated the Phase III procedures and provided for the Board of Control and State Engineer to exercise their respective statutory authority over the water rights that had been adjudicated in the proceeding. With this pen stroke, the district court wrapped-up Phase III nearly thirty years after it had been set in motion.

### *E. Closure*

Judge Skar signed the order terminating the Phase III procedures at a ceremony in the Washakie County District Courtroom in Worland, Wyoming, on September 5, 2014. Termination of the Phase III procedures was an important part of this ceremony, but its purpose was broader: signing of the final order concluding the *Big Horn* adjudication. This milestone had been a long time coming. Preparations for it spanned the preceding decade, going as far back as an initial meeting convened in April 2004 by an ad hoc committee assembled by Judge Hartman to offer procedural recommendations for the

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<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> McCann Interview, *supra* note 421.

<sup>434</sup> Order Terminating Phase III Procedures Big Horn River General Adjudication (September 5, 2014), *available at* <http://bhcrac.washakiecounty.net/DocumentCenter/BHCR/9-29-14c.PDF>.

adjudication's conclusion.<sup>435</sup> Phase III was estimated to be completed by 2006 when the committee later issued its recommendations—a prognosis respectfully more than eight years off the mark—but these recommendations, including proposed text for the orders eventually signed by Judge Skar on this historic day, proved precedential.<sup>436</sup>

A menagerie of individuals filled the courtroom for the signing ceremony—a relatively modest assemblage of state and tribal officials coupled with varied others whose lives and livelihoods had been touched by the *Big Horn* adjudication in one way or another.<sup>437</sup> A sense of release hung in the air. It seemed to be a shared feeling, notwithstanding the undoubtedly diverse reasons for it, and gradually increased in intensity as the proceeding unfolded, perhaps analogous to a drum crescendo. Although no longer a judicial official, Judge Hartman was invited to offer reflections, and he shared candidly and earnestly his views on the relative value of the adjudication and the significance of the final order. Judge Skar followed suit with similar remarks, and Special Master Kropf captured the historic event in photographs. The finale, of course, was the final order's signing and entry by Judge Skar.<sup>438</sup> Describing that the matters presented in Phase I, Phase II, and Phase III had been decided by final orders, and that all rights to use of the water in the Big Horn River System and all other sources in Water Division III had been adjudicated, the order declared that the adjudication was concluded. The order then looked to the future. It recognized that “unforeseen problems may develop regarding the rights adjudicated in this litigation” and stated that, “[i]f cooperative efforts fail to resolve future problems, the parties may invoke the jurisdiction of this Court as provided in *Big Horn I* and *Big Horn III*” subject to the order's provisions.<sup>439</sup> One such provision allowed parties to seek supplemental relief, including judicial enforcement, for legal questions arising from the adjudication. Before such relief could be sought, however, the requesting party would be obligated to “meet and confer with all other parties that may be directly affected by the request . . . and attempt to negotiate a settlement of the

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<sup>435</sup> Ad Hoc Committee, *Big Horn Adjudication: Recommendations for Concluding the Adjudication* Submitted to Judge Gary H. Hartman (November 6, 2005), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/RPND9B0000.pdf>.

<sup>436</sup> *Id.* at 7, 33, 35–36. Notably, the committee advised against drafting and issuance of a “comprehensive final decree document” to wrap up the adjudication. *Id.* at 8. It regarded such a decree as undesirable based on the view that “an effort to summarize or digest past information and decisions would inevitably lead to new rounds of conflict.” *Id.* It also considered such a decree impractical “because of the difficulty of choosing what information and what decisions from the long history of this case should be included in one comprehensive document.” *Id.*

<sup>437</sup> The author had the good fortune of attending this ceremony and offers these anecdotal remarks.

<sup>438</sup> Final Order (September 5, 2014), *available at* <http://bhrac.washakiecounty.net/DocumentCenter/BHCR/9-29-14a.PDF>.

