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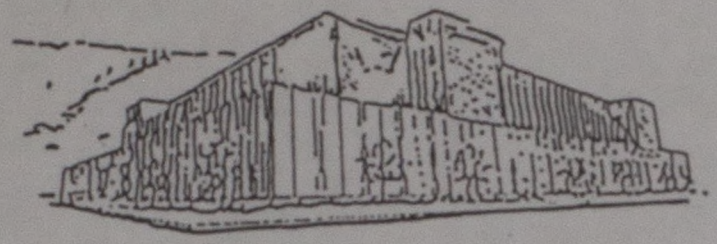

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WATER RIGHTS AND ECOLOGY ON THE WIND RIVER INDIAN RESERVATION: THE COLLISION OF HISTORIES, A TRADITION OF NEGLECT AND SUGGESTIONS FOR RESOLUTION

by

John F. Dillon

B.S. The University of San Diego, 1985

presented in partial fulfillment of the requirements

for the degree of

Master of Sciences

The University of Montana

1997

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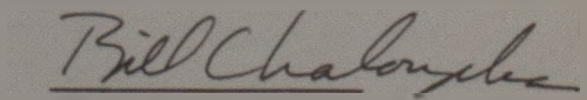

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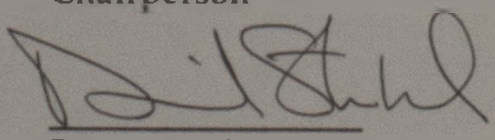

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Dillon, John F., M.S., January 1998 Environmental Studies

Water Rights and Ecology on the Wind River Indian Reservation: The Collision of Histories, A Tradition of Neglect and Suggestions For Resolution

Director: Bill Chaloupka

In 1989, in a four-to-four vote without opinion, the United States Supreme Court let stand a senior priority, reserved Indian water right for the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation. Shortly thereafter, the Tribes issued a permit requiring a minimum flow of water, known as an 'instream flow,' on the Wind River for fishery, environmental and cultural purposes. In 1992 however, a Wyoming Supreme Court majority ruled the Tribes must divert their water from its stream channel in order to use it and that the State Engineer shall administer the Tribes' water. Without means to divert, the tribes' water right has essentially been usurped.

This *Big Horn III* case obstructs United States policy of self-determination for Indian tribes and neglects federal principles protecting tribal sovereignty from state interference. The Wyoming court decision also permits irrigators to continue practices that prohibit biological integrity for the Wind River ecosystem and seriously limit cultural, recreational and economic values of the river. Wind River tribal leaders nonetheless opted not to appeal the decision because the U.S. Supreme Court had been acting unpredictably toward Indian rights in lieu of state rights.

In the early 1900's, the federal government promised water to both the tribes and non-Indian farmers of the Wind River Basin. Today, mistrust and apprehension surround water use in the basin. Farmers fear their livelihoods could be lost to eventual Indian water use while the tribes watch non-Indians dry up seven miles of river each year by diverting Indian water. Some say that with efficiency, plenty of water exists for both interests.

After twenty years and over $20 million, no court or agency has been able to resolve this water rights conflict. It is time for the diverse people of the Wind River to rise above their fears and respect one another in their inherent connection to each other and their river. With mutual respect, the Wind River watershed community can collectively and responsibly manage their water resources in an open, watershed council forum.

CONTENTS

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To everyone who shared their perspectives through interviews, thank you. I thank Geoff O'Gara for his continual guidance. For his hearty encouragement, I thank Wes Martel. My appreciation to Dick Baldes for his assistance and for his deep committment to the Wind River.

Finally, I thank Mom, Dad, and Luke for their faith.

INTRODUCTION

In 1977, the State of Wyoming sued the Shoshone and Arapaho Tribes of the Wind River Indian Reservation to determine whether the Tribes possess any water rights and if so, how much water. Thus began the first stream-wide adjudication of Indian water rights held in a state court. Finally, in 1988, over $20 million dollars later, the Wyoming Supreme Court ruled that indeed the Tribes own reserved water rights and that these rights have senior priority in the Wind River Basin. In 1989, the United States Supreme Court allowed this decision to stand with an ambiguous four-to-four vote without opinion.

Shortly thereafter, the Wind River Tribes' Joint Business Council appointed a tribal water board to regulate their newly written Wind River Water Code. Later that year, the water board issued a permit requiring a minimum flow of water, known in the West as an "instream flow," on the Wind River for fishery, environmental and cultural purposes. However, in 1992, a Wyoming Supreme Court majority ruled that the Tribes must divert their water from its natural stream channel to use it and that the State Engineer shall administer the tribes' water. This legal decision, *Big Horn III*, neglects fundamental tribal sovereign rights and obstructs federal policy of self-determination for the Wind River Tribes in order to maintain state control of water.

The State of Wyoming commenced the Big Horn cases, as they are called, almost immediately after the 1976 U.S. Supreme Court interpreted the 1952 McCarran Amendment as allowing for Indian water rights cases to be

heard in state courts. The same 1976 ruling simultaneously instructed that state courts must follow federal Indian law when adjudicating Indian water rights. The Big Horn cases indicate however, that the political nature of the Wyoming courts, and perhaps any western state court, cannot satisfactorily meet this critical mandate. Wind River tribal leaders nonetheless opted not to appeal *Big Horn III* because the U.S. Supreme Court had been acting unpredictably toward Indian rights in the name of state rights and there was too much to lose for themselves and other Indian tribes.

Twenty years of litigation on the Wind River have spawned legal confusion and community distrust rather than resolution. Extreme tension surrounded the Tribes' defense of their reserved water rights prior to 1989 and since then, non-Indian resistance to the Tribes managing their own water has run even higher. Today, the results enable non-Indian irrigation districts to dictate the flow (or lack thereof) of tribal water. The Tribes express that they need to administer their own water for their cultural and economic well-being. Meanwhile, the state argues that the tribes cannot provide the certainty that irrigators need as they fear their agricultural livelihoods could be lost to the Tribes' eventual use of their water right.

Not only has this water rights conflict proliferated social injustice, but it also perpetuates degradation of the Wind River ecosystem. Wyoming's rigid brand of water policy, the prior appropriation doctrine, has historically neglected ecology of its streams and rivers. By rejecting the Tribes' instream flow, the Wyoming court in effect prolonged chronic low flows and excessive sedimentation that prohibit biological integrity and significantly limit cultural, recreational and economic values of the Wind River.

The Shoshone and Northern Arapaho Tribes on the other hand, tend

to be more flexible in their water policy, benefiting more people. Their instream flow dedication reflects an understanding of the benefits of a healthy river, including economic advantages for both tribal members and non-Indians in the Wind River valley. In light of their destructive social and ecological consequences, the Big Horn cases exemplify the extent to which the state guards its provincial and archaic water paradigm.

Last August, representatives from the Wind River Tribes, the State of Wyoming and the federal government entered yet another round of closed-door negotiations over water issues on the Wind River Indian Reservation. Thus far no agreements have been reached. Given the collision of histories on the Wind River, a settlement amongst these officials that will appease all involved parties seems dubious.

The Wind River situation represents one of more than 50 major settlements being litigated or negotiated between tribes and western states in the last five years. Another 100 or more tribes have water rights that exist on paper, but have yet to be quantified. All together, these rights add up to a huge amount of water and a veritable time bomb for the water-scarce West. Thus, Indian water represents one of the major natural resource and civil rights questions facing the West at the turn of the century.

The current conflict between state water control and Indian water rights is a present-day reminder of the old struggle over the Land's resources between Native and more recent Americans. As of yet, no practical answers have arrived. But while potentially devastating to the region's peoples, from within the Wind River turmoil exists the opportunity to find new ways of living in the West – ways grounded in mutual respect and the genuine desire to attain a sustainable community in a semi-arid land.

This interdisciplinary study describes the history behind and current effects of the water rights dispute on the Wind River and provides suggestions for resolution. It starts by exploring the foundation of Indian reserved water rights, beginning with tribal sovereignty and federal Indian law. Next, Wyoming's water policy history and its incongruent relationship to Indian water rights are described. A commentary of the Big Horn cases, the clash of these two histories, follows a description of their proceedings. Effects to the Wind River and its peoples are illustrated through personal interviews and scientific studies. Finally, suggestions are made to resolve the water rights conflict and to restore integrity along the Wind River.

CHAPTER ONE

RESERVED INDIAN WATER RIGHTS

Tribal Sovereignty and Federal Indian Law

Understanding Indian water rights begins with an understanding of two major ideas: tribal sovereignty and the American Indians' relationship with the United States government. Westerners, for the most part, have been slow to accept these concepts because most of us were incorrectly taught by well-intentioned parents and teachers that there are two levels of government in the United States – the federal government and the states. However, there is a third sovereign, evident in the treaty clause of the United States Constitution – American Indian tribal governments.

The tribes established the first governments in what is today called the West. This is not a sentimental idea but an historical, sociological, and legal fact. Indian people governed themselves by their own laws.[1] Unlike federal and state governments, tribal sovereignty was not and could not be created by the Constitution. Inherent tribal sovereignty preexisted 1787 by several thousand years and continues today, though diminished in specific aspects. When the United States acquired land and extended its sovereignty in the West, they excluded all foreign nations, but did not exclude Indian tribes. From the beginning, the United States recognized tribal property and sovereignty.[2] In 1973, the Supreme Court reiterated, "It must always be remembered that the various Indian Tribes were once independent and

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[1] eg. Llewellyn, K.N. and Hoebel, E. Adamson, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*. University of Oklahoma Press, 1941.

[2] Charles Wilkinson Testimony, *Indian Water Policy: Hearing Before the Select Committee on Indian Affairs, United States Senate, One Hundred First Congress, 1st Session, April 6, 1989, Washington, D.C.* p.6.

sovereign nations, and that their claim to sovereignty long predates that of our own Government."[3]

The legislative, executive, and judicial branches have recognized tribal sovereignty since the early days of the United States. This recognition has developed into a special trust relationship with the tribes, reflecting the demands of history, of transfers of real property, and of commercial trade. There are competing theories as to the origin of the federal-Indian trust relationship. Most persuasive is the constitutional basis found in the Indian Commerce Clause of the Constitution, which authorizes Congress to "regulate commerce . . . with the Indian Tribes."[4] The Treaty Clause and the Property Clause also express this relationship.[5]

The federal trust duty has also been expressed in moral terms, a good faith standard held by the government in its dealings with Indians. In 1831, in *Cherokee Nation v. Georgia*, the United States Supreme Court described Indian tribes as "domestic dependent nations" whose relation "to the U.S. resembles that of a ward to his guardian."[6] In *Seminole Nation v. United States*, the Supreme Court pronounced that the government "is something more than a mere contracting party. Under a humane and self-imposed policy . . . (the federal government) has charged itself with moral obligations (to tribes) of the highest responsibility and trust."[7]

Whatever its source, the trust relationship reflects a form of both control and protection. Important to this study, this historic federal relationship with Indian tribes extends to the field of property rights, which

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[3] McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (1973).

[4] U.S. Constitution, article I, section 8, clause 3.

[5] Ibid. stat 2, clause 2 and article IV, statute 3, clause 2.

[6] 30 U.S. (5 Pet.) 1 (1831).

[7] Seminole Nation v. United States 316 U.S. 286, 296-297 (1942).

includes Indian water rights. Felix Cohen, author of the *Handbook of Federal Indian Law*, wrote that the U.S. government "is charged with the responsibility of administering trust property for the sole use and benefit of its Indian wards."[8]

Territorial governments, followed by State governments, were next in the West. The states represented the frontier – local control, diversity, and a sense of opportunity like states in the East. The U.S. etched the states out of territories, giving them broad influence in recognition of the value of government close to the people. However, from the outset, the federal government kept Indian issues away from the states – far away, as the Supreme Court put it, from local hostility and ill feeling.[9] In 1832, in one of the canon cases of Indian law, *Worcester v. Georgia*, Chief Justice Marshall recognized that in relation to a state, an Indian tribe is:

> a distinct community occupying its own territory, with boundaries accurately described, in which the laws of (a state) can have no force. . . . The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[10]

Congress has stated that nothing "shall authorize the alienation, encumberance, or taxation of any property, including water rights . . . or shall confer jurisdiction upon the State to adjudicate . . . the ownership or right . . . of such property."[11] State enabling acts also restrict state control over tribal issues. In 1981, the Supreme Court declared, "State regulatory authority over a tribal reservation may be barred either because it is preempted by federal law, or because it unlawfully infringes on the right of reservation Indians to

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8 Felix Cohen, *Handbook of Federal Indian Law* 62, The Michie Company (1982 ed.) at 596.
9 Ibid.
10 Worcester v. Georgia 31 U.S. 561 (1832).
11 25 USC §1322.

self-government."[12]

In regard to the state's ability to regulate Indian water use, the Supreme Court has stated:

> Water use on a federal reservation is not subject to state regulation absent explicit federal recognition of state authority. . . . Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in the arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.[13]

Tribes retain a right of use and occupancy upon their traditional or aboriginal lands – known as "aboriginal title" – a right only the United States can take away.[14] Also, the federal intent to reserve to tribes the means of self-support preempts state laws which would limit or interfere with the Indians exercise and enjoyment of their means of livelihood.[15]

Indian treaties are the supreme law of the land and are superior to conflicting state laws.[16] Courts have acknowledged the language barriers and unequal bargaining power between Indians and non-Indians during most treaty negotiations.[17] Accordingly, U.S. courts have constructed three canons of law presuming Indian-federal treaties should be interpreted as protecting Indian rights. First, treaties must be liberally construed to favor Indians.[18]

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[12] Colville Confederated Tribes v. Walton 647 F.2d at 51 (1981) citing White Mtn Apache Tribe v. Bracker.

