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Charles Wilkinson

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# WYOMING LAW REVIEW

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## INTRODUCTION TO *BIG HORN* GENERAL STREAM ADJUDICATION SYMPOSIUM

*Charles Wilkinson\**

This issue of the Wyoming Law Review is dedicated to the Big Horn General Stream Adjudication, originally filed in 1977, with a final decree issuing from the Wyoming Fifth District Court on September 5, 2014. The articles for this special volume were generated by a symposium organized by the University of Wyoming College of Law and marking the completion of the adjudication, one of Wyoming's—and the West's—most notable pieces of litigation. More than 200 federal, tribal, and state representatives, attorneys, interested citizens, and students attended the symposium, held in Riverton on the Wind River Reservation, the homeland of the Eastern Shoshone and Northern Arapaho Tribes. The gathering, as reflected in the articles in this issue, addressed the Big Horn adjudication itself from many different perspectives and, for comparison purposes, the general stream adjudications held in other western states.

Further, the symposium and many of the articles presented were forward-looking. Now that the Big Horn adjudication is complete, can it also be a beginning? Can the many people who use and love this river system move beyond the combat that characterized the adjudication and, working cooperatively, find ways to broaden and improve management of this watershed and its development uses, recreation opportunities, and beauty?

The general stream adjudication, unique to the arid American West, is an imposing legal institution. Water is much contested in the region—"whiskey is for drinking, water is for fighting"—and the general stream adjudications, which comprise all the water claimants in a river basin, is where enforceable water rights are officially litigated and determined.<sup>1</sup> Covering large geographic areas and many

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\* Distinguished Professor and Moses Lasky Professor of Law, University of Colorado.

<sup>1</sup> Terry L. Anderson, *Water Needn't Be a Fighting Word*, THE WALL STREET JOURNAL, Sept. 30, 1983, at 30.

water users, these proceedings are almost always long-running and expansive. The Big Horn-Wind River watershed in Wyoming (the lower mainstem flows north into Montana) encompasses 20,500 square miles, about twenty-one percent of the state. Twenty thousand claimants participated in the Big Horn adjudication. The thirty-seven years used to litigate the Big Horn adjudication is not atypical.

In the Big Horn adjudication, as with the proceedings in most other states, Indian water rights created the greatest conflict and consumed the largest amount of time. These federally-recognized rights, emanating from tribal-United States treaties and the federal-Indian trust relationship as explained in the famous 1908 *Winters* case and other federal court decisions, are independent of state water law.<sup>2</sup> They fly in the face of the *first-in-time*, *first-in-right* and *use-it-or-lose-it* prior appropriation doctrine adopted in every western state. Traditionally, state water agencies have been beholden to non-Indian rights holders and viewed the tribes as interlopers who often have markedly different perceptions about water. To the states, it is wrong that diversions for irrigated farmlands—going back generations and considered *vested* rights under state law—should be called into question by tribal and Justice Department lawyers asserting superior tribal rights.

The position of the tribes and the United States is straightforward. Under federal law, tribal water rights date back to the signing of a treaty or even aboriginal times long before that. Either way, the tribal rights are senior to almost all non-Indian diversions and the *Winters* doctrine provides, contrary to state law, that neither a diversion nor actual use is required. They are the *supreme Law of the Land* under Article VI of the Constitution and trump the contrary state requirements.

But it has never been that simple. Western water law has become more than law. Epitomized by the image of the hard-working farm families who have irrigated for generations, prior appropriation is infused with history, myth, emotion, politics, economics, and public acceptance. This thick mix lies heavy over courtrooms in Wyoming and the West. This is not to say that the judges, state and some federal, have not been fair. In Wyoming and elsewhere, tribes have prevailed on some important points. The proceedings, though, do not reflect the normal supremacy of valid federal laws over contradictory state provisions. The tribes have had uphill battles. The weight of prior appropriation, assertedly the Law of the West, has been palpable.

This symposium issue presents what will surely become the standard academic treatment of the Big Horn adjudication and, as well, amounts to one of the most comprehensive examinations of West-wide general stream adjudications.

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<sup>2</sup> See *Winters v. United States*, 207 U.S. 564 (1908).