<sup>439</sup> *Id.*

matter in issue.”<sup>440</sup> It was on this note of judicially mandated cooperation and negotiation that the district court drew to a close what up to this point constitutes the only general stream adjudication undertaken by the State of Wyoming<sup>441</sup>—a proceeding elapsing more than thirty-seven years, involving more than 20,000 water rights claimants,<sup>442</sup> and consuming literally untold millions of dollars.<sup>443</sup>

## V. CONCLUSION

“Here is a land where life is written in water.”<sup>444</sup> These words were penned by the State of Colorado’s poet laureate, Thomas Hornsby Ferril, in 1940 and have been etched on the state capitol rotunda. Perhaps they also should be strung on a banner across the Wind-Big Horn Basin. The scale, complexity, cost, and in many respects contentiousness of the *Big Horn* adjudication speak to the essential nature of the resource for which the adjudication was employed to draw lines. Its features provide an excellent reference point when considered in relation to

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<sup>440</sup> *Id.*

<sup>441</sup> As mentioned *supra* note 16, two appeals concerning water permits at issue in Phase III have been filed in the Wyoming Supreme Court since Judge Skar’s issuance of the final order, but neither of these appeals (given their very narrow focus) undermine the notion that the *Big Horn* adjudication effectively has concluded.

<sup>442</sup> In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 835 P.2d 273, 275 (Wyo. 1992) (*Big Horn III*) (describing *Big Horn III* as “another appeal of an ongoing general adjudication of all water rights in the Big Horn River System, involving over 20,000 claimants.”).

<sup>443</sup> A comprehensive cost figure for the *Big Horn* adjudication unfortunately does not appear to exist. As described by Judge Hartman in 2009 after he had retired from the bench: “While no entity has determined the total cost of this project, suffice it to say that it was hundreds of millions of dollars in time, effort and expense.” Gary P. Hartman, *The Big Horn River General Stream Adjudication*, WYO. LAWYER, Oct. 2009, at 1, 2. A similar ballpark figure uncovered in my research comes from a book published by Geoff O’Gara in 2000 that placed the adjudication’s overall cost at “more than \$60 million so far.” O’GARA, *supra* note 14, at 174. Writing in 1993, nearly a decade after he had stepped down as Special Master, Teno Roncalio published a book chapter indicating the following as of that year: “To include the costs of attorneys of the Departments of Justice and the Interior, of the tribes, and of many private parties, plus attorneys and consultants added to the state payroll at work in the case, would surely run the total costs of the litigation to well over \$20 million.” Roncalio, *supra* note 272, at 211. Of this total, the State of Wyoming had spent nearly \$9 million as of a then “recent count.” *Id.* Roncalio’s state-specific figure is lower than the \$14 million in attorneys’ fees reportedly expended by the State of Wyoming as of 1995. *Dividing the Waters II*, *supra* note 138, at 304. Roncalio’s figure does comport, however, with a counterpart provided by Wyoming Assistant Attorney General S. Jane Caton on February 5, 1990, identifying the state’s total litigation costs as \$8,586,860. Membrino, *supra* note 153, at 7. For older state-specific figures, see Caton, *supra* note 233, at 21 (identifying state’s total expenditures from January 1977 to December 1987 as \$8,140,634, including \$4,524,100 in consultant fees, \$3,082,573 in legal fees, and \$533,961 in administration fees), and Cox, *supra* note 233, at 8 (identifying state’s total expenditures as of October 9, 1984, as \$7,260,000, including \$4,300,000 in fees labeled “engineering, etc.,” \$2,500,000 in legal fees, and \$460,000 in clerical and administrative fees).

<sup>444</sup> The Poetic History of Colorado, <http://www.poets.org/poetsorg/text/poetic-history-colorado> (last visited March 17, 2015).

counterpart adjudications embarked on by other western states during the past several decades—a topic ably addressed later in this issue.<sup>445</sup> So, too, does the adjudication provide much food for thought about the normative question of whether general stream adjudications are optimal measures for reconciling competing interests of federal, state, and tribal sovereigns over water resources. Again, please read on for expert coverage of this subject.<sup>446</sup> Overall, it is hoped that the preceding account of the *Big Horn* adjudication provides citizens, policymakers, practitioners, and scholars alike with a worthwhile case study in the use of general stream adjudications as management tools for the most precious natural resource within the American West.