[13] Ibid. at 46 and 52.

[14] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

[15] Cohen's *Handbook* at 276 citing Washington v. Fishing Vessel Ass'n 443 U.S. 658 (1979).

[16] U.S. v. 43 Gallons of Whiskey, 108 U.S. 491 (1883). State of Montana v. McClure, 127 Montana 534, 268 P.2d 629, 631 (1954).

[17] Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 675-76. (1979).

[18] E.g. Choate v. Trapp, 224 U.S. 665, 675 (1912); United States v. Walker River Irrigation Dist., 104 F. 2d 334, 337 (9th Cir. 1939).

Second, ambiguities must be resolved in favor of the tribes.[19] Third, treaties must be interpreted as the Indians would have understood them at the time they entered the treaty.[20] In identifying the purpose for which a reservation was created, it is considered that Indians need to maintain themselves under changing circumstances.[21]

Indian rights advocates argue that a treaty does not grant rights to the respected tribe(s), but is a grant of rights from them – a reservation of those not granted by the tribe to the federal government.[22] For example, upon the establishment of a reservation, tribes implicitly reserved sufficient water to fulfill the purposes of the reservation.[23] Additionally, tribes reserved the right to maintain their way of life, which may have included hunting and fishing, even where a treaty is silent on hunting and fishing rights.[24] If a tribe's sustenance included fishing, the tribe implicitly maintained the right to sufficient instream flows to maintain the fishery.[25] Aboriginal water rights carry a priority date of "time immemorial," based upon historical usage of water prior to the creation of the reservation.

These foundations of federal Indian law are critical in protecting the rights of American Indians. Established tenets of tribal sovereignty, aboriginal rights, treaty interpretation, and the U.S. trust relationship all play pivotal roles in the determination and exercise of tribal water rights. Their historical legal framework continues to affect the future of Indian water rights

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19 E.g. Winters v. United States, 207 U.S. 564, 576 (1908); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); McClanahan v. Arizona State Tax Comm., 411 U.S. 164, 174 (1973).

20 E.g. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832).

21 Colville Conf. Tribes v. Walton, 647 F.2d at 46 (1981).

22 United States v. Winans, 198 U.S. 371, 381 (1905).

23 Winters v. United States, 207 U.S., 564 (1908).

24 Menominee Tribe v. United States, 391 U.S. 404, 406 (1968).

25 U.S. v. Adair 723 F.2d at 1412-1415 (1983).

because, as described below, Indian water rights are a judicial creation.

The Winters Doctrine

The United States Supreme Court first recognized Indian water rights in the 1908 *United States v. Winters* case.[26] *Winters* involved the waters of the Milk River on the Fort Belknap Indian Reservation in Montana, wherein the U.S. brought suit to prevent a diversion of water by non-Indian irrigators upstream from the reservation. The Fort Belknap reservation had been created by Congress on May 1, 1888. The agreement made no mention about an associated tribal water right nor had the State of Montana granted a water right to the Fort Belknap Tribes or the U.S. government.

In the *Winters* decree, the U.S. Supreme Court held that the legislation establishing the Fort Belknap Indian Reservation implicitly reserved that water necessary to satisfy the purposes of the reservation.[27] The holding for the Indian water right was based on the Court's determination that in the 1888 law, the U.S. and the Fort Belknap Tribes created the reservation as a permanent homeland for self-supporting tribal residents, and to support a new way of life among the tribes, from a nomadic to a pastoral people.[28] Relying on one principle of treaty interpretation, which resolves ambiguities in favor of the Indians, the Court held that when the reservation was created, the tribes and the federal government intended to reserve enough water to fulfill the purposes of the reservation.[29] In the semi-arid climate at Fort Belknap, this included water for irrigation. Justice Joseph McKenna's statement that the Indians did not "give up the waters which made (the land)

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[26] 207 U.S. 564 (1908).
[27] Ibid at 575.
[28] Ibid at 576.
[29] Ibid at 576-77.

valuable or adequate" implies that the tribes reserved for themselves the water they did not transfer by treaty.[30] In stating its belief that Congress did not intend to take the Tribes' water, the Court noted that such an intention would have deprived the Indians of their ability to change to new habits as dictated by congressional policy and intent.[31]

In response to "equal footing" arguments by the State of Montana that the state's admission to the Union in 1889 turned all waters within its boundaries over to the state, the *Winters* Court stated, "The power of the government to reserve the waters and exempt them from appropriation under the state law is not denied, and could not be. . . . This was done May 1, 1888." The decision assigned the Fort Belknap Indian water rights a priority date of the day the reservation was created. Significantly, the Court also held that the water right thus "impliedly reserved" by the Indians continued indefinitely, even when not put to use. As will be shown later, these two principles, no loss of use and the priority date, conflict with water law of western states.

Reserved Indian water rights today provide tribes with the last substantial amount of undeveloped water in the West. The *Winters* decree then, created a powerful and controversial water right for Indian tribes, perhaps unknowingly at the time. At the same time, the Court failed to clarify a number of issues. Two important issues left unresolved by *Winters* were one, the quantity of water reserved for Indian tribes and two, uses of water associated with the reserved right. In recent court cases, including the Big Horn cases, both of these issues have revolved around the purposes, or the intent behind the creation, of the Indian reservation.

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30 Ibid at 564, 577.

31 Ibid at 564.

In the 1970's, the Supreme Court acted to define water rights reserved for non-Indian federal reservations, such as National Parks and other federal lands. In *United States v. New Mexico*, the Court used a narrow rationale to decide that reserved water rights are attached only to the primary purpose(s) for which a reservation is made and that, where water is valuable for a secondary purpose, it must be acquired in the same manner employed by any other private or public appropriator, that is, via state law.[32] Therefore, in *New Mexico*, the Court awarded water to the Gila National Forest for only those purposes listed in its establishment – timber production and watershed protection. In the establishment of the Forest, the U.S. Forest Service did not obtain water rights for the protection of fish, wildlife, or recreational values because these were secondary uses.

The Ninth Circuit Court, in *Cappaert*, applied the *New Mexico* test to Indian water rights but did so liberally, considering that specific purposes of Indian reservations were usually not laid out, that the general homeland purpose requires broad, liberal interpretation, and that reservations were created to benefit Indians, not the United States.[33] Two years later, in *Adair*, the court identified the purposes for the Klamath Reservation by analyzing "the intent of the parties to the 1864 Klamath Treaty as related in its text and the surrounding circumstances,"[34] concluding that the *New Mexico* test is "not directly applicable to Winters doctrine rights on Indian reservations."[35] The *Adair* Court found that a second purpose of the Klamath Reservation was to encourage farming. Therefore the court awarded reserved water rights for both irrigation and fishery maintenance. When determining the

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[32] 438 U.S. 696 (1978).

[33] 647 F.2d 42 (9th Cir. 1981).

[34] U.S. v. Adair 723 F.2d 1394 (9th Cir. 1983).

[35] Ibid.

reservations' purposes in these two cases, the Ninth Circuit followed federal law by liberally interpreting federal actions which established those reservations. The Ninth Circuit recognized the significant differences between Indian and other federal reservations.

Quantification of Indian Water Rights

While the specific right to water was rarely mentioned in the establishment of Indian reservations, quantification of that right was completely ignored until 1963. As a result, the size of a reservation water right has been a sharp point of contention for non-Indians and state water administrators who want to know how much water remains for them to use. Heightened competition for scarce water in the semi-arid West has increased the need for confirming Indian water rights and their dimensions.

In 1963, fifty-five years after Winters, the Supreme Court was called upon to restate and quantify reserved Indian water rights. In the landmark *Arizona v. California* case,[36] an interstate adjudication of the lower Colorado River waters, the Court followed *Winters* and stated that the tribes involved held reserved water rights effective at the time their reservations were created. The Court also agreed with the case's special master, an individual agreed upon by both parties to research the case and make recommendations to the court, that the water reserved for five Indian reservations should be measured by "the amount of irrigable land set aside within a reservation."[37] The Court stated: "enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."[38] The Court concluded that reserved

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[36] 373 U.S. 546 (1963).

[37] Special Master's Report, 373 U.S. 540 (1963).

[38] 373 U.S. 546, 600-601 (1963).

rights quantifications were to be based on the purposes of creating the particular reservation and determination of how much water it would take to carry out those purposes. The practicably irrigable acreage (PIA) standard was based on the determination that the five Indian reservations along the Colorado River were established for agricultural purposes.

In 1979, a supplemental *Arizona* decree was issued wherein the Court stated that while the consumptive use required for irrigation established the means of determining the quantity of water rights for Indian reservations, it did not restrict the use of the water right to irrigation or other agricultural application.[39] Rather, the water right may be used for recreational, commercial or industrial purposes. Similarly, the Ninth Circuit has held a PIA allocation could be used for any lawful purpose, including non-consumptive use.[40]

It should not be assumed that the PIA quantification standard will continue to apply for all Indian water rights cases following *Arizona*. In that case, special master Tuttle explained that the PIA standard is not necessarily a standard to be used in all cases and when it is used it may not have the exact meaning it holds in *Arizona*. Also, in response to later tribal intervention in the proceedings, the Court refused to recalculate the amount of practicably irrigable acreage determined in its 1964 allocations, citing the strong interest in finality. The Court gave the opinion that if the Indian water right quantity issue were reopened, "the irrigable acreage standard itself should be reconsidered."[41]

In 1989, the Supreme Court granted certiorari to the issue of the

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[39] Arizona v. California, 439 U.S. 419, 422 (1979).

[40] See Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (1981); also United States v. Anderson, 736 F.2d 1358, 1365 (1984).

[41] 51 U.S.L.W. at 4330, 4331 (1983).

Wyoming Supreme Court's application of the PIA standard in *Big Horn I*. In *Wyoming v. United States*, an evenly divided Supreme Court sustained the state court's PIA quantification of the Shoshone and Northern Arapaho Tribes' reserved water right.[42] That the Court decided to review only the use of the PIA in *Big Horn I* and that the vote was a 4-4 deadlock are curious. Justice Sandra Day O'Connor, usually restrictive of Indian rights, excused herself from the vote due to a conflict of interest.

This high court decision, in its ambiguity, has raised a clamor regarding not only the future of the PIA quantification measure but the future of reserved Indian water rights. The Court had the opportunity to confirm and/or clarify critical aspects of tribes' water rights in *Wyoming*, but forfeited. Notably, the Justices bypassed an appeal by the Wind River Tribes for an award of water based on purposes other than agricultural. The case stands as a reminder, some observers say, that because Indian water rights still rely almost solely on previous Supreme Court decisions, they remain vulnerable to future rulings that could overturn or compromise them.

Meanwhile, the interpretation that a reservation was created for a sole activity, such as "agricultural," causes problems. First, it restricts tribes' livelihoods. Secondly, it implies that tribes' activities cannot evolve with time and environmental factors. When Indian reservations were established the respected tribes were often encouraged (not required) to take up agriculture that would both "civilize" and provide sustenance for them. However, tribes did not readily adjust to this lifestyle. To this day, Indians on the Wind River Reservation and elsewhere generally resist or cannot afford to pursue agricultural livelihoods. Neither tribes nor the federal government

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[42] 109 S. Ct. 2994 (1989).

have taken initiative to construct irrigation infrastructures on most reservations.

Transferability of Indian Water Rights

Substantial debate exists as to whether or not tribal water rights can be transferred. A transfer refers to either a transfer of water use or location, for example to lease water to a downstream municipality or to change use from agricultural diversion to an instream flow for a fishery. Tribal advocates argue that use of tribal water should be left to the tribe(s) while a major argument against transferability interprets Indian water use as restricted exclusively to the interpreted purpose of an Indian reservation. Opponents of transferability also contend that a *Winters* right is attached to the land and has no existence apart from it. The Indian reserved water right should be limited to making the reservation productive, they argue, and not be aimed toward the economic well-being of the tribes.

Indian people see an opportunity to assert their water rights for improvement of economic conditions and therefore, increased independence. They reject a strictly agricultural purpose. A reserved right represents a property right that the holder ought to be able to use for maximum gain, they argue. This view fits well with the federal government's policy of self-determination that encourages Indians to manage and develop their own natural resources. If transferring a water right is necessary for economic enrichment, proponents say, tribes should be allowed to do it.

