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Water Law - Drawing the Line on Indian Reserved Water Rights: No Super-Walton Rights in Wyoming's Big Horn River System - In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming

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Casenotes

WATER LAW—Drawing the Line on Indian Reserved Water Rights: No “super-Walton” Rights in Wyoming’s Big Horn River System. *In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming*, 899 P.2d 848 (Wyo. 1995)

On July 13, 1995, the Wyoming Supreme Court issued its latest ruling in the nineteen year old general adjudication¹ of water rights in the Big Horn River System.² This latest case, *Big Horn IV*, returns to an issue originally raised in *Big Horn I*. Namely, which non-Indian landowners in the Big Horn River System³ can claim Indian reserved water rights?⁴ *Big Horn IV* makes clear that the only Indians who can obtain Indian reserved water rights are those whose land title traces to an Indian allotment.

The State of Wyoming initiated the general adjudication of water rights⁵ in the Big Horn River System on January 24, 1977.⁶ The adjudi-

1. General adjudication is defined by Wyoming statute as “the judicial determination or establishment of the extent and priority of the rights to use water of all persons on any river system and all other sources within the state of Wyoming. WYO. STAT. § 1-37-106(a)(i)(A) (1988). See also A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems & Solutions*, 30 LAND & WATER L. REV. 9 (1995) (discussing ongoing water rights adjudications across the West).

2. *In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources*, State of Wyoming, 899 P.2d 848 (Wyo. 1995) [hereinafter *Big Horn IV*].

3. The Big Horn River System consists of all lands within the state drained by the Big Horn River and its tributaries and by Clark’s Fork River and its tributaries. *Big Horn I*, 753 P.2d at 83. The Big Horn River System includes the Wind River Indian Reservation and all or part of Fremont, Hot Springs, Washakie, Big Horn and Park counties in northwestern and west central Wyoming. *Id.* Major tributaries to the Big Horn River in the Reservation are the Wind River and the Popo Agie River. *Id.*

4. The Indian reserved water doctrine discussed in this note is the judicial understanding that when the federal government reserves land for an Indian reservation, it impliedly reserves sufficient water to satisfy the purpose of that reservation. 4 WATERS AND WATER RIGHTS § 37.02(a) (Robert E. Beck ed., 1991) [hereinafter WATERS]; FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 578 (Rennard Strickland et al. eds., 1982)[hereinafter HANDBOOK]. See *infra* notes 45-58 and accompanying text.

5. Wyoming and most Western states follow the doctrine of prior appropriation, commonly thought of as “first in time, first in right,” in determining water rights in the state. WELLS A. HUTCHINS, 1 WATER RIGHTS LAW IN THE NINETEEN WESTERN STATES 226 (1971) [hereinafter HUTCHINS]. See *infra* notes 31-36 and accompanying text. For overviews of the prior appropriation doctrine, see HUTCHINS, chs. 7-9; 2 WATERS, *supra* note 5, §§ 11.01-17.04; A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES (1993) §§ 5.01-5.19 [hereinafter WATER RIGHTS]. See also Mark Squillace, *A Critical Look at Wyoming Water Law*, 24 LAND & WATER L. REV. 307 (1989).

6. *Big Horn I*, 753 P.2d at 84.

cation was initiated in the District Court of the Fifth Judicial District of Wyoming in accordance with Wyoming statutory law⁷ and the McCarran Amendment.⁸ The goal of the adjudication was a determination of the water rights of more than 20,000 water users in the Big Horn River System.⁹

In *Big Horn I*, the Wyoming Supreme Court held that the Eastern Shoshone and Northern Arapaho Tribes¹⁰ (hereinafter "Tribes") on the Wind River Indian Reservation¹¹ (hereinafter "Reservation") had a reserved water right with an 1868 priority date for water from the Big Horn River System.¹² The court established the practicably irrigated acreage (PIA) standard¹³ as the basis for quantification of the right.¹⁴ The court also recognized "Walton rights¹⁵," ruling that non-Indian successors to Indian allottees had a reserved water right with an 1868 priority date.¹⁶ In *Big Horn II*, the Wyoming Supreme Court held that non-Indian successors to Indian allottees who were not parties in *Big Horn I* "and any other party similarly situated" could make a claim for a reserved water right for their lands.¹⁷ *Big Horn III* concerned the Tribes' use of their reserved water right.¹⁸ The *Big Horn III* decision

7. WYO. STAT. § 1-37-106 (1977) (authorizes the State to institute an action for a general adjudication of water rights).

8. 43 U.S.C. § 666 (1988) (the Amendment waives federal immunity in general adjudications of water rights, including, by judicial interpretation, Indian reserved water rights). See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). See also Michael D. White, *McCarran Amendment Adjudications - Problems, Solutions, Alternatives*, 22 LAND & WATER L. REV. 619 (1987).

9. *Big Horn IV*, 899 P.2d at 850.

10. The Second Treaty of Fort Bridger established the Wind River Indian Reservation for the Shoshone and Bannock Indians; the Arapahoe moved to the Reservation in 1878. *Big Horn I*, 753 P.2d at 83.

