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SLIDES: Wrapping Up the Big Horn Adjudication: Lessons After 38 Years and 20,000 Claims

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2015 Martz Summer Conference

Wrapping Up the Big Horn Adjudication
Lessons after 38 Years and 20,000 Claims

Ramsey L. Kropf

Innovations in Managing Western Water:
New Approaches for Balancing
Environmental, Social, and Economic Outcomes

June 11-12, 2015

Water



“Thousands have lived without love, not one without water.” W.H. Auden

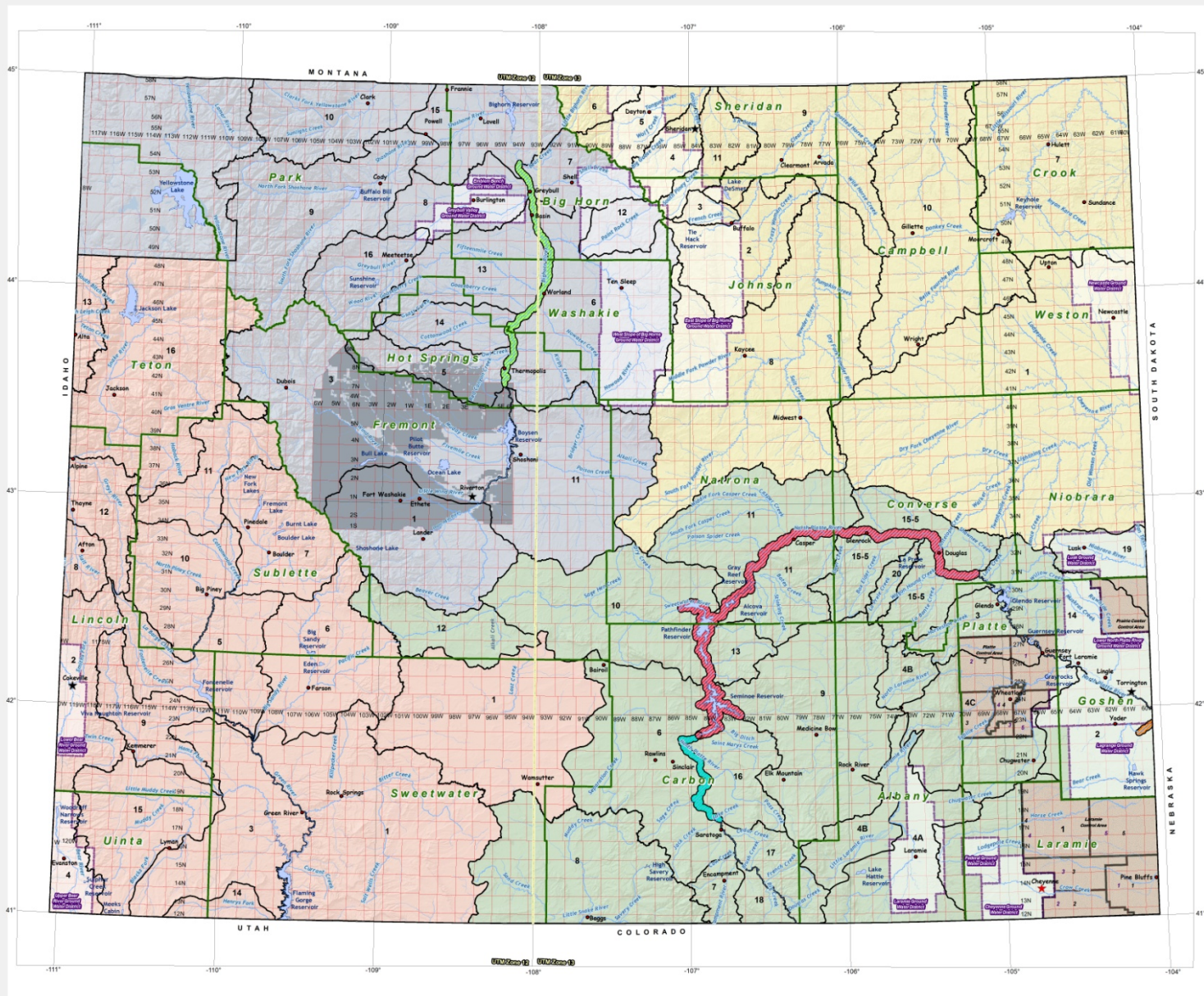
Wyoming's Statutory Adjudication - Administrative