The 1979 *Arizona v. California* supplemental decree states that the method of determining the amount of the reserved Indian water right does not limit the use of the right. Restricting tribes' marketing of water decreases

the utility of reserved Indian water rights and the ability of tribes and non-Indians to move water to more beneficial uses for society and/or the environment. It is inconsistent with the movement in the West toward more efficient and beneficial uses of water. Examples of how tribal water marketing can be beneficial include:

- a tribal agreement not to develop water on a reservation for a time in exchange for a payment or other concessions so that an irrigation district can have a dependable supply.

- a contract that would compensate a tribe that agreed to stop irrigating in a drought year so that an instream flow could be maintained.

- an arrangement by which a city pays for lining ditches on a reservation or constructs a modern, water-saving irrigation system on a reservation in exchange for the water conserved.

The flexibility to enter into such arrangements represents value not only to Indian tribes but to states and their residents. Situations might arise in which the only alternative might be for a tribe to raise and invest capital developing less efficient, environmentally destructive water uses. Meanwhile, local non-Indians may be desperate for water. Freezing Indians into restrictive water uses and barring non-Indians from access to the tribes' water helps no one. Moreover, without the ability to determine the use of their own water, Indian tribes lose a quintessential aspect of their sovereignty – control of resources.

David Getches, former Director of Colorado's Department of Natural Resources and professor of Indian law at University of Colorado, suggests that restriction of Indian water use is merely a backhanded way to diminish the amount of water that tribes can use.[43] More than anything else, efforts to

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[43] David Getches Testimony, *Indian Water Policy: Hearing Before the Select Committee on Indian Affairs, United States Senate, One Hundred First Congress, 1st Session, April 6, 1989, Washington, D.C.*

restrict tribal water use reflects the competition for water in the West. States and non-Indian water users in the dry West have been struggling for ways to secure water since they arrived on the scene. That those people who settled here long before have begun to assert their rights to water is now often perceived as a threat by and to the more recent settlement.

Jurisdiction of Indian Water Rights

As competition for water resources intensifies, so rises the anxiety of states wishing to clarify the dimensions of Indian water rights. Prior to the *Akin* decision in 1976, states were frustrated by their inability to take issues of reserved water rights into state courts since Indian tribes and the federal government were protected under the doctrine of sovereign immunity. In the controversial *Colorado River Water Conservation v. United States* (*Akin*) case,[44] the Supreme Court interpreted the 1952 McCarran Amendment as Congressional intention for Indian reserved water rights to be heard in state courts. Even though the term "reserved rights" was conspicuously absent from the McCarran Amendment, the Court determined that because the amendment is "all-inclusive," such rights must have been contemplated by Congress.

Many observers, including some on the Court, have questioned that states actually have jurisdiction of Indian water rights. Several rationales argue against *Akin*. These include the federal Indian policy that traditionally insulates tribes from state interference. In 1989, Congress preserved this longstanding policy of maintaining federal jurisdiction over Indian affairs by specifically withholding jurisdiction to adjudicate, regulate or tax "any real or

[44] 424 U.S. 800.

personal property, *including water rights*, belonging to any Indian or Indian tribe . . . that is held in trust by the United States. . . ."[45]

Several other arguments against state jurisdiction of Indian water rights exist: that the McCarran Amendment did not waive *tribal* immunity even if it waived federal immunity in general adjudications; tribal reserved water rights are based on federal not state law; and reserved rights can be adjudicated independent of claims under state law. Loud opposition to *Akin* has of course come from the Indian community. Peterson Zah, Chairman of the Navajo Nation, remarked:

> Our water requirements have created a "problem" for the non-Indians. From our perspective, we have what they want and, just as was done in the past, they are looking for ways to take what we have. In our view, that is the impetus behind all the recent attention on Indian water rights, an attempt to find ways to limit our call on the water.[46]

Unlike federal court cases, state cases are decided by popularly-elected judges who may be influenced by politics. Many westerners are openly hostile to the reserved water rights because of their potential effect on state water policy and their share of the water. They oppose the decision in *Arizona v. California* giving the tribes large amounts of water and believe that the *Winters* doctrine takes established rights without compensation. Indian reserved rights are much greater in quantity than rights reserved for other federal purposes and thus risk greater hostility. State courts, accustomed to state water policy, the prior appropriation doctrine, may be persuaded to ignore Indian reserved rights which have never been used in order to protect state water

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[45] 28 U.S. C. 1360(b) (1989) (emphasis added).

[46] Peterson Zah, "Water: Key to Tribal Economic Development," in *Indian Water 1985: Collected Essays*, at 75, (Christine L. Miklas & Steven L. Shupe eds., 1986).

appropriators who are presently using water and have been for many years.

In 1968, the National Water Commission warned of state courts intruding on tribes' rights, recommending that Congress specifically designate the federal courts for presiding over Indian water rights cases, expressly in order to avoid the "suspicion of bias."[47] Subsequently, in response to the 1976 *Akin* case, Senator Edward Kennedy stated:

> Indian water rights—no matter how critical to a tribe's future, no matter how well inventoried, no matter how brilliantly defended by government attorney's, cannot receive full protection in state court forums, for the security of Indian water rights rests not only upon a full commitment from the Executive and the complete support of Congress, but also upon the availability of an independent and dispassionate federal judiciary to adjudicate these rights. The *Akin* case may make this impossible.[48]

The *Akin* Court nevertheless opened the door to force tribes into state court, the legal forum most hostile to Indian rights. Perhaps the Court was persuaded that state courts could adjudicate Indian water rights expertly and fairly, subject to Supreme Court review. Meanwhile, the Court made it clear that state courts have a solemn obligation to follow the federal law of reserved water rights. Citing *Eagle County*[49] in *Akin*, the Court stated, "questions (arising from the collision of private rights and reserved rights of the United States), including the volume and scope of particular reserved rights, are federal questions."[50] In 1983, the Court warned that any state court decision alleged to abridge Indian water rights will be subject to

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[47] Michael Leider, "Note, Adjudication of Indian Water Rights Under the McCarran Amendment: Two Courts Are Better Than One," 71 *Georgetown L. J.* 1052 (1983).

[48] *Indian Water Rights: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, 94th Congress 2nd Session*, at 2 (1976).

[49] U.S. v. District Court in and for the County of Eagle, 401 U.S. (1971) at 520.

[50] Akin 401 U.S. at 526.

"particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment."[51]

Immediately following the *Akin* decision, the Wyoming legislature spent the remaining months of 1976 drafting a bill to comply with the jurisdictional criteria established by the Supreme Court. The bill became the fastest bill enacted in Wyoming history, making its way through the legislative process and signed by the Governor in eight days. As the first general adjudication of Indian water rights in a state court, the Big Horn cases both evolved from and contribute to the debate about federalism and jurisdiction of Indian water rights.

The State of Wyoming's urgency to litigate the Wind River Tribes' water rights came from the state's urge to control water. This impetus conflicts with the Wind River Tribes' management of their own water. The following chapter describes the history behind Wyoming's water policy and its inevitable clash with reserved Indian water rights.

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51 Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. (1983) at 571.

CHAPTER TWO

WESTERN WATER DEVELOPMENT: THE COLLISION WITH INDIAN WATER RIGHTS

> The unpeopled West, naturally, was where a great many immigrants hoped to find their fortunes. They didn't want to hear that the West was dry. Few had ever seen a desert, and the East was so much like Europe that they imagined the West would be, too. A tiny bit semiarid, perhaps, like Italy. But a desert? Never! They didn't want to hear of communal pasturelands – they had left those behind, in Europe, in order that they could become the emperors of Wyoming.
>
> Marc Reisner, in *Cadillac Desert*[1]

As gold was discovered in California in the late 1840's and 50's, the onrushing miners soon learned that the West is in fact much drier than the East. As a result, they decided that a new water policy was needed, for mining – that is, society – could not prosper unless water could be guaranteed in sufficient quantities. Thus, these California miners established the prior appropriation doctrine.

Just as the first miner to stake a claim was accorded the right to work a piece of land, so too was the first user of water considered to have an absolute right of priority. The first legal decision of this new water policy occurred in the 1855 California Supreme Court decision *Irwin v. Phillips*.[2] That court found for a miner who had taken water before another miner, dismissing the claim that a water course must be allowed to flow in its "natural channel."[3]

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[1] Marc Reisner, *Cadillac Desert*, (Viking Penguin, Inc., New York, NY, 1986) at 48.

[2] 5 Cal. 140 (1855) cited in Cohen's *Handbook of Federal Indian Law*, at 576.

[3] Ibid at 145.

Rather, the opinion stated, the "courts are bound to take notice of the political and social condition of the country which they judicially rule," and affirmed and protected "the rights of those who by prior appropriation, have taken waters from their natural beds and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers."[4] Eleven years later, Congress began its policy of deferring to the miners' regional water policies in Section 9 of the Mining Act of 1866.[5]

The slogans, "first in time, first in right," "first in right, first in might" and "use it or lose it," express both the simplicity and rigidity of the prior appropriation doctrine. The first user gets an assured amount of water as long as it is available. In times of scarcity, junior users are left dry in favor of senior appropriators, the most junior appropriator being cut off first. If a rightholder stops using her water, she loses the right. There is no sharing of water. There exists no incentive to keep water in a watercourse. A stream or lake can be dried up entirely to accommodate rightholders, which has occurred on hundreds of western rivers and streams, including the Wind River. These guidelines express the belief by state administrators that the wisest policy is a passive one; decisions on water use are best made by the private water users themselves.[6]

Since the crafters of the prior appropriation doctrine's interest was gold, not the natural flow of rivers, the prior appropriation doctrine exists not to regulate water use but only to issue permits and enforce the rights of record. Despite statutes aimed against waste, state engineers leave water use after diversion to the rights holders, so long as the water goes to a specified so-

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[4] 5 Cal. 146 (1855) cited in 19 *Ecology Law Quarterly* at 554.

[5] Act of July 26, 1866, chapter. 262, section 9, 14 Stat. 251, 253 (codified at 30 U.S.C. sec. 51).

[6] Charles Wilkinson Testimony,*Special Hearing on Indian Water Policy, Select Committee on Indian Affairs, United States Senate*. April 6, 1989, at 66.

called beneficial use. Water policy agents, then, purely enforce private rights to water.

Formal administrative structure of the prior appropriation doctrine started in Wyoming. Elwood Mead, along with John Wesley Powell, was a visionary of early western water politics. After being denied his dream of state control of water in Colorado, Mead moved to Wyoming. As a principal author of Wyoming's constitution in 1890, Mead convinced his colleagues there was great potential in state ownership of water. As a result, the state's constitution includes the statement, "The water of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the State, are hereby declared to be the property of the State."[7] Mead also convinced the state to invest powers of water management in the hands of a single official, the State Engineer, a job Mead himself soon took.

Under Mead's guidance, the position of Wyoming State Engineer resembled a water czar, and still does today. In control of all waters within the state, except for water belonging to Indians and federal reservations, the position plays a pivotal role in the state's growth. Once appointed, the State Engineer has the opportunity to become more or less a permanent fixture in state government from acquiring yet more power and influence.

Wyoming's constitution was the first to include statutes outlining principles of the prior appropriation doctrine. This began a succession of statutes in other states such as California, Colorado, Arizona and Idaho, between 1890 and 1919.[8] Wyoming however, continues to be the most zealous proponent of the prior appropriation doctrine. To the extent that the

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[7] Reisner, *Cadillac Desert*, at 2.

[8] Charles Wilkinson, "Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine," 24 *Land and Water Law Review* (1989) at 10.

state attempts to manage water, it does so with the doctrine's original principles in mind. Wyoming's doctrine maintains that the best way for an upstream state to protect its water interests against downstream claims is to store water and put it to "beneficial" use, which historically has required removing it from its natural channel.

The first white settlers of the West were rugged frontiersmen, but most American settlers wanted to participate in the more traditional fashion of owning land and farming. The government agreed, deciding that the continent should be "settled" by more reliable citizens.[9] Thus, for 150 years, federal policy gave cheap or free land to the small farmer looking for a new life on the frontier. The Homestead Act of 1862 for example, gave away 160 acres of land to people who promised to reside on the property for five years and make improvements.[10]

This next group of settlers following the miners to the expanding west – farmers and ranchers – also saw water as their essential resource. In the colder and drier states west of the 100th meridian however, annual precipitation averages less than twenty inches, the amount of water required to farm with rainfall only, or dry-farm. A farmer could hardly subsist on these dry lands without irrigation. The prior appropriation doctrine could provide ample water for early-arriving farmers but as more and more people moved West, it became clear that the doctrine alone could not provide enough water.

In 1878, John Wesley Powell, an opponent of federal funding for dams, wrote that publicly-funded reservoirs would be needed to make the desert

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9 The Federal Government still needed to secure its territory, safe from the threat of a European attempt to acquire or settle it. For example, Russia occupied Fort Ross, about one hundred miles north of San Francisco as late as 1841. 19 *Ecology Law Quarterly* at 549.