Professor Jason Robison's detailed and rich article, *Wyoming's Big Horn General Stream Adjudication*, is a complete guide to this monumental adjudication. The largest issues all involve tribal rights. To the court's lasting credit, the decision awarded the tribes a reserved water right of some 500,000 acre feet—by far the largest water right in the basin, and so substantial that the tribes elected not to petition to the United States Supreme Court for certiorari, although the tribes did counterclaim on several issues in response to the state's certiorari petition. The United States Supreme Court affirmed the state court award in 1989. The tribes are quick to point out in frustration that, as of 2015, about half of these adjudicated rights remain *paper rights* because the tribes have been unable to obtain funding to develop them. This, however, is a matter largely beyond the control of the court, except for the use of water for recreational uses, to which I will return.

Professor Robison's article also addresses the areas in which the court's rulings have disadvantaged the tribes. All demonstrate how judges have used the concepts and values of state prior appropriations law to diminish these federally protected rights.

The Big Horn court ruled that the Eastern Shoshone and Northern Arapaho rights do not extend to groundwater. Traditionally, states, including Wyoming, created regimes for surface water and groundwater. Extensive groundwater usage did not come about until after World War II with the advent of rural electrification in the West, which allowed for the use of high-lift pumps. By then, surface water laws were mature, and groundwater first developed on a separate track, even though aquifer-river connectivity was beginning to be better understood.

By the time the Wyoming Supreme Court handed down its Big Horn decision in 1988, the connectivity of groundwater was common knowledge and many states, acknowledging this fact, had turned to "conjunctive use" of surface and groundwater. Wyoming took this action in 1957, when it recognized that rights in interconnected groundwater and surface sources will be treated as a "common water supply."<sup>3</sup> It is hard to imagine a reason for denying tribal right to groundwater on the reservation, other than a knee-jerk reaction to the traditional prior appropriation notion of the two sources being separate. However much of the court's ruling is contrary to hydrology and other courts' rulings,<sup>4</sup> and however unlikely other states are to follow Wyoming's approach, the Wind River tribes are left with the result.

In the 1988 opinion, the court also upheld so-called *Walton* rights of non-Indians who obtained allotted land. The difficulty from the tribal standpoint is

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<sup>3</sup> WYO. STAT. ANN. § 41-3-916.

<sup>4</sup> See, e.g., *In re General Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 989 P.2d 739 (Ariz. 1999); *United States v. Orr Ditch Water Co.*, 600 F.3d 1152 (9th Cir. 2010).

that such rights carry an 1868 priority date so long as they were developed with reasonable diligence. This elevates these treaty-based rights to the same priority date as the tribes', making the non-Indian holders of the rights direct competitors with the tribes. The *Walton* doctrine is supported by Ninth Circuit cases, but there are strong arguments against it based on the policy reasons underlying *Winters* rights.<sup>5</sup>

The Wyoming Supreme Court also made a foundational ruling—that the *sole* purpose of the 1868 treaty was agriculture—that controlled several specific issues to the disadvantage of the tribes. As Professor Robison points out, Teno Roncalio, special master in the Big Horn adjudications, found that the treaty purpose was to assure the tribes a “permanent homeland,” a standard much more attuned to the beneficent intentions normally imputed to Congress in cases construing Indian treaties.<sup>6</sup> While the court found that municipal, domestic, and commercial uses fit within the overarching agricultural purposes, the court denied tribal water rights for mineral and industrial purposes, both water-intensive uses.

Further, the court refused to allow instream water rights for fishermen, wildlife, and aesthetics in crabbed explanations of how these tribal people did not traditionally rely on water for these purposes. The weight of classic prior appropriation surely played a role here, for these uses were wholly unrecognized under the consumptive, out-of-stream imperative that drives western water law. (Modest recent provisions allowed for only very junior rights.<sup>7</sup>) The instream flow matter came back to the court in *Big Horn III*.<sup>8</sup> In what Professor Robison calls a “fractured” decision marked by separate opinions from each of the five justices, the tribe was prohibited from dedicating part of its reserved right to instream flows to improve stream conditions for fisheries.<sup>9</sup>

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This issue also provides us with quality analysis of general stream adjudications in other states. Two of the West's wisest voices on water are Lawrence MacDonnell, longtime Executive Director of the Natural Resources Law Center at the University of Colorado and law faculty member at the Wyoming and Colorado law schools; and John Thorson, who has contributed to western water law and policy for more than thirty years, including work as special master in both the Arizona General Stream adjudication and the ongoing Lummi Decree in Washington State.

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<sup>5</sup> David H. Getches, *Water Rights on Indian Allotments*, 26 S.D. L. REV. 405 (1981).

<sup>6</sup> Jason A. Robison, *Wyoming's Big Horn General Stream Adjudication*, 15 WYO. L. REV. 243, 280 (2015).

<sup>7</sup> The Wyoming instream flow program, initiated in 1988, is codified at WYO. STAT. ANN. §§ 41-3-1001 and 41-3-1002.

<sup>8</sup> 835 P.2d 273 (Wyo. 1992).

<sup>9</sup> Robison, *supra* note 6, at 290.

In *General Stream Adjudications, the McCarran Amendment, and Reserved Water Rights*, MacDonnell provides a full look at the federal statute that allowed states to bring federal, as well as tribal, reserved rights into state adjudications. He recounts how Congress adopted the McCarran amendment in 1952 and, although the statute did not refer to tribes, how the United States Supreme Court held in 1976 that Congress intended to grant states jurisdiction to adjudicate the tribes' federally-protected rights. After an account of state court proceedings under the McCarran Amendment, MacDonnell finds that, both as to tribal and federal reserved water rights, this has been "an experiment that has failed." The root cause is the force of western state water law, even though state law should properly apply only procedurally, not substantively. "Whether consciously or not," he writes, state courts "may well tend to apply federal law in a way that produces results protective of state interests and constrictive of federal interests. It is difficult reading many of these state court decisions not to be aware of the explicit or implicit hostility to reserved rights they often display."<sup>10</sup>

MacDonnell goes a step further. "It is time," he writes, "to remove this authority from state general adjudication courts."<sup>11</sup> This can be done by amending the McCarran Amendment so that it applies only to federal and tribal claims to water rights under state law; or the Supreme Court could revisit its earlier rulings based on four decades of experience under the current regime. He acknowledges that neither of these options will come easily, but it is good to have MacDonnell's carefully thought out views on the table.

Thorson, who also offers a state-by-state survey of adjudications, looks at them through a somewhat different lens. He finds that there have been useful gains from the adjudications in terms of improving water data. On confirming valid, existing water rights, the results are "mixed;" the adjudications have brought some order, including weeding out "bogus and exaggerated claims," but many water uses, including some hydrologically-connected groundwater and small domestic uses, have been left outside the adjudication processes.

On the issue of resolving federal reserved water rights, "the news here is quite favorable." But Thorson's point is not that state judges have correctly upheld tribal and federal claims; rather, most tribes leveraged the court cases into achieving results outside of the adjudications. Using the "pressure of litigation," tribes, federal officials, and water uses under state law have moved beyond the lawsuits and forged settlements that have been, or will be, ratified by Congress.<sup>12</sup> And

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<sup>10</sup> Lawrence J. MacDonnell, *General Stream Adjudications, the McCarran Amendment, and Reserved Water Rights*, 15 WYO. L. REV. 313, 342 (2015).

<sup>11</sup> *Id.* at 343.

<sup>12</sup> 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, 409 (2015).

he is right about this: in part because the adjudications have proved to be such difficult forums, cooperation and settlement has become the broadest and deepest movement in Indian water law. For the Wind River tribes who have not reached settlements, the results have been especially unfortunate.

The general stream adjudications across the West have been well addressed in other articles in this issue. Burke Griggs, of the Bill Lane Center of the American West at Stanford, makes a constructive proposal for employing a version of the general stream adjudication to address the long and complex saga of the Ogallala Aquifer underlying vast reaches of the Great Plains. He explains how the classic general stream adjudication process does not square with the hydrology, current legal regime, and multi-state status of the Ogallala. However, the idea of an adjudication does make sense: Bringing all the parties together to achieve a quantification of all rights could lay the foundation for stemming the current over-appropriation. Griggs, who represents the State of Kansas on Ogallala matters, knows that achieving a comprehensive resolution to this multi-layered problem will hardly be easy, but believes that his approach is realistic and could work if enough people become imbued with the imperative need to preserve the sustainability of this great natural resource.<sup>13</sup>

Professor Michelle Bryan, who teaches water law and directs the Land Use & Natural Resources Clinic at the Montana School of Law, offers an in-depth look into the operation of general stream adjudications across the West and also presents a provocative discussion of what should happen next. In examining the adjudication processes and current record-keeping practices of the individual western states, Bryan makes good use of numerous, informative interviews with state engineers, attorneys, special masters, and others to provide a sense of actual, current on-the-ground practices. But now, with many adjudications final and others winding down, it is in her view time to consider the “post-adjudication world.” With rights adjudicated, the question in her fine Section II and Conclusion is whether and how states will create “nimble, predictable water rights systems that allow uses to adapt to the emerging needs of the West . . . foster[ing] [] accurate, efficient water delivery throughout complex, interconnected watersheds.”<sup>14</sup> Rights have been set, but not in stone. Can water managers find ways to accommodate changing circumstances?

