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CASENOTES

WATER LAW—INDIAN LAW—Cowboys, Indians and Reserved Water Rights: May a State Court Limit How Indian Tribes Use Their Water? *In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming*, 835 P.2d 273 (Wyo. 1992).

A fifteen year history of litigation¹ over water rights in Wyoming² began on January 24, 1977, when the State of Wyoming initiated a general adjudication³ of water rights in the Big Horn River

1. The original action resulted in three Wyoming Supreme Court cases identified herein as *Big Horn I*, *Big Horn II*, and *Big Horn III*. The first case involved Indian reserved water rights for the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation. *In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, State of Wyoming, 753 P.2d 76 (Wyo. 1988) [hereinafter *Big Horn I*]. The second case dealt with claims of non-Indian successors to allotments on the Wind River reservation. *In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, State of Wyoming, 803 P.2d 61 (Wyo. 1990) [hereinafter *Big Horn II*]. The principal case regards the regulation and administration of the reserved rights awarded in *Big Horn I*. *In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, State of Wyoming, 835 P.2d 273 (Wyo. 1992) [hereinafter *Big Horn III*].

2. Wyoming generally follows the doctrine of prior appropriation, or "first in time, first in right", to determine water rights in the state. To attain a water right for surface water, a user must first apply for a permit from the State Engineer, stating the purpose of the water use. The State Engineer may deny such a permit application for any of three reasons: (1) no unappropriated water is available; (2) the proposed use conflicts with existing uses; or (3) the proposed use could be detrimental to the public interest. Upon approval of a permit, the user must "perfect" the water right by putting the water to a "beneficial use." There is no statutory definition of beneficial use in Wyoming law, but the common understanding is that a beneficial use is one which is not wasteful or inefficient, is reasonable, and is used for a generally recognized and socially acceptable use. Within five years after putting the water to beneficial use, the user must submit an application to change her permit to a water right. The water division Superintendent, after receiving proof of the appropriation from the applicant, provides an opportunity for comment or hearing to other water users. The State Board of Control reviews the application. If the Board approves the application, the water user then owns an adjudicated water right for a particular use of water in a particular location. The water right will have a "priority date", the date of the permit application, which determines the seniority of the water user. All users with a later priority date may not fulfill their water rights until the senior user receives the water guaranteed by her water right. See Wyo. Stat. §§ 41-3-301 to 42-4-517 (1977 & Supp. 1992). For a more extensive explanation of Wyoming's statutory provisions, see Mark Squillace, *A Critical Look at Wyoming Water Law*, 24 LAND & WATER L. REV. 307 (1989). For overviews of the prior appropriation doctrine, see 1 WELLS A. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* (1971); JOSEPH L. SAX, ET AL., *LEGAL CONTROL OF WATER RESOURCES* (2d. ed. 1991); 2 *WATERS AND WATER RIGHTS* (Robert E. Beck, ed., 1991); Charles F. Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 LAND & WATER L. REV. 1 (1989).

3. A general adjudication is a court decree which lists every appropriation of water in a particular river basin. The decree states the name of the appropriator, the date of the priority of the water right, the amount and purpose of the appropriation, the place of diversion of the water, the dates and times of the water use and the place of the use. Sax, *supra* note 2, at 144.

System.⁴ The goal of the adjudication was to quantify the water rights of more than 20,000 water users, including potential reserved water rights⁵ for the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation⁶ (hereinafter "Tribes" or "Wind River Tribes"). Pursuant to the McCarran Amendment,⁷ which allows a state to adjudicate federal reserved water rights, Wyoming filed a complaint⁸ for the general adjudication in the district court of the Fifth Judicial District of Wyoming.⁹

The state district court allowed the Wind River Tribes to intervene in the adjudication,¹⁰ and appointed a special master to hear the case.¹¹ After four years of investigation, the special master concluded that the Tribes owned a reserved water right, based upon the federal government's purpose of establishing the reservation as a permanent homeland for the Tribes.¹² To fulfill the "permanent homeland" purpose, the special master determined, water should be awarded for irrigation, stock watering, fisheries, wildlife, aesthetics, mineral, industrial, domestic, commercial, and municipal uses.¹³ The special master quantified the reserved water right according to the practicably irrigable acreage (PIA)¹⁴ standard, an issue which later received review by the United States Supreme Court.

4. The Big Horn River System, also identified as Wyoming Water Division 3, encompasses Park, Big Horn, Washakie, Hot Springs and Fremont counties in northwest and central Wyoming. Squillace, *supra* note 2, at 311.

5. The reserved rights doctrine recognizes water rights for lands set aside by the federal government for a particular purpose. The right ensures a quantity of water sufficient to fulfill the purpose of the federal reservation. See *infra* notes 46-57 and accompanying text.

6. The federal government originally established the Wind River reservation for the Shoshone Tribe, but later also moved the Northern Arapaho Tribe to the reservation. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938).

7. 43 U.S.C. § 666 (1988). See *infra* notes 60-67 and accompanying text.

8. Wyoming Statute § 1-37-106 (1988), passed after the McCarran Amendment, allows the State to institute an action for a general adjudication of water rights.

9. The United States, named as a defendant in the complaint, attempted to remove the case to federal court, but the United States District Court remanded the adjudication to state court. *Big Horn I*, 753 P.2d at 84.

10. The Tribes argued that the United States would not adequately represent their interests. The Tribes filed supplemental claims for 1,103,000 acre feet of water in addition to the 640,000 acre feet of water claimed by the United States. Brief for the Petitioner State of Wyoming on Writ of Certiorari at 6, *Wyoming v. United States*, 492 U.S. 406 (1989) (No. 88-309).

11. First Order of Certification and Referral to a Special Master, Fifth Judicial District, State of Wyoming, May 29, 1979. Generally, the court charged the special master with the duties of determining the status of water rights in the Big Horn River System. *Big Horn I*, 753 P.2d at 85.

12. Report Concerning Reserved Water Right Claims By and On Behalf of the Tribes of the Wind River Indian Reservation, Wyoming, by Teno Roncalio, Special Master at 692a (Dec. 15, 1982) (Civil No. 4993), in Appendix H of Wyoming's Petition for a Writ of Certiorari to the Supreme Court of Wyoming (Aug. 19, 1988) [hereinafter Roncalio Report]. The special master applied the principle set forth in *Winters v. United States*, 207 U.S. 564 (1908), stating that a reserved water right consists of sufficient water necessary to fulfill the purpose of the reservation. Roncalio Report at 441a-442a. See *supra* notes 46-53 and accompanying text.

13. Roncalio Report, *supra* note 12, at 692a-700a.

14. *Id.* at 534a. Practicably irrigable acreage is a standard which calculates the quantity

Following objections to the special master's report by all parties, District Judge Joffe affirmed the award of a reserved water right for the Tribes on May 10, 1983 (hereinafter "1983 decree").¹⁵ Judge Joffe disagreed, however, with the special master's determination that the purpose of the establishment of the Wind River Reservation was as a permanent homeland for the Tribes.¹⁶ Rather, the Judge held that the purpose of the reservation was to promote Indian agriculture.¹⁷ Judge Joffe quantified the Tribes' water rights on the basis of the "agricultural purpose" using the PIA standard.¹⁸ All parties moved to alter or amend the decree.¹⁹ On May 24, 1985, District Judge Johnson²⁰ issued an Amended Judgment and Decree (hereinafter "1985 decree").²¹ All parties appealed the 1985 decree to the Wyoming Supreme Court.