10 Ibid at 550.

bloom. Powell warned that the arid lands of the West should never be expected to support large numbers of people and suggested that boundaries of all kinds be established in accordance with watershed boundaries. Powell's wisdom was ignored. In 1902, the Federal Reclamation Act was passed, authorizing federal funding for most of the big irrigation projects that today dam most western rivers. Homestead entries boomed, peaking in 1910 (two years after the Winters decision), as new waves of settlers moved west to reap the benefits of nearly free farmland and water. On the Wind River Indian Reservation, Congress essentially forced the Arapahos and Shoshones to sell off part of their reservation before encouraging homesteaders to acquire the land, enticing them with the promise of cheap water from federal water projects.[11]

The Reclamation Act culminated a twenty-five year effort by a well-financed eastern and western business lobby. From its inception, the Act provided subsidies in the form of interest free loans. By 1974, the Bureau of Reclamation had invested six billion dollars in completed dam projects. A study in 1980 by the Interior Department's Office of Policy Analysis found that per-acre subsidies ranged from "57 to 97 percent."[12] On the Wind River Reservation, the largest irrigation district and a non-Indian project, Midvale, pays the Bureau of Reclamation $1.25 an acre-foot for their main water-supply system while it cost BuRec $35 an acre-foot.[13]

In *Command of the Waters: The Iron Triangle, Federal Water Development and Indian Water*, Daniel McCool writes that the enormous

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11 Andrew Melnykovych, "Battle of the Big Wind is Over!," *High Country News*, August 27, 1990.

12 Monique C. Shay,19 *Ecology Law Quarterly*. Comment, "Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of the Relationship Between the Winters Doctrine and Federal Water Development in the Western United States," (1992). at 552.

13 Geoff O'Gara, "Waterless in Wind River?," *High Country News*, August 27, 1990.

sums of money spent by the Army Corps of Engineers and Bureau of Reclamation, never recovered by the federal government, represents the success of a powerful "iron triangle."[14] This triangle comprises western water interests and state agencies in one corner; federal water development agencies in another; and key congressional subcommittees on these issues controlled by western congressmen in the third corner. A mixture of industrial clout, state water politics, a lack of concern by eastern political interests, and the desire of westerners to be left alone all have combined to perpetuate this triangle. Observing the unusually tight relationship between the Army Corps of Engineers and Congress, Secretary of Interior Harold Ickes, in 1951, called the Corps "the most powerful and most pervasive lobby in Washington."[15]

This cozy triangle obstructed consideration of Indian reserved water rights while creating a system of outside funding and internal control, the best of possible worlds for dam builders and irrigation interests. Congress provided the money while the water was distributed according to state water law, without regard to Indian water interests. Special water districts, quasi-governmental organizations created under state law and usually dominated by irrigation interests (and often L.D.S. church leaders), to this day administer the West's subsidized water. These irrigation districts deliver about one-half of all water in the West. There are three irrigation districts managed by non-Indians on the Wind River Indian Reservation, on which the Wind River Tribes historically had no influence (until the Big Horn cases).

Ironically, it was during the period that homesteaders and the prior appropriation doctrine were spreading through the West that the U.S.

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[14] Daniel McCool, *Command of the Waters: Iron Triangle, Federal Water Development, and Indian Water* 4 (1987) at 5.

[15] Ibid at 86.

Supreme Court established the Winters doctrine. *Winters* announced in 1908 that not all water in the West belonged to the states and their settlers but that potentially very large amounts of water belonged to Indian tribes. Still, federal agencies continued to create incentives for people to move West, promising plenty of water as state agencies cultivated the prior appropriation doctrine often dependent upon Indian water to satisfy water rights.

Besides the problem caused by state water rights that still rely upon Indian water is that the prior appropriation doctrine conflicts with key principles of reserved Indian water rights. The prior appropiation doctrine primarily aims to provide certainty in times of water shortage for its high-priority right holders. Since Indian water rights cannot be lost through non-use, they disrupt this certainty. Tribal water rights usually consist of large amounts of water and because most Indian reservations were established before western states, they have priority over the majority of state right holders. Indian water rights are (supposedly) not dependent upon or governed by state law, thus state definitions of "beneficial use" of water do not apply. Also, Indian water rights may exist where there is no Indian property attached.

As such, Indian water rights create uncertainty for white water users and may pose hardship for these users who have relied upon otherwise unchallenged priority dates. State water right holders presume they will derive few benefits from Indian water use and therefore express hostility toward recognizing Indian water rights. They generally see Indian water rights as a malign presence in the West.

White farmers and ranchers built their operations and their homes on water rights they believed to be certain. They refer to decrees issued by state

judges to that effect. Irrigators argue that tribal reserved water rights contradict federal policy for them to settle out West, a policy with which they identify their history and culture. They view Indian water rights as an intrusion in their management of water. In a recent interview, Craig Cooper, irrigator and Deputy State Engineer for Wyoming's Division III (which includes the Wind River) said:

> You become accustomed to certain patterns in the way things work logistically and logically; and your ability, I guess, to really operate the system the way it is intended to operate, really gets skewed when a new wrinkle like the 1868 (Indian) priority is thrown in. Any water rights system has to have somebody in charge. And in Wyoming, that has historically been the state engineer's office. That's the way the (state) constitution's set up.[16]

Western water development, then, has relied largely on its ability to minimize reserved water rights claims and to divert from water courses as much as possible under state rights. As a result, the Bureau of Reclamation has always interpreted reserved water rights narrowly. This inevitably led the Bureau of Reclamation into conflict with the Bureau of Indian Affairs, both of the Department of Interior.

The Interior Department then, has espoused two water doctrines placed in direct conflict over scarce water: the Winters Doctrine and the Prior Appropriation Doctrine. It has not been an equal contest. Those in the federal government who favor state control over water rights hold more influence than those who advocate and rely upon the Winters Doctrine. As Paul Eckstein, general counsel of the Navajo Tribe stated, "When the two bureaus are in conflict – and they often are – the prior and paramount water

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16 Craig Cooper, interview by author, video, Division III State Engineers Office, Riverton, WY, April 21, 1997.

rights of the Indian give way to the Anglo's need for more land, water, and power."[17] The Bureau of Reclamation denies these allegations, arguing that its work aided Indians on a number of reservations.[18]

The federal government has spent billions of dollars to store, divert, and deliver millions of acre-feet of water, often belonging to Indians, under the aegis of state water law. In contrast, relatively little has been spent to deliver water for Indian purposes. In 1919, the Commissioner of Indian Affairs stated, "There are millions of acres of irrigable lands in Indian reservations" and declared his intent to irrigate them. Seventy-five years later, only 7 percent of that land had been irrigated.[19]

On the Wind River Reservation, $88 million has been appropriated for the non-Indian Midvale Irrigation District by the Bureau of Reclamation contrasted with roughly $4 million on the BIA project across the river. Gary Collins, Deputy Tribal Water Engineer for the Wind River Tribes, said, "You have the Interior Department making decisions on both projects where they're so far apart in terms of a dollar per acre enhancement value. The contrast would be $100 an acre on the irrigation project of the BIA, and $1000 an acre on the BuRec. I find that a very strong conflict of interest, in how those dollars were appropriated and projects established for the future of this community."[20]

Following the *Winters* decision, policy makers in the Justice Department and the BIA began to realize that the 1908 decree would never be implemented unless steps were taken to emphasize the government's

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[17] U.S. Congress, Senate 1974:80.

[18] McCool, *Command of the Waters* at 171.

[20] Ibid at 247.

[20] Gary Collins, interview by author, video, Wind River Tribal Complex, Ft. Washakie, WY, April 22, 1997.

commitment to Indian water rights. In 1913 a bill was constructed that reiterated the major tenets of the *Winters* decision. This generated little support however, even among proponents of the measure. The bill was never introduced. Assistant Commissioner Merritt decided that the Bureau of Indian Affairs would have more success if language protecting reserved water rights was written instead into the appropriation bill that funded the Indian irrigation projects. Congressman Mondell of Wyoming, a leader of the reclamation movement and an ardent opponent of reserved rights, objected. The Senate stopped the provision led by Democrat Henry Lee Myers of Montana.[21] The Senator agreed to accept the 1914 amendment if Indian reserved rights could be limited to three years; if by that time they had not been put to beneficial use the right would be lost. Vermont's Senator Page responded to Myers:

> These appropriations may not be wrong if we will protect the Indian's rights, but, in my judgment, Mr. President, we are not doing this. We substantially say to the Indian 'You must be a farmer. You must make beneficial use of this water.' The Indian says, 'I have no money; I have no horses, and I have no wagons: I have no plows. Help me to the wherewith and I will do it.' Our reply to him is substantially this: 'No, sir; we are going to tie your hands. We will not give you anything to work with; and yet if you do not make beneficial use of this water within three years'–that is the amendment offered by the Senator from Montana–'your rights under these irrigation projects may be taken away from you.'[22]

This debate over the proposed reserved rights amendment to the Indian appropriations bill exemplifies the general Congressional attitude

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21 McCool, *Command of the Waters* at 54.

22 Ibid at 55.

toward Indian water rights. Congress has failed to signify a clear intent in regard to Indian water rights other than to stay away from the issue. As a result, the Winters Doctrine still lacks the program legitimacy of a statutory law. There were plenty of opportunities to legislate the *Winters* doctrine out of existence or officially recognize it. Congress did neither, preferring to leave the broader question of Indian water rights to the courts. Senator Wallop of Wyoming recently complained that "an almost complete lack of national legislation on Indian water rights has hampered the search for a solution (to the conflict of water rights)." In 1979, the state water engineer for New Mexico stated, "Historically, Congress forgot to address the issue (of Indian water rights). Today the potato's gotten so hot Congress wouldn't touch it with a ten-foot pole."[23]

The controversy brought on by Indian water rights in the face of western water development has resulted in a steady pattern of bias against Indians by western politicians. Since Indians are a minority, it is politically suicidal for western senators and congress members to support measures asserting Indian water rights. Advocates of Indian rights have come almost exclusively from non-western states, who can risk political activity in an issue distant from their constituents.

The courts then, have been left to protect Indian water rights. The Justice Department adopted what resembles an affirmative action approach, one in which the prejudice of historical conditions must be taken into account. As the subsequent four thousand or so cases attest, the courts have generally continued to make an effort to protect Indians, sometimes in the face of great adversity. With the absence of congressional and/or executive

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[23] Ibid at 61.

branch initiative however, the judiciary faces difficult obstacles in its role of upholding Indian water rights. This problem is exacerbated when funding is required, as in the case of Indian water projects. Congress can influence the implementation of Supreme Court decisions through legislation or lack thereof, especially in neglecting to provide budgetary support.

Federal courts have developed the doctrine of reserved water rights largely without clarifying, explaining, or attempting to compensate for its impact on non-Indian water rights and water development. As explained in the first chapter, no substantial effort was made to determine the extent of Indian water rights until the 1976 case of *Arizona v. California*. The development of two conflicting water rights doctrines in practically total isolation from each other means that neither was designed to accomadate the needs of the other. The two policies have been on a collision course for over fifty years.

The reclamation program went ahead in a vacuum, never looking to respect Supreme Court-established water rights of Indian tribes. Western water issues cannot be settled now or in the years to come without resolving this conflict as summarized by the National Water Commission in 1973:

> Following Winters, more than 50 years elapsed before the Supreme Court again discussed significant aspects of Indian water rights. During most of this 50-year period, the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the Winters doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior – the very office entrusted with protection of all Indian rights – many large irrigation projects were constructed on streams that flowed through or bordered Indian

> Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects. . . . In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.[24]

After the Supreme Court decided in 1976 that state courts could hear stream-wide adjudications of Indian water rights, the incongruent histories of Indian water rights and western water development could no longer avoid one another. The State of Wyoming immediately took the opportunity to confront the Wind River Tribes' water rights in its state courts. The following chapter outlines a brief history of the Wind River Indian Reservation leading up to and including the "modern-day Battle of the Big Horn," known as the Big Horn cases.

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[24] National Water Commission, *Water Policies for the Future*, (1973) at 474-475.

CHAPTER THREE

THE BIG HORN CASES: BACKGROUND AND PROCEEDINGS

Brief History of the Wind River Indian Reservation

At the turn of the 17th century, the Eastern Shoshone hunted bison on the land that now represents eastern portions of Utah and Idaho, extending to the Powder River basin in northeastern Wyoming. The Eastern Shoshone primarily ate bison, and fish from the Wind River was the second principle food between late February and early June.[1] Hunting in the Powder River basin brought competitive contact with the allied Northern Arapaho and Sioux.[2] The Northern Arapaho had been displaced by Anglo settlement from the Red River area of Minnesota and relocated to an area that included the Powder River basin. The Northern Arapaho depended upon bison and other game for survival on the high plains.[3]

The Shoshone held the balance of power between the Great Basin and the High Plains. As a powerful enemy of the Sioux, the Shoshone were receptive to alliances with the United States. The Shoshone stand as the only Great Basin tribe never to be militarily defeated or altogether displaced from their homelands.[4]

In the early 1800's, explorers, traders and trappers began to infiltrate the region but neither group immediately interfered with the other. In 1858, the

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1 Tom Kinney, Comment, "Chasing the Wind: Wyoming Supreme Court Decision in Big Horn III Denies Beneficial Use for Instream Flow Protection, But Empowers State to Administer Federal Indian Reserved Water Right to the Wind River Tribes," 33 *Natural Resources Journal* 844, (1993).