One area of Bryan’s inquiry involves changes of water rights. Her findings evidence both discouragement and promise. Too often, as the Arizona Assistant Director put it, change proceedings are perceived of as “lengthy, difficult, and

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<sup>13</sup> See Burke W. Griggs, *General Stream Adjudications as a Property and Regulatory Model for Addressing the Depletion of the Ogallala Aquifer*, 15 WYO. L. REV. 413 (2015).

<sup>14</sup> Michelle Bryan, *At the End of the Day: Are the West’s General Stream Adjudications Relevant to Modern Water Rights Administration?*, 15 WYO. L. REV. 461, 463 (2015).

uncertain.”<sup>15</sup> In addition, states are sometimes using change applications to review inefficient senior rights. A Colorado water lawyer describes these “knock downs,” where decreed rights are reduced to comport with historic consumptive use.<sup>16</sup> This is done in several other states and one result, as reported in Montana, is that this scrutiny of existing practices (along with delay and expense) causes some rights holders to avoid the change process altogether.

While it has drawbacks, this use of change procedures highlights the need to respond to one of the most critical issues in western water law, policy, and management. One way or another, we must find fair, effective ways to reduce the inefficient irrigation practices found in every Western state in order to free up water for the kinds of new uses—and ancient ones in Indian country—that westerners expect to see represented in the management of their rivers.

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At the two-day symposium, participants were interested in the specifics of the adjudication, to be sure, but people’s minds may have turned more toward the future, interested in what comes next. That was a subject in the minds of the authors discussed above, as well. Each of them addressed the post-adjudication world in some fashion.

The second day looked almost entirely to the future and it will be remembered for the vigorous prospective panel during that morning. Many future issues involving Wyoming water exist, but the one on most people’s minds, certainly including the tribal members in attendance, was the issue of instream flows under the auspices of the tribes. In *Big Horn III*, the court, by a 3-2 decision, held that the tribes could not put their treaty irrigation rights to use for instream flows to enhance the fishery. The adjudication also ruled against other cultural and traditional uses. And the tribes, who have so avidly worked for instream flows, are not alone in their quest. At the second day of the symposium, Kim Wilbert, who has lived in Riverton all his life, reported his sorrow over what the large-scale diversions have done to the Wind River as it flows through Riverton in the summer. “You can wade across it without it hardly going over your sneakers.”<sup>17</sup>

The chair of the symposium’s future-looking panel was Anne MacKinnon, journalist, lawyer, and adjunct professor at the University of Wyoming’s Haub School of Environment and Natural Resources, who has long been a constructive force in Wyoming water matters. Her article, *Eyeing the Future on the Wind River*, presents a broad view of what might be done to move beyond the adjudication

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<sup>15</sup> *Id.* at 468.

<sup>16</sup> *Id.* at 475.

<sup>17</sup> Kim Wilbert, Remarks at the Big Horn General Stream Adjudication Symposium Conference (Sept. 12, 2014). A video recording of the second day of the symposium can be found at <https://www.youtube.com/watch?v=McmzAzOzFrQ> (last visited June 26, 2015).



and bring justice to the tribes of the Big Horn-Wind River watershed.<sup>18</sup> In terms of river governance, she raises the possibility of a joint management agreement, or even co-management, among the state, the tribes, and the Bureau of Reclamation. As one precedent, she looks to the Pacific Northwest, where the twenty tribes of northwest Washington have a recognized and successful co-management relationship over salmon and other marine species with the relevant state and federal agencies. She raises other provocative proposals directed at water marketing, including selling bottled Wind River water; providing instream flows through new storage; and a hard look at finding ways to turn the tribal “futures” water from paper to wet water.

MacKinnon’s premise is that, with the adjudication completed, cooperation can replace combat on the river and, once a commitment to cooperation takes hold, a whole new set of possibilities becomes realistic. And she is right. Unpredictable, time-consuming, and risky for all involved, but realistic.

The second-day panel on the future of the basin harbingered the chance of a new beginning. Jeff Fassett, State Engineer during most of the adjudication, had earlier explained how the dynamics of the adjudication failed to allow for any true agreement among the parties.

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 train . . . [C]learly the hard-fought litigation left ill will among two parties. It damaged relationships. And it damaged the neighborhood . . . [T]he result of our litigation is that we have a solution from the courts, not a solution by the parties.<sup>19</sup>

At the symposium panel, Wyoming’s current State Engineer, Patrick Tyrrell, carried that thought forward: “If we can move water without any ill effect to existing users, we can make changes. But we need everybody at the table.”<sup>20</sup>

A main set of perceptions that will need to be explored and understood in any future talks is the way the principals view water. Under Wyoming law, the “preferred uses,” in order are: “water for drinking purposes for both man and

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<sup>18</sup> See Anne MacKinnon, *Eyeing the Future on the Wind River*, 15 WYO. L. REV. 517 (2015).

<sup>19</sup> Robison, *supra* note 6, at 297.

<sup>20</sup> Patrick Tyrrell, Wyoming State Engineer, Remarks at the Big Horn General Stream Adjudication Symposium Conference (Sept. 12, 2014).

beast;” “municipal purposes;” use of “steam engines and for general railway use” and related purposes; “industrial purposes;” and “irrigation.”<sup>21</sup> While all senior state water rights were obtained under this consumptive use regime, a 1986 Wyoming state law does allow for the creation of instream flows for recreation and fisheries.<sup>22</sup> Most of those instream rights, however, are junior, subordinate to the extractive rights created under the pure prior appropriation regime.

The Wind River Tribal water code, on the other hand, begins by expressing a dramatically different vision of water, finding that “all Reservation natural resources are interconnected; and that the water resource has cultural, spiritual, and economic values that guide the appropriate use, management, and protection of that resource.”<sup>23</sup> Sara Robinson, Shoshone, as a panelist, spoke to the non-Indians about water: “Your eyes do not see what my eyes see.”<sup>24</sup>

That truism applies on many western rivers, but one of the hallmarks of modern western water law has been the willingness of westerners to come together and do the slow, deliberate, sometimes agonizing work of finding ways to accommodate both visions. John Thorson discusses this in his article, offering many examples of settlements that addressed the needs of both tribes and non-Indian users. The extraordinary recent settlements on the Klamath and Umatilla rivers are especially noteworthy. So are the historic dam removals on the Elwha River on the Olympic Peninsula and the White Salmon River on the Columbia. The Lower Elwha Klallam Tribe, and the Yakama Nation on the White Salmon River, assumed leadership roles in those efforts.

On the Wind-Big Horn, in spite of the contentiousness, there has been some cooperation when the tribes and the state have worked together on fish screens and ladders and on funds for construction. At the symposium, State Engineer Tyrrell gave an example of how the approach in a past cooperative effort not involving the tribes might lead to future tribal-state agreements on instream flows for fisheries. By reworking the complex water delivery system, the state, environmentalists, and irrigators were able to provide a seventy-five cubic-foot per second (cfs) flow and a “marvelous fishery” in Fremont Canyon on the North Platte River, which had gone dry most of the year, without any injury to existing

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<sup>21</sup> WYO. STAT. ANN. § 41-3-102.

<sup>22</sup> WYO. STAT. ANN. §§ 43-3-1001–1002. The Wyoming instream flow statute acknowledges recreation and fisheries as beneficial uses and allows for creation of junior instream flows.

<sup>23</sup> WIND RIVER WATER CODE, ch. 1 (A)(1).

<sup>24</sup> Sara Robinson, Remarks at the Big Horn General Stream Adjudication Symposium Conference (Sept. 12, 2014).

users. “Some of those fish you almost can’t land,” Tyrrell enthused.<sup>25</sup> “It was a win-win situation.”<sup>26</sup>

The key to making real progress may be in finding creative avenues to make existing operations more efficient. One thing we have learned over the past couple of generations is that when everyone is at the table and everyone knows the watershed, local people can innovate, creating a great deal of flexibility in allowing new uses without damaging existing ones. Techniques include new storage, timing of releases and diversions, efficiency measures, including sprinklers and laser leveling, and conservation buy-outs. Funding, including support for conservation measures, is sometimes necessary, and public funding does not come easy these days. Still, given time, settlements with broad support can make headway. Wyoming is an outdoors state, and public sentiment will build among citizens and corporations for tribal-state-rancher proposals that are good conservation, good recreation, and good economics.

Pie in the sky? Maybe, but we’ve seen it already on many western rivers, and ventures of this sort are proliferating. It will take time. Will it ever. Even the essential, initial step—achieving trust—will take time. To my eye, the circumstances here are truly promising. The adjudication is over. The combat did not work. People, in the state and tribes, held out their hands at this symposium. The question is whether they will keep them out, begin a challenging journey, and explore ways to make this wondrous river system a better and more just place.

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<sup>25</sup> Tyrrell, *supra* note 18.

<sup>26</sup> *Id.*