11. The Reservation consists of 1,836,556 acres situated in Fremont and Hot Springs Counties. THE CONFEDERATION OF AMERICAN INDIANS, INDIAN RESERVATIONS: A STATE AND FEDERAL HANDBOOK 309 (1986).

12. *Big Horn I*, 753 P.2d at 94.

13. Practicably irrigable acreage are "those acres susceptible to sustained irrigation at reasonable costs." *Id.* at 101. The U.S. Supreme Court developed the PIA standard in *Arizona v. California*, 373 U.S. 546 (1963). See also Lynette J. Boomgaarden, Note, *Water Law - Quantification of Federal Reserved Indian Water Rights - "Practicably Irrigable Acreage" Under Fire: The Search for a Better Legal Standard*, 25 LAND & WATER L. REV. 417 (1990).

14. *Big Horn I*, 753 P.2d at 100.

15. "Walton rights" are Indian reserved water rights held by Indian and non-Indian successors to Indian allottees, subject to conditions. *Big Horn IV*, 899 P.2d at 852. The name derives from the case in which that right was articulated. See *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). See also *infra*, notes 72-79 and accompanying text.

16. *Big Horn I*, 753 P.2d at 113-14.

17. *Big Horn II*, 803 P.2d at 69.

18. For discussion of the *Big Horn III* decision, see Mark Squillace, *Transferring Indian Reserved Rights to Instream Flows: Lessons from the Big Horn Adjudication*, RIVERS, January 1993, at 48; Peggy Sue Kirk, Note, *Cowboys, Indians and Reserved Water Rights: May a State Court Limit How Indian Tribes Use Their Water?* 28 LAND & WATER L. REV. 467 (1993); Berrie Martinis, Note,

has no bearing on *Big Horn IV* since the cases address unrelated issues.

Following the *Big Horn II* decision, the district court established procedures pursuant to which landowners could claim "Walton rights."¹⁹ The district court received 423 claims, 85 of which the appellants²⁰ in *Big Horn IV* filed.²¹ In response to those claims, several of the appellees²² in *Big Horn IV* filed motions for summary judgment or partial summary judgment denying the appellants' claims for "Walton rights."²³ The district court granted summary judgment to the *Big Horn IV* appellees in a 1994 decree,²⁴ ruling that the *Big Horn IV* appellants would not receive reserved water rights with an 1868 priority date.²⁵

In the subsequent appeal of the district court's 1994 decree, the Wyoming Supreme Court affirmed the district court's ruling.²⁶ The court held that the 1868 priority date for appurtenant reserved water rights only applied to the Tribes, Indian allottees, and successors in title of Indian allottees.²⁷ The Wyoming Supreme Court disposed of any future uncertainty regarding who could claim Indian reserved water rights in the Big Horn River System by stating:

[T]he priority date for the reserved water rights was extended to the diminished portion of the reservation; restored, retroceded, undisposed of and reacquired lands owned by the Tribes; fee lands held by Indian allottees; and lands held by Indian and non-

From Quantification to Qualification: A State Court's Distortion of the Law in In re General Adjudication of All Rights to Use Water in the Big Horn River System, 68 WASH. L. REV. 435 (1993); Wes Williams, Jr., Note, *Changing Water Use for Federally Reserved Indian Water Rights: Wind River Indian Reservation*, 27 U.C. DAVIS L. REV. 501 (1994).

19. *Big Horn IV*, 899 P.2d at 851.

20. Appellants in *Big Horn IV* included: Riverton Valley Irrigation District; Midvale Irrigation District; LeClair Irrigation District; J. & D. Aplan, Campbells, Inc., John and Lorna Collins, Billy M. and Barbara M. Daniels, Jim B. Enis, Bayard and Meloena Fox, Kenneth A. Hood, Johnson Cattle Co., Inc. (Burke Johnson), Robert W. Stewart, James Thronburg, Ruth Clare Yonkee; and G. A. Brown Testamentary Trust. *Id.* at 848.

21. *Id.* at 851.

22. Appellees in *Big Horn IV* included: Big Horn Canal Association, Bluff Irrigation District, Fritz Ditch Company, Hanover Canal Company, Highland Hanover Irrigation District, Kirby Ditch Company, Inc., Lower Hanover Canal Association, Upper Bluff Irrigation District; Eastern Shoshone Tribe; Northern Arapaho Tribe; United States of America; State of Wyoming. *Id.* at 848.

23. *Id.* at 852.

24. Judgment and Decree, Fifth Judicial District, State of Wyoming, January 28, 1994, (Civil Docket Nos. 77-4993/86-0012).

25. *Id.* at 5.

26. *Big Horn IV*, 899 P.2d at 855.

27. *Id.*

Indian successors to allottees. That is the limit for the July 3, 1868 priority for water rights.²⁸

This note considers whether Indian reserved water rights should exist for lands on ceded Reservation lands with title tracing to patents granted under "homestead" acts.²⁹ It begins with a broad overview of water rights under the prior appropriation doctrine and Indian reserved water rights doctrine, with a focus on Wyoming and the Wind River Indian Reservation, in particular. The note reviews the case law regarding Indian reserved water rights on Indian reservation lands that have left tribal control through allotments and cessions. The conflict between prior appropriation water rights and Indian reserved water rights is then considered. The note concludes with a discussion supporting the Wyoming Supreme Court's decision and reflects on the importance of *Big Horn IV* to water users in the Big Horn River System.