Wyoming Water Divisions

- Water Division 1:
Torrington
- Water Division 2:
Sheridan
- Water Division 3:
Riverton
- Water Division 4:
Cokeville



Wyoming Water Division Map





Background



Balancing state and federal water rights

- * As Western states developed as sovereigns, they each developed their own ways of appropriation water allocation.
- * *Winters v. United States* (1908) – an Indian reservation may reserve water for future use in an amount necessary to fulfill the purpose of the Indian reservation
- * McCarran Amendment (1952) – Law that waives the federal government's sovereign immunity such that tribal and other federal rights can be determined in state adjudications.
- * *AZ v. CA* (1963) – Practicably Irrigable Acreage standard developed.

The Three Main Goals of Water Rights Adjudications

1. Confirm existing water rights
2. Quantify federal reserved water rights
3. Create a centralized listing of water rights

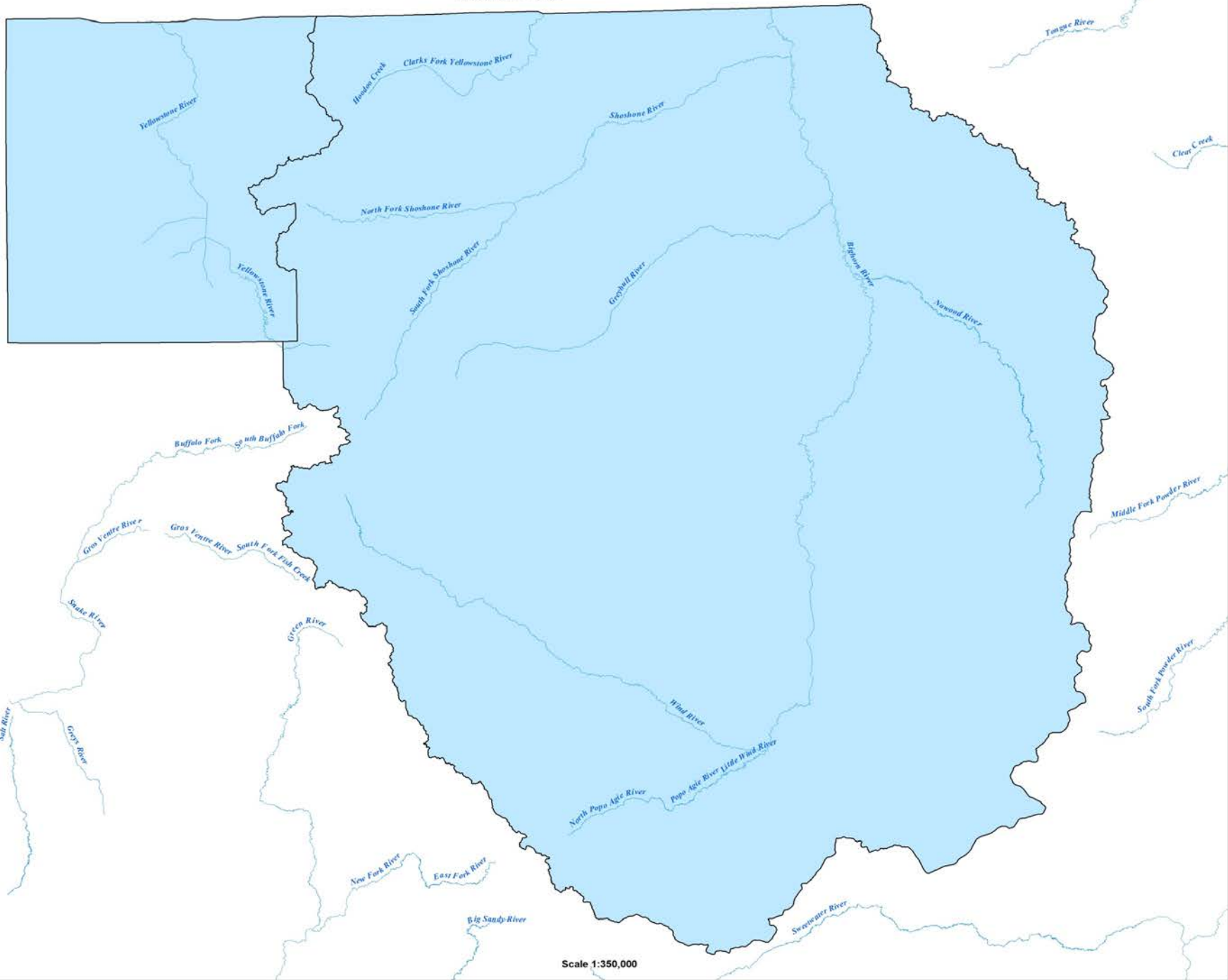


Historic Reasons for Today's Basin-Wide General Stream Adjudications

- * Unresolved social/policy issues
- * Regional Growth - Post WWII
- * Management of water across state borders (interstate apportionment concerns)
- * Unknowns with senior Indian federal reserved rights
- * Struggle between riparian and prior appropriation doctrines
- * Dominance of Federal land ownership
- * Droughts, Shortages, Aridity

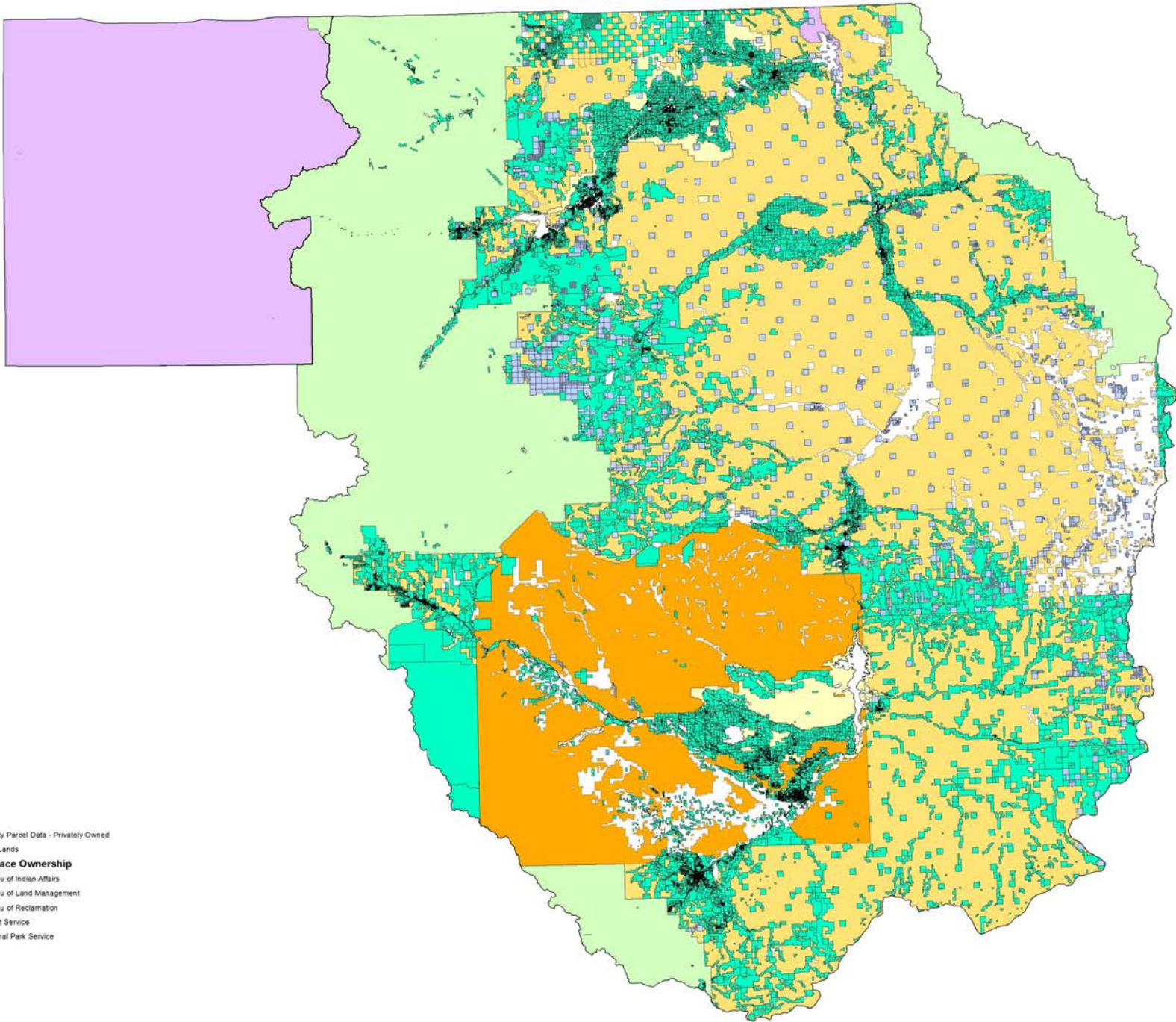


Water Division 3



Legend

Scale 1:350,000



Legend

- County Parcel Data - Privately Owned
- State Lands
- BLM Surface Ownership**
 - Bureau of Indian Affairs
 - Bureau of Land Management
 - Bureau of Reclamation
 - Forest Service
 - National Park Service

Wyoming's Experience



- * Broad Reasons for Case
- * Seven Supreme Court Determinations
- * Three Different Phases
- * Three Basic Prongs to the Legal Holdings

Wyoming's Experience



Bill Grange

Three Different Phases:

- Phase I – Adjudication of Indian Federal Reserved Rights
- Phase II– Adjudication of Non-Indian Federal Reserved Rights
- Phase III – Adjudication of State-based rights in the basin

Wyoming's Adjudication First Steps

- * Court appoints Special Master Teno Roncalio
- * Parties and Special Master divide the case into three phases
- * Critical organizational structure
- * **Phase I** – Determines all Indian Federal Reserved Water Rights
- * **Phase II** – Determines non-Indian Federal Reserved Water Rights
- * **Phase III** – Determines State Based Water Rights

Wyoming's Adjudication

- * The First Special Master's Report and Recommendation (December 15, 1982)