Yet the *Big Horn* adjudication is not solely relevant as an institutional reference point. It is also a microcosm for paradigmatic themes western historians have emphasized for many years to make sense of what has transpired within the American West since the Louisiana Purchase in 1803 and before. One such theme concerns vision and its role in shaping interactions among human beings concerning natural resource use.<sup>447</sup> As a species, we are unique in our capacity to bring, or at least to attempt to bring, into reality diverse and potentially competing visions of our collective and individual lives—visions that in myriad episodes of western history have involved using natural resources for wide-ranging ends.<sup>448</sup> The law has been implicated in this process in numerous ways—more precisely, the concept of “property” as superimposed on natural resources.<sup>449</sup> Water law illustrates this pattern vividly. Its allocational and procedural rules have controlled in no uncertain terms which communities and individuals have been entitled to use, or have been prohibited from using, a resource that has been instrumental to countless goals and aspirations that have been envisioned. Viewed from this angle, the *Big Horn* adjudication is not purely remarkable as a case study for general stream adjudications—their institutional design, utility, etc.—but also as a testament to a phenomenon that has animated western history—namely, the role

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<sup>445</sup> See John E. Thorson, *Reflections on Western General Stream Adjudications Upon the Signing of Wyoming's Big Horn River Adjudication Final Decree*, 15 WYO. L. REV. 383 (2015). See also Ramsey L. Kropf & S. Chapin Lewis, *The Big Horn General Stream Adjudication Concludes After 37 Years*, 1 W. WATER L. & POL'Y REP. 66 (2015) (discussing how *Big Horn* adjudication's “organization structure provides some useful lessons learned for ongoing adjudications” in other western states).

<sup>446</sup> See Lawrence J. MacDonnell, *Rethinking the Use of General Stream Adjudications*, 15 WYO. L. REV. 347 (2015) See also *Dividing the Waters II*, *supra* note 138, at 479–80 (describing perception among Montana compact commission members and staff that *Big Horn's* litigation-based approach to adjudication of Indian reserved rights “made neighboring water users into lifelong enemies and split the community between Anglo water users and Native American water users.”).

<sup>447</sup> See, e.g., ELLIOTT WEST, *THE CONTESTED PLAINS: INDIANS, GOLDSEEKERS, AND THE RUSH TO COLORADO* xxiv, 318, 333, 336 (1998).

<sup>448</sup> *Id.* at xx.

<sup>449</sup> See, e.g., LIMERICK, *supra* note 32, at 26–27 (“Western history has been an ongoing competition for legitimacy—for the right to claim for oneself and sometimes for one's group the status of legitimate beneficiary of Western resources. This intersection of ethnic diversity with property allocation unifies Western history.”).

played by law in mediating competing visions of communities and individuals concerning their interactions with one another over the western landscape. In whose hands did the adjudication place a pen from which life could be written in the Wind-Big Horn Basin?

With these big-picture lenses on the *Big Horn* adjudication as background, a final return is fitting to the roughly sixteen-month trial before Special Master Roncalio that began in January 1981 and concluded in May 1982. As flagged at the outset of this piece, Wyoming Attorney General John Troughton made a clever quip on the first day of this trial regarding the “hot seat” in which the special master sat. Not to be outdone, counsel for the State of Wyoming on the last day of trial, Michael White, spoke with similar eloquence immediately before the special master adjourned the session. Mr. White echoed what Attorney General Troughton had said the year before. “I know that the United States and the Tribes have told you that promises have been made to the Indians which you need to insure are kept. We’ve told you that promises have been made to the non-Indians which you need to insure are kept.”<sup>450</sup> “You are both correct,” replied the special master.<sup>451</sup> Mr. White then went on to quote a passage from Robert Frost’s *Stopping by Woods on a Snowy Evening*—a passage Mr. White described as having “haunted” him “during this entire trial over promises.”<sup>452</sup> The passage reads: “The woods are lovely, dark and deep, but I have promises to keep, and miles to go before I sleep, and miles to go before I sleep.”<sup>453</sup> “I suspect that’s the position in which you find yourself,” described Mr. White. In so many words, the special master agreed.<sup>454</sup> He did have miles to go before producing his 467-page report by the end of the year.<sup>455</sup> The parties, too—though unaware of it at the time—also had miles to go before the district court would conclude the adjudication more than three decades later. And to further co-opt Robert Frost to bring this article to its conclusion: Is it now time for sleep? With the *Big Horn* adjudication having run its course, is it *now* time for sleep?