BACKGROUND

Prior Appropriation Doctrine

Prior appropriation is the standard doctrine of water rights in the Western United States.³⁰ Under the doctrine, water rights are allocated according to a "first in time, first in right" principle.³¹ The date of appropriation, or priority date, determines the user's priority relative to other water users, with the earliest appropriator having the superior right.³² This means that if the amount of water on a stream is insufficient to meet all needs, those earliest in time of appropriation will obtain all of their allotted water; while later appropriators may receive only some, or none, of the water to which they have rights.³³ Also important to the prior appropriation doctrine is the fact that water rights can be lost through non-use.³⁴ This protects the expectations of later appropriators because no prior appropriator who let his water right extinguish through non-use can

28. *Id.*

29. The acts applicable to the lands in question are: Homestead Act of May 20, 1862, 12 Stat. 392 (current version at 43 U.S.C. §§ 161-302 (1988)); Pre-emption/Cash Entry Act of April 24, 1820, 3 Stat. 566; Desert Land Act of March 3, 1877, 19 Stat. 377 (current version at 43 U.S.C. §§ 321-339 (1988)); Federal Reclamation Act of 1902, 32 Stat. 388 (current version at 43 U.S.C. §§ 371-6000e (1988)). *Id.* at 849.

30. 2 WATERS, *supra* note 5, § 12.01.

31. *Id.* § 12.02.

32. *Id.* § 12.03(e) at 118.

33. *Id.*

34. *Id.* § 17.03.

suddenly demand water already appropriated by later appropriators.³⁵

In Wyoming, the prior appropriation doctrine is defined by the state constitution and statutes. To obtain a surface water right, a user must first apply to the State Engineer for a permit.³⁶ The State Engineer must reject an application when: (1) no unappropriated water is available; (2) the proposed use conflicts with existing uses; or (3) the proposed use threatens to prove detrimental to the public interest.³⁷ If, however, the State Engineer does approve the permit application, the user generally has five years to "perfect" the water right by putting the water to beneficial use³⁸ and submitting proof of the appropriation to the appropriate water division Superintendent or State Engineer.³⁹ The water division Superintendent receiving the proof of appropriation then provides public notice of the proof, after which he forwards the proof to the Board of Control.⁴⁰ Other appropriators on the stream in question can contest the proof of appropriation in a hearing held for that purpose.⁴¹ The Board of Control reviews the proof of appropriation and issues a certificate of appropriation if the board approves of the appropriation.⁴² The priority of the appropriation dates from the filing of the application in the State Engineer's office.⁴³ Water rights attach to the land for "irrigation, or to such other purposes or object for which acquired in accordance with the beneficial use made for which the right receives public recognition, under the law and administration provided thereby."⁴⁴ The *Big Horn IV* appellants hold valid water rights for irrigation based on this system. The priority dates for the appellants' rights generally date from the turn of the century.⁴⁵

35. *Id.* § 17.03 at 436 n.41.

36. WYO. STAT. § 41-4-501 (1977). *See also* Wyoming Hereford Ranch v. Hammond Packing Co., 236 P. 764 (Wyo. 1925) (permit required for a lawful diversion to constitute an appropriation).

37. WYO. STAT. § 41-4-503 (1977).

38. Beneficial use is a term not yet defined by Wyoming courts, legislature, or the State Engineer. Squillace, *supra* note 6, at 324. The term is generally understood to concern the social and economic value of the use, its efficiency, and whether or not the use is wasteful. *Id.*

39. WYO. STAT. § 41-4-506 (1977).

40. WYO. STAT. § 41-4-511 (1977).

41. *Id.*

42. *Id.*

43. WYO. STAT. § 41-4-512 (1977).

44. WYO. STAT. § 41-3-101 (1977).

45. *Big Horn IV*, 899 P.2d at 851.

Indian Reserved Water Rights

The United States Supreme Court first recognized Indian reserved water rights⁴⁶ in the 1908 case of *Winters v. United States*.⁴⁷ In *Winters*, water diversions by upstream non-Indian landowners deprived Indians⁴⁸ of water from the Milk River or its tributaries at the Fort Belknap Indian Reservation⁴⁹ in Montana. The Court reasoned that the federal government established the Fort Belknap Indian Reservation to convert the Indians from a nomadic to a pastoral people by encouraging "agrarian pursuits" and that without irrigation the lands "were practically valueless."⁵⁰ Therefore, the Court ruled that in establishing the Fort Belknap Indian Reservation, the federal government impliedly reserved water in the Milk River for the Indians.⁵¹ The Court established the priority date for the reserved water right as the creation date of the reservation.⁵²

The doctrine of Indian reserved water rights that originated in *Winters* has several important aspects. The doctrine recognizes rights to a quantity of water sufficient to fulfill the purposes of a reservation.⁵³ The crucial priority date of the water right is the date of the treaty establishing that reservation.⁵⁴ In contrast to a prior appropriation water right, Indian reserved water rights are not lost through non-use.⁵⁵ Indian reserved water rights are federal in nature and not generally subject to state administration⁵⁶, although those rights may be adjudicated in state courts.⁵⁷

46. For an overview of Indian water rights see 4 WATERS, *supra* note 5, § 37.02; WATER RIGHTS, *supra* note 6, § 9.07; LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF THE LAW (1991); INDIAN WATER POLICY IN A CHANGING ENVIRONMENT (Patricia Zell ed., 1982); Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61 (1994).

47. 207 U.S. 564 (1908). Most authorities cite *Winters* as the case which established the reserved water rights doctrine, but note that *Winters* cited two earlier cases which recognized the power of the federal government to reserve waters from state appropriation. *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).

48. Indians referred to in *Winters* were Gros Ventre and Assiniboine. *Winters*, 207 U.S. at 565.

49. Congress created the Fort Belknap Indian Reservation in 1874. *Id.* at 567.

50. *Id.* at 576.

51. *Id.* at 577.

52. *Id.*

53. HANDBOOK, *supra* note 5, at 578.

54. 4 WATERS, *supra* note 5, § 37.02(b) at 222.

55. *Id.* § 37.01(c)(1) at 215.

56. *But cf. Big Horn III*, 835 P.2d at 279 (holding 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).

57. WATER RIGHTS, *supra* note 6, § 9.07(1)(a).

A Brief History of the Allotment Act, Allotment Water Rights, and "Walton Rights"

Indian reserved water rights on former reservation lands no longer in tribal control is a subset of the general category of Indian reserved water rights. A basic knowledge of the General Allotment Act is necessary for an understanding of this sub-category of Indian reserved water rights. Congress passed the General Allotment Act⁵⁸ in 1887 ostensibly to encourage assimilation of Indians into the rest of society by breaking up Indian reservations.⁵⁹ The Act provided for individual Indians to receive an allotment of land for agricultural purposes which the U.S. government would hold in trust for 25 years before patenting in fee to the allottee.⁶⁰ The Act provided that non-Indians could settle on those lands left remaining on the reservations after all the individual tribal members had received an allotment.⁶¹ Congress formally ended the allotment program in 1934 with the Indian Reorganization Act.⁶²

Two Ninth Circuit cases⁶³ in the 1920's addressed whether Indian reserved water rights also applied to Indian allotments and whether non-Indian successors to those allotments could also obtain Indian reserved water rights. Both the *Skeem* and *Hibner* courts decided that allottees' water rights were essentially the same as the tribes' and that a lease or sale of the allotment also transferred the water rights of the allotment.⁶⁴ By 1939, the issue of Indian reserved rights eventually made it to the United States Supreme Court in *United States v. Powers*.⁶⁵ In *Powers*, the United States sought an injunction against non-Indian successors⁶⁶ to Indian allotments within the Crow Indian Reservation in Montana from

58. Ch. 119, 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-358 (1988)).

59. Royster, *supra* note 47, at 87. See also HANDBOOK, *supra* note 5, at 130-132; David H. Getches, *Water Rights on Indian Allotments*, 26 S. D. L. REV. 405 (1981); Philip W. Dufford, *Water for Non-Indians on the Reservation: Checkerboard Ownership and Checkerboard Jurisdiction*, 15 GONZ L. REV. 95 (1979).

60. General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389 (1887) (codified as amended at 25 U.S.C. § 331 (1988)).

61. General Allotment Act, ch. 119, 24 Stat. 388, 389-90 (1887)(codified as amended at 25 U.S.C. § 331 (1988)).

62. Act of June 18, 1934, ch. 576, § 2, 48 Stat. 984 (1934) (codified at 25 U.S.C. § 462 (1988)).

63. *Skeem v. United States*, 273 F. 93 (9th Cir. 1921); *United States ex. rel. Ray v. Hibner*, 27 F.2d 909 (D.Idaho 1928).

64. *Skeem*, 273 F. 93 at 96; *Hibner*, 27 F.2d at 912.

65. 305 U.S. 527 (1939).

66. The facts of *Powers* do not specify that these successors were non-Indians. *Id.* Later cases that cite *Powers* make that fact clear. See *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956) (identifying the successors as white transferees of patented Indian allotments).

diverting any water from two streams on the reservation.⁶⁷ The Court reasoned that the goal of allotments was to encourage individual members of a tribe to farm and the allotted lands were of no agricultural value without irrigation.⁶⁸ Accordingly, the Court held that Indian allottees had a right to a ratable portion of the tribes reserved rights.⁶⁹ However, the Court declined the opportunity to consider what the "extent or precise nature" of the non-Indian allotment successors' water rights were.⁷⁰

Forty-two years after *Powers*, the Ninth Circuit again considered the question of Indian reserved water rights on allotments in *Colville Confederated Tribes v. Walton*.⁷¹ In *Walton*, Tribes sought to enjoin a non-Indian successor to an Indian allottee from using surface and ground waters in a hydrologic system entirely on the Tribe's reservation.⁷² The court ruled that a non-Indian successor acquires a right to water currently appropriated by the Indian allottee at the time the title passes.⁷³ The court reasoned that an Indian allottee must have the right to sell his land along with his share of the reserved waters in order to enjoy the full worth of the reserved water right.⁷⁴ That water right has a date-of-reservation priority date.⁷⁵ The non-Indian successor also has a right to water that he appropriates with reasonable diligence after the passage of title, again with a date-of-reservation priority date.⁷⁶ Finally, the non-Indian successor loses his right to the full measure of the Indian allottee's reserved water right if he does not maintain that right by continuous use.⁷⁷ The Wyoming Supreme Court recognized "*Walton* rights" and extended them to allottees' non-Indian successors in *Big Horn I*.⁷⁸

67. *Powers*, 305 U.S. at 528.

68. *Id.* at 533.

69. *Id.*

70. *Id.*

71. 647 F.2d 42 (9th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981). This case is one of a series of related cases starting with *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.Dist.Wash. 1978). The 1981 case was followed by *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986). For differing views on the holdings of the 1981 case compare Collins, *Indian Allotment Water Rights*, 20 LAND & WATER L. REV. 421 (1985) with Getches, *supra* note 60; Robert Isham, Jr., Note, *Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit*, 43 MONT. L. REV. 247 (1982).

72. *Walton*, 647 F.2d at 44.

73. *Id.* at 51.

74. *Id.* at 49-50.

75. *Id.* at 50.

76. *Id.*

77. *Id.*

78. *Big Horn I*, 753 P.2d at 113-14.

Water Rights on Ceded Reservation Lands

Another Indian reserved water rights issue is what water rights apply to reservation lands ceded by the Tribes to the United States or opened to homesteading under the Allotment Act? The issue has existed as far back as *Winters*, where the non-Indian homesteaders on former Fort Belknap Indian Reservation lands had acquired water rights under state prior appropriation systems.⁷⁹ Courts have generally left homesteaders to rely on their state-granted water rights, and the prevailing view is that no Indian reserved water rights exist on former reservation lands homesteaded by non-Indians.⁸⁰

In 1935, the United States Supreme Court decided *California-Oregon Power Company v. Beaver Portland Cement Co.*,⁸¹ a case not pertaining to, but ultimately affecting, Indian reserved water rights cases. The *California-Oregon Power Co.* Court found that a patent issued under the Desert Land Act⁸², a homestead act, "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself."⁸³ The effect of this case was that anyone who received public land under a homestead act would have to obtain appropriative water rights based on the controlling state's system.⁸⁴

The Ninth Circuit applied this concept in *United States v. Anderson*,⁸⁵ a case arising from a water rights adjudication with facts similar to the *Big Horn* adjudication. *Anderson* concerned an adjudication of water rights centered around the Spokane Indian Reservation in Washington's Chamokane Basin.⁸⁶ Much like the Wind River Indian Reservation, the Spokane Indian Reservation consists of a mix of lands, including tribal lands, allotments now held by non-Indians, lands homesteaded by non-Indians, and lands reacquired by the Spokane Tribe.⁸⁷ As in *Big Horn IV*, the *Anderson* court had to address the issue of whether non-Indians should receive reserved water rights when they succeed to the interests of individuals who received title of ceded reserva-

79. *Winters*, 207 U.S. at 569.

80. Royster, *supra* note 47, at 90. See also RICHARD L. FOREMAN, INDIAN WATER RIGHTS: A PUBLIC POLICY AND ADMINISTRATIVE MESS 67 (1981).

81. 295 U.S. 142 (1935).

82. Desert Land Act of March 3, 1877, 19 Stat. 377, (current version at 43 U.S.C. §§ 321-339 (1988)).

83. *Id.* at 158.

84. 4 WATERS, *supra* note 5, § 37.01(a) at 202.

85. 736 F.2d 1358 (9th Cir. 1984).

86. *Id.* at 1361.

87. *Id.*

tion land under a homestead act.⁸⁸ The *Anderson* court relied on the rule from *California Oregon Power Co.* in holding that homesteaders and their successors are not entitled to Indian reserved water rights.⁸⁹ The court found that applying the rule to such lands effectively precluded the possibility of Indian reserved water rights "on those reservation lands which have been declared opened to homesteading, and subsequently conveyed into private ownership."⁹⁰

Water Rights on the Wind River Reservation

The *Big Horn IV* appellants' arguments are grounded in the history of the Wind River Indian Reservation lands, necessitating a basic understanding of that history. An 1868 treaty⁹¹ established the Wind River Indian Reservation, to transform the Tribes nomadic lifestyle into an agrarian society.⁹² The Tribes ceded various amounts of Reservation lands back to the United States government from 1872 to 1905.⁹³ The final cession opened up 1,480,000 acres of Reservation for acquisition by non-Indian settlers under the Second McLaughlin Agreement.⁹⁴ The federal government offered the ceded lands for sale to the public under provisions of federal homestead, townsite, and coal and mineral land laws.⁹⁵ The majority of the *Big Horn IV* appellants' lands trace to lands ceded by the Second McLaughlin Agreement and were acquired under the various homestead acts.⁹⁶

The reduced Reservation became known as the "diminished reservation."⁹⁷ Beginning in 1940, the federal government returned undisposed ceded land back to the Tribes and also reacquired, in trust for the Tribes, additional ceded lands, as well as lands on the diminished Reservation that had passed into private ownership.⁹⁸ The Wyoming Supreme Court treats the reacquired lands on ceded lands the same as Tribal lands on the diminished Reservation.⁹⁹

As established by the *Big Horn I* court, the Tribal-held diminished reservation lands are entitled to reserved water rights with an 1868 priori-

88. *Id.* at 1362-63.

89. *Id.* at 1363.

90. *Id.*

91. Second Treaty of Fort Bridger, 15 Stat. 673 (1869).

92. *Big Horn I*, 753 P.2d at 83.

93. *Id.* at 83-84.

94. *Id.* at 84.

95. *Id.*

96. *Big Horn IV*, 899 P.2d at 851.

97. *Big Horn I*, 753 P.2d at 84.

98. *Id.*

99. *Id.* at 114.

ty date.¹⁰⁰ This reserved right also extends to Indian fee lands, and former allotments now held by non-Indians.¹⁰¹ In a break with the *Anderson* decision, the *Big Horn I* court extended the reserved right with the 1868 priority date to those ceded reservation lands that the Tribes or individual Tribal member had reacquired.¹⁰² This means that land tracing to a non-Indian homestead patent can also have a reserved water right, but only if that land now belongs to the Tribes or individual Tribal members.

PRINCIPAL CASE

Justice Thomas, writing for a unanimous court, framed the issue in *Big Horn IV* as whether "lands that were originally part of Wind River Indian Reservation but which were never owned by Indian allottees should be afforded a priority date for appurtenant water rights of July 3, 1868."¹⁰³ The court used the term "super-Walton right" to describe the water right claimed by the appellants for these lands, because such a right would expand on the traditional "Walton right" by not requiring land title to trace to an Indian allotment.¹⁰⁴ The court rejected this "super-Walton right" concept and held that only the Tribes, Indian allottees, and successors in title of Indian allottees could receive appurtenant reserved water rights with an 1868 priority date.¹⁰⁵

The initial foundation of the appellants' argument was that reserved water rights are appurtenant to, and attach to, the land.¹⁰⁶ Accordingly, appellants argued, the reserved water right for the Reservation, impliedly created by the Second Treaty of Fort Bridger in 1868, is appurtenant to all lands part of the original Reservation.¹⁰⁷ Although the original Reservation was diminished in size by cessions to the United States, the appellants argued that the government never returned these ceded lands to the public domain, but instead held them in trust for the Tribes.¹⁰⁸ Therefore, according to appellants' argument, because the ceded lands never returned to the public domain, the reserved water right appurtenant to those lands never ceased.¹⁰⁹ As the court saw it, the "crux" of the appellants' argu-

100. *Id.* at 112.

101. *Id.* at 112-14.

102. *Id.* at 114.

103. *Big Horn IV*, 899 P.2d at 850.

104. *Id.* at 849.

105. *Id.* at 855.

106. *Id.* at 853.

107. *Id.*

108. *Id.*

109. *Id.*

ment was that no basis in law exists to distinguish between the lands appellants owned on the ceded portion of the Reservation and the retroceded and reacquired lands the Tribes own on the ceded portion.¹¹⁰

In a similar vein, appellants also argued that no basis existed to distinguish between their lands and those of allottees' successors regarding an award of "*Walton* rights."¹¹¹ From the appellants' viewpoint, since the appellants' lands derived from cessions of Reservation lands held in trust for the Tribes, their claim to a portion of the Tribes' reserved water right is as strong as the claim of allottees' successors.¹¹² The appellants argued that fairness requires that reserved water rights have parity, regardless of whether those rights derived from the Tribes or from allottees.¹¹³

Appellants' final argument was that termination or diminution of Indian rights requires express legislative intent by Congress.¹¹⁴ Accordingly, the appellants argued that specific legislation is required to abrogate reserved rights on the ceded portion of the Reservation.¹¹⁵

The court dismissed the appellants arguments by relying on the reasoning from *Anderson* and the initial *Walton* case.¹¹⁶ As those courts reasoned, the purpose for which the reserved rights were recognized no longer exists for lands not controlled or owned by the Tribes.¹¹⁷ Since the Tribes no longer needed those land for the original purposes of the Reservation, the reserved water right necessary for Indian use of the lands ceased.¹¹⁸

The court then relied on the district court findings which established that none of the appellants in *Big Horn IV* were successors in title of Indian allottees.¹¹⁹ The court therefore decided that none of the appellants were entitled to a reserved water right with a treaty priority date of 1868, based on *Big Horn I*.¹²⁰ The court also found that the appellants were not "similarly situated" to the successful *Walton* claimants as established by *Big Horn II* and could therefore not make a claim for Indian reserved water rights.¹²¹ Regard-

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 854.

117. *Id.*

118. *Id.*

119. *Id.* at 855.

120. *Id.*

121. *Id.*

ing the appellant's last argument, the court found no support in law for the position "that Congress intended Indian water rights to be received by those who succeeded to title from sources other than Indian allottees."¹²²

ANALYSIS

The appellants' arguments appeal to a sense of fairness, especially because adjoining pieces of land with essentially the same chain-of-title can have vastly different water rights. However, case law and public policy regarding Indian reserved water rights supports the court's decision against extending Indian reserved water rights to non-Indians on former reservation lands ceded to the United States. *Big Horn IV* is an important case to water users in the Big Horn River System because it limits the scope of potential Indian reserved water rights there. As a result, the general adjudication can proceed more quickly to its final resolution of water rights in the Big Horn River System.

Precedent Does Not Support the Appellants' Claims

Case law surrounding water rights on ceded reservation lands is unfavorable to the appellants' arguments. Appellants were unsuccessful in attempting to draw distinctions between that case law and their own situation. The appellants built their argument on the premise that the ceded Reservation lands never returned to the public domain; therefore, the reserved water rights appurtenant to the original reservation lands still existed.¹²³ This premise ignores the reality of the cessions and subsequent disposition of the ceded lands.

The cession of lands to the federal government itself indicated that Tribes no longer had need of the land ceded. Since the Tribes no longer had need of the lands for their Reservation, the lands no longer had need for Indian reserved water rights and those rights ceased to exist.¹²⁴ This reasoning is the essence of the *Anderson* court's logic that the *Big Horn IV* court found appealing; "[t]he claim that the reserved right is appurtenant to the land purchased is not a sufficient justification for maintaining the priority date when the Tribe, in effect, agrees it no longer needs the land for purposes of a reservation."¹²⁵

The holding of *California-Oregon Power Co. v. Portland Beaver*

122. *Id.*

123. *Big Horn IV*, 899 P.2d at 853.

124. *Anderson*, 736 F.2d at 1363.

125. *Big Horn IV*, 899 P.2d at 854.

Cement Co. is accepted for the proposition that a land patent from the federal government only grants the surface estate of land received under the patent, not water rights.¹²⁶ Consequently, the grant of a land patent to homesteaders would have severed any appurtenant reserved water rights that might have existed on ceded Reservation lands.¹²⁷ Most of the appellants attempted to distinguish *California-Oregon Power Co. v. Portland Beaver Cement Co.* by arguing that it only applied to public domain lands, not lands held in trust for the Tribes.¹²⁸ Whether the land was public domain land or not, any reserved water rights were extinguished when the federal government granted a homestead.¹²⁹

Indian Reserved Water Rights Serve to Benefit Indians, Not Non-Indians

The policy underlying Indian reserved water rights also goes against the *Big Horn IV* appellants. The appellants' arguments do not give enough deference to the fundamental concept that the *Winters* court created the Indian reserved water rights doctrine to benefit Indians.¹³⁰ Accordingly, the underlying question a court should consider regarding claims for Indian reserved water rights is, "Would a finding of reserved water rights benefit the welfare of a tribe or individual Indian?" The answer to that question regarding "super-Walton" rights is clearly "no."

Tribes benefit by having reserved water rights with such high priority dates because tribes can then rely on adequate water for the purpose of their reservation.¹³¹ Individual Indian allottees likewise benefit by having an early priority date because the allotment is assured of receiving water.¹³² Extending reserved water to Indian allottees and their successors

126. 4 WATERS, *supra* note 5, § 37.01(a) at 202.

127. *Id.*

128. See Brief of Appellant Riverton Valley Irrigation District at 15, In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, 899 P.2d 848 (Wyo. 1995) (Nos. 94-58, 94-59, 94-60, 94-61, 94-62, 94-63) (on file with the *Land and Water Law Review*); Brief of Appellants J. & D. Apland, et. al, at 12, In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, 899 P.2d 848 (Wyo. 1995) (Nos. 94-58, 94-59, 94-60, 94-61, 94-62, 94-63) (on file with the *Land and Water Law Review*); Brief of Appellant G.A. Brown Testamentary Trust at 14, *Big Horn IV*, 899 P.2d 848 (Wyo. 1995) (Nos. 94-58, 94-59, 94-60, 94-61, 94-62, 94-63) (on file with the *Land and Water Law Review*); Brief of Appellant LeClair Irrigation District at 17, In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, 899 P.2d 848 (Wyo. 1995) (Nos. 94-58, 94-59, 94-60, 94-61, 94-62, 94-63) (on file with the *Land and Water Law Review*).

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

130. See *supra* notes 47-58 and accompanying text.

131. 4 WATERS, *supra* note 5, § 37.01(c)(1) at 215.

132. *Id.*

also ensures that Indian lands have their greatest economic potential.¹³³ The value of allottees' lands would decline if the reserved water right could not transfer at the time of sale or lease of the land.¹³⁴

However, neither the Tribes nor Indian allottees would realize any economic benefit from a grant of reserved water right to the appellants' lands because the lands long ago passed from Indian control. Further, an award of Indian reserved water rights to appellants would harm, rather than benefit, the Tribes. Such an action would lessen the reserved water right of the tribes, since tribes would have to share its early priority date not only with allottees and their successors, but also with non-Indians on the ceded portions of their reservations.¹³⁵ Termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent.¹³⁶ The *Big Horn IV* court found no such intent to give reserved water rights to those succeeding to title from sources other than Indian allottees.¹³⁷

Courts Should Limit Reserved Water Rights Because They Upset the Prior Appropriation System.

Since prior appropriation is the standard for water rights across the West, difficulties arise in integrating the federal doctrine of Indian reserved water rights into state statute-based prior appropriation systems.¹³⁸ The creation date of most Indian reservations generally preceded non-Indian settlement of the areas around the reservations; the reservations' water rights accordingly have a very early priority date.¹³⁹ This means that when a reservation's reserved water rights is recognized, those rights supersede the water rights of most, if not all, the other water users along a stream.¹⁴⁰ This is true even when those reserved rights are recognized long after others have acquired appropriative water rights under state statutes.¹⁴¹ Consequently, an appropriative water user who has complied with all state laws might place unfounded confidence in his water right, unaware that someone else holds a water right with an earlier priority date; this can happen since even the state might not know such a right exists.¹⁴² Adding to the confusion surrounding

133. See Getches, *supra* note 60 at 425-26.

134. *Big Horn IV*, 899 P.2d at 855 n.6.

135. HANDBOOK, *supra* note 5, at 596.

136. *Id.* See also *Walton*, 647 F.2d at 50.

137. *Big Horn IV*, 899 P.2d at 855.

138. 4 WATERS, *supra* note 5, § 37.01(c)(1) at 215.

139. *Id.*

140. *Id.*

141. *Id.* at 221.

142. *Id.* at 215.

Indian water rights is the fact that few reservations remain intact as originally established, due to cessions of reservation lands back to the United States and distributions of individual tracts through the Allotment Act.¹⁴³ Since a reservation is seldom the same as originally set aside and the reserved water right goes back to the creation of the reservation, the question becomes exactly what former reservation lands are eligible to claim the priority date of the original reservation.

In limiting “*Walton* rights” to former reservation lands originally held by Indian allottees, the court properly recognizes that Indian reserved water rights are a disruptive exception to prior appropriation systems.¹⁴⁴ As the district court noted:

Water law is conservative by nature because of the reliance we all place on certain concepts. In the West, a basic tenant [sic] of the prior appropriation doctrine is predictability. We all know the priority of our water rights by referring to certain dates. *Walton* water rights, like *Winters* reserved water rights, upset the system throughout the West. Even now, we struggle to fit these rights into a workable scheme to manage a scarce resource. As the courts have recognized these aberrations of established water law, they have insisted that the “new” water rights be applied narrowly and strictly.¹⁴⁵

While policy reasons exist to upset prior appropriation systems by granting Indian reserved water rights to Indian allottees’ successors, no such reasons exists to disrupt water rights among other non-Indians.

Importance of the Ruling to Water Users in the Big Horn System

Big Horn IV is an important case for water users in the Big Horn River system for several reasons. Of immediate importance is that the ruling eliminated reserved water right claims to roughly approximately 98,500 acres of appellants’ lands.¹⁴⁶ The appellants must continue to rely on their statutory based water rights; consequently the ranking of priority dates for water rights remains the same as before the appellants’ claims arose. Preservation of the status quo regarding water rights in the Big Horn River System means that water users there can have confidence in the priority ranking of their water rights

143. Dufford, *supra* note 60, at 97.

144. See 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 1, 50 (1991).

145. Judgment and Decree, Fifth Judicial District, State of Wyoming, July 30, 1992 (Civil Docket No. 77-4993/86-0012) at 7-8.

146. *Big Horn IV*, 899 P.2d at 851.

and plan water usage on their land accordingly.¹⁴⁷ Also, because the priority dates for appropriations throughout the system stay constant, no change in property values will result from the ruling.¹⁴⁸

Probably of greatest importance is that the general adjudication can proceed without having to consider a potentially greatly expanded scope of reserved water rights.¹⁴⁹ After *Big Horn IV*, the focus of the inquiry regarding a claim by non-Indians for Indian reserved rights is simply whether the claimant's land title traces to an Indian allottee.¹⁵⁰ With the scope of Indian reserved water rights firmly established, the state can proceed towards its ultimate resolution of water rights in the Big Horn River System.

CONCLUSION

The *Big Horn IV* court properly rejected the concept of "super-Walton" rights. Lands on ceded Reservation lands with title tracing to a patent granted under a "homestead" act should not have a reserved water right. The purpose of reserved water rights is to provide a benefit to Indian tribes and their members, not to non-Indians who happen to own land that was once part of a reservation. Considering the potential for conflict of Indian reserved water rights with the prior appropriation system, the Wyoming Supreme Court correctly limited the scope of such rights. Most importantly, since *Big Horn IV* precludes any expansion of reserved water rights, the general adjudication can proceed to its conclusion without unnecessary delay.

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147. See *supra* notes 31-36 and accompanying text.

148. See Brief of Appellee Big Horn Canal Association, *et. al.* at 14-16, In re The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, 899 P.2d 848 (Wyo. 1995) (Nos. 94-58, 94-59, 94-60, 94-61, 94-62, 94-63) (on file with the *Land and Water Law Review*) (arguing that a grant of reserved water rights to appellants would result in an aggregate property devaluation of appellees' lands of up to \$11,620,000).

149. Interview with Keith Burron, Assistant Wyoming Attorney General, in Cheyenne, WY. (September 13, 1995).

150. *Big Horn IV*, 899 P.2d at 854.