- * 451 page Report
- * Four years of conferences and hearings
- * 100 attorneys or so
- * 15,000 pages of transcript
- * Over 2,000 exhibits
- * Wyoming Supreme Court Op. 1988
- * US Supreme Court Op. 1989



THREE PRONGS OF BIG HORN RIVER ADJUDICATION





First Prong of Decisions

Quantification

Big Horn I

- * Case Affirmed by United States Supreme Court in 1989
- * 4 to 4 vote; Justice Sandra Day O'Connor does not participate
- * No opinion – tie vote affirms State Court decision

Second Prong – Walton Rights

- * Big Horn I
- * Big Horn II
- * Big Horn IV
- * Big Horn V
- * Big Horn VI



Second Prong: Walton Rights

Big Horn V (1995)

In re Rights to Use Water in the Big Horn River, 899 P.2d 848 (1995).

Big Horn VI (2002)

In Re Rights to Use Water in the Big Horn River, 48 P.3d 1040 (Wyo. 2002).

- Defining Limits for Walton Right Recognition
- No Super-Walton Rights
- Walton Rights are available where irrigation began when federal project water available



Third Prong Administration

- * Big Horn III
- * Five separate opinions from Wyoming Supreme court
- * Differences of opinions on meaning of the decision continue
- * Two major outcomes (?)

Third Prong Administration

- * **Wyoming Supreme Court decides "Big Horn III", In Re Big Horn River System, 835 P.2d 273 (Wyo. 1992)**
- * **Justice Thomas, concurring specially: "I am persuaded that the real battle in this case is now over sovereignty, not over water."**
- * **Justice Michael Golden's dissent: "If one may mark the turn of the 20th century by the massive expropriation of Indian lands, then the turn of the 21st century is the era when the Indian tribes risk the same fate for their water resources."**

LESSONS LEARNED FROM THE BIG HORN ADJUDICATION



- * Simplicity
- * Acknowledging Federal Rights
- * Removing Ambiguity from State Role
- * Administration in Wyoming
- * Settlements

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LESSONS LEARNED FROM THE BIG HORN ADJUDICATION



- * Dollars spent, was it worthwhile?

How do those lessons play out in other states?

IDAHO



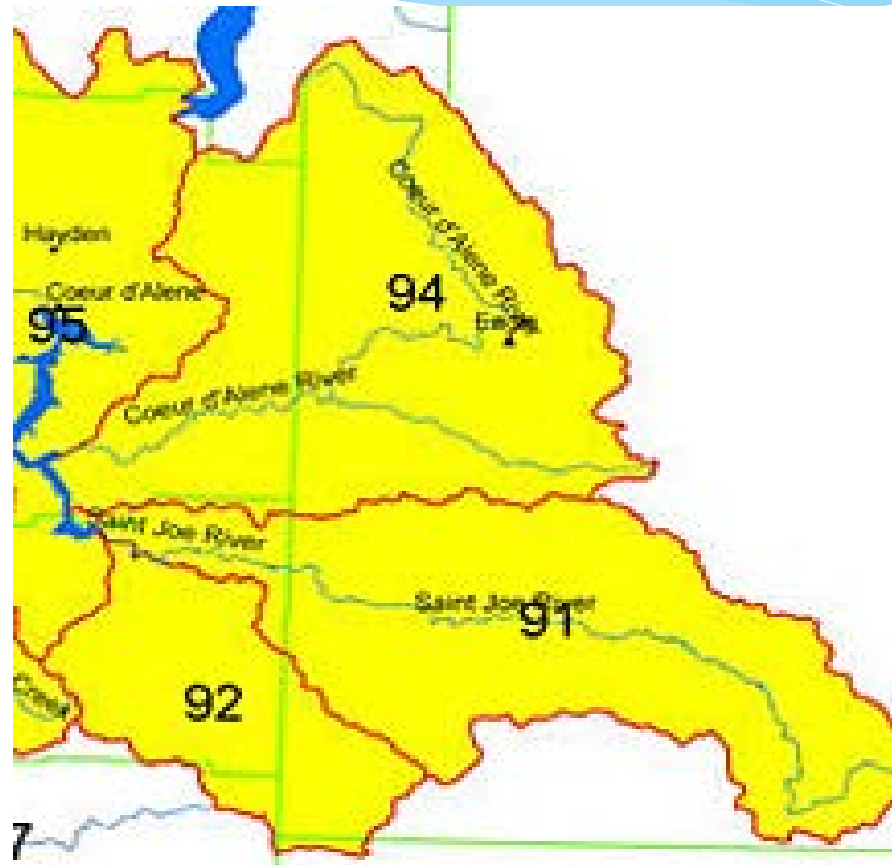
- * The Snake River Basin Adjudication (SRBA) began in 1987 to determine the water rights in the Snake River Basin drainage. The Final Unified Decree for the SRBA was signed on August 25, 2014, and that decree can be viewed at srba.idaho.gov.

How do those lessons play out in other states?

IDAHO

**Northern Idaho
Adjudication (NIA)**

**Bear River Basin
Adjudication (BRBA)**



How do those lessons play out in other states?

MONTANA



- * Reserved Water Rights Compact Commission (RWRCC)
- * Seven Montana Indian reservations
- * Other federal lands: national parks, forests and wildlife refuges, and federally designated wild and scenic rivers

Photo: Montana DNRC, www.montana.gov

How do those lessons play out in other states?

ARIZONA



- * Joseph Feller, *The Adjudication that Ate Arizona Water Law*, 49 *Ariz. Law Rev.* 440 (2004)
- * Success with Indian water rights settlements
- * Goals from Kyl Center at Arizona State University

How do those lessons play out in other states?

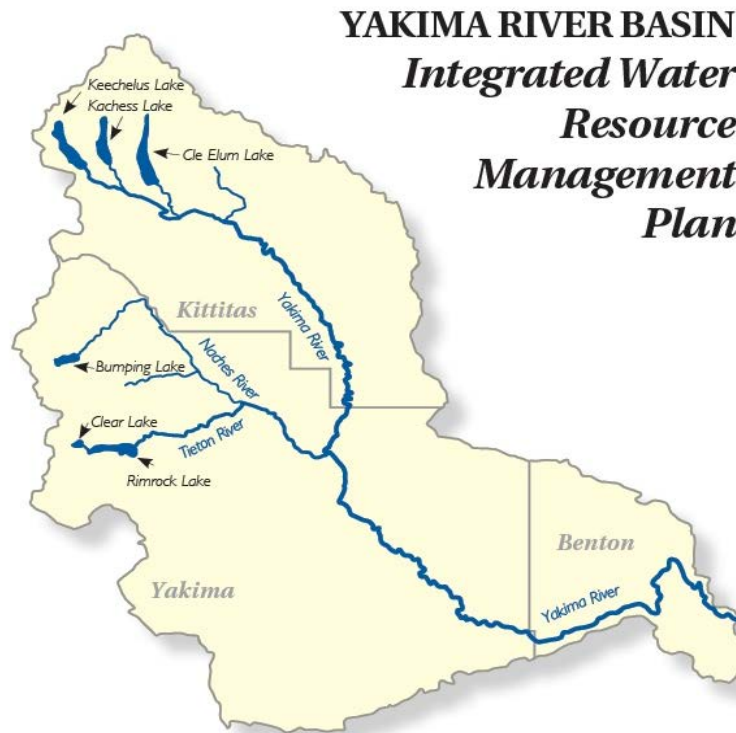
WASHINGTON



- * Yakima River Basin Adjudication sets the stage
- * Shortages are persistent features in Yakima watershed
- * Shortages are expected to continue to be persistent and could worsen

How do those lessons play out in other states?

WASHINGTON



- * Yakima Integrated Plan
- * Near Universal Support
- * Major Elements
 - * Enhanced water supply for all
 - * Environmental benefits

How do those lessons play out in other states?

WASHINGTON



- * All water rights are not numerically “quantified”
- * Irrigation is quantified
- * Fishery water is “quantified” with a narrative standard that is flexible depending on water year
- * Groundwater = open question

Photo: Yakima Basin Conservation Campaign

How do those lessons play out for other purposes?

INDIAN WATER RIGHTS



- * Multiple Indian Water Settlements
- * Real benefits for Tribes, non-tribal water users
- * Economic multiplier effect for States

Contemporary Reasons for Adjudications in 2015

- * Climate Change
- * Demographic Predictions in the West – Municipal Growth Continues
- * Water Security, Food Security
- * Environmental Concerns
- * Federal Indian Water Rights Still Require Resolution/Settlements
- * Market Activity/Shift of Agricultural Use to Municipal Use
- * Interstate Water Sharing
- * Technology Improvements



Adjudications – Good or Bad?

The Positives +



- * Addresses all interested parties in the same proceeding, provides resolution forum
- * Creates certainty
- * Creates a multi-faceted solution
- * Decision-makers are people with specialized understanding of water and water rights
- * Promotes/pressures Indian water settlements

The Negatives -



- * Time consuming! Keep in mind *Big Horn 1* began in 1977!
- * \$\$ Expensive! \$\$
- * In attempting to solve existing conflicts, adjudications can create new conflicts.
- * Narrow outcomes from court determinations
- * More negotiation and implementation lies ahead

“Will the polarization of the past half-century give way to a new era of accord and understanding? I believe so. Creative solutions to common problems will be found. The potential is limitless, needing only – as has always been the case in the West - the people to match the challenges: a society to match the scenery, as Wallace Stegner expressed it.”



- Special Master Teno Roncalio, The Big Horns of the Dilemma

Questions



Ramsey Kropf
Deputy Solicitor, Water Resources
Department of the Interior