The questions just posed are rhetorical, and “no” is the unequivocal answer in my view. Casting eyes toward the path that lies ahead, the patchwork pattern of water rights decreed in the adjudication—reserved rights, *Walton* rights, appropriative rights, and in some instances all of the above along the same ditch—mirrors in its complexity the patchwork pattern of land ownership within the Wind-Big Horn

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<sup>450</sup> Trial Transcript, *supra* note 1, at 215.

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> Poetry Foundation, *Stopping by Woods on a Snowy Evening* by Robert Frost, <http://www.poetryfoundation.org/poem/171621> (last visited March 17, 2015).

<sup>454</sup> Trial Transcript, *supra* note 1, at 215.

<sup>455</sup> Roncalio Report, *supra* note 153.

Basin.<sup>456</sup> A clear understanding of the former pattern as it impacts the interests of parties subject to the relevant decrees and orders is essential to their legal and political empowerment. Sharing of this knowledge is nothing short of critical. Such knowledge is also integral to another priority about which the adjudication, particularly the Phase I litigation, speaks volumes: collaboration. The decrees and orders provide a default framework that in the future will govern and coordinate the activities of water rights holders as well as serve as a baseline from which these parties may develop allocation and management arrangements that are innovative and mutually beneficial.<sup>457</sup> In the words of Special Master Roncalio a decade after he resigned his post: “Creative solutions to common problems will be found. The potential is limitless, needing only—as has always been the case in the West—the people to match the challenges: ‘a society to match the scenery,’ as Wallace Stegner expressed it.”<sup>458</sup> Knowledge sharing and collaboration are two of numerous items that might be referenced to speak to the same closing point in the *Big Horn* adjudication’s wake. Perhaps there may come a time for “sleep” in Robert Frost’s parlance, but, if so, it is miles away from here and now.

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<sup>456</sup> *Big Horn* Adjudication Manager Nancy McCann has painted this picture eloquently: “[I]magine the checkerboard (or patchwork) ownership pattern overlaid with a patchwork of varying water rights with different attributes of appurtenance (or not), abandonment (or not), water duties and appropriations, varying administrations and priorities all on the same ditch.” Email from Nancy McCann, Adjudication Manager, Wyoming State Board of Control (November 25, 2014) (on file with author). Ms. McCann’s explanation of the historical and institutional processes underlying this state of affairs is equally illuminating: “When the courts issued their orders, decrees, and decisions, they looked through a legal microscope at the issue at hand, but did not see in a comprehensive way the telescoping effects (big picture) when you have to sew all the resultant decrees together to see how the pieces actually fit.” *Id.* The end product, in Ms. McCann’s words, “is more than just a quilt, it is multi-layered and interwoven, separate but continuous with each thread.” *Id.*

<sup>457</sup> See, e.g., Kropf & Lewis, *supra* note 445, at 66 (describing upon adjudication’s conclusion how “many Wyoming participants expressed the desire for state, tribal and federal water users to move forward with post-adjudication data-sharing and cooperative monitoring schemes to share and administer this precious resource.”).

<sup>458</sup> Roncalio, *supra* note 272, at 214. The excerpt in which the phrase attributed to Wallace Stegner appears is itself apropos in this context. It describes the American West in terms that go to the region’s heart—and, in this author’s view, to the heart of the Wind-Big Horn Basin’s future and potential: “This is the native home of hope. When it fully learns that cooperation, not rugged individualism, is the quality that most characterizes and preserves it, then it will have achieved itself and outlived its origins. Then it has a chance to create a society to match its scenery.” WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER: THE CHANGING AMERICAN WEST* 38 (1980).