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### Big Horn River Litigation Experience: The Second Generation – Post Decree Administration

Gordon W. Fassett

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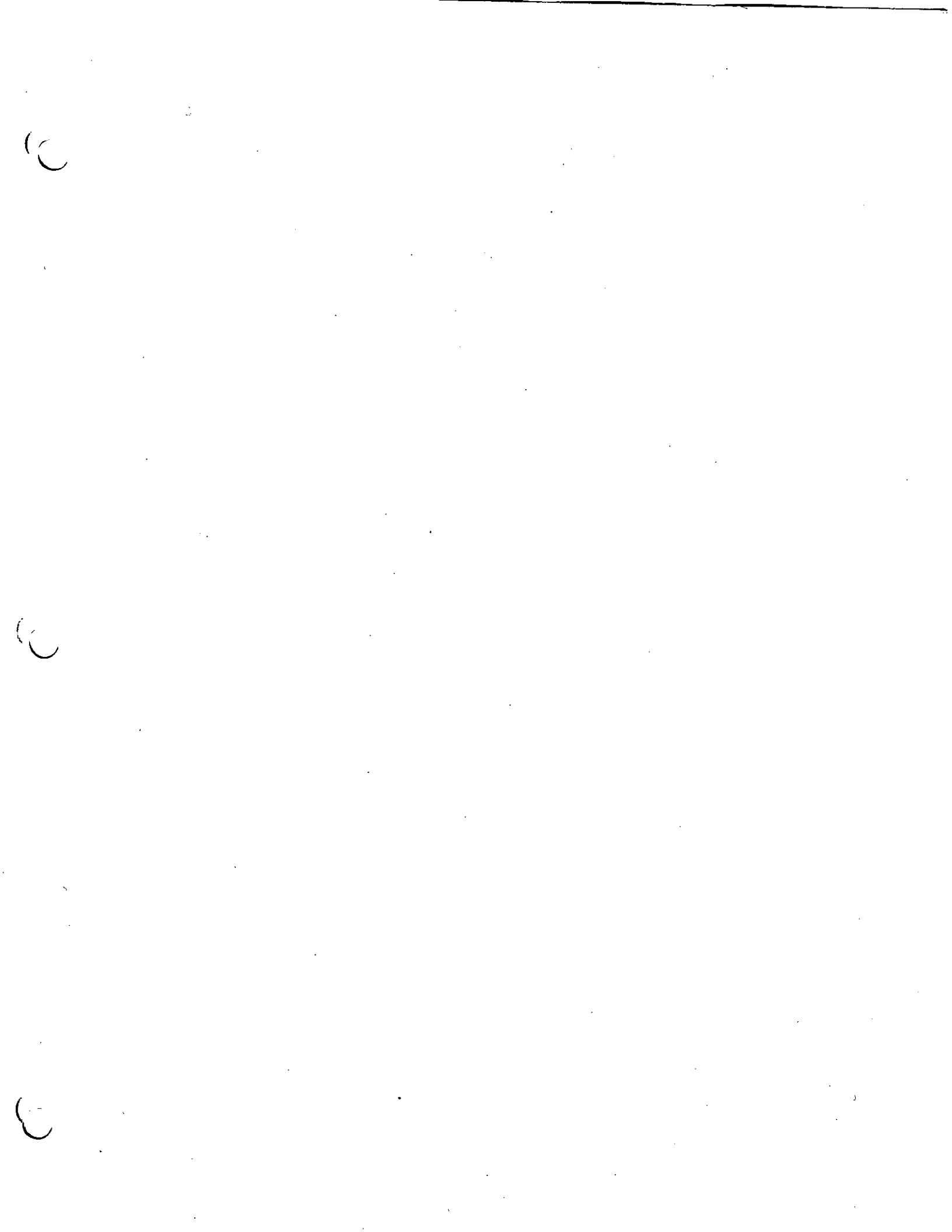
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**Big Horn River Litigation Experience**  
**The Second Generation - Post Decree Administration**

**Gordon W. Fassett**  
**Wyoming State Engineer**

**Innovation In Western Water Law  
And Management**

**Natural Resources Law Center  
University of Colorado School of Law  
June 5-7, 1991**



**INNOVATION IN WESTERN WATER LAW  
AND MANAGEMENT**

**Big Horn River Litigation Experience - the Second Generation  
Post Decree Administration**

**Gordon W. Fassett**

**Wyoming State Engineer**

- I. Introduction to topic**
- II. Administration of Water Rights**
  - A. General Discussion - Wyoming Water Law**
    - 1. Constitutional Basis**
    - 2. 100 Years of Statutory and Case Law History**
  - B. Flexibility or Evolution of Administration  
and Regulation of Water Rights**
    - 1. Unified System of Administration - Hydrologic  
Boundaries**
    - 2. Defined Process, Procedures, Rules and  
Regulations of Administration**
  - C. Key factors of "Administration"**
    - 1. Definition or Parameters of a Water Right**
    - 2. Regulation**
    - 3. Enforcement Action**
    - 4. Changes to Water Rights**
    - 5. Data Collection**

### **III. Big Horn River General Adjudication - The Wyoming Experience**

- A. Litigation vs. Negotiated Settlement**
- B. Quantification - Three Phases of Effort**
  - 1. Treaty Based Water Rights**
  - 2. Federal Reserved Water Rights**
  - 3. State Awarded Water Rights**
- C. Big Horn I (753 P. 2d 76)**
  - 1. Indian Reserved Water Rights Quantified**
    - a. PIA - Agriculture is Primary Purpose**
    - b. Quantity of Water or Water Right**
  - 2. What's Next! - Implementation and Administration**
    - a. Result of Litigation - Decree to Enforce**
    - b. Factual Setting of Wind River Basin -  
Hydrology, Lands, Water Rights**
- D. Practical Problems**
  - 1. Lack of Specifics in the Decree**
  - 2. Process of Administration - What are the "Rules of  
the Game" as Guided by Law**
  - 3. Not Enough Reliable Supply - Hydrologic Limits**

### **IV. Implementation**

- A. Establish a Process of Administration**
  - 1. Define the Role of the Players:  
State, Tribal, Water Users, Courts**
  - 2. State Process - with modification, Can and Should  
Provide Basis of Administration**
  - 3. Due Process by Administrative Agency With Equal  
Access to Courts**

## B. On-the-Ground Reality

1. Water Interest vs. Textbook Idealism vs. Historic Tradition
2. Results more Important than Egos
3. Expansive Reserved Rights Doctrine - Not "in the cards" for the second generation of issues
  - a. Law Not Clear
  - b. Negotiation is Preferred
4. Standards of Review and Technical Questions of Limitations, Injury Test, and of Factors or Attributes of Water Right Changes

## V. Litigation Update and Status

- A. Phase I - Big Horn II (November 30, 1990, 803 P.2p 61)  
Walton Rights Standing and New Process  
Reopened, 2 more years to complete
- B. Phase III - Still Going - State Awarded Water Rights  
Adjudication, 2 Years Left - (5 already completed)
- C. Phase I "Leftovers"
  1. Overlap Cancellation
    - a. PIA vs. State Law Based Water Rights
    - b. Technical Efforts
    - c. Court Review and Confirmation
  2. Change of Type and Nature of Right- Big Horn III ?!
    - a. 1989 Interim Settlement
    - b. The Summer of 1990
    - c. New Litigation Issues and Decisions to Date,  
Through May 1991
    - d. Revived Settlement Discussions - Short and Long  
Term

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