2 Ibid

3 Ibid at 845.

4 Ibid.

Eastern Shoshone's Chief Washakie asked to reserve land for his tribe on the Henry's Fork River in northeastern Idaho. The request received little attention, but a later request by Washakie led to the establishment of reserved land for the tribe in 1865, whereby over 44 million acres were defined as Shoshone land.[5] This reservation included areas of today's Yellowstone National Park.

The history of the Wind River Indian Reservation typifies the pattern of cession and diminishment that occurred on Indian lands in the 19th century. Three years after its establishment, the government dramatically reduced the reservation to accommodate more western settlement in the Second Treaty of Fort Bridger in 1868. The Tribe relinquished its claims to land in present-day Colorado, Utah, and Idaho and retained control of just over 3 million acres in Wyoming. This treaty established the Wind River Indian Reservation.

The reservation originally was established for the Shoshone and Bannock Indians, but in 1878, despite a history of cultural and tribal differences, the Northern Arapaho tribe was moved onto the reservation when settlers displaced them from their lands.[6] Though the Eastern Shoshone and Northern Arapaho were enemies, Washakie allowed the Northern Arapaho to stay on the Wind River Reservation until they had recovered from military defeat and imprisonment.[7] While Washakie intended for the stay to be temporary, the Northern Arapaho settled permanently on the Wind River Indian Reservation.

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5 Ibid.

6 Michelle Knapik, "Who Shall Administer Water Rights on the Wind River Reservation: Has Wyoming Halted an Environmentally Sound Indian Water Management System?" 12 *Temple Environmental Law and Technical Journal* 233 (1993).

7 Ibid.

The Wind River Indian Reservation makes up the nation's third largest reservation, today encompassing approximately 2.2 million acres. Topographically, the reservation varies from low desert badlands to alpine peaks and valleys, occupying the best-watered portion of Wyoming. The Wind River bisects the reservation before its name changes to the Big Horn River (the Big Horn and the Wind River are one and the same) at the "Wedding of the Waters." The Big Horn flows north along the eastern boundary of the reservation before flowing into Montana and the Yellowstone River.

The Shoshone and Northern Arapaho Tribes at first sustained themselves on the reservation by their traditional bison hunting, but as the animals' numbers decreased, the Indians made efforts to take up agriculture.[8] The tribes failed in agriculture and sold land back to the United States. In 1897, the Indians ceded 55,000 acres and in the 1905 Second McLaughlin Agreement, the Tribes were forced by Congress to cede approximately one and one-half million acres of land north of the Wind River for cash to develop the reservation. The United States agreed to sell the land as trustee for the Indians if buyers appeared, but would not guarantee to find a purchaser. The land presently owned and irrigated by non-Indian ranchers was bought at this time. By the time the Big Horn cases began in 1977, all of the unsold lands ceded in 1905 had been returned to the tribes. However, the tribes contend that the sold lands, as well, belong to the tribes.

In 1888, Elwood Mead had moved from Colorado and become the territorial engineer of Wyoming. As discussed above, the state adopted Mead's approach to water management in which the State Engineer, through

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[8] Big Horn I, 753 P.2d at 83.

the Board of Control, functions as a quasi-judicial administrator of prior appropriation water rights. In the meantime, water development and homesteading enticed settlers to farm the arid lands of Wyoming.

Within and adjacent to the reservation today live close to 30,000 people. Shoshone Tribal Chairman John Washakie said there were between 5,000 and 6,000 tribal members in the late 70's and today there are over 10,000. "This is home," Washakie said. "We're not moving. As the reservation [population] grows, we'll need more room."[9] There are about 24,000 non-Indians living on the reservation. Most of the farms on the reservation are non-Indian.

The tribal headquarters is located at Fort Washakie, but the largest town on the reservation is Riverton, on the confluence of the Wind and the Beaver rivers, which hosts a community college. Most residents of Riverton are non-Indian. Some say that without enough water for non-Indian irrigators, Riverton will become "a ghost town."[10] Just south of the reservation lies the town of Lander, international headquarters for the National Outdoor Leadership School. The craggy peaks and broad shoulders of the Wind River Range attract hikers, hunters, fishers, climbers and other recreationists to reside or visit.

The current economic condition on the reservation is poor. Although the reservation holds minerals, by the mid-1970's declining yields from oil and gas wells had decreased the tribe's largest source of revenue. A 1976 economic development plan for the reservation suggested that increasing irrigated agriculture, mining gypsum and uranium, or developing a

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[9] John Washakie, interview by author, Wind River Tribal Complex, Fort Washakie, WY, March 23, 1995.

[10] David Perry, editor, *The Riverton Ranger*, interview by author, Riverton, WY, March 17, 1994.

recreation and tourism industry centered around blue-ribbon trout fishing on the Wind River might provide a needed economic boost.[11] Twelve years later, a survey found that the average tribal family income was only $6,277, with forty-six percent of the households having no income. The overall unemployment rate amongst tribal members was seventy-one percent. The lack of basic transportation, garbage services, adequate housing, medical care, and supervised recreation for children remain serious problems.[12] About 70 percent of the tribal population is under 21 years of age. If young people wish to stay on the reservation, the creation of jobs is essential.

The facts and events described in this and previous chapters have led to pivotal debate regarding water control in the Wind River Basin. When the Wind River Tribes expressed discontent about expansion of non-Indian water use within the reservation, the state government became concerned.[13] After the 1976 *Akin* decision opened the door for states to sue Indian tribes in state courts, the Wyoming Legislature enacted a general stream adjudication statute as soon as it could, which was applied two days later to Water Division No. 3.[14]

The Big Horn Cases

The State of Wyoming initiated the general adjudication of water rights for the Big Horn River system on January 24, 1977. Hoping to quantify the rights of more than 20,000 water users, especially the Shoshone and Northern Arapaho Tribes, the state filed a complaint for general adjudication

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11 Walter Rusinek, "A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine," 17 *Ecology Law Quarterly* 355 (1990) at 381.

12 Ibid.

13 Ibid.

14 Wyoming Statute 1-1054.1 (enacted Jan. 22, 1977).

in state district court. The United States attempted to move the suit to federal court, but pursuant to the McCarran Amendment, the United States District Court remanded the adjudication to state court.[15] After arguing that the United States would not adequately represent their interests, the Tribes were allowed by the state district court to intervene in the adjudication.

In Big Horn I, the state district court judge appointed a special master to determine the scope of the Wind River Tribes water right. Teno Roncalio, a former U.S. Representative, signed his 451-page report on December 15, 1982, covering four years of conferences and hearings, involving more than 100 attorneys. The report included 15,000 pages of transcripts and over 2,300 exhibits.[16]

Special master Roncalio concluded that the Wind River Tribes own a reserved water right based on the establishment of the reservation as a permanent homeland for the tribes, in accordance with the Winters Doctrine and *Arizona v. California*.[17] To provide for the their permanent homeland, Roncalio awarded tribal water for irrigation, stock watering, fisheries, wildlife, aesthetics, mineral, industrial, domestic, commercial, and municipal uses.[18]

The State of Wyoming, the United States, the Shoshone and Arapaho Tribes, and numerous private parties objected to the special master's report. Following these objections, on May 10, 1983, District Judge Joffe affirmed a

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15 Big Horn I, 753 P.2d at 84.

16 Ibid at 85. The special master noted that "in my lifetime, except for the Federal anti-monopoly cases recently dismissed or settled, and according to the memory of most counsel herein, no case in our experience has carried so many hours and so many thousands of pages of discovery proceedings involving unprecedented expense to parties on all sides." Casenote, 30 *Nat. Res. J.* 442.

17 The Special Master applied the legal principle from Winters v. United States, 207 U.S. 564 (190 (1908), stating that a reserved water right consists of water necessary to fulfill the purpose of the reservation. See Teno Roncalio, Special Master, *Report Concerning Reserved Water Right Claims By and On Behalf of the Tribes of the Wind River Indian Reservation, Wyoming,* at 692a (Dec. 15, 1982) (Civil No. 4993) (hereinafter Roncalio Report).

18 Ibid at 692a-700a.

reserved water right for the Wind River Tribes, awarding them just over one-half million acre-feet[19] of water from the Wind River system. Judge Joffe disagreed that the reservation had been established as a permanent homeland for the tribes. He contended that rather than to create a permanent homeland, the federal government desired only "to convert the Indians from a nomadic to an agrarian people."[20] The Judge quantified the tribes' water rights on the basis of this "agricultural purpose" using the PIA standard. The Judge also decreed, "The 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."[21]

The State of Wyoming and the Tribes moved to alter or amend Judge Joffe's 1983 decree. The state made motions regarding priority dates of reacquired lands, diversions for domestic and livestock watering uses, corrections of math calculations, redefinition of boundaries, and off-reservation lands. The Tribes made motions to include groundwater and a quantity of water for instream flow and fish habitat and to eliminate conditions for water storage. On June 8, 1984, District Judge Alan Johnson issued an Amended Judgment and Decree (Judge Joffe had retired). While denying the Tribes' motion for an additional quantity of water for instream flow, Judge Johnson stated:

> The reserved water right quantified by Judge Joffe does not deny the Tribes the ability to regulate in-stream flows in order to maintain what may be considered necessary water for optimum fish habitat. . . . The Tribes may

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19 An acre-foot of water is enough to cover one acre of land with water a foot deep - approximately 326,000 gallons.

20 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 p.62-63, May 10. 1983 *amended* May 24, 1985 (Docket No, 101-324).

21 Justice Macy, Big Horn III, 835 P.2d 273 (Wyoming 1992) at 277.

> seek to dedicate their stream flows for fish habitat by using water reserved to them by the decision.[22]

The implied reservation of water was held to include sufficient water to meet related stock water and domestic needs, but excluded water for industrial, mineral, municipal, fisheries, wildlife, and aesthetic purposes. The district court declined to find a reserved right to groundwater and denied a right to export water off the reservation.

All parties appealed the 1985 decree to the Wyoming Supreme Court. The Wyoming Supreme Court affirmed the state district court's award of reserved water rights to the Tribes in *Big Horn I* on February 24, 1988.[23] The court agreed that the reservation was established solely for agricultural purposes and quantified the water right based upon agricultural, livestock, municipal, domestic, and commercial water uses.[24] There was no reservation of groundwater for the tribes nor exportation of water from the reservation. Instream flow for a fishery, water for mineral and industrial development, wildlife, or aesthetic uses were not considered in the quantification.[25] Additionally, the court affirmed an award of reserved water for future projects, based on a calculation of reservation lands which were still undeveloped for irrigation.[26]

In the *Big Horn I* opinion, the majority concluded that federal law did not preempt state oversight of the Wind River Tribes' Indian reserved water right.[27] The court based this determination on case law that supported

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22 Ibid.

23 Big Horn I, 753 P .2d at 91.

24 Ibid at 96-99.

25 Ibid.

26 Ibid at 101. Pursuant to Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908).

27 Big Horn I at 114.

limited state regulation of water sources that were not confined within a reservation. The Wyoming Supreme Court expressly stated that the Wyoming State Engineer should monitor and enforce the Wind River Tribes' federal Indian reserved water right against injury from state water right appropriators.[28] At the same time, should the Tribes violate the state district court decree regarding their reserved water right, the state engineer could seek redress before the district court.[29] In doing this, the state engineer would apply federal water law rather than state water law. "The decree only requires the United States and the Tribes first to turn to the state engineer to exercise his authority over the state users to protect their reserved water rights before they seek court assistance to enforce their rights," the decision stated.[30]

Both the State of Wyoming and the Tribes petitioned for a *writ of certiorari* to the United States Supreme Court. The State of Wyoming sought review of (1), whether reserved water rights actually existed for the Wind River Tribes, (2) whether the PIA standard was the proper method of quantification, and (3) the priority date for ceded reservation land returned to the tribes. The Tribes cross-petitioned for review of (1), the "agricultural" as opposed to a "permanent homeland" purpose of the reservation, (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.[31]

In 1989, the United States Supreme Court granted *certiorari*, choosing

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[28] Id at 114-15.

[29] Ibid at 115. The question remains as to whether the state district court can enjoin the Wind River Tribes without a waiver of tribal sovereign immunity.

[30] Ibid.

[31] Peggy Sue Kirk, casenote, "Cowboys, Indians and Reserved Water Rights: May a State Court Limit How Indian Tribes Use Their Water?" 28 *Land and Water Law Review* at 470 (1993).

to review only question two from the State's petition, the issue of whether the PIA was the appropriate quantification standard. On July 3, 1989, an evenly divided United States Supreme Court upheld the Wyoming Supreme Court decision that awarded approximately 500,000 acre feet of water from the Wind River system to the Shoshone and Northern Arapaho Tribes.[32] Justice Sandra Day O' Connor was absent from the 4-4 decision because of a conflict of interest. The decision recognized the tribes' water right priority date at 1868, with 210,000 acre-feet of that water awarded for future water development.

In spring 1990, the Tribes' Joint Business Council put together their code of water law, entitled "The Wind River Water Code," describing the range of purposes for tribal water use. The Tribes also established a Water Resources Control Board to enforce the code and regulate their water rights. Shortly thereafter, the board issued a permit dedicating a portion of their awarded futures water rights to a minimum instream flow for fisheries protection and enhancement, recreation, groundwater recharge, and benefits to downstream irrigators.

In late spring of 1990, the Wind River instream flow level fell below the amount prescribed on the Tribes' permit due to local irrigation. A letter was sent by the Tribes to state engineer Jeff Fassett informing him of the violation of the tribal permit and requesting him to enforce the permit. The state engineer refused, explaining that the Big Horn adjudication was incomplete and that until the adjudication was final, he would administer all water rights as when the adjudication began in 1977. Fassett also informed the Tribes that "their permit for instream flow was unenforceble because the Tribes had been awarded only the right to divert water and that any change in

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[32] Wyoming v. United States, 109 S. Ct. 2994, reh'g denied, 110 S. Ct 28 (1989). Justice O'Connor was absent from the decision, although she attended the oral arguments.

the use of future project water covered by their reserved right must be made following a diversion."[33] A motion was filed by the Tribes on July 30, 1990 requesting that the state engineer be held in contempt for refusing to enforce the Tribes' instream flow and requesting the court to appoint a special water master to see the Tribes' water rights carried through.

On March 11, 1991, Judge Hartman of the state district court declared that the Tribes were entitled to use their reserved water rights on the reservation as they deemed advisable, including instream flow use, without regard to Wyoming water law.[34] The court also ruled that the Tribes would replace the state engineer as administrator of tribal water rights since the state engineer was not being impartial in monitoring the Tribes' rights. The State of Wyoming appealed Judge Hartman's decision. On May 3, 1991, the Wyoming Supreme Court stayed enforcement of the district court's decision pending appeal.

In *Big Horn III*, the Tribes claimed that the findings in *Big Horn I*, which was upheld by the Wyoming Supreme Court, quantified their water but did not restrict tribal water use. They contended that Judge Joffe in 1983 had made it clear that the methodology used to quantify the Tribes' water right had in no way limited their use of the water when he declared:

> The Court by such finding does not intend to dictate to the Tribes that they are restricted as to the use of said reserved water only for the purpose of agriculture, inasmuch as it recognizes that it cannot tell the Tribes how they must use water that comes under a reserved water permit. If the Tribes desire to use so much of their water for other purposes, they may do so.[35]

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33 Opinion of Justice Macy, Big Horn III 835 P.2d at 276.

34 Ibid.

35 Ibid at 277.

The State argued that the Tribes' interpretation of the 1983 decision as allowing futures water to be used for an instream flow was misplaced. The State contended that the 1985 Johnson decree, which amended the 1983 Joffe decree, contained no possibility that the Tribes' reserved water right was other than to actually divert water from the stream. The State argued that Judge Johnson discarded his previous views on instream flows when he entered his 1985 decree or he would have provided for such and that the Tribes were not awarded water rights which might or could have been included in the 1985 decree.[36]

On June 5, 1992, in the *Big Horn III* decision, the Wyoming Supreme Court voted 3-2 to reverse Judge Hartman's 1991 state district court's ruling, holding that the Tribes could not convert their future water rights to instream flows. The court declared that it was *Big Horn I*, not the 1983 Joffe or 1985 Johnson decree, that decided the issue of whether the Tribes can use their quantified reserved water right to implement an instream flow on the Wind River. The *Big Horn III* court stated:

> (In *Big Horn I*) We qualified the Tribes' use of their water right by stating: The government may reserve water from appropriation under state law for use on the lands set aside for an Indian reservation. . . . Considering the well-established principles of treaty interpretation, the treaty itself, the ample evidence and testimony addressed, and the findings of the district court, we have no difficulty affirming the finding that it was the intent at the time to create a reservation with a sole agricultural purpose. . . . The evidence is not sufficient to imply a fishery flow right absent a treaty provision.[37]

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[36] Ibid at 277.

[37] Ibid at 277-278.

In the majority opinion, Justice Richard Macy stated, "Our opinion (in *Big Horn I*) clearly and unequivocally stated that the tribes had the right to use a quantified amount of water on the reservation solely for agricultural and subsumed uses, and not for instream purposes," Macy said. "If 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. . . . The tribes do not have the unfettered right to use their quantified amount of future project water for any purpose they desire."[38] The court further ruled that if the tribes want to change water rights from agricultural to another use, they must follow state law. "We hold 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," Macy wrote.[39] Macy also stated:

> The Wyoming Legislature has for good reason precluded water right holders from unilaterally dedicating water to maintain instream flows. Water is the lifeblood of Wyoming. It is a scarce resource which must be effectively managed and efficiently used to meet the various needs of society. Wyoming's forefathers also recognized the necessity of having state control over this vital resource.[40]

When the nature, extent and priority of a senior Indian reserved right are clear and not respected by state appropriators, "the state engineer must exercise his authority over the state appropriators to see that the tribal right is observed," the court said.

The *Big Horn III* opinion said that the Tribes' reasoning that historical

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[38] Ibid at 278.

[39] Ibid at 279.

[40] Ibid.

federal and tribal regulation of Indian water use preempts state control was not persuasive. Rather, "We are persuaded," Macy said, "by *United States v. New Mexico* . . . . wherein the United States Supreme Court held that water is impliedly reserved only to the extent necessary to meet the primary purpose(s) for which a reservation is made and that, where water is valuable for a secondary purpose. . . . Congress intended for water to be acquired in the same manner as is employed by any other private or public appropriator."[41]

In a prepared release following the 1992 *Big Horn III* decision, Wind River Tribal Chairman John Washakie said, "This (decision) is a continuing example of the efforts of non-Indians to take or destroy the value of tribal property whenever it is determined that the property has value." Soon thereafter, the Tribes filed a petition for rehearing of instream flow and water administration issues judged by the *Big Horn III* court. In their petition, tribal attorneys argued the decision "ignores or distorts federal law" in concluding the tribes cannot make an instream flow dedication. The petition suggested that if the court does not reconsider its opinions, "drastic and undesirable consequences will follow." First, the attorneys argued, "The tribes would lose the value of their water right by having to use the water according to what state officials deem advisable and in a marginal economic activity rather than the tribes determining the highest and best use of water." Also, the tribes will lose "flexibility to participate in efforts to develop solutions for water disputes that create tailored economic opportunities for the reservation community and the region as a whole."[42]

In addition, the Tribes' petition argued that federal law, not state law, is

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41 Ibid. at 278.

42 David Perry, "Tribes Want Examination of Decision," *The Riverton Ranger* (Wyoming), June 26, 1992.

paramount in Indian affairs. They said the tribes' court-awarded water may be circumscribed "only by the parties who created this water right: the United States Congress and the tribes, the parties to and beneficiaries of the Fort Bridger Treaty of 1868. No federal law or policy permits this court to convert the Indian reserved water right to a state law-based water right for the convenience of the state." The Tribes stated that the Wyoming Supreme Court opinion was "unprecedented" in suggesting the state engineer may have any authority, "other than limited monitoring and enforcement duties under court direction, over Indian use of Indian treaty water rights on the reservation." Generally, the brief said, the Tribes concur with the views offered by Justice Golden in his dissenting opinion.[43] The Wyoming Supreme Court denied the Shoshone and Arapaho Tribes' petition for rehearing.

The Tribes announced in September 1992 that they would not appeal *Big Horn III* to the U.S. Supreme Court. Immediately following *Big Horn III*, the Tribes had numerous telephone conversations with other tribes and legal council before deciding it would be best not to appeal because of the potential adverse effects upon other tribes.[44] "Certainly I disagree profoundly with the decision," John Washakie said. "But our attorneys and other attorneys very knowledgeable in this area advised we shouldn't appeal the decision."[45] The Wind River Tribes decided that the United States Supreme Court at the time might offer little hope of redress, due to its holdings allowing greater state intrusions upon tribal sovereignty.[46]

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[43] David Perry, "Tribes Want Examination of Decision," *Riverton (Wyoming) Ranger*, June 26, 1992.

[44] John Washakie, interview by author, Ft. Washakie, WY, March 23, 1995.

[45] Perry, *Riverton Ranger*, June 26, 1992.

[46] Kirk, 28 *Land and Water Law Review* at 472.

For the past two years, since 1995, selected officials from the Wind River Tribes, the State of Wyoming and the federal government have been holding (tightly) closed-door meetings to negotiate water use on the reservation. Thus far, nothing has emerged from these meetings. Whatever results from negotiation between these officials, the Big Horn cases represent the first state court forum for the collision of western water policy and Indian water rights. The following chapter comments on these cases in their legal context.

CHAPTER FOUR

COMMENTARY ON THE BIG HORN CASES

The Wind River Tribes' reserved water right originates from federal Indian law. When the U.S. Supreme Court held that the McCarran Amendment allowed state courts to adjudicate Indian water rights in 1976, the Court explicitly instructed state courts to follow this law. However, the majority opinions in *Big Horn I* and *Big Horn III* disregarded the pertinent Supreme Court decisions, mischaracterized others, and encroached upon the inherent sovereignty of the Wind River Tribes. The Wyoming Supreme Court majority took unprecedented liberties to preserve business as usual for state water policy at the expense of both the tribes and the biological health of the Wind River.

The amount of water attached to an Indian reservation is that which is necessary to fulfill the reservation's purpose. Much of the legal confusion in the Big Horn cases stems from the notion that the Wind River Indian Reservation was created for a sole agricultural purpose. Early in *Big Horn I*, Special Master Teno Roncalio pointed out that Article 4 of the Fort Bridger Treaty states that the tribes "will make said reservation their permanent home" and that Article 6 notes that they may "desire to commence farming."[1] It does not say that they *must* commence farming. Roncalio thus concluded, "The principal purpose of the United States in entering into the Treaty of 1868 was to provide a permanent homeland for the Indians so that they may, in whatever way most suitable to their development, establish a

[1] Big Horn I 753 P.2d (1988) at 95.

permanent civilization on the Wind River Indian Reservation."[2] To satisfy the tribes' "permanent homeland," the Special Master quantified and awarded water for irrigation, stock watering, fisheries, wildlife, aesthetics, mineral, industrial, domestic, commercial, and municipal uses.

The general homeland purpose articulated by the special master early in the Big Horn cases recognizes that Indian reservations were set aside not merely for peasant-style economic survival, but for broader benefits to the Indian people. This includes changing needs with time. The government did not restrict the use of the land reserved by and for Indian tribes in its treaties. Congress promoted Western European cultural practices and development, such as agriculture, but did not restrict tribal decisions about land use.[3] It makes no sense to assume differently with Indian water.

Given today's politics, even if tribes intend to use their decreed water for agriculture, they face formidable financial hurdles in developing irrigation. More problematic is the fact that irrigation is still one of the least efficient and most ecologically damaging ways to use water. Increasing water consumption by irrigation contradicts the trend toward water conservation. Irrigating reservation lands, typically of low fertility, will result in the stripping of land, erosion, declining water quality and an increase in pesticides.

The language used by the special master in the Big Horn adjudication regarding the purpose of the reservation follows the United States Supreme Court *Winters* decision. The Court in *Winters* stated that the tribes had not relinquished "command of all their beneficial use" of waters on the

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[2] Teno Roncalio, Special Master, *Report Concerning Reserved Water Right Claims By and On Behalf of the Tribes of the Wind River Indian Reservation, Wyoming,* (Dec. 15, 1982) (Civil No. 4993) (hereinafter Roncalio Report).

[3] See Big Horn I, 753 P.2d at 97-98.

reservation and that the Fort Belknap Tribe's reserved water right could be used in pursuit of the "arts of civilization."[4] This language calls for flexible interpretations of both the purposes of Indian reservations and tribal water uses. Also, the Special Master's conclusion was similar to that in *United States v. Finch*, where the Ninth Circuit construed a "permanent homeland" to include the use of a fishery as an intended purpose of the reservation, even though the Crow Indians were not a fishing people by tradition.[5]

The Wyoming Supreme Court in *Big Horn I* nonetheless rejected the Special Master's findings. It disposed of the Master's identification of a permanent homeland, stating that Article 4 of the Fort Bridger Treaty "does nothing more than permanently set aside lands for the Indians; it does not define the purpose of the reservation."[6] In support of its "sole agricultural purpose" argument, the court cited Articles 6, 8, 9, and 12 of the treaty, which authorized allotments for farming purposes, provided seeds and implements to Indian farmers, required the government to pay twice as much money annually to each Indian farmer as to each "roaming" Indian, and established cash awards for the ten best Indian farmers. The *Big Horn I* court reasoned that while "the treaty did not force the Indian to become farmers and although it clearly contemplates that other activities would be permitted (hunting is mentioned in Article 4, lumbering and milling in Article 3, roaming in Article 9), the treaty encouraged only agriculture, and that was its primary purpose."[7] The court rejected the option of finding more than one purpose for the reservation as the Ninth Circuit did in *Walton* in

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[4] Winters v. United States, 207 U. S. 564 (1908) at 576.

[5] Lee Herold Storey, Note, "Leasing Indian Water: A Use Consistent with Purposes of the Reservation," 76 *California Law Review* (1988) at 179.

[6] 753 P.2d at 97.

[7] Ibid.

interpreting an executive order less specific than the Treaty of Fort Bridger.

In its analysis of the Treaty of Fort Bridger, the Wyoming Supreme Court noted but apparently gave sparse weight to federal guidelines for interpreting Indian treaties. Treaties are mutual agreements to be construed as Indians understood them at the time; they are not unilateral.[8] Congress is presumed to have "dealt fairly" with Indian tribes, therefore the treaties establishing the reservations "are not to be interpreted narrowly"[9] and ambiguities must be resolved in the Indians' favor.[10] In identifying the purpose for which a reservation was created, it is considered that Indians need to maintain themselves under changing circumstances.[11]

A construction favoring the tribes would have encouraged the court to give greater weight to the many references to activities other than agriculture, to the agreement of the Shoshone Tribe to make the reservation their permanent home, to the fulfillment of this promise, and to the establishment of the reservation for the "absolute and undisturbed use" of the Shoshone.[12] In fact, in the 1938 *United States v. Shoshone Tribe*, the U.S. Supreme Court interpreted the Ft. Bridger Treaty stating that treaties should "not. . . . be interpreted narrowly. . . . but are to be construed in the sense in which naturally the Indians would understand them."[13] Also, since Shoshone Chief Washakie *requested* the reservation for his tribe (as explained earlier in this chapter), it seems logical that he intended for it to be a permanent homeland.

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[8] E.g. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832).

[9] Ibid citing United States v. Shoshone Tribe 304 U.S. 111, 116 (1938).

[10] E.g. Winters v. United States, 207 U.S. 564, 576 (1908); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); McClanahan v. Arizona State Tax Comm., 411 U.S. 164, 174 (1973).

[11] Colville Confederated Tribes v. Walton, 647 F.2d at 46 (1981).

[12] 753 P.2d at 97.

[13] 304 U.S. at 111 (1938).

The Wyoming Supreme Court also misapplied *United States v. New Mexico* in determining the purpose(s) of the reservation in its *Big Horn I* ruling. As described in chapter two, The *New Mexico* Supreme Court limited the scope of reserved water rights to a primary purpose after the reservation's purpose had been determined, *not the method for determining those purposes.* The Wyoming court in *Big Horn I* significantly mischaracterized *New Mexico* , citing it to restrict the establishment of the Wind River Indian Reservation to one purpose.

In *Big Horn III,* (after the U.S. Supreme Court had allowed *Big Horn I* and the statement that the Wind River Reservation was established solely for agricultural purposes), the Wyoming Supreme Court further misapplied *United States v. New Mexico.* The *Big Horn III* majority held that the Wind River tribes could not change the use of their water right from its "primary" agricultural purpose to an instream flow without first going through state water administration. This restriction represents a huge infringement on tribal sovereignty.

The "primary purpose" test of *New Mexico* involves reserved water rights unrelated to Indian water rights and has never been applied to Indian water rights. In applying this test to Indian water rights, the Wyoming court neglects important distinctions between Indian water rights and those attached to federal, non-Indian water reservations. The U.S. Ninth Circuit Court, in both *Cappaert* and *Adair,* provided clear precedent for recognizing these distinctions based in federal Indian law.[14] Upon considering these Ninth Circuit decisions, the *Big Horn III* majority stated, "We cannot remake history," and, "Courts should not distort the words of a treaty to find rights

[14] See chapter one, p. 12.

inconsistent with its language."[15]

The *Big Horn III* majority refused to follow the 1979 Supreme Court subsequent decree in *Arizona*. That decree pronounced that the quantification of reserved Indian water rights does not limit uses of those rights.[16] The majority in *Big Horn III* on the other hand, held that the agricultural purpose of the reservation identified in *Big Horn I* determined how the tribes may use the water. However, the issue of use never arose in *Big Horn I*. That case concerned only the quantity of the tribes' water rights. Justice Macy argued however, that the Wyoming court in *Big Horn I* would have explicitly stated that the tribes could use their decreed water for purposes other than agriculture if that were the case.

The United States Supreme Court's review of *Big Horn I* involved one issue– the PIA quantification method. The federal court gave no indication of any other considerations in its review. But since the Supreme Court sustained *Big Horn I*, Justice Macy reasoned, the tribes are limited to an agricultural *use* of water. This implication is roundabout. It implies the Supreme Court affirmed the invisible. In his dissenting opinion in *Big Horn III*, Justice Michael Golden remarked that seeing something that isn't there, as the court majority did, reminded him of "Alice in Wonderland." "I see nobody on the road," Alice said, and the King replied, "I only wish I had such eyes, to be able to see Nobody! And at that distance, too!"

Justice Macy held that Indian water rights could not be transferred from their "primary purpose" by recalling an aspect of *U.S. v. Adair*, where the Ninth Circuit had rejected the United States' attempt to convert Indian reserved rights to U.S. forest and wildlife programs. However, in *Adair*, it

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[15] 753 P.2d at 97.

[16] Arizona v. California, 439 U.S. 419, 422 (1979).

was the *government* attempting to transfer Indian rights to *non-Indian* purposes. In the Big Horn, on the other hand, the Wind River Tribes' acted to use their own water for their *own* purposes.

Given the complex and evolving nature of a forest, limiting water rights to satisfy the so-called "primary purpose" of a national forest in *New Mexico* is too restrictive in itself. Imposing this standard upon the water rights of a group of people raises serious questions of human rights. To expect American Indian people to survive, let alone prosper, with water use restricted to a primary purpose interpretation of an ambiguous treaty is unrealistic at best. Such a ruling ignores unpredictable economic and environmental changes.

Another state court has interpreted Indian water rights in a way more consistent with principles of federal Indian law. In *Montana v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, the Montana Supreme Court stated that Winters rights may be used for "acts of civilization which will include consumptive uses for industrial purposes."[17] The Montana court did not strictly construe the Flathead Indian Reservation's purposes, indicating that a liberal interpretation was necessary "to further the federal goal of Indian self-sufficiency."[18] The court stated that other 'acts of civilization' could include instream flows for environmental, recreational, cultural or economic purposes.

A more expansive interpretation of the reservation's purpose was expressed by Justice Thomas of the *Big Horn III* court, stating that the Wyoming Court's majority analysis "assumes that the Indian peoples will not

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[17] Montana v. Confederated Salish & Kootenai tribes of the Flathead Reservation, 712 P.2d (Mont. 1985) at 754, 765.

[18] Ibid at 767-68.

enjoy the same style of evolution as other people, nor are they able to have the benefits of modern civilization." Not to say the tribes necessarily want the "benefits" of modern civilization, but they have the choice. In a recent interview, Justice Thomas said,

> If you're really trying to give an identifiable population the opportunity, in a way, to chart their own course, then it would seem to me to be a mistake to say you can only do this as long as you're willing to make mud bricks – that you have to give them the opportunity perhaps to build cars if they want to.[19]

Ironically, Justice Thomas opined that the Wyoming State Engineer should administer tribal water and that the use of the Indian water right should be limited to on-reservation purposes. When asked why the tribes should not administer their own water, Thomas replied, "First of all, they were novices in this area, [it] wasn't anything they were used to doing."[20]

The scope of federal protection of reserved water rights is broader for Indian water rights than for non-Indian reserved rights. As explained in chapter one, leaving Indians free from state jurisdiction and control is integral to the Nation's history.[21] In the major legal handbook on Indian Law, author Felix Cohen wrote:

> The establishment of a reservation in and of itself has the effect of preempting state jurisdiction within the reservation over Indians, Indian tribes, and Indian property. Therefore, state water laws do not govern the use of water by Indians and Indian tribes on Indian lands with respect to any of the purposes of a reservation.[22]

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[19] Justice Thomas, interview by author, video, Wyoming Supreme Court Building, Cheyenne, WY, August 24, 1997.

[20] Ibid.

[21] Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) p582-584.

[22] Ibid citing United States v. McIntire, 101 F.2d 650 (9th Cir. 1939) at 654.

Given these considerations, Cohen stated, the relevant inquiry in determining Indian reserved water rights is not whether a particular use is primary or secondary but whether it is completely outside of a reservation's purpose. Therefore, according to the *Handbook of Federal Indian Law*, the Wyoming Supreme Court's requirement that the tribes go through state water management processes, as well as the assignment of the state engineer to oversee tribal water use, represents an encroachment on sovereignty of Indian tribes and federal law. Since the tribes' reserved water right has senior priority on the Wind River, it seems obvious that the tribes could put their water to any reasonable, or for that matter, beneficial, use they see fit.

The opinions of the five justices in *Big Horn III* are so widely scattered that the outcome prolongs more confusion than it resolves. For example, Justice Macy stated that all water within the boundaries of the state belongs to the state (even though the tribes were awarded 500,000 acre feet of water). Justices, Cardine, Golden and Brown agreed that Indian water does not belong to the state. In regard to what law applies to change of use, Justices Macy and Thomas argued that the tribes must seek change of use under state law. Justice Cardine said that change of use is not subject to state law – that federal or tribal law applies. But Cardine also suggested that the federal policy of deference to state water law must be respected. Justices Golden and Brown argued that state law does not apply and was not supported by *Big Horn I* (as the majority suggested), that federal law applies, and that the various water uses permitted by the tribes' water code should be acknowledged by the state.[23]

Northern Arapaho tribal attorney at the time and Lander resident,

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[23]Justice Golden Opinion, Big Horn III 835 P.2d 273 (Wyo. 1992) at 292.

Andrew Baldwin, considers Justice Cardine's opinion to be "the deciding vote" in the sense that Cardine's decision most closely reflects the final result of the case.[24] Cardine essentially wrote that if the tribes put water on some dirt this year and next year took it off and put it to instream flow, they tribes would be "legal." While disagreeing that the tribes should be subject to Wyoming's water laws, Cardine argued that the tribes may change the use of their water only if they first put it to a beneficial use with an agricultural purpose. On one hand arguing that irrigation was the purpose of the tribes' reserved rights he added, "Indian water rights must be interpreted with sufficient flexibility to allow for change in use which may be needed when the needs of the tribes also change."[25]

Cardine on several occasions brought up concerns of the Wind River Basin farmers and ranchers. "My primary concern is that the change of use must be orderly and gradual so as to minimize the devastating effect of an enormous dedication to instream flow of water," he wrote. "The benefits that result from my proposed disposition are many. First, those farmers and ranchers who, for generations, had an adequate, reliable source of irrigation water will not be ruined, bankrupted over night by their neighbor and now new senior appropriator, the tribes."[26]

Such political concerns do not belong in courts of law. Legal principles established by the federal government must be followed by state courts. As Cohen wrote:

> In determining water rights for Indian reservations, courts are not to engage in balancing the competing interests of Indian and non-Indian users. Fulfilling the purposes of the reservation may result in economic hardship or may

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24 Andrew Baldwin, telephone interview by author, notes, April 27, 1994.

25 Justice Cardine Opinion, Big Horn III 835 P.2d at 287.

26 Ibid.

> even leave non-Indian interests without a water supply at all. Those problems may be addressed by Congress subject to constitutional limitations; they cannot justify an "equitable apportionment" or "reduction of Indian water rights by the judiciary."[27]

In a spring 1997 interview, Shoshone staff attorney John Schumacher said,

> It's very clear that tribes do have water rights, and those water rights date as the date of reservation. And they are a very large component of western water law. . . . people need to recognize those water rights. They can't pretend that they're going to go away, because they're not. If people look for solutions rather than focusing upwards on trying to just keep tribes either from getting their right, or using those, I believe you can get much more quickly to the system that is workable. That may not give everybody everything they want, but definitely can allow communities to get back to what is really important, which is creating a decent lifestyle for the people who live there.[28]

In responding to *Big Horn III*, retired Wyoming Supreme Court Justice Walt Urbighkit said, "In the law you can find an excuse or an explanation for damn near anything."[29] Last August, Arapaho attorney Andrew Baldwin said:

> What's the point? We follow the rules, the science supports us, we don't hurt anybody on the ground, the cases support us, the special master says we're right, the district court judge not only says we're right he throws the state engineer off the reservation, but when we get to the state supreme court, all bets are off.[30]

Baldwin pointed out the irony that "the 1988 state supreme court said that the

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[27] See Cohen's *Handbook* at 587.

[28] John Schumacher, interview by author, video, Ft. Washakie, WY, April 23, 1997.

[29] Geoffrey O'Gara, "A Wind River Runs Through It," *Northern Lights*, Summer 1993.

[30] Andrew Baldwin, personal interview, video, Lander, WY, August 23, 1997.

tribes could use their water as they deem advisable. And the tribes went so far as to say 'we won't create any injury [to irrigators] in fact,' even though they could with the senior water right."

> The only thing we have on the record in this instream flow is the ruling from district court to the effect that the state engineer couldn't administer them in a neutral fashion. We don't have any evidence in any of the record anywhere that the tribes were incapable of doing it, in fact, it was Judge Hartman who said it's time to give the tribes the turn to do it.[31]

"I was disappointed the Tribes didn't appeal, albeit at serious risk," Baldwin said. Baldwin contends that issues of Indian water rights should be determined in tribal courts. Baldwin also claimed:

> I don't care what kind of government it is – the point of sovereignty is that you have the right to make mistakes, learn from them, change, hopefully. When a state officer makes a major decision, you don't hear the outcry that the state should be dissolved. But when it happens to tribes that is what you hear – tribes should be dissolved or their powers should be stripped. The whole point of sovereignty is you've got the power, the authority to regulate your own affairs and your territory and people there and resources there. . . . I think you've got to give the tribes the opportunity on the record to show what they can do and people will be surprised what they can do.[32]

At one point during his assignment as Special Master, Teno Roncalio had brain scans due to severe headaches. While he could understand some disagreement over the totals he arrived at, he would not concede to political pressures from non-Indians. "That's why I stuck with this," he said, "this was the law of the land and I'll be goddamned if I would reverse it just for

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31 Ibid.

32 Ibid.

Wyoming."[33]

In August 1997, Justice Thomas, the only Wyoming Justice to serve on the bench since the beginning of the Big Horn adjudication, said, "One of the fascinating things about this whole case is that obviously it was one that the Supreme Court of the United States should have reviewed because as you've noted, there seem to be at least different interpretations of prior Supreme Court opinions which they could settle." In discussing whether or not federal law was followed in *Big Horn III*, Justice Thomas said, "I would say that certainly that was the thesis of the court – was that we were faithfully applying federal law as it dealt with the concept of reserved water rights."[34]

Following *Big Horn III*, majority speaker Justice Macy said, "You know from practice and experience where society should be headed. I don't think we (the Wyoming Supreme Court) violated any treaty. The water was to be put to beneficial use. My attitude is, we don't have enough water, and I don't think sending it downstream to Nebraska is a beneficial use. . . . We say the state owns the water." Macy added that he felt the decision parallels the general trend to move tribes into the mainstream, "rather than to perpetuate a nation within a nation."[35]

Justice Golden argued that if the injury to other water users resulting from instream flow is no worse than if the water was used for agricultural purposes, then there is no injury against which the courts can protect. Golden explained that an instream flow is a beneficial use, and the tribes may call for their water "for any use to which water may be beneficially put." If people are hurt by such use, they may take action in the courts, Golden said.

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[33] O' Gara, *Northern Lights*.

[34] Justice Thomas, interview by author, video, Cheyenne, WY, August 24, 1997.

[35] O' Gara, *Northern Lights*.

"The burden of proof in such an instance must be on the appellants, not the tribes," Golden wrote. The State of Wyoming in *Big Horn III* presented no evidence that the junior priority, non-Indian water users had been or would be injured by tribal water use.

Justice Golden pointed out that *Big Horn I* called for the state engineer to "monitor" tribal use of reserved water, not "administer" it. "I find it difficult to fathom how the state engineer could have sufficiently executed the role of impartial water master while acting as the state's chief negotiator in talks with tribes over water issues and at the same time retaining the constitutional duty to protect the waters of the state." He argued that when the state engineer failed and refused to protect the tribe's water rights, it was within the court's power to appoint another person or entity to carry out the orders of the district court.

Golden also noted that under *Montana v. United States*, tribes administer their own water. "Water regulation is an important sovereign power. It is hard to imagine a resource more critical to the economic security or health and welfare of the Wind River Reservation tribes," Golden wrote. In summarizing his opinion, Golden also said, "In this specific instance, there is no question but that an instream flow is a benefit to the Tribes as well as the public in general."[36] In concluding *Big Horn III*, Justice Golden announced:

> 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. . . . Today some members of the court sound a warning to the tribes that they are determined to complete the agenda initiated over one hundred years ago and are willing to pervert prior decisions to advance that aim. I cannot be a party to

[36] Big Horn III at 294.

> deliberate and transparent efforts to eliminate the political and economic base of the Indian peoples under the distorted guise of state water law superiority.[37]

In August 1997, Justice Thomas responded to this statement by Golden, laughing at the end,

> I suppose it isn't terribly difficult to make that case, that here we have indigenous tribes that basically have all of what we now call the United States of America and 200 years later they don't have very much of it and of course the other side of that coin is well, that's what happens to you when you lose.[38]

Since each judge wrote his own opinion and there exists no majority of reasoning in *Big Horn III*, the case likely has little persuasion outside of Wyoming. In their petition for rehearing, tribal attorneys said, "The opinion and those of the concurring and dissenting justices offer contradictory views and dicta that will hinder greatly the resolution of water issues by the concerned tribal and state governments, whether through litigation or by agreement."[39] Shoshone staff attorney, John Schumacher, said, "It's one of the few cases, in fact it's the only case I know of where one of the judges actually put a score card in the decision to try and help people figure out what they (the judges) had done. . . . I think everybody who is litigating Indian water rights, whether you're working for the tribes or for others, will probably try and pick and choose from the decision."[40]

When asked what kind of effect the Wyoming cases might have on other cases, Justice Thomas said, "I've heard and think I've come to believe

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[37] Ibid at 303.

[38] Justice Thomas interview, August 24, 1997.

[39] David Perry, *Riverton Ranger*, June 26, 1992.

[40] John Schumacher interview, April 23, 1997.

that the federal government, that whenever they're claiming reserved water rights, they're trying to get the matter into the federal system before a state adjudication is instituted and I suppose that if you're representing them, you'd see some really good reasons to do it that way rather than to confront all of the things that have gone on in Wyoming."

The Role of the United States Supreme Court

Apparently convinced that state courts could and would justly adjudicate them, the Supreme Court in 1976 nonetheless declared that any deficiencies in state trials of Indian water rights can be reviewed by the Supreme Court with "particularized and exacting scrutiny" after final judgment.[41] As observer Stephen Feldman suggests however, "this assurance has proven to be a phantom prophylactic. No general adjudication of water rights has yet progressed from state court up to the Supreme Court."[42]

The Supreme Court's interpretation of the McCarran Amendment, as evidenced by the manipulation of law by Wyoming courts, goes too far. The *Akin* decision symbolizes a failure by the Supreme Court to protect Indian governments from the states, essentially giving the fox jurisdiction over the hen house. Given the go ahead, state courts will naturally favor state interests over tribal interests. For this express reason, several Supreme Court cases, such as *Oneida Indian Nation v. County of Oneida*,[43] previously held that congressional approval of state jurisdiction over Indians must be specific

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[41] Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 812 (1976).

[42] Stephen Feldman, "The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Right s," 18 *Harvard Environmental Law Review* 433 (1994).

[43] 414 U.S. 661 (1974).

and explicit. Since the McCarran Amendment did not provide specific or explicit language in regard to Indian water rights, how then did states get any jurisdiction over Indian water? Some argue that while states might be able to adjudicate whether or not Indian tribes own water rights in a given state, and perhaps how much water they 'own,' they do not have jurisdiction of Indian water *use*.

Another question arising from the Big Horn cases is why the Supreme Court limited its review, of all the inquiries raised after *Big Horn I*, to the state's questioning of the PIA standard. The federal government and the tribes had, overall, accepted *Big Horn I* and were opposed to Supreme Court review. That the Court would boast the judicial economy of state court adjudications in its McCarran Amendment cases, and then, when presented with a state supreme court decision acceptable to the federal and tribal litigants, choose to put the Indian tribes to the additional cost and risk of litigating in the Supreme Court appears inconsistent.

Excerpts from the *Wyoming v. United States* trial transcript reveal at least one Justice's questioning of an essential distinction of a reserved Indian water right, its inability to be lost by non-use. In the following, the Justice is not identified. Jeffrey Minear, Assistant to the Solicitor General, argued on behalf of the United States:

> Question:–[Y]ou don't want the reserved right to ever be subject to diminution for non-use?
> Mr. Minear: That's – well, that is in the very nature of a reserved water right.
> Question: Well, it doesn't have to be.
> . . . .
> Question: But, of course, the whole – the whole Winters Doctrine is just an implication to Congress. Congress never said in so many words, we're reserving a water right. That's just what this Court

> said Congress must have intended. So, Congress has never even spoken.[44]

The 1976 *Akin* case marked the beginning of a disturbing trend in the Supreme Court that compromises tribal sovereignty. While the Supreme Court has historically been the branch of government most willing to uphold and protect tribes' rights (as discussed in chapter two), it appears that the current Court may be more easily influenced by a different legal premise – state politics. That the Wyoming courts even had the opportunity to adjudicate Indian water was itself a significant break from historic federal policy.

The Wind River Tribes had a compelling case supported by a century of Western water law. However, the current U.S. Supreme Court has proven one of the most radical courts, certainly in this century, in terms of overturning and moving away from existing, settled principles of tribal sovereignty. This tendency combined with the nebulous manner in which the Court affirmed *Big Horn I* likely raised the courage of the Wyoming Supreme Court to maintain state control of Indian water.

Summary

The Wind River tribes own an 1868 priority right, an early and valuable right senior to almost all other water rights holders in the Wind River Basin. However, by pigeon-holing a "sole agricultural purpose" of the reservation in quantifying the tribe's water in *Big Horn I* and then erroneously restricting use of the water to a "primary purpose" in *Big Horn III*, the court in effect confines the tribes to an agricultural lifestyle. The tribes'

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[44] Joseph Membrino, "Indian Reserved Water Rights, Federalism and the Trust Responsibility," 27 *Land and Water Law Review* 1 at 9.

initiative to implement an instream flow has been sabotaged by state control.

Perhaps the most significant decree of law protecting Indian reservations from state intrusion came from U.S. Supreme Court Justice Marshall in the *Worcester v. Georgia* case 165 years ago. This fundamental case decided that an Indian reservation is, "A distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia (or any state) can have no force."[45] *Big Horn III* reflects a serious erosion of this legal canon as the Wyoming Supreme Court perceives, based on state constitutional grounds, that it cannot limit the state engineer's jurisdiction over the Wind River Indian Reservation. In misapplying both state and federal laws, the *Big Horn III* majority overstepped judicial precedent and attempts to undermine tribal sovereignty.

If allowed to continue exercising authority over what resources still belong to Indian tribes, states will further oppress tribes and their economies. Tribes may or may not act to alter current uses of water in Indian country, but whichever the case, their water rights should accommodate the flexibility necessary to sustain their culture in an ever-changing world just as other citizens change their resource uses. Therefore, the reserved water rights, or *Winters*, doctrine should not be left susceptible to varied interpretations by state courts.

In 1990, United States Senator Bill Bradley, from New Jersey, said, "Water rights are one of the greatest resources tribes have . . . the federal government should always back tribes concerning water."[46] Federal Indian policy requires that Congress serve tribal self-governance and protect tribal sovereignty. However, Congress has failed to protect Indian water rights.

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[45] Worcester v. Georgia31 U.S. 561 (1832).

[46] "Wallop's Legislation 'Upsets' Indian Tribes." *Wind River News* (Lander, WY) October 18, 1988.

Congressional legislation, or focussed action by the United States Supreme Court, should overrule *Big Horn III* to ensure there will not be similar cases in the future. Such action should aim to remove the legal confusion brought up by *Big Horn III* and clarify that state law does not apply to Indian reserved water rights by articulating the power of tribes to govern their own reserved water rights.

Wyoming hastily initiated its stream-wide adjudication of the Big Horn River system based on the Supreme Court's go ahead for state adjudications of Indian water rights. However, when it came to meeting the concurrent 1976 Supreme Court mandate that states follow federal law in such adjudications, the Wyoming court looked the other way. The U.S. Supreme Court has yet to clearly demonstrate that state courts must follow federal law when adjudicating Indian water rights. As Wyoming Supreme Court Justice Thomas said, "One of the fascinating things about this whole case is that obviously it was one that the Supreme Court of the United States should have reviewed because as you've noted, there seem to be at least different interpretations of prior Supreme Court opinions which they could settle."[47]

One observer points to a 1992 Supreme Court decision providing legal basis for adjudicating Indian water rights exclusively in a federal forum.[48] Stephen Feldman suggests that the McCarran Amendment should be reexamined in light of the Supreme Court's interpretation of sovereign immunity statutes in *United States v. Nordic Village, