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## Wyoming's Experience With Federal Non-Indian Reserved Rights: The Big Horn Adjudication

The federal non-Indian reserved rights segment of the Big Horn adjudication is a modern example of the Shakespearean phrase, "much ado about nothing." The controversy, born of Wyoming's attempt to finally adjudicate and quantify all federal rights<sup>1</sup> claimed under the reservation doctrine, took over five years and millions of dollars to resolve. The adjudication was specifically intended to eliminate disputes pertaining to the water rights of the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, and vast numbers of non-Indian and private claims<sup>2</sup> within Water Division No. 3.<sup>3</sup> It was anticipated that the general adjudication of water rights would end the uncertainty experienced by water users in Water Division No. 3 that resulted from the possibility of large federal claims.<sup>4</sup>

### SETTING THE STAGE

From the outset Wyoming was faced with several difficult procedural issues. The first and foremost consideration was whether the state could secure jurisdiction over the United States and the Shoshone and Arapahoe Tribes. Wyoming effectively disposed of this issue by enacting special water adjudication legislation just one week before suit was filed.<sup>5</sup>

The Wyoming jurisdictional statute provided that the state could adjudicate the "nature, extent and relative priority of the water rights of

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1. Special Master's Report at 3, In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, Civil No. 4993 (5th Dist. Wyo. Dec. 15, 1982) [hereinafter Special Master's Report].

2. Special Master's Report, *supra* note 1, at 1, 2. Water Division No. 3 includes several federal entities including the Shoshone and Bighorn National Forests, a portion of Yellowstone National Park, numerous public water reserves, stock driveways and wildlife habitat. Several thousand private defendants held an interest in 812,000 acres of ranch and farmland in the Big Horn drainage.

3. WYO. STAT. § 41-3-501(a)(iii) (1957). Wyoming Water Division No. 3 is statutorily defined as "all lands within this state drained by the Big Horn River and its tributaries, and by Clark's Fork and its tributaries."

4. Special Master's Report, *supra* note 1, at 8.

5. WYO. STAT. § 1-37-106 (1977). That statute states:

(a) The State of Wyoming upon the relation of the attorney general may 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 and all other sources, provided:

(i) For the purposes of this section:

(A) The term "general adjudication" shall mean 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. The court conducting such a general adjudication shall:

(I) Certify to the state board of control those legal and factual issues which the court deems appropriate for the board to determine. Upon such certification, the board shall exercise those powers and follow those procedures set forth in Rule 53 of the Wyoming Rules of Civil Procedure;

(II) Confirm those rights evidenced by previous court decrees, or by certificates of appropriation, or by certificates of construction heretofore issued by the Wyoming state board of control;

all persons in any river system.”<sup>6</sup> The term “person” was defined under the statute as including the United States.<sup>7</sup> In addition, the statute facilitated the service of process on the approximately 27,000 unadjudicated but permitted rights in the Big Horn drainage.<sup>8</sup>

Despite the jurisdictional effect of the statute, the United States filed a petition for removal of the case from state court in Worland<sup>9</sup> to federal district court in Cheyenne. Federal Judge Ewing T. Kerr remanded the case to state court on the motion of the state and two private parties.<sup>10</sup> Judge Kerr concluded that the Wyoming jurisdictional statute fulfilled the requirements of the federal McCarran Amendment which explicitly waived the United States’ sovereign immunity in state water adjudications.<sup>11</sup>

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(III) Determine 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 thereunder not theretofore adjudicated under W.S. 41-211 [§ 41-4-511];

(IV) Determine 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 aforescribed decrees, certificates, or permits;

(V) Establish, in whatever form determined to be most appropriate by the court, one or more tabulations or lists of all water rights and their relative priorities on the river system and all other sources;

(B) The word “person” shall be construed to mean an individual, a partnership, a corporation, a municipality, the state of Wyoming, the United States of America, or any other legal entity, public or private;

(ii) When the potential defendants number one thousand (1,000) or more, personal service of a summons and complaint shall not be required and (A) the court shall order that the clerk obtain service on known potential defendants by mailing a court-approved notice of the action by certified mail, return receipt requested, and (B) the court shall order that the clerk obtain service on all unknown parties by publication of said notice for four (4) consecutive weeks in a newspaper published in each of the counties within which interests in and rights to the use of water may be affected by the adjudication. If there is no newspaper in one (1) or more of said counties, then publication for such counties shall be in one (1) or more newspapers published in the state, and of general circulation within said counties. If publication is in a daily newspaper, one (1) insertion a week shall be sufficient;

(iii) The complaint for such a general adjudication shall be captioned: “In re the General Adjudication of All Rights to Use Water in the \_\_\_\_\_ River System and All Other Sources, State of Wyoming”;

(iv) When 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.

6. *Id.* § 1-37-106(a)(i)(A).

7. *Id.* § 1-37-106(a)(i)(B).

8. *Id.* § 1-37-106(a)(i)(B)(ii). See Comment, *McCarran Amendment General Adjudications in Wyoming: Threshold Problems*, 16 LAND & WATER L. REV. 53 (1981).

9. Special Master’s Report, *supra* note 1, at 17. The suit was filed in the Fifth Judicial District of Wyoming in Worland, Washakie County. The Department of Justice filed in the United States District Court on February 22, 1977 for removal of the case to U.S. District Court in Cheyenne.

10. *Id.* at 17. The private parties who joined the state in its motion to remand to state court were Owl Creek Ranch and Mr. Landis Webber.

11. 43 U.S.C. § 666 (1976) provided that the United States explicitly consented to be joined as a defendant in state water adjudication suits when it was a necessary party. In *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971), the McCarran Amendment was challenged and upheld. The McCarran Amendment has been the source of court action in a number of states and has been repeatedly upheld. See, e.g., *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1976).

With jurisdiction established in the state court, the next procedural issue Wyoming encountered concerned the referral of the adjudication to the Board of Control, a procedure which is provided by statute.<sup>12</sup> The Shoshone and Arapahoe Tribes objected to the Board of Control's role in determining factual and legal issues in the adjudication. In consideration of objections raised by the Tribes, state district court Judge Harold Joffe referred the adjudication to a Special Master.<sup>13</sup> The authority to determine the status of water rights claims in the Big Horn drainage was thereby transferred to the Special Master.<sup>14</sup> When confronted with claims in three distinct categories, Special Master Teno Roncalio trifurcated the proceedings.<sup>15</sup> The categories consisted of Indian rights on the Wind River Indian Reservation, claims of individual appropriators, and non-Indian claims for reserved rights in federal enclaves.<sup>16</sup>

Despite all this procedural maneuvering, the non-Indian federal claims portion of the adjudication was finally determined, not by a court of law, but by an agreement reached by the parties.<sup>17</sup> The Partial Interlocutory Decree and Supporting Documents Regarding the United States' Non-Indian Claims (Partial Decree) was the product of five years of negotiation.<sup>18</sup> From the beginning, the United States and Wyoming were clearly antagonistic toward each other. This enmity was reflected in their respective claims. Yet political exigencies and economic considerations forced both parties to take to the negotiation table rather than to the courtroom.

The United States initially claimed water rights for every federal enclave within Water Division No. 3.<sup>19</sup> Also claimed was a reserved right in the entire flow of Middle Creek within Yellowstone National Park. The United States argued that these claims defied quantification.<sup>20</sup> In the Bighorn and Shoshone National Forests, the United States claimed full natural flow rights for a wide variety of uses.<sup>21</sup> Reserved rights in public water reserves, stock driveways, water producing gas wells, wildlife habitat and the Big Horn National Recreation Area were also claimed.<sup>22</sup>

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12. WYO. STAT. § 1-37-106(a)(i)(A)(I) (1977).

13. Special Master's Report, *supra* note 1, at 20.

14. *Id.*

15. *Id.*

16. *Id.*

17. Partial Interlocutory Decree and Supporting Documents Regarding the United States' Non-Indian Claims, In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, No. 4993 (5th Dist. Wyo. Feb. 9, 1983).

18. Special Master's Report, *supra* note 1, at 13, 26, 27. Suit was filed for the adjudication of water rights in the Big Horn on January 27, 1977. Both parties participated in prolonged motion and discovery procedures. Negotiations resulted in the entry of the Partial Decree on February 9, 1983.

19. *Id.* at 1, 2. Government reservations within Wyoming Water Division No. 3 include the Bighorn and Shoshone National Forests, portions of Yellowstone National Park, the Bighorn Canyon National Recreation Area, the East Fork and Whiskey Basin Winter Elk Pastures, and numerous public water reserves, water wells and stock driveways.

20. *See infra* note 90.

21. United States' Statement of Claims at 26-30, In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and all Other Sources, State of Wyoming, No. 4993 (5th Dist. Wyo. March 5, 1980).

22. *Id.* at 30-33.

In its Brief In Support of its Response to the Claims for Water Rights of the United States and the Shoshone and Arapahoe Tribes,<sup>23</sup> Wyoming stated, “[Our] view of the water rights owned by the United States differs dramatically from that of the United States and Tribes.”<sup>24</sup> Wyoming’s position was not understated. Preliminarily, Wyoming took the position that reserved water rights for federal enclaves simply did not exist as a matter of law.<sup>25</sup> Wyoming then asserted that the confirmation of her constitution when it was admitted into the Union also confirmed state ownership of water.<sup>26</sup> Finally, Wyoming contended that federal acquisition of water through the state permit system in the past worked an estoppel on claims to federal reserved rights.<sup>27</sup>

The antagonism inherent in water rights adjudications involving federal claims had not gone unnoticed by Presidents of the United States. Shortly after suit was filed in the Big Horn adjudication, President Carter directed federal agencies holding lands which might include reserved water rights to take action to reduce uncertainty over future assertions of rights.<sup>28</sup> Agencies were instructed to seek an expeditious establishment and quantification of federal reserved rights<sup>29</sup> by handling disputes with a “willingness to negotiate and settle such rights in an orderly and final manner by using a reasonable standard rather than hypothetical ones.”<sup>30</sup> A Task Force<sup>31</sup> formed to study the conflict between state and federal claims opined that a satisfactory accommodation of all interests could be achieved.<sup>32</sup>

When the Reagan administration took power in 1981, it moved to solidify state control over water resources.<sup>33</sup> Federal agencies were directed to follow state procedures when acquiring water rights.<sup>34</sup> Regulations of the Department of the Interior were revised in order to eliminate conflicts between state and federal rights. In several instances the federal government agreed to quantify its claims within a state upon request.<sup>35</sup> Negotiations with states rather than lengthy court proceedings were clearly mandated.

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23. Wyoming’s Brief in Support of its Response to the Claims for Water Rights of the United States and the Shoshone and Arapahoe Tribes, In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, No. 4993 (5th Dist. Wyo. July 16, 1980) [hereinafter Wyoming’s Brief].

24. *Id.* at 1.

25. *Id.* at 2.

26. *Id.* at 4-7.

27. *Id.* at 7.

28. President’s Memorandum to Federal Agencies, 14 WEEKLY COMP. PRES. DOC. 1043 (June 6, 1978).

29. *Id.*

30. *Id.*

31. President’s Water Policy Implementation Task Force 5a.

32. REPORT OF FEDERAL TASK FORCE ON NON-INDIAN RESERVED RIGHTS (Draft June 1979).

33. Shupe, *Water Policies of the Reagan Administration*, 12 COLO. LAW. 601, 602 (1983).

34. *Id.*

35. *Id.*

Wyoming also had a substantial interest in avoiding court action over federal non-Indian reserved rights. Federal claims for the Wind River Indian Reservation were Wyoming's primary concern, and it was clear that these rights would have to be determined by a court of law.<sup>36</sup> The legislature had appropriated a considerable sum of money for the adjudication effort, yet this budget appeared insufficient to sustain two prolonged court actions.<sup>37</sup> A negotiated settlement for the non-Indian claims portion of the adjudication was thought to be the preferable solution.

The Partial Decree reflects the political and legal problems encountered by both parties during the course of the negotiations. Following a discussion of the federal reservation doctrine, this comment will focus on the Partial Decree in the non-Indian federal rights segment of the Bighorn adjudication. The claims and conciliations of both parties will be discussed. The last section of this comment will explore the ramifications of the Bighorn adjudication to the federal non-Indian reserved rights doctrine.

#### THE RESERVATION DOCTRINE: AN ABRIDGED DOCTRINAL ANALYSIS

The reservation doctrine has been described by at least one commentator as a "rhetorical, chimerical, phantasmagoria."<sup>38</sup> Considering the alarm that even a whisper of this doctrine arouses in water lawyers and state legislators, this description may be apt. Although arguments have been made which would repudiate its existence,<sup>39</sup> the doctrine of federal reserved rights occupies a permanent position in western water law.

The reservation doctrine was judicially created.<sup>40</sup> A limited number of cases have dealt with the doctrine yet at least six forms of the reservation doctrine exist.<sup>41</sup> In simplest terms, reserved rights arise when the United States reserves a portion of the public domain for a federal purpose which requires water. If the government exhibits an intention to reserve unappropriated water for that purpose, then sufficient water to fulfill the purpose is reserved.<sup>42</sup>

The application of the reservation doctrine has been viewed as a substantial threat to state and private interests. The threat is seen as twofold.<sup>43</sup> First, "when the [federal] water is eventually put to use the right of the United States will be superior to private rights acquired after the date of the reservation. . . ." This may result in the destruction or impair-

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36. For a complete case update of the adjudication of Indian rights to water in the Big Horn drainage, see WESTERN NATURAL RESOURCE LITIGATION DIGEST, § 12.5 (Conference of Western Attorney Generals Winter 1986).

37. See *infra* note 183.

38. Corker, *A Real Live Problem or Two for the Energies of Frank J. Trelease*, 54 DEN. L.J. 499, 500 (1977).

39. *Id.* at 500-501.

40. *Winters v. United States*, 207 U.S. 564 (1908), is attributed with establishing the reservation doctrine.

41. F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 109 (NWC Legal Study No. 5, 1971).

42. *Id.*

43. *Id.*

ment of state acquired rights without compensation. Second, "the federal use is not subject to state laws regulating the appropriation and use of water."<sup>44</sup>

The reservation doctrine generates especially serious conflicts where prior appropriation is the sole water law.<sup>45</sup> Prior appropriation is founded on a few basic principles.<sup>46</sup> First, beneficial use of water, not land ownership, is the basis of the right to use water. Second, an appropriation is based on a definite quantity of water. The amount of water an appropriator may divert is measured by the beneficial use to be served.<sup>47</sup> Third, priority of use as determined by its duration is the basis for division of water among appropriators when there is not enough water for all.<sup>48</sup>

Reserved rights, however, are by their very nature unquantified and unrecorded.<sup>49</sup> State water officials administering streams in prior appropriation states have no records of the existence of reserved rights, their location, their amount, or their priority. This situation leads to considerable uncertainty as to the quantity of water available for appropriation in any drainage containing federal enclaves.<sup>50</sup> When state water officials must rely on conjecture to certify water rights, state-granted rights can be left unprotected against subsequent federal claims. Appropriators cannot be assured of adequate water until reserved rights are adjudicated and quantified. As a result, many states have begun adjudicating drainages containing federal enclaves.<sup>51</sup>

The reservation doctrine was established by dicta in *Winters v. United States*.<sup>52</sup> An action was brought to enjoin upstream irrigators from preventing waters of the Milk River from flowing into Montana's Fort Belknap Indian Reservation.<sup>53</sup> As trustee for the Indians, the United States successfully argued that implicit in the reservation-creating Trea-

44. *Id.*

45. 1 WATER AND WATER RIGHTS § 4.1 (R. Clark ed. 1967). The Western states whose water law is based solely on prior appropriation include Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming.

46. *Id.* § 15.1. Prior appropriation principles originated in the early mining law of California's Sierra Nevada. *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 113 (1855). The appropriative right is a right of beneficial use of water based on the concept of first in time, first in right. Though usufructuary in nature, beneficial use of water creates a property right.

47. *Id.* § 19.2. Beneficial use has been defined as a reasonable use consistent with the public interest in the best use of water supplies. In *Tulare Irrig. Dist. v. Lindsay-Swathmore Irrig. Dist.*, 3 Cal. 2d 489, 567, 45 P.2d 972, 1007 (1935) the judge stated: "What is a beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."

48. *Id.* § 8.2.

49. Trelease, *supra* note 41, at 114, 115.

50. *Id.*

51. For example, Colorado Water Divisions 2, 3, 5, 6, 7 are all presently involved in adjudicating federal claims. See generally WESTERN NATURAL RESOURCE LITIGATION DIGEST § 12 (Conference of Western Attorney Generals, Winter 1986).

52. 207 U.S. 564 (1908). Professor Trelease asserts that the reservation doctrine was actually established as late as 1955 in *Federal Power Comm. v. Oregon*, 349 U.S. 435 (1955). See F. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DEN. L.J. 473, 475 (1977).

53. *Winters*, 207 U.S. at 565.

ty of 1888<sup>54</sup> was the reservation of water sufficient to allow the Indians to change their nomadic ways and "become a pastoral and civilized people."<sup>55</sup> The United States Supreme Court reasoned that Congress *must have* intended to reserve sufficient water to convert the arid and valueless land into irrigable tracts. Without water, the purpose of the reservation would certainly be defeated. The implied congressional intent to reserve water on Indian reservations arose from this inference.<sup>56</sup>

Montana's argument in *Winters v. United States* illustrates the use of the equal footing doctrine as a defense against reserved rights.<sup>57</sup> Montana argued unsuccessfully that its admission to the Union on an equal footing with the original states repealed any implied reservations of water on government lands.<sup>58</sup> The *Winters* Court perfunctorily dismissed this argument based on its interpretation of the Treaty of 1888.<sup>59</sup>

The *Winters* decision did little to disrupt the smoothly administered accoutrements of the state prior appropriation systems because it appeared to apply only to Indian reservations.<sup>60</sup> The case that expanded the reserved rights doctrine to non-Indian reservations was *Federal Power Commission v. Oregon*, decided in 1955.<sup>61</sup> Though not dealing directly with water rights,<sup>62</sup> *Federal Power Commission v. Oregon* is generally read as holding that although the Desert Land Act of 1877<sup>63</sup> allowed settlers to obtain patents on desert tracts provided that they intended to reclaim the land through irrigation, the public domain was specifically excluded from the requirement of procuring reclamation water via prior appropriation under state law. The decision was not limited to Indian reservations.<sup>64</sup> Accordingly, the federal-state conflict over reserved rights commenced.<sup>65</sup>

54. Treaty Reserving Lands of Fort Belknap Reservation, March 1, 1888, United States-Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Tribes, 25 Stat. 113 (1888).

55. *Winters*, 207 U.S. at 576.

56. *Id.* at 577.

57. U.S. CONST. art. IV, § cl. 1. See generally Pollard v. Hagan, 44 U.S. 212 (1845).

58. *Winters*, 207 U.S. at 577.

59. *Id.*

60. *Id.* at 577.

61. 349 U.S. 435 (1955).

62. *Id.* The case merely held that a license issued by the United States to build a dam on reserved federal lands could not be overruled by a state's lack of approval.

63. 43 U.S.C.A. § 321-39 (West 1986). Section 321 states that a citizen may "file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section by conducting water upon the same, within the period of three years thereafter. . . ."

"The Desert Land Act contributed immeasurably to the stature and spread of the doctrine of prior appropriation by declaring: (a) that doctrine to be the rock upon which the right to use water on one's desert land tract should be founded, and (b) that all surplus nonnavigable waters on the public lands should remain free for appropriation and use of the public."

1 WATER AND WATER RIGHTS § 20.2 (R. Clark ed. 1967).

64. Generally the language of *Pelton Dam* is construed as applying to the Desert Land Act's severance of water from the public lands. The *Pelton Dam* opinion asserted that this severance did not apply to reserved lands at all. Thus, reserved lands were assumed to have water rights attached to them. *FPC v. Oregon*, 349 U.S. at 447, 448, 455.

65. Professor Trelease attests to the fact that though it is popular to attribute the precedent for the federal reserved rights doctrine to dicta in *United States v. Rio Grande Irrig. Co.*, 174 U.S. 690 (1899), no one regarded this case as such prior to *Pelton Dam*. F. Trelease *Federal Reserved Water Rights Since PLLRC*, 54 DEN. L.J. 473, 475 (1977).



The subsequent decision in *Arizona v. California*,<sup>66</sup> which dealt with the apportionment of the Colorado River between the states comprising the Colorado River Compact,<sup>67</sup> added vigor to the reserved rights doctrine as applied to federal non-Indian enclaves. The United States asserted federal reserved rights on an Indian reservation, wildlife refuges, Lake Mead National Recreation Area and national forests.<sup>68</sup> The United States Supreme Court recognized the implied congressional intent to reserve water for other federal enclaves as well as for Indian Reservations.

Dicta in *Cappaert v. United States*<sup>69</sup> expanded the reservation doctrine first announced in *Winters*. *Cappaert* involved a small fish, the Devil's Hole Pupfish, which inhabits the pool located in the cavern of Devil's Hole National Monument in Nevada.<sup>70</sup> In order for the pupfish to spawn, the level of the pool must be sufficient to submerge a rock shelf.<sup>71</sup> The Cappaerts were nearby ranchers whose well withdrawals resulted in the subsidence of the water level in the pool, endangering the survival of the pupfish.

In ruling for the pupfish, the Supreme Court stated that the executive proclamation which created the reservation<sup>72</sup> explicitly reserved a water right sufficient to protect the pupfish. According to *Cappaert*, the reservation doctrine reserves "that amount of water necessary to fulfill the purpose of the reservation, no more."<sup>73</sup> The Court set a level to which withdrawals could be made.<sup>74</sup> Though the Court characterized the water in the pool as surface water, it stated that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater."<sup>75</sup>

The cases following *Winters* significantly expanded the reservation doctrine to include non-Indian lands<sup>76</sup> and even groundwater.<sup>77</sup> But this steady expansion of federal rights was dealt a setback in *United States v. New Mexico*.<sup>78</sup>

The case arose as a result of the general adjudication of the Rio Mimbres River in New Mexico. The federal government claimed reserved water rights in the Gila National Forest. The United States argued that the purpose of the national forest as stated in the Organic Act of 1897<sup>79</sup> was to

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66. 373 U.S. 546 (1963).

67. Colorado River Compact, 1 FED. RECL. LAWS. ANN. 441 (1972).

68. 373 U.S. 546, 595-97 (1963).

69. 426 U.S. 128 (1976).

70. *Id.* at 132.

71. *Id.* at 133-34.

72. Proclamation No. 2961, 3 C.F.R. 147 (1949-1953). President Truman's proclamation was issued under the American Antiquities Preservation Act, 16 U.S.C.A. § 431 (West 1978).

73. *Cappaert*, 426 U.S. at 141.

74. *Id.*

75. *Id.* at 142, 143.

76. See *supra* text accompanying notes 51-68.

77. *Cappaert*, 426 U.S. at 142, 143.

78. 438 U.S. 696 (1978).

79. Organic Administration Act of June 4, 1897, 16 U.S.C.A. §§ 473-482 (West 1978).

protect the watershed and to preserve the supply of timber.<sup>80</sup> The United States also contended that the Multiple-Use Sustained Yield Act (MUSYA) of 1960<sup>81</sup> added outdoor recreation, range, fish and wildlife purposes to the Organic Act purposes.<sup>82</sup>

The Supreme Court refused to grant water for purposes enunciated in MUSYA. The Court held that national forests exist only for the dual purposes of the Organic Act, which are the maintenance of watersheds and the preservation of the timber supply.<sup>83</sup> These primary purposes, the Court stated, qualified for reserved rights. All other purposes were deemed secondary, requiring the federal government to obtain rights from the state.<sup>84</sup>

The Court's attitude towards non-Indian reserved rights was decidedly hostile in *United States v. New Mexico*. Despite the enmity exhibited towards the reservation doctrine, the Court's decision was somewhat beneficial to federal rights. Prior to the *New Mexico* decision, a valid water right could not be obtained simply by laying claim to water flowing naturally in a stream. Under state prior appropriation law, a diversion is necessary to perfect a claim.<sup>85</sup> However, *New Mexico* supports the proposition that minimum stream flows are within the purview of the reservation doctrine if the purposes of watershed maintenance and timber preservation require these instream flows.<sup>86</sup>

Law established in the reservation doctrine cases clearly affected the substance of the Partial Decree of non-Indian claims in the Big Horn adjudication. The United States and Wyoming supported their claims with applicable case law.<sup>87</sup> However, the Partial Decree was not the predictable result that case law would mandate. Political considerations and compromise also contributed to the Partial Decree.

#### THE PARTIAL DECREE: CLAIMS, DEFENSES AND COMPROMISES

The United States' claims of reserved rights in the Big Horn drainage consisted of claims in Yellowstone National Park, Shoshone and Bighorn National Forests, and claims for public water reserves and stock drive-ways. The federal claims pertaining to each of these four categories will be examined in turn, along with Wyoming's defenses and the ultimate compromise in the Partial Decree.

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80. *New Mexico*, 438 U.S. at 698.

81. Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C.A. §§ 528-541 (West 1978).

82. *Id.* § 528 declares that its purposes shall be supplemental to but not in derogation of national forest purposes as set out in the Organic Act, 16 U.S.C.A. § 473.

83. *New Mexico*, 438 U.S. at 718.

84. *Id.* at 716.

85. Meshorer, *Federal Reserved Water Rights Litigation*, 28 ROCKY Mtn. Min. L. Inst. 1283, 1300 (1982).

86. *New Mexico*, 438 U.S. at 716.

87. See Legal Parameters for United States Statement of Claims, In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, No. 4993 (5th Dist. Wyo. March 5, 1980) [hereinafter United States Statement of Claims].

*Yellowstone National Park*

Consistent with the line of cases holding that federal reserved rights exist to promote the stated purpose of the reservation, the United States sought federal reserved rights sufficient to "preserve the natural resources, natural curiosities and the public enjoyment thereof,"<sup>88</sup> in the portion of Yellowstone National Park within Water Division No. 3. The United States claimed consumptive and nonconsumptive reserved rights in the Middle Creek drainage in Yellowstone National Park. It requested a priority date of March 1, 1929, the date when this portion of the park was withdrawn from the public domain.<sup>89</sup> Of particular significance the federal government claimed the entire natural flow<sup>90</sup> of Middle Creek and its tributaries.<sup>91</sup> The United States also claimed natural flows in various springs and seeps in the Middle Creek drainage as well as *natural levels*<sup>92</sup> in lakes and ponds within this drainage, plus the quantity of groundwater needed to maintain the Park in its natural state. Finally, water was claimed for administrative and visitor uses.<sup>93</sup>

Wyoming countered federal claims relating to the park purpose by stating, "The reserving documents provide no support for the allegation that this portion of Yellowstone [within Water Division No. 3] had as its purpose, 'natural scenic condition' as alleged by the United States."<sup>94</sup> Instead, Wyoming delineated park purposes according to its literal reading of the Park's enabling legislation. The act creating the Park states that Yellowstone's purpose is "to preserve the scenic, natural and historic objects and the wildlife for public enjoyment."<sup>95</sup> Wyoming interpreted this to mean that only particular objects in the Park, and not its scenic conditions, were to be preserved.<sup>96</sup> Wyoming's argument, based on semantics rather than substance, is indicative of the antagonism between the parties from the outset of this adjudication.

Wyoming consistently argued for quantification of federal reserved rights in Yellowstone National Park, as was its right under Yellowstone's enabling legislation. In response, the government wrote:

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88. *Id.* at 17.

89. *Id.* at 16.

90. Partial Interlocutory Decree and Supporting Documents Regarding the United States' Non-Indian Claims at 4, In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, No. 4993 (5th Dist. Wyo. Feb. 9, 1983) [hereinafter Partial Decree]. Natural flow is defined as "that flow of water which, recognizing normal annual and seasonal variations, will occur within any natural stream, spring, or seep as the result of the overall hydrologic characteristics of the basin, undisturbed by the activities of man or animals, within which the natural stream, spring, or seep is located."

91. United States Statement of Claims, *supra* note 87, at 18.

92. Partial Decree *supra* note 90, at 5. " 'Natural level' is that amount of water, measured in feet above sea level which, recognizing normal annual and seasonal variations, will exist within any natural lake as the result of the overall hydrologic characteristics of the basin, undisturbed by the activities of man or animals, within which the natural lake is located."

93. *See supra* note 90.

94. Wyoming's Brief, *supra* note 23, at 67.

95. *Id.*

96. *Id.*

We are at a loss to understand why [you] persist in attempts to put numbers on this infinitely complex and unique natural system. As you know, our claim is to the natural flow, level or yield of all sources of water in or connected to Middle Creek. You also know that it is neither possible nor necessary to quantify or provide the information you request in order to assess the impact on rights held by private parties. There are, by law, no private parties having the right to divert water from within Yellowstone National Park.<sup>97</sup>

Wyoming eventually recognized the impossibility of quantifying claims in Yellowstone National Park.

The Partial Decree granted the government reserved rights in the natural flow of Middle Creek, the natural flow rights in springs and seeps, and the natural levels in lakes and ponds in the Middle Creek drainage.<sup>98</sup> Further, the Partial Decree provided that the United States would not be barred from bringing an action in any court of competent jurisdiction to protect Yellowstone National Park from groundwater withdrawals detrimental to the natural condition of Yellowstone National Park.<sup>99</sup> The reserved right for groundwater was also recognized as defying quantification.<sup>100</sup>

#### *The Shoshone and Bighorn National Forests*

In the Shoshone and Bighorn National Forests within Water Division No. 3, the United States claimed federal reserved rights in the instream flow of waterbodies.<sup>101</sup> The United States claimed these waters in order to satisfy the purposes of the national forests as established in the Organic Act of 1897: to conserve watersheds and to furnish a continuous timber supply.<sup>102</sup> For particular streams, the United States claimed the entire snowmelt runoff in the spring<sup>103</sup> and at all other times a quantified baseflow discharge.<sup>104</sup> The government requested that a quantification point on each stream be established at the intersection of the stream with the boundary of the national forest.<sup>105</sup> Priority dates varied depending on the reservation date of the particular area of the national forest within which each stream was located. Claimed uses were exclusively non-consumptive.

Also under the Organic Act,<sup>106</sup> the United States claimed surface and groundwater necessary for future administrative and operational uses.

97. Letter from United States Department of Justice, Land and Natural Resource Division to Michael White and David Jankowski (February 26, 1982).

98. Partial Decree, *supra* note 90, at 86-95.

99. *Id.* at 92.

100. *Id.*

101. Second Supplemental Claim of the United States of America 1-8, In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, No. 4993 (5th Dist. Wyo. Nov. 3, 1982) [hereinafter Second Claim].

102. 16 U.S.C.A. §§ 528-541 (West 1978).

103. Second Claim, *supra* note 101, at 2, and Exhibit A.

104. *Id.* at 3. Baseflow discharge was defined as a minimum flow and set out in Exhibit A.

105. *Id.* at Exhibit B.

106. 16 U.S.C.A. §§ 473-482 (West 1978).

These included domestic uses at guard stations, ranger stations, and administrative sites; growth, management, and production of timber; fire prevention and suppression; stock water for Forest Service animals; reforestation; and erosion control, road dust palliation, road construction and vehicle maintenance.<sup>107</sup>

Under MUSYA,<sup>108</sup> the United States claimed reserved rights for specific quantities of water necessary to fulfill that act's purposes. These included wildlife, fish, range, and outdoor recreation uses. A general right enabling grazing allottees to water stock in the two national forests was also requested under MUSYA.<sup>109</sup>

Wyoming conceded that the United States was entitled to reserved rights sufficient to fulfill the primary purposes of the forests under the Organic Act.<sup>110</sup> This was Wyoming's only concession. The state argued that the only additional use necessary to prevent the forest purposes from defeat was fire prevention and control.<sup>111</sup> Wyoming insisted on precise quantification of water used for fire prevention.<sup>112</sup> Citing *United States v. New Mexico*,<sup>113</sup> Wyoming termed all other claimed uses as coming within "secondary purposes," therefore undeserving of reserved water under the Organic Act. Wyoming contended that secondary purposes must be satisfied through acquisition of water from the state.<sup>114</sup>

Wyoming also denied any federal reserved right to maintain stream flows in national forests. It stated:

This claim . . . is an affront to Wyoming and the Court. The purpose of the [Organic] Act, as described above . . . , demands the delivery of water conserved by the forest to downstream users. To secrete away waters deep within the lonesome boundaries of the national forests to suit the active imaginations of the Forest Service would utterly frustrate this fundamental forest purpose.<sup>115</sup>

Wyoming's vehement opposition to claims for the national forests forced the United States to relinquish claims for MUSYA purposes and, to a limited extent, claims for Organic Act purposes.<sup>116</sup> Full natural flow claims in the national forests were clearly out of the question. Gains made by the United States in Yellowstone National Park were offset by its losses in the national forests.

107. Second Claim, *supra* note 101, at 4.

108. 16 U.S.C.A. §§ 528-541 (West 1970).

109. Second Claim, *supra* note 101, at 8.

110. Wyoming's Brief, *supra* note 23, at 122 (citing *United States v. New Mexico*, 438 U.S. 696 (1978)).

111. *Id.* at 123.

112. *Id.* at 126.

113. 438 U.S. 696 (1978).

114. Wyoming's Brief, *supra* note 23, at 130-131.

115. *Id.* at 127.

116. Partial Decree, *supra* note 90, at 595-597. The limited rights granted to the United States were subrogated to state permitted rights regardless of the purpose established by the United States.

In all, the United States abandoned close to sixty percent of its claims in the Bighorn and Shoshone National Forests.<sup>117</sup> Instream flow claims were drastically reduced from the federal government's original claims. Quantification points were moved upstream from the requested points on the national forest boundaries.<sup>118</sup> With quantification points located inside the national forests, the United States would never be able to call the river<sup>119</sup> below the quantification point. With the exception of a limited quantified administrative use,<sup>120</sup> all decreed uses were non-consumptive in nature.

Another serious blow to United States claims in the national forests occurred as a result of the government's agreement to the subrogation of its rights by existing rights permitted under Wyoming law.<sup>121</sup> Anticipated storage and reservoir projects on streams running through the forests would also be administered as senior to the federal reserved rights. Unspecified rights initiated under Wyoming law subsequent to the date of the decree and having a diversion point upstream from the United States' quantification points would also be administered as senior to the United States' right.<sup>122</sup> An unquantified amount of water was granted for forest fire fighting purposes, but the right was qualified so as to provide redress to appropriators damaged by this unquantified use.<sup>123</sup> These limitations on the minimum rights granted in the national forests offset the federal claims granted.

In one area, however, the federal government fared better. The Partial Decree granted the United States a reserved right to maintain natural levels of the springs and seeps in the Bighorn and Shoshone National Forests. Since these were to fulfill the purposes stated in MUSYA,<sup>124</sup> this marked an important inroad for the government. The spring and seep grants were, however, limited to nonconsumptive uses which would not interfere with previously permitted rights under state law.<sup>125</sup>

A minimal quantity of water was granted in the national forests for stockwatering and domestic uses.<sup>126</sup> Future discrete uses<sup>127</sup> were recognized, including the possible development by the federal government of

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117. *Id.* at 352-712.

118. *Id.* at 357-593.

119. To "call a river" refers to the act of contacting the water division superintendent's office, which sends out a "ditch rider" to check how much water each person is getting.

120. Partial Decree, *supra* note 90, at 352.

121. *Id.* at 594.

122. *Id.* at 595-597.

123. *Id.* at 709-710.

124. *Id.* at 607-608.

125. *Id.*

126. *Id.* at 609-613.

127. *Id.* at 2. A discrete use is defined in the Partial Decree as "a measurable and identifiable use of water on the Bighorn National Forest or Shoshone National Forest which use is shown and described on the United States Forest Service's annually updated printouts of current and foreseeable uses on land reserved from the public domain pertaining to the Bighorn National Forest and the Shoshone National Forest. A discrete use (as opposed to, for example, seeps, springs, instream flows, etc.) is also a measurable and identifiable use of water on any other federal land. A 'discrete use' includes a future use of water."

underground, direct flow or storage rights on the national forests. The Partial Decree permitted federal government development of these sources without compliance with Wyoming law.<sup>128</sup> The priority date of these future discrete uses was designated as the date on which the land where the use was located was reserved as national forest.<sup>129</sup> This limitation was also applied to the general right of stockwatering granted by the decree.<sup>130</sup>

### *Public Water Reserves*

Congress in 1916 enacted the Stock-Raising Homestead Act,<sup>131</sup> which authorized the Secretary of the Interior to withdraw and reserve for public use land containing waterholes. The withdrawn public springs and waterholes were to be administered by the BLM and were intended to prevent the monopolization of water resources.<sup>132</sup> The United States claimed federal reserved rights in numerous public springs and waterholes within Water Division No. 3.<sup>133</sup>

Wyoming contended that the water reserves in question were tributaries and therefore exempt from classification as public water reserves under the Colorado case of *Hyrup v. Kleppe*.<sup>134</sup> According to Wyoming's *Hyrup* test, a spring or waterhole that drains into a river is a tributary and thus exempt from reservation as a public water reserve.

Wyoming also argued that "only important waterholes" were intended to be reserved by the Stock-Raising Homestead Act of 1916.<sup>135</sup> In addition, the state contended that artificial structures created to capture or retain surface or groundwater were excluded from spring or waterhole status. According to Wyoming, waterholes which were not demonstrably needed for a specific present use could not be reserved. Lastly, Wyoming asserted that no reserved right could be created until such time as the public water reserve was needed for its stated purpose.<sup>136</sup>

In spite of these objections, the United States left the negotiation table with the majority of its claims to public water reserves intact.<sup>137</sup> During negotiations Wyoming dropped its assertion that public water reserves were tributaries and therefore exempt from reservation. The state also dropped its other arguments, on the condition that reserved rights in the

128. *Id.* at 616.

129. *Id.* at 619.

130. *Id.* at 703.

131. 43 U.S.C.A. § 201 (West 1980) (partially repealed by The Act of Oct. 21, 1976, 90 Stat. 2787 (1976)).

132. Under the broad authority to withdraw lands for public purposes, granted to the President in the Pickett Act, 43 U.S.C.A. § 141 (1976) (repealed by The Act of Oct. 21, 1976, 90 Stat. 2792 (1976)), public water reserves were created, 43 U.S.C.A. § 300 (1976) (repealed by the Act of October 21, 1976, 90 Stat. 2792 (1976)).

133. Second Claim, *supra* note 101, at 9-10.

134. 406 F. Supp. 214-16 (D. Colo. 1976). The *Hyrup* court found that if a spring were a tributary to a river it would not be subject to an executive order withdrawing it for a federal water reserve.

135. Wyoming's Brief, *supra* note 23, at 91-92.

136. *Id.* at 97-98.

137. Partial Decree, *supra* note 90, at 607-08.

public water reserves would be administered as junior to existing permitted rights, and that future rights to waterholes and springs could only be acquired in compliance with state water law.<sup>138</sup>

### *Stock Driveways*

Stock driveways were also established by the Stock-Raising Homestead Act of 1916.<sup>139</sup> Driveways were intended to insure access by the public to water reserves and to provide routes needed for the movement of stock to and from summer ranges. The checkerboarding of large portions of the west resulting from railroad grants<sup>140</sup> forced the establishment of stock driveways. The government condemned narrow quasi-easements<sup>141</sup> through its power of eminent domain in order to allow stockmen to drive their livestock to and from summer and winter ranges.

The United States claimed reserved water rights on each stock driveway in Water Division No. 3 in amounts sufficient to water a designated number of stock during the periods of the year when the driveway was in use.<sup>142</sup> These claims were necessary in order to advance the purpose of the driveways.

Wyoming countered these claims by asserting that despite the purpose of the stock driveways, no federal reserved right was intended. The state was unable to support this assertion with case law.<sup>143</sup> Wyoming's denial of government claims in public water reserves and stock driveways could well have been detrimental to the state's own interests. Only the inhabitants of the locality in which public water reserves are located benefit from their existence. Allottees of grazing permits on public lands frequent public water reserves today as did the first settlers. Closing public water reserves would injure the ranching community. Apparently, Wyoming recognized this possibility and agreed to the reservation of water for these purposes.<sup>144</sup> As a result, the United States came away from the bargaining table with the majority of its claims in this area granted.<sup>145</sup>

### FEDERAL GAINS AND LOSSES

The Partial Decree for the non-Indian claims portion of the Big Horn Adjudication reflects the give and take of both parties involved. In some areas of the adjudication, the United States attained a firm foothold for reserved rights. In others, entire claims were relinquished. These gains

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138. *Id.*

139. 43 U.S.C.A. § 201 (West 1980).

140. *See, e.g.*, Act of July 1, 1882, ch. 120, 12 Stat. 489 (1882) which provided for construction loans and a 400 foot right of way for the Union Pacific and Central Pacific Railroads. In order to further assist the financing of these railroads, the railroads were given their choice of twenty odd numbered sections within a forty mile belt of every mile built. *See G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 88 (1981).*

141. G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCE LAW 88 (1981).

142. Second Claim, *supra* note 101, at 9-10.

143. Wyoming's Brief, *supra* note 23, at 119-22.

144. Partial Decree, *supra* note 90, at 154-72.

145. *Id.*



for both sides deserve particular recognition in anticipation of federal government claims in future adjudications.

*Federal Reserved Rights in Natural Flows*

The United States claimed the entire natural flows of the Middle Creek system in Yellowstone National Park. The government cited dicta in *United States v. New Mexico*<sup>146</sup> for the proposition that the express concern for the natural curiosities and biotic elements in Yellowstone's enabling legislation would allow the assertion of reserved water rights required to fulfill such purposes.<sup>147</sup> Natural flows were claimed and granted in Middle Creek in order to advance these fundamental park purposes.<sup>148</sup>

The Partial Decree's grant of the entire natural flow of Middle Creek is significant for two reasons. First, by securing the natural flow, natural lake, spring and seep levels in Yellowstone National Park, the United States refused to relinquish water rights to state control. Congress may impliedly reserve water pursuant to its constitutional power to regulate the public domain under the Property Clause.<sup>149</sup> Although in the past the federal government has generally acquiesced to state control of water under state water law, the result in this portion of the Big Horn Adjudication illustrates that the federal government will not surrender these rights where their existence is crucial to maintaining important public lands.

Second, granting natural flows goes well beyond the precedent of case law, which only speaks of minimum flows. *United States v. New Mexico* specifically held that a federal reservation of water should only be enough to fulfill the primary purpose of the reservation of land. In its claim for natural flows, the United States distinguished *New Mexico* on the ground that it dealt with national forests rather than national parks.<sup>150</sup>

Wyoming argued that *United States v. Cappaert*<sup>151</sup> applied to the rights claimed in Yellowstone National Park, so that the reservation required only the minimal amount of water needed to fulfill the park's purpose.<sup>152</sup> Wyoming further contended that it was not Congress' intent to preserve the features of the park inviolate.<sup>153</sup> Since no precedent specifically dealt with the national park issue, it was undoubtedly a heated source of debate during negotiations. Granting full natural flows to the United States in Yellowstone Park was assuredly not the result of case law analysis. Natural flow rights were simply insisted upon by the United States.

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146. 438 U.S. 696 (1978).

147. Statement of Claims, *supra* note 87, at 17 (citing *New Mexico*, 438 U.S. at 709-11).

148. Partial Decree, *supra* note 90, at 86, 87.

149. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The *Cappaert* court stated, "Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8 which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3 which permits federal regulation of federal lands."

150. Statement of Claims, *supra* note 87, at 17.

151. 426 U.S. 128 (1976).

152. Wyoming Brief, *supra* note 23, at 67.

153. *Id.* at 69.

One explanation for the Partial Decree's recognition of natural flows for Yellowstone National Park becomes clearer if the adjudication of non-Indian claims is viewed as a whole. Though the United States' claims for Yellowstone were granted in their entirety, claims in the national forests were gutted.<sup>154</sup> The overall settlement indicates that the United States secured its claims in Yellowstone National Park at the expense of the national forests.<sup>155</sup>

The United States will undoubtedly assert similar claims in future adjudications when water rights in national parks are involved. Full natural flow rights may therefore become common.

### *Federal Reserved Rights in Groundwater*

The Partial Decree also granted the United States groundwater sufficient to maintain Yellowstone National Park in its natural condition.<sup>156</sup> The groundwater granted was recognized as unquantifiable. Since its origin as a reserved rights issue in *Cappaert*,<sup>157</sup> groundwater has remained an extremely controversial area. Although most states have enacted groundwater legislation, reserved rights in groundwater are exempted from state control in the same manner as surface rights. Federal reserved rights in groundwater may detrimentally affect the hydrology of an area should consumptive uses be granted by a state. As a result, the states and the federal government have been engaged in an ongoing debate as to whether *Cappaert* provided for federal reserved rights in groundwater.<sup>158</sup> Granting groundwater rights to the United States in Yellowstone National Park was an important result because it suggests that the reservation doctrine applies to all water sources.

### *Recognition of MUSYA Purposes*

Although United States' claims in the Bighorn and Shoshone National Forests were dramatically reduced, and any rights granted were all but nullified by subrogation to state rights, the national forest issue did result in an advance for the federal government. In *United States v. New Mexico*, MUSYA purposes<sup>159</sup> were termed "secondary" and immaterial to the 1897 Organic Act priority date. However, in spite of this case, the United

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154. See *supra* text accompanying notes 101-30.

155. *Id.*

156. See *supra* text accompanying notes 92-100.

157. 426 U.S. 128 (1976).

158. Using virtually the same language as the *Cappaert* Court, the Partial Decree held that "nothing in this Decree shall be deemed to bar the United States from bringing an action in any court of competent jurisdiction to protect Yellowstone National Park from groundwater withdrawals detrimental to the natural condition. . . ." Partial Decree, *supra* note 90, at 92. *Cappaert* held that "the United States can protect its water from subsequent diversion whether the diversion of surface or groundwater." *Cappaert*, 426 U.S. at 143. Since the *Cappaert* court referred to the water in Devil's Hole Pool as surface water, a strong argument may be made as to whether a reserved right in groundwater was substantiated by the language of the case.

159. 16 U.S.C.A. § 528 (West 1978), established the policy that national forests are established for outdoor recreation, range, timber, watershed and fish and wildlife purposes. See *United States v. New Mexico*, 438 U.S. 969, 713 (1978).

States secured its claims to the natural levels of springs and seeps for purposes stated in the Organic Act and MUSYA. No priority date was stated because such rights were expressly limited to those which would not interfere with existing permitted rights under Wyoming law.

Though narrowly limited to spring and seeps, incorporating Organic Act and MUSYA purposes in one category was important to the United States. This result indicates that where no detriment to state appropriators exists, Organic Act purposes may not be as strictly construed as was previously inferred from the *United States v. New Mexico* decision. Subsequent withdrawals by state appropriators which would contravene MUSYA's fish, wildlife and outdoor recreation purposes would be actionable by the United States.

#### WYOMING'S GAINS: NATIONAL FOREST LIMITATIONS

Clearly, the federal government was not the only party to suffer losses and celebrate gains during this adjudication. When Wyoming initiated suit, its goal in this portion of the adjudication was a final settlement of non-Indian claims. The state accomplished this. Also to Wyoming's benefit was the reduction of United States claims in the national forests. Wyoming managed to strictly limit all national forests claims.

Although Wyoming eventually acknowledged and agreed to federal claims in Yellowstone National Park, the tables were turned when the focus changed to the Shoshone and Bighorn National Forests.<sup>160</sup> The United States asserted blanket claims to natural flows for purposes beyond those of the Organic Act.<sup>161</sup> Relying on *United States v. New Mexico*, Wyoming maintained that only the Organic Act should support water withdrawals. Wyoming succeeded in reducing United States claims to the minimum necessary to prevent the defeat of Organic Act purposes.<sup>162</sup>

Wyoming narrowly interpreted *United States v. New Mexico* in reference to this issue.<sup>163</sup> Yet, Wyoming did agree on a reserved instream use to conserve water flows and furnish a continuous supply of timber.<sup>164</sup> *New Mexico* has been interpreted by some courts as a complete denial of an instream flow in the national forests under any priority.<sup>165</sup>

In order to further strip federal rights, Wyoming insisted on a clause which subrogated federal rights to present and future state permitted rights.<sup>166</sup> During years when sufficient water exists in the drainage, this clause would not be injurious to United States claims. Theoretically, however, during years of drought holders of state permitted rights senior to federal rights would be able to divert waters from high in the national

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160. See *supra* text accompanying notes 110-23.

161. 16 U.S.C.A. § 528 (West 1978).

162. *Id.*

163. Wyoming's Brief, *supra* note 23, at 122-31.

164. Partial Decree, *supra* note 90, at 353-93.

165. See, e.g., *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1983); Note, *The Limits of Federal Reserved Water Rights in National Forests*, 19 LAND & WATER L. REV. 71 (1984).

166. Partial Decree, *supra* note 90, at 594.

forests to satisfy their needs downstream. In such a situation, the federal right granted in the Partial Decree would be completely worthless.

As a practical matter, any diversion works developed by state water users to acquire waters flowing through the national forests would have to cross federal lands. It is undisputed that the Property Clause<sup>167</sup> gives the United States the power to "protect its lands, to control their use and to prescribe in what manner others may acquire rights to them."<sup>168</sup> The United States' power to grant or deny a right-of-way for diversion purposes would effectively bar the exercise of state permitted water rights detrimental to federal reserved rights. The United States' willingness to agree on the subrogation of its reserved rights was certainly affected by the power to allow or foreclose the placement of diversion works on the public land.

This consideration is also worthy of note in discussing the location of quantification points for the reserved water in the national forests. The United States originally requested that quantification points be located on the intersection of the stream with the national forest boundary. These quantification points were moved up the stream into the national forests in the Partial Decree. The movement of the quantification points was calculated to prevent the United States from demanding its granted flow at the park border. Downstream from the quantification points, state appropriators could theoretically divert water for their permitted use. However, once again appropriation by state users would be dependent on their ability to divert water within the national forests. The United States could deny a right-of-way for diversion across the national forest for the purpose of "protecting its lands."<sup>169</sup>

Normally, the movement of quantification points upstream would prevent a call on the waters of the stream. However, in the Big Horn and Shoshone National Forests, federal reserved rights were subrogated to state appropriative rights. The United States would have no opportunity to call the stream whether quantification points were moved or not.

Wyoming's strategy in relation to the national forests was to make United States rights as ineffective as possible. Undeniably, the state accomplished this goal. By limiting water to Organic Act purposes, by subrogating federal rights to state appropriative rights and by moving quantification points upstream, Wyoming theoretically divested the United States of all water in the national forests of Water Division No. 3. Of course, the United States has the inherent power to nullify these state gains.

#### PRECEDENTIAL VALUE

The Partial Decree in this segment of the Big Horn adjudication contained a section entitled, "Future Litigation."<sup>170</sup> Under this heading, the

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167. U.S. CONST. art. IV, § 3, cl. 2.

168. *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917).

169. *Id.*

170. Partial Decree, *supra* note 90, at 4.

parties agreed that the stipulation and agreement "shall not be used as precedent in any other adjudication of federal water rights."<sup>171</sup> In spite of this clause, however, the United States has already begun using the example of the Big Horn Adjudication in negotiations arising out of other adjudications.<sup>172</sup> This stipulation may also help states in their negotiations with the federal government because it indicates that the United States may relinquish claims in some areas where the law is uncertain. In other contexts, the federal government will give up nothing.

Further, the example of the Big Horn adjudication suggests that United States claims will not be unreasonable. Perhaps the value of this adjudication lies in the defusing effect it may have on the reservation doctrine controversy.

#### CONCLUSIONS

The Big Horn adjudication of non-Indian water rights amounted to "much ado about nothing." The federal reservation doctrine remains unchanged as a result of this adjudication. Wyoming's gains attributable to this experience were minimal. Private appropriators were for the most part unaffected, and the water continues to run in the Big Horn drainage system.

The reservation doctrine provided a basis for federal claims in the federal enclaves within Water Division No. 3. The Partial Decree, which was the product of an agreement of the parties, adds little to clarify the often confused and controversial reservation doctrine. Nothing novel or extraordinary resulted from this adjudication.

Reserved water rights granted in this adjudication generally were derived from earlier case law. For example, groundwater rights granted in Yellowstone National Park resulted from the interpretation of *Cappaert*,<sup>173</sup> which applies the reservation doctrine to both surface and groundwater. However, this interpretation has not been universally accepted.<sup>174</sup> The result in the Big Horn Adjudication suggests that groundwater rights may indeed attach to reserved surface rights in extraordinary circumstances such as those existing in Yellowstone National Park.

The agreement which provided for a limited instream flow in the Bighorn and Shoshone National Forests also was derived from reservation doctrine case law.<sup>175</sup> Although the general trend has been to interpret *New Mexico* narrowly, the result in this adjudication indicates that the case may be interpreted to allow instream flow rights consistent with

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171. *Id.*

172. *See, e.g.*, In Re: Application for Water Rights of the United States for Water Rights in Water Division No. 3, State of Colorado, No. 79CW85 (10th Dist. Colo. Dec. 20, 1979); In Re: Application of the United States for Water Rights in Water Division No. 2, No. 81CW11 and 81CW12 (12th Dist. Colo. 1979).

173. 426 U.S. 128 (1976).

174. J. Little, *Administration of Federal Non-Indian Water Rights*, 27B ROCKY MOUNTAIN L. INST. 1709, 1762 (1982).

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

the purposes established under the Organic Act.<sup>176</sup> Such rights have been construed to apply only for watershed maintenance and timber management purposes. In order to accomplish these purposes, limited administrative rights will be allowed.<sup>177</sup>

The state contested federal reserved rights claims for public water reserves and stock driveways on a limited basis. Public water reserves and stock driveways serve a beneficial purpose to state users. Their establishment under the Stock Raising Homestead Act<sup>178</sup> is undisputed. These federal water institutions were created by statute rather than by judicial interpretation of congressional intent. Public water reserves and stock driveways hold a solid position in the law of federal water rights.

Wyoming's gains in this adjudication were more theoretical than practical. Ostensibly, Wyoming completely stripped the United States' claims in the Shoshone and Bighorn National Forests. However, the practical effects of the subrogation agreements,<sup>179</sup> as well as the positioning of quantification points,<sup>180</sup> are minimal when considered in the light of the federal power to control the public lands.<sup>181</sup>

The Big Horn adjudication also had little effect on state appropriated water rights. Holders of permitted but unadjudicated rights were not threatened by the assertion of federal reserved rights. Their rights were adjudicated and granted in an almost summary manner.<sup>182</sup>

At the commencement of the Big Horn adjudication, the Wyoming legislature appropriated six million dollars to the Attorney General's Office for costs of the adjudication.<sup>183</sup> To date, nearly eight million dollars have been spent on the project.<sup>184</sup> Although the portion of the adjudication discussed in this comment represents a small part of the entire project, the cost to the state for these extremely limited returns is inordinately high.

Wyoming's first experience in an adjudication of this magnitude involving large federal claims indicates that the state's returns from its substantial outlay of money will be minimal and of little consequence to state appropriated rights. Sufficient water existed at the outset of the adjudication for all users in the Big Horn drainage basin. And despite the clamor, the expense and even the result, the water still flows in the Big Horn drainage.

KATHERINE LAMERE MEAD

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176. 16 U.S.C.A. § 528 (West 1978).

177. See *supra* text accompanying notes 126-30.

178. 43 U.S.C.A. § 201 (West 1980).

179. See *supra* text accompanying notes 121-22.

180. See *supra* text accompanying notes 117-20.

181. See *supra* text accompanying notes 167-69.

182. See Special Master's Report, *supra* note 1, at 22.

183. Act of March 10, 1982, ch. 60, Wyo. Sess. Laws § 4k(2) (1982).

184. Telephone interview with Attorney General's Office, State of Wyoming (March 21, 1986).