On February 24, 1988, the Wyoming Supreme Court affirmed the state district court's award of reserved water rights to the Tribes.²² The court agreed that the federal government established the reservation for agricultural purposes and quantified the water right based upon agricultural, livestock, municipal, domestic, and commercial water uses.²³ As with the state district court, the Wyoming

of water which would be necessary to irrigate "those acres susceptible to sustained irrigation at reasonable costs." *Big Horn I*, 753 P.2d at 101. See Lynnette J. Boomgaarden, Note, *Quantification of Federal Reserved Indian Water Rights - "Practically Irrigable Acreage" Under Fire: The Search for a Better Legal Standard*, 25 LAND & WATER L. REV. 417 (1990); H.S. Burness et al., *Practically Irrigable Acreage and Economic Feasibility: The Role of Time, Ethics and Discounting*, 23 NAT. RESOURCES J. 289 (1983); H.S. Burness et al., *The "New" Arizona v. California: Practically Irrigable Acreage and Economic Feasibility*, 22 NAT. RESOURCES J. 517 (1982).

15. Decision Concerning Reserved Water Rights Claims By and On Behalf of the Tribes of the Wind River Indian Reservation, Wyoming, Fifth Judicial District, State of Wyoming 62-63, May 10, 1983 (Civil No. 4993), *amended* May 24, 1985 (Docket No. 101-324).

16. *Id.* at 16-18.

17. *Id.* at 18. The Judge contended that, rather than to create a permanent homeland, the government desired only "to convert the Indians from a nomadic to an agrarian people." *Id.*

18. *Id.* at 28.

19. The State made several motions regarding, *inter alia*, priority dates of reacquired lands, diversions for domestic and livestock watering uses, corrections of arithmetic calculations, redefinition of boundaries, and off-reservation lands. The Tribes made motions to include a quantification of a reserved right for instream flow and fish habitat and to eliminate conditions for water storage. Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983, First Judicial District, State of Wyoming, June 8, 1984 (Docket No. 101-234).

20. Judge Johnson was assigned the case on May 13, 1983 upon the retirement of Judge Joffe.

21. Amended Judgment and Decree, First Judicial District, State of Wyoming, May 24, 1985 (Docket No. 101-234). Generally, Judge Johnson recalculated the reserved water right, determined priority dates for reacquired lands on the reservation, defined the water uses included in the quantification, and clarified several minor issues. Language in the 1985 decree later became of issue in the principal case. The Judge stated that "[t]he Tribes are entitled to make such use of the water covered by their reserved water rights as they deem advisable but the use is confined to the reservation and in no event shall the consumptive use be increased." *Id.* at 17.

22. *Big Horn I*, 753 P.2d at 91.

23. *Id.* at 96-99.

Supreme Court did not include fishery flow, mineral and industrial development, wildlife, or aesthetic uses in its quantification.²⁴ Lastly, the court affirmed an award of reserved water for future projects, based on a calculation of reservation lands which were not yet developed for irrigation.²⁵

Both the State of Wyoming and the Tribes petitioned for a writ of certiorari to the United States Supreme Court.²⁶ In 1989, the Supreme Court granted certiorari limited to the issue of the Wyoming court's use of the PIA quantification standard.²⁷ The Court affirmed the use of the PIA standard without opinion in a 4-4 decision.²⁸

Following the Supreme Court's affirmation of *Big Horn I*, the Tribes' Joint Business Council adopted a tribal water code stating the range of purposes for tribal water use.²⁹ At the same time, the Wind River Tribes established a Water Resources Control Board to regulate the Tribes' water rights.³⁰ The Board issued a permit which allowed the Tribes to dedicate a portion of their awarded future water rights to an instream flow use³¹ for the purposes of fishery

24. *Id.*

25. *Id.* at 101. The government may reserve water for future requirements as well as for present uses. *Conrad Investment Co. v. United States*, 161 F. 829 (9th Cir. 1908).

26. The State sought review of (1) whether reserved water rights existed, (2) whether the PIA standard was the proper method of quantification, and (3) the priority date for ceded reservations lands later returned to the Tribes. Petition for a Writ of Certiorari to the Supreme Court of Wyoming, *Wyoming v. United States*, 492 U.S. 406 (1989) (No. 88-309). The Tribes cross-petitioned for review of (1) the "agricultural" as opposed to a "permanent homeland" purpose, (2) tribal rights to groundwater, (3) denial of the right to export water from the reservation, (4) the water efficiency rates which the court used, (5) the priority date of non-Indian reserved rights, and (6) the proof required to establish reserved water rights on historic lands on the reservation. Cross-Petition for a Writ of Certiorari to the Supreme Court of Wyoming, *Shoshone Tribe & Northern Arapaho Tribe of the Wind River Reservation v. Wyoming*, 109 S. Ct. 3265 (1989) (No. 88-309) (certiorari denied).

27. The Supreme Court limited its review to question two from the State's petition for certiorari:

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

Wyoming v. United States, 488 U.S. 1040 (1989) (No. 88-309).

28. *Wyoming v. United States*, 492 U.S. 406 (1989). One author suggests that the United States Supreme Court only grudgingly adhered to precedents of Indian law. Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 *LAND & WATER L. REV.* 1, 9. Another author refers to the questions which the Court asked during oral argument as evidence that the Indian reserved water rights doctrine faces an uncertain future with the current Supreme Court. Walter Rusinek, Note, *A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine*, 17 *ECOLOGY L. Q.* 355, 398 (1990).

29. Wind River Interim Water Code (Apr. 12, 1990), revised and adopted as Wind River Water Code (Mar. 18, 1991).

30. Telephone Interview with John Schumacher, On Reservation Attorney for the Wind River Tribes (Jan. 13, 1993).

31. Instream flow is a dedication of water in-place (i.e., in the waterway) to assure a minimum water flow level, usually for the purposes of fish and wildlife maintenance, recreation,

enhancement, groundwater recharge, and benefits to downstream irrigators and other water users.³²

In April of 1990, the instream flow level in the Wind River³³ fell below the amount dedicated on the Tribes' permit. The Tribes requested that the State Engineer³⁴ enforce the permit. The State Engineer refused, explaining that he did not consider the Tribes' water award final, since Phases II and III³⁵ of the Big Horn adjudication were still ongoing.³⁶ Until the adjudication was final, the State Engineer declared, he would administer all water rights as administered in 1977, when the adjudication began.³⁷

In July of 1990, the Tribes filed a motion requesting that the State Engineer be held in contempt for refusing to enforce the instream flow, and asking the court to appoint a special water master to implement the Tribes' water rights.³⁸ The district court ruled on March 11, 1991, that the Tribes could change their future reserved water right to instream flow without regard to Wyoming state water law.³⁹ The court also held that the Tribes would replace the State Engineer as administrator of tribal water rights.⁴⁰ The State appealed the

or aesthetics. Recognition of instream flow as a "use" of water is a contentious issue in the West. See A. Dan Tarlock, *The Recognition of Instream Flow Rights: "New" Public Western Water Rights*, 25 ROCKY MTN. MIN. L. INST. 24-1 (1979).

32. Wind River Water Resources Control Board, Instream Flow Permit No. 90-001 (Apr. 12, 1990).

33. The Wind River is a tributary of the Big Horn River which runs through the Wind River Indian Reservation.

34. The State Engineer is the chief water official in the state and has "general supervision of the waters of the state." WYO. CONST. art 8, § 5.

35. The special master had divided the adjudication into three separate phases: Phase I for Indian reserved and any other federal reserved water rights claims, Phase II for claims of non-Indian successors to allotments within the Wind River Reservation, and Phase III for claims based on state permits or certificates. The principal case is part of Phase I. Phase II has since been completed and Phase III is ongoing.

36. Letter from Gordon W. Fassett, State Engineer, to Gary P. Hartman, District Judge, Fifth Judicial District (Mar. 12, 1991) [hereinafter Fassett Letter]. In the principal case, discrepancies exist among the Wyoming Supreme Court justices as to the State Engineer's response to the enforcement request. In the majority opinion of the principal case, Justice Macy explains that the State Engineer refused to honor the request because "the Tribes had been awarded only the right to divert water and that any change in the use of future project water covered by their reserved water right must be made following a diversion." *Big Horn III*, 835 P.2d at 276. Justice Golden, however, stated that "the state engineer considered the Tribes' 'right' to commit any portion of their waters to instream flow a 'gray' area and, rather than enforcing the permit to the letter, he attempted to balance the rights of the [State of Wyoming] with the request for the instream flow." *Id.* at 291 (Golden, J., dissenting).

37. Fassett Letter, *supra* note 36. Using this procedure, the State Engineer was not able to fulfill the Tribes' instream flow demand, since all irrigators' water demands had priority. However, a portion of the instream flow was maintained at all times, and after mid-July of 1990, the instream flow was at the approximate level authorized by the Tribes' permit. *Big Horn III*, 835 P.2d at 291 (Golden, J., dissenting).

38. *Big Horn III*, 835 P.2d at 276.

39. *Id.*

40. *Id.* This issue was also later appealed to the Wyoming Supreme Court in the principal case. See *infra* note 81.

decision. On May 3, 1991, the Wyoming Supreme Court stayed enforcement of the judgment and decree pending appeal.

On June 5, 1992, the Wyoming Supreme Court reversed the district court and held that the Tribes could not change their future water right to an instream flow use.⁴¹ The court stated that the Tribes, "like any other appropriator, must comply with Wyoming water law to change the use of their reserved future project water from agricultural purposes to any other beneficial use."⁴²

On September 3, 1992, the Tribes announced that they would not appeal the Wyoming Supreme Court's decision.⁴³ After consulting with legal experts, the Tribes decided that the current United States Supreme Court would offer little hope of redress, due to its recent holdings allowing greater state intrusions upon tribal sovereignty.⁴⁴ The Tribes emphasized their strong disagreement with the Wyoming Supreme Court's decision, but stated that they hoped to limit the potential adverse effects upon other tribes should the Supreme Court affirm the decision.⁴⁵

This casenote questions the Wyoming Supreme Court's decision in *Big Horn III*. A discussion of the principles which govern Indian reserved water rights demonstrates that the Wyoming Supreme Court was obligated to follow federal law in the *Big Horn* adjudication. An overview of federal law illustrates that the water uses defined for quantification purposes do not limit how a tribe may use its water. This casenote concludes that the court disregarded both its obligation to follow federal principles and federal limits to its authority over tribal water use. The court's decision raises questions concerning the validity of state courts as forums for the adjudication of Indian reserved water rights.

BACKGROUND

Federal and Indian Reserved Water Rights

The United States Supreme Court devised the doctrine of federal reserved water rights in the 1908 case of *Winters v. United States*.⁴⁶

41. *Big Horn III*, 835 P.2d at 279.

42. *Id.*

43. Katharine Collins, *Legal Advice Spurred Wind River Tribes Not to Appeal Water Decision*, CASPER STAR-TRIBUNE, Oct. 5, 1992, at A1.

44. *Id.*

45. *Id.* at A10.

46. 207 U.S. 564 (1908). *Winters* is the case traditionally cited for establishing the Indian reserved rights doctrine, but two earlier cases recognized the power of the government to reserve waters from state appropriation. The *Winters* Court cited these cases. *Id.* at 577. See *United States v. The Rio Grande Ditch and Irrigation Co.*, 174 U.S. 690 (1899); *United States v. Winans*, 198 U.S. 371 (1905).

In *Winters*, Indians of the Fort Belknap Reservation in Montana claimed that water diversions by upstream landowners had deprived the Tribe of water.⁴⁷ Thus, the issue addressed in *Winters* was whether the Indians held a protected right to the waters of their reservation.

According to the Supreme Court, the existence of a water right for the Indians depended upon the "purpose" of the government in establishing the Fort Belknap Reservation.⁴⁸ The Court looked to the 1888 agreement between the Indians and the federal government, and determined that the reservation had been established for the purpose of converting the Indians from a nomadic to a pastoral people.⁴⁹ Without water, the Court reasoned, the arid lands of the reservation would be valueless, civilized communities could not be established, and the purpose of the reservation would be defeated.⁵⁰ The Court refused to believe that Congress intended to take the Tribe's water, noting that such an intention would deprive the Indians of the ability to change to new habits.⁵¹ Likewise, the Court doubted that the Indians had intended to relinquish their water when they signed the Fort Belknap treaty. The Court reflected its doubt in an often quoted statement:

The Indians had command of the lands and the waters - command of all their beneficial use, whether kept for hunting "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?⁵²

Accordingly, the Court affirmed the Ninth Circuit Court's injunction against the upstream water users.⁵³

The *Winters* doctrine established that the federal government reserves water when it creates a federal reservation.⁵⁴ The United States Supreme Court later clarified the federal reserved rights doctrine in *Cappaert v. United States*.⁵⁵ In *Cappaert*, the federal government sought reserved water rights to protect a species of fish in the Devil's

47. *Winters*, 207 U.S. at 567.

48. *Id.* at 575.

49. *Id.* at 576. Interestingly, the Court concluded that the conversion of the Indians from a nomadic to a pastoral people represented both the purpose of the federal government and the desire of the Indians. *Id.*

50. *Id.* at 576-77.

51. *Id.* at 577.

52. *Id.* at 576.

53. *Id.* at 578.

54. A federal reservation is a dedication of withdrawn federal land to a permanent specified purpose. GEORGE C. COGGINS & CHARLES F. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 197 (1981).

55. 426 U.S. 128 (1976).

Hole National Monument. Because the presidential proclamation which established the monument noted the importance of the pupfish, the Court determined that preservation of the pupfish was one "purpose" of the reservation.⁵⁶ The Court stated that when the federal government withdraws land for a federal reservation, it reserves by implication an amount of water necessary to accomplish the purpose of the reservation.⁵⁷ For the Devil's Hole National Monument, the Court held, the government had reserved an amount of water necessary to protect the pupfish and thereby accomplish one of the purposes of the reservation.⁵⁸ The *Cappaert* decision provides the governing principles for the recognition of federal reserved water rights, including Indian reserved water rights.⁵⁹

State Adjudication of Reserved Water Rights

State courts could not adjudicate federal reserved water rights until Congress passed the McCarran Amendment in 1952.⁶⁰ The statute waived federal immunity to suit for the purpose of avoiding duplicative and conflicting adjudications of different types of water rights in both state and federal forums.⁶¹ In 1976, the United States Supreme Court held that the McCarran Amendment also encompassed state adjudications of Indian reserved water rights.⁶²

56. *Id.* at 141.

57. *Id.* at 138.

58. *Id.* at 139.

59. The Court stated that the reserved water rights doctrine also applies to Indian reservations. *Cappaert*, 426 U.S. at 138.

60. 43 U.S.C. § 666 (1988). Part (a) of the Amendment states:

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

61. *United States v. District Court In and for Eagle County*, 401 U.S. 520 (1971).

62. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The Supreme Court considered several factors in addition to that of avoiding piecemeal litigation, including the lack of federal adjudicatory proceedings as opposed to a comprehensive adjudication system in Colorado, the quantity of state water rights holders who would be named as defendants, the proximity of the state and federal courts to the site of the dispute, and the federal government's participation in other reserved water rights cases in Colorado. These factors, according to the Court, outweighed the importance of federal adjudication of the water right. *Id.* at 811.

The McCarran Amendment opened the door to state involvement in the determination of federal reserved water rights.⁶³ Despite the application of the McCarran Amendment to Indian reserved water rights, however, the United States Supreme Court directed state courts to define Indian water rights in reference to federal law.⁶⁴ In *Arizona v. San Carlos Apache Tribe of Arizona*,⁶⁵ the Supreme Court clearly stated that state courts have a "solemn obligation" to follow principles of federal law when adjudicating Indian reserved water rights.⁶⁶ Additionally, the Court warned that any decision by a state judiciary which violated federal protection of Indian water rights would receive "a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment."⁶⁷

Defining the Scope of Indian Water Use after State Adjudication

Only a few authorities address how Indian tribes may use their water following an award of reserved water rights. The sources assert that, while a state may determine the existence and quantity of a reserved water right, the determination does not limit how a tribe may use its awarded water. The precedent most often cited for this rule is the report of the special master in *Arizona v. California*,⁶⁸ which involved a complex adjudication of water rights for the Colorado River. The special master distinguished between the *quantification* of the water right and the *uses* to which the water could be put, stating that quantification for agricultural purposes did not limit water usage to agricultural purposes.⁶⁹ A Supplemental Decree later

63. This result was precisely the desire of the Western states which were frustrated with the uncertainty created by federal reserved water rights. Because the federal government would quantify water only when the United States needed the water, states were never certain how much water remained for appropriation to state users. The uncertainty reportedly slowed water development in the West. See Michael D. White, *McCarran Amendment Adjudications - Problems, Solutions, Alternatives*, 22 LAND & WATER L. REV. 619 (1987). See also Frank J. Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957).

64. *Colorado River Water Conservation Dist.*, 424 U.S. at 811. See also Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 583 (1982 ed.).

65. 463 U.S. 545 (1983).

66. *Id.* at 571. The Court stated, "[w]e also emphasize, as we did in *Colorado River*, that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law." *Id.*

67. *Id.* One author doubts the Court's supposed willingness to stand ready to correct abuses of state adjudications, due partly to the complex factual determinations involved in adjudication procedures. Cohen, *supra* note 64, at 602-03 n.14.

68. 373 U.S. 546 (1963).

69. Report from Simon H. Rifkind, Special Master to the Supreme Court in *Arizona v. California* (Dec. 5, 1960). Specifically, the special master stated:

This does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agriculture and related uses. . . . The measurement used in defining the magnitude of the water rights is the amount of water

issued by the Court⁷⁰ reiterated the special master's holding, stating that the PIA standard, as the means of determining the quantity of adjudicated water rights, did not restrict the usage of the water to agricultural applications.⁷¹

Following *Arizona*, the Solicitor for the Department of the Interior recommended to the Secretary of the Interior that Indian reserved water rights could be used for any beneficial purpose.⁷² There could be no reason, the Solicitor stated, to mandate that the Indians use their water only for agriculture.⁷³ The Solicitor compared such a restriction to mandating that Indians could use their lands only for agricultural purposes.⁷⁴

The Ninth Circuit relied upon *Arizona* when it addressed an Indian water use issue in *Colville Confederated Tribes v. Walton*.⁷⁵ The Colville Tribes wanted to use water for trout spawning as part of their water rights which had been quantified on the basis of a fishing grounds purpose.⁷⁶ The court allowed the use, stating that a tribe may use its vested right in reserved water in any lawful manner.⁷⁷

Indian tribes have made very few attempts to secure reserved water rights.⁷⁸ *Arizona v. California*⁷⁹ resulted in an award of reserved water rights to five Indian tribes, and was the landmark case preceding assertions of Indian reserved water rights. Since *Arizona*, Indian water rights have become an issue of increasing importance and conflict in the water dependent West.⁸⁰

necessary for agriculture and related purposes because this was the initial purpose of the reservation, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.

Id. at 265-66.

70. *Arizona v. California*, 439 U.S. 419 (1979).

71. *Id.* at 422. The State of Wyoming, in the principal case, attacked the precedential value of *Arizona* because the parties stipulated to the decree. Brief of Appellant State of Wyoming at 24, *Big Horn III*, 835 P.2d 273 (Wyo. 1992) (Nos. 91-43, 84, 91, 92, 93, 94, 96, 97) [hereinafter Brief of Wyoming].

72. Solicitor's Memorandum to the Secretary of the Interior (Feb. 1, 1964).

73. *Id.*

74. *Id.*

75. 647 F.2d 42 (9th Cir. 1981).

76. *Id.* at 48. The court quantified the water rights for the purposes of development and maintenance of fishing grounds. *Id.* at 48-49.

77. *Id.*

78. See *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Conrad Investment-Co. v. United States*, 161 F. 829 (9th Cir. 1908). The non-assertion of Indian reserved water rights arguably can be attributed to the failure of the federal government, as trustee, to secure the rights because they conflict with the government's interest in securing other federal reserved rights. See Membrino, *supra* note 28.

79. 373 U.S. 546 (1963). See *supra* notes 68-71 and accompanying text.

80. See, e.g., COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO CONGRESS, RESERVED WATER RIGHTS FOR FEDERAL AND INDIAN RESERVATIONS: A GROWING CONTROVERSY IN NEED OF RESOLUTION (1978); RICHARD L. FOREMAN, INDIAN WATER RIGHTS: A PUBLIC POLICY AND ADMINISTRATIVE MESS (1981).

PRINCIPAL CASE⁸¹

Quite noticeable about the Wyoming Supreme Court's decision in *Big Horn III* is the court's issuance of five separate opinions. While three justices held that the Tribes could not change their reserved water use to instream flow, each voiced a different rationale and authored a separate opinion. Two justices wrote dissenting opinions on the issue.

The majority opinion, written by Chief Justice Macy, divided the issue of whether the Tribes could change the use of their water into two components. First, the court discussed whether the Tribes could use their future reserved water for instream flow. The Tribes argued that the two earlier district court decisions controlled the issue.⁸² According to the Tribes, the 1983 decree⁸³ determined that the agricultural purposes relied upon to quantify the water did not limit the Tribes' water uses, and the 1985 decree had established that the Tribes could use their water for instream flow.⁸⁴ Conversely, the State contended that the 1985 decree⁸⁵ controlled the issue, because it specifically awarded only a "right to divert" waters,⁸⁶ and a right to divert could not be transferred to an instream flow right.⁸⁷

The court rejected both parties' arguments on the basis that the Wyoming Supreme Court's decision in *Big Horn I* had already decided the issue.⁸⁸ The majority held that *Big Horn I* "clearly stated" that the Tribes could use their water right solely for agricultural purposes, and not for instream flow.⁸⁹ Justice Macy clarified that the quantification of water rights in *Big Horn I* was not merely a methodology, but was a determination of how the Tribes could use their water rights.⁹⁰

81. The instream flow use issue discussed in this casenote was one of two issues decided in the principal case. On the second issue, the Wyoming Supreme Court held that the district court erred by replacing the State Engineer with the Tribes as the administrator of the Wind River tribal water rights. *Big Horn III*, 835 P.2d at 280-83.

82. Brief of Appellees Shoshone and Northern Arapaho Tribes at 12, *Big Horn III*, 835 P.2d 273 (Wyo. 1992) (Nos. 91-43, 84, 91, 92, 93, 94, 96, 97) [hereinafter Brief of Tribes].

83. See *supra* notes 15-18 and accompanying text.

84. *Big Horn III*, 835 P.2d at 276-77. See *supra* note 21 and accompanying text.

85. See *supra* note 21 and accompanying text.

86. Brief of Wyoming, *supra* note 71, at 11. The State argued that the right to divert necessitated a *physical* diversion of the waters. *Id.* The Tribes' instream flow use did not involve a physical diversion, since the water was to remain in the waterway.

87. *Id.* at 17.

88. *Big Horn III*, 835 P.2d at 277.

89. *Id.* at 278.

90. *Id.* According to Chief Justice Macy, if the *Big Horn I* court had intended that the quantification process was merely a method for determining the amount of the Tribes' water, it would have stated so. Absent such a statement, the Chief Justice argued, the *Big Horn I* court's quantification of water rights also determined the uses to which the Tribes could put their water. *Id.*

The court dismissed the Tribes' argument that the Wyoming Supreme Court should have followed principles of federal law, which do not limit how the Tribes could use their water.⁹¹ Again, the court held that *Big Horn I*, having been affirmed by the United States Supreme Court, was final and controlling.⁹² Justice Macy closed the issue by stating that the Tribes do not have an unfettered right to use their water for any purpose which they desire.⁹³

The court next addressed the second component of the change of use issue, whether the Tribes could change their water use without regard to Wyoming water law. The Tribes maintained that the State lacked authority to regulate tribal water rights,⁹⁴ and presented several bases for their argument. First, the Tribes contended that federal law controlled the issue, as evidenced by the court's statement in *Big Horn I* that "the decree entered in the instant case does not require application of state water law to the Indian reservation."⁹⁵ The Tribes also argued that precedents in federal water and Indian law supported the change of use without regard to state law, and that state regulation of the Tribes' water was preempted.⁹⁶ Third, the Tribes stated that interpretations of the McCarran Amendment held that only federal sovereign immunity is waived in state adjudications, not the federal government's power to invoke authority over federal water rights.⁹⁷

The Wyoming Supreme Court again rejected the Tribes' reliance upon the district court decisions. The court held that *Big Horn I*, not the district court decisions, controlled the issue.⁹⁸ It would make no sense for the court to limit tribal use of water in *Big Horn I*, argued Chief Justice Macy, and then allow the Tribes to change the use based upon the district court's earlier decisions.⁹⁹

Chief Justice Macy next explained that the statement in *Big Horn I* that "[t]he decree entered in the instant case does not require application of state water law to the Indian reservation" could not be taken out of context.¹⁰⁰ According to Justice Macy, the statement was an acknowledgement that the Tribes' reserved right derived from the treaty which created the reservation, and was not dependent upon state law for its existence.¹⁰¹ The Chief Justice argued that the *Big Horn I* court had clearly stated that oversight of the Tribes' reserved

91. *Id.*

92. *Id.*

93. *Id.*

94. Brief of Tribes, *supra* note 82, at 41.

95. *Id.* at 39 (citing *Big Horn I*, 753 P.2d at 115).

96. *Id.*

97. *Id.* at 45-51.

98. *Big Horn III*, 835 P.2d at 278.

99. *Id.*

100. *Id.*

101. *Id.*

water by the state had not been preempted by federal law.¹⁰²

The court also rejected the Tribes' federal law arguments. In response to the argument that federal law governs Indian reserved water rights, the court replied that the Tribes had not provided any precedents in support of their argument.¹⁰³ Nor was the Tribes' pre-emption argument persuasive, stated the court.¹⁰⁴ Conversely, the majority concluded that the Tribes must comply with Wyoming water law to change their water use,¹⁰⁵ and turned to two federal cases as support. First, the court cited *United States v. Mexico*¹⁰⁶ for its holding that reserved water rights extend only to the amount of water necessary to meet the primary purpose of the reservation, and that any secondary purposes must be acquired under state law.¹⁰⁷ Second, the court relied upon *United States v. Adair*,¹⁰⁸ in which the Ninth Circuit Court would not allow the United States to use Indian reserved water rights for forest and wildlife programs because it would amount to "tacking" a new reserved right onto a prior reserved right.¹⁰⁹ The federal cases, according to Chief Justice Macy, clearly applied to and limited the Tribes' right to change the use of their water.¹¹⁰

As reflected by the majority opinion, the Wind River Tribes cannot change their future reserved water right to an instream flow right and must comply with state water law to change their water uses. Justice Cardine, although concurring with the holding, disagreed that the Tribes should be subject to state water law.¹¹¹ Justice Cardine argued that the Tribes must first put the water to a beneficial use, and as required by *Big Horn I*, the beneficial use must be for an agricultural purpose.¹¹² Once put to beneficial use, Justice Cardine believed, the Tribes could then change the use without being "hamstrung by compliance with Wyoming statutes defining acceptable uses and procedures for change of use."¹¹³ However, Justice Cardine advocated that state water law supply guidance in defining the scope of Indian reserved water rights.¹¹⁴

102. *Id.* (citing *Big Horn I*, 753 P.2d at 114).

103. *Id.*

104. *Id.*

105. *Id.* at 279.

106. 438 U.S. 696 (1978).

107. *Big Horn III*, 835 P.2d at 278.

108. 723 F.2d 1394 (9th Cir. 1983) *cert. denied*, 467 U.S. 1252 (1984).

109. *Big Horn III*, 835 P.2d at 279.

110. *Id.*

111. *Id.* at 285 (Cardine, J., concurring in part and dissenting in part).

112. *Id.* at 285-86. Justice Cardine implied that instream flow is not a beneficial use, a theory which differs from the opinion of Justice Golden. See *infra* note 126 and accompanying text.

113. *Big Horn III*, 835 P.2d at 287.

114. *Id.*

Justice Brown¹¹⁵ dissented from the court's holding. The justice first argued that the majority opinion treated the Tribes' water right as an appropriation under state law, rather than as a right which evolved from the treaty which created the Wind River Reservation.¹¹⁶ According to Justice Brown, by limiting the Tribes' water uses, the majority was making "marginal farmers out of the Tribes forever," thereby failing to give proper effect to the Tribes' treaty.¹¹⁷

Secondly, Justice Brown disagreed with the majority's reliance on *Big Horn I* as controlling authority. Justice Brown argued that *Big Horn I* did not consider a change of use issue, nor did it address changing a reserved right for agriculture to an instream flow right.¹¹⁸ Conversely, Justice Brown believed that the 1983 and 1985 district court decrees which allowed change of use represented the law of the case.¹¹⁹ The majority mistakenly cited *Big Horn I* as authority to prohibit a change of use, Justice Brown contended, because "all [other] authority is to the contrary."¹²⁰

In his dissent, Justice Golden agreed with Justice Brown that *Big Horn I* did not address whether the Tribes could change the use of their water.¹²¹ The primary issue in *Big Horn I*, Justice Golden stated, was quantification of the water rights.¹²² Using an argument similar to Justice Macy's in the majority opinion,¹²³ Justice Golden noted that had the *Big Horn I* court intended to limit the Tribes' water

115. Justice Brown, retired Justice of the Wyoming Supreme Court, heard the case for Justice Urbigkit, who recused himself for conflict of interest.

116. *Big Horn III*, 835 P.2d at 288 (Brown, J. (retired), concurring in part and dissenting in part).

117. *Id.*

118. *Id.* Justice Brown harshly criticized the majority's reliance on *Big Horn I*, stating that "[t]he majority, however, quotes portions of *Big Horn I* out of context and bootstraps the case to support its determination in the case before us" and "[t]he majority pumps air into its *Big Horn I* decision, then cites the enhanced opinion for its determination that the Tribes cannot change their right to divert water for agricultural purposes to an instream flow for fisheries." *Id.*

119. *Id.* at 289.

120. *Id.*

121. *Id.* at 293 (Golden, J., dissenting). Justice Golden chided the majority for claiming that *Big Horn I* addressed the use issue, stating that the majority's rationale reminded him of the following passage:

"I see nobody on the road," said Alice.

"I only wish I had such eyes," the king remarked in a fretful tone. "To be able to see Nobody! And at that distance too! Why, it's as much as I can do to see real people in this light!"

Id. at 293 n.2 (citing LEWIS CARROLL, *Through the Looking Glass and What Alice Found There* 136 (1872)).

122. *Id.* at 293.

123. See *supra* note 90 and accompanying text. Justice Macy stated "[i]f we had intended to specify what the water could be used for merely as a methodology to determine the amount of water the Tribes could use for any purpose, we would have said so." *Big Horn III*, 835 P.2d at 278.

uses, it could have made a clear statement to that effect, but did not.¹²⁴

The proper interpretation of *Big Horn I*, according to Justice Golden, was that the Tribes may use their water for their best interests as long as the use does not interfere with the "public right."¹²⁵ Justice Golden reasoned that the beneficial use concept allows the Tribes to use their water for any beneficial use, including instream flow.¹²⁶ Any grievance to the public right resulting from the Tribes' choice of water use, Justice Golden stated, should be presented to the district court for a possible remedy.¹²⁷

In conclusion, Justice Golden criticized the court for its "crabbed interpretation" of the proper uses of tribal reserved waters¹²⁸ and for continuing an age old agenda to expropriate Indian lands and waters.¹²⁹ The majority's decision, according to Justice Golden, was a deliberate attempt to undermine the Tribes under the "distorted guise of state water law superiority."¹³⁰

Helpful to understanding the *Big Horn III* decision is a "Guide to the Court's Present Opinion"¹³¹ which Justice Golden prepared and included in his dissent. Justice Golden summarized the court's differences and noted inconsistencies within the justices' opinions. The synopsis highlights the wide range of rationales presented by the Wyoming Supreme Court in deciding *Big Horn III*.¹³²

124. *Big Horn III*, 835 P.2d at 278.

125. *Id.* at 293. Justice Golden explained the "public right" standard as providing that a resolution would occur where a change in use is injurious to the commonweal, as opposed to only certain individuals, and where the injury results from more than mere assertion of a water right. *Id.* at 293 n.3.

126. *Id.* at 293-94. The Justice stated that "[t]here simply is no question but that an instream flow is a beneficial use, whether studied under the federal law which must govern in this instance, or studied under traditional Wyoming state water law, which may have some application here as persuasive authority." *Id.* at 294. Note that in Wyoming, however, only the State may own an instream flow right. Therefore, instream flow is not a beneficial use available to other appropriators. See WYO. STAT. § 41-3-1002(e) (1977 & Supp. 1992).

127. *Big Horn III*, 835 P.2d at 294. However, Justice Golden noted that no remedial injury would exist if the harm of using the water right for instream flow would also occur if the water were used for irrigation. *Id.*

128. *Id.* Justice Golden believed that the United States Supreme Court had clearly set forth the proper uses of Indian reserved water rights in *Winters*, in which the Court stated that the Indians retained "command of the lands and the waters - command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization." *Id.* (quoting 207 U.S. 564, 576 (1908)). See *supra* notes 46-53 and accompanying text.

129. *Big Horn III*, 835 P.2d at 303-04.

130. *Id.* at 304.

131. *Id.* at 300.

132. Pertinent to this casenote are the following summaries by Justice Golden:

1. Interpretation of *Big Horn I*:

1a. *Big Horn I* gave right to use water only for agricultural purposes, not for an instream flow - Justice Macy; Justice Thomas generally agrees.

1b. Sees real issue now as sovereignty though this was not addressed in *Big*

ANALYSIS

There is great potential for conflict between state water laws and Indian reserved water rights.¹³³ The Big Horn adjudication epitomizes this conflict. The Wyoming Supreme Court, as one of the first state courts to complete an adjudication of Indian reserved water rights, had an opportunity to set a precedent which could sort through the conflict and attempt to accommodate both the State's and the Tribes' interests. But the court's decision falls far short of providing any such precedent. Rather, the decision disregards relevant federal principles, imposes strict limitations on the Tribes, and raises doubts about the ability of state courts to fairly adjudicate Indian reserved water rights.

The Tribes' reserved water right is a federal right arising under federal law.¹³⁴ When the United States Supreme Court held that the

Horn I - Justice Thomas.

- c. *Big Horn I* never discussed change of use or other uses - Justices Golden and Brown.
- 2. What Law Applies to Change of Use
 - 1a. Tribes must seek change of use for future project waters under state law - Justices Macy and Thomas
 - b. Change of use is not subject to state law; Federal or Tribal law applies; but also states that federal policy of deference to state water law must be respected - Justice Cardine.
 - c. State law does not apply to change of use and not supported by *Big Horn I*; federal law applies; following *Big Horn I*, state acknowledged various water uses permitted by Tribes and should now be estopped from changing its position - Justices Golden and Brown.
- 3. Beneficial Use
 - 1a. Beneficial use is key and is seen as an evolving concept - Justice Macy; Justice Thomas generally agrees.
 - b. Future "paper right" must be applied to beneficial use before allowed to interfere with state appropriators and beneficial use is defined only as irrigation; but determines that beneficial use should be broadly applied to the federal reserved right and therefore allow for instream flow development; disagrees with Justice Macy that "change of use must be hamstrung by compliance with Wyoming statutes defining acceptable uses"; states that when Indian rights are not in use they may be taken by junior appropriators - Justice Cardine.
 - c. Earlier district court decisions in this case by Judges Joffe and Johnson held that Tribes may use water in any manner they deem advisable or to their benefit; this was not reversed by *Big Horn I* and is now the law of the case - Justices Golden and Brown.

Id. at 301-02.

133. See, e.g., D. Craig Bell and Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, The Prospects for Accommodation*, 21 ENV. LAW 47, 52 (1991), in which the authors attribute the conflict to the displacement of state water rights by federal reserved water rights which would have an earlier priority date, therefore giving federal reserved water rights holders the superior right to use water.

134. See F. COHEN, *supra* note 64, at Ch. 10; 4 WATERS AND WATER RIGHTS, *supra* note 2, at § 37.

McCarran Amendment allowed state courts to adjudicate Indian water rights,¹³⁵ the Court explicitly instructed states to follow federal law.¹³⁶ Three of the five justices on the Wyoming Supreme Court recognized this directive.¹³⁷ Oddly, however, the majority opinion disregarded the applicable federal laws, mischaracterized other federal laws to support its reasoning, and determined the scope of the Tribes' reserved water rights according to Wyoming water law.¹³⁸

The *Big Horn III* majority relied upon two United States Supreme Court decisions, but the applicability of both cases is questionable. First, the court relied upon *United States v. New Mexico*¹³⁹ for its "primary purpose" test. The *New Mexico* Court held that reserved water rights are reserved only to the extent necessary to fulfill the primary purpose of the reservation, and that water rights for any secondary purposes must arise under state law.¹⁴⁰ The applicability of *New Mexico* is problematic for two reasons. First, the primary purpose test determines the purposes for which water rights were originally reserved. It does not address the *transfer* of a primary purpose water right to a different use. Chief Justice Macy misrepresented the applicability of *New Mexico*. Second, the primary purpose test arguably applies only to non-Indian federal reserved water rights, not to Indian reserved water rights.¹⁴¹ Ironically, the Wyoming Supreme Court noted the questionable validity of the primary purpose test to Indian reserved water rights in *Big Horn I*,¹⁴² but overlooked the problem in *Big Horn III*.

A second situation further illustrates the court's misuse of federal law. The court relied upon *United States v. Adair*¹⁴³ as authority that the Tribes must comply with state law. The excerpt relied upon by the court, however, addressed an attempted conversion of a water right by the United States, not by the Tribes. The United States sought

135. One author criticizes the Supreme Court's decision to allow states to adjudicate Indian reserved water rights, arguing that the Court misjudged the experience and ability of state courts. Membrino, *supra* note 28, at 3-4. See also COHEN, *supra* note 64, at 601.

136. See *supra* notes 65-68 and accompanying text.

137. Justices Cardine, Brown and Golden, respectively. All three justices specifically state in their dissents that federal law applies to Indian reserved water rights.

138. Although three of the five justices believe that federal law applies, the majority held that the Tribes are subject to state law. This is due to Justice Cardine's belief that the court must consider the state beneficial use concept, and that the Tribes must first put their water to a beneficial use before changing the water use. For this reason, Justice Cardine concurred with the majority's holding that the Tribes must comply with state law. See *supra* notes 111-114 and accompanying text.

139. 438 U.S. 696 (1978).

140. *Id.* at 702.

141. See COHEN, *supra* note 64, at 583-84 (stating that "[t]he relevant inquiry in ascertaining Indian reserved rights is not whether a particular use is primary or secondary but whether it is completely outside the scope of a reservation's purpose.")

142. *Big Horn I*, 753 P.2d at 96.

143. 723 F.2d 1394 (9th Cir. 1983).

to convert an Indian reserved water right to wildlife and forest uses.¹⁴⁴ This situation differs from the Wind River Tribes' desire to use their own water for instream flow purposes, and therefore is inapplicable.

Unfortunately, the court's attention to federal law, although incorrect federal law, did not persist in *Big Horn III*. Instead, the court turned to state law as a basis for limiting the Tribes' water right, relying specifically upon the state's beneficial use principle.¹⁴⁵ Because instream flow is not a legally recognized beneficial use in the State of Wyoming,¹⁴⁶ the court denied the Tribes the right to use water for instream flow. By doing so, the court made a distinction between the source of the Tribes' water right and the adjudication of the water right. The court implied that the water right arises from federal law, but is then subject to state law for adjudication. The federal government, however, has not made this distinction.

The source of the court's confusion is its misunderstanding of the *Winters* doctrine,¹⁴⁷ exemplified by its reliance upon the following statement from *Big Horn I*: "[t]he government may reserve water from appropriation *under state law for use on the lands set aside for an Indian reservation.*"¹⁴⁸ Chief Justice Macy interpreted the statement as requiring that the waters be appropriated under state law. But as Justice Golden pointed out in his dissent, the court misconstrued the *Big Horn I* statement by erroneously placing emphasis on state law as the source of the appropriation. The statement in *Big Horn I* derives from *Winters*, in which the court stated: "[t]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."¹⁴⁹

144. *Id.*

145. The court also noted that even if the Tribes sought to change to a legally recognized beneficial use, they would have to comply with the state change of use statute. *Big Horn III*, 835 P.2d at 280, n.7. The statute provides that a change in the use or place of use of water may be allowed if the water transferred does not (1) exceed the amount of water historically diverted under an existing use; (2) exceed the historic rate of diversion under an existing use; (3) increase the historic amount consumptively used under an existing use; (4) decrease the historic amount of return flow under an existing use; or (5) injure in any manner other lawful appropriators. WYO. STAT. § 41-3-104 (1977). Although the requirement of following the change of use statute is not a direct holding in the case, it raises the same issue of whether the court can require the Tribes to comply with state law.

146. Instream flow is a legally recognized use in Wyoming only for the State. No other appropriator may hold an instream flow right in Wyoming. See WYO. STAT. §§ 41-3-1001-1014 (1977 & Supp. 1992). For discussions of the instream flow issue in Wyoming, see Squillace, *supra* note 2, at 316; Matthew Reynolds, Comment, *Wyoming's New Instream Flow Act: An Administrative Quagmire*, 21 LAND & WATER L. REV. 455 (1986); Rick A. Thompson, Comment, *Statutory Recognition of Instream Flow Preservation: A Proposed Solution for Wyoming*, 17 LAND & WATER L. REV. 139 (1982).

147. See *supra* notes 46-54 and accompanying text.

148. *Big Horn III*, 835 P.2d at 277 (quoting *Big Horn I*, 753 P.2d at 94 (emphasis added in *Big Horn III*)).

149. 207 U.S. 564, 577 (citing *United States v. Rio Grande Ditch and Irrigation Co.*, 174 U.S. 690, 702 (1899)).

It is clear from the meaning of *Winters* as a whole that the Court did not intend the emphasis upon state law as was made by Justice Macy. Rather, *Winters* established that Indian reserved water rights exist independent of state appropriation procedures. Chief Justice Macy's interpretation is therefore contrary to *Winters*.

The court's decision is also contrary to the relevant federal principles which the court neglected to follow. Federal law differentiates between the quantification of water rights and the subsequent uses of reserved waters.¹⁵⁰ But the majority in *Big Horn III* took a completely opposite stance and held that the purposes identified in *Big Horn I* for quantification of the Tribes' water rights also determined how the Tribes may use the water. As authority for this position, the court erroneously relied upon its *Big Horn I* decision. The reliance is invalid for two reasons. First, the issue of actual usage of the awarded rights never surfaced in *Big Horn I*.¹⁵¹ That case determined how much water to award the Tribes; how the Tribes could use the water was never an issue before the court. Second, the court implied that the United States Supreme Court's affirmance of *Big Horn I* provided further support that *Big Horn I* controlled the decision in *Big Horn III*.¹⁵² However, the United States Supreme Court reviewed only one issue from *Big Horn I*, the PIA quantification procedure.¹⁵³ The Supreme Court's affirmance of the PIA standard thus is completely unrelated to the issues presented in *Big Horn III*, and Chief Justice Macy's opposite implication is unwarranted.

The Wyoming Supreme Court's insistence upon mandating the Tribes' water use is not difficult to understand, given its ramifications. By limiting the Tribes' water uses to the agricultural purposes of the reservation identified in *Big Horn I*, the court is in effect limiting the Tribes to an agricultural lifestyle. Considering the high costs of capital required for irrigation projects,¹⁵⁴ it is possible that the Tribes would not be able to utilize their rights for agricultural

150. See *supra* notes 69-77 and accompanying text.

151. Justices Brown and Golden aptly argued in their dissents that the change of use issue presented in *Big Horn III* was not an issue before the court in *Big Horn I*. See *supra* notes 118-124 and accompanying text.

152. The court stated that "*Big Horn I*, having been affirmed by the United States Supreme Court, is final and controlling." *Big Horn III*, 835 P.2d at 278.

153. See *supra* note 27 and accompanying text.

154. But see Reid Peyton Chambers & John E. Echohawk, *Implementing the Winters Doctrine of Indian Reserved Water Rights: Producing Indian Water and Economic Development Without Injuring Non-Indian Water Users?* 27 GONZ. L. REV. 447 (1992), in which the authors state that Congress has awarded large amounts of money to tribes via water settlement acts. *Id.* at 462-63. The authors report that the amount "is over and above the construction costs of federal storage and water delivery projects." *Id.* at 463. Note, however, that the Wind River Tribes have not yet been the beneficiary of such water settlement acts by Congress.

purposes.¹⁵⁵ The limitations set by the court thus raise the question of whether the Tribes' future water right will remain unused.

An unused water right under Wyoming's prior appropriation system leaves a greater quantity of water available for junior users. The Tribes own an 1868 priority right, an early and valuable right senior to other water rights holders in the Big Horn system. But if the Tribes are not able to use their water, state permit holders with a junior priority date would be ensured a greater quantity of available water. In effect, the junior state users would have greater protection and less potential for injury.

But the potential injury to state water users is a factor which the court should not consider in adjudicating water rights. The United States Supreme Court has held that Indian reserved water rights must be recognized despite the displacement of state water rights.¹⁵⁶ The *Big Horn III* decision raises a suspicion that the court is indeed trying to protect state water rights. Such a goal would not be surprising, considering the importance of water in the West and the hostility of western states towards reserved water rights.¹⁵⁷ Chief Justice Macy summarized the situation quite well with his statement that "[w]ater is simply too precious to the well being of society to permit water right holders unfettered control over its use."¹⁵⁸

The importance of water to the State of Wyoming, however, does not allow the court to strictly limit the Tribes' water rights. Such a limitation is contrary to the federal government's policies of tribal sovereignty and self determination.¹⁵⁹ The Wyoming Supreme Court

155. This argument also arises in the context of whether Indian tribes may transfer their water off the reservation via selling or leasing the water. See David H. Getches, *Water Rights on Indian Allotments*, 26 S.D. L. REV. 405 (1981); Bill Leaphart, *Sale and Lease of Indian Water Rights*, 33 MONT. L. REV. 266, 275 (1972); Christine Lichtenfels, Comment, *Indian Reserved Water Rights: An Argument for the Right to Export and Sell*, 24 LAND & WATER L. REV. 131 (1989); Jack D. Palma II, *Considerations and Conclusions Concerning the Transferability of Indian Water Rights*, 20 NAT. RESOURCES J. 91 (1980); Lee Herold Storey, Note, *Leasing Indian Water Off the Reservation: A Use Consistent With the Reservation's Purpose*, 76 Cal. L. Rev. 179 (1988).

156. See Cohen, *supra* note 64, at 587 (citing *Cappaert v. United States*, 426 U.S. 128, 138 n.4; *Arizona v. California*, 373 U.S. 546, 597 (1963); *United States v. Washington*, 506 F. Supp. 187, 204-05 (W.D. Wash. 1980)).

157. See, e.g., Jeff Taylor and Duane Birdbear, Note, *State Jurisdiction to Adjudicate Indian Reserved Water Rights*, 18 NAT. RESOURCES J. 221 (1978), in which the authors cite a recommendation by the Western Conference of the Council of State Governments that would "prohibit Indians from voting in state elections unless they surrender jurisdiction over their lands and persons to the states." *Id.* at 228-29 (citing *The New Mexican (Santa Fe)*, Sept. 28, 1977, at 1, col. 4).

158. *Big Horn III*, 835 P.2d 273, at 280.

159. A discussion of the federal government's Indian policies is beyond the scope of this casenote. Generally, the government has encouraged Indian tribes to remain as distinct, political entities free to control the future of the reservation community. See *Worcester v. Cherokee Nation*, 31 U.S. (6 Pet.) 515 (1832); VINE DELORIA, JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* (1984).

did not acknowledge the federal government's desire that Indian tribes be autonomous, self-sufficient communities. Instead, the court persisted in encroaching upon the Tribes' autonomy. As a result, the Tribes now are limited to using their water for agricultural purposes, a limitation which will affect the Tribes' economic status as well as their freedom to determine the future of the Wind River Reservation.

The court's decision thus extends the boundaries for state authority over Indian tribes, and raises the issue of whether state courts can fairly adjudicate Indian reserved water rights.¹⁶⁰ The United States Supreme Court's primary reason for allowing state adjudications of Indian reserved water rights was to avoid piecemeal adjudications in both state and federal courts. However, it is likely that the State of Wyoming would not have adjudicated the Big Horn System had it not been for the Tribes' reserved water rights.¹⁶¹ In that case, the federal courts could have adjudicated the Tribes' rights without a concurrent adjudication of state water rights.

Despite the problems that conflicting adjudications would cause, however, a more important question is whether Indian tribes receive a fair forum in state courts. The *Big Horn III* decision indicates that state protectionism will play a role in state court adjudications. It is not surprising that a state would attempt to protect its water rights, given the importance of water in the West and the displacement of state water rights by earlier Indian reserved water rights. Conversely, the Tribes' decision not to appeal *Big Horn III* for fear of an unfair decision by the United States Supreme Court¹⁶² suggests that the federal courts, as well, may not offer a fair forum for the adjudication of Indian reserved water rights.

CONCLUSION

The United States Supreme Court has permitted state courts to adjudicate Indian reserved water rights, but has qualified the process with a mandate that state courts follow federal law. The Wyoming Supreme Court disobeyed this mandate in *Big Horn III* by disregarding federal law and reaching a decision which is contrary to federal principles. Federal precedents do not allow a state court to limit how Indian tribes may use their reserved water rights.

Big Horn III strengthens the argument that state courts are not a fair forum for the adjudication of Indian reserved water rights. Wyoming's lack of legitimate legal support for its decision suggests

160. See Michael Lieder, Note, *Adjudication of Indian Water Rights Under the McCarran Amendment: Two Courts Are Better Than One*, 71 GEORGE. L.J. 1023 (1983).

161. See Membrino, *supra* note 28, at 6.

162. See *supra* notes 43-45 and accompanying text.

that the court is protecting state water rights at the expense of the Tribes. Considering the importance of water in the West, the uncertainty created by reserved water rights, and the history of state-tribal hostility, it is not difficult to predict the underlying policy considerations that will encourage states to protect state water rights when adjudicating Indian reserved water rights. The *Big Horn III* majority has fallen victim to such policy considerations, and in the process has illegitimately extended the boundaries of state authority over Indian tribes. Fortunately, however, the lack of a clear consensus in the five separate opinions issued by the Wyoming Supreme Court severely limits the precedential value of *Big Horn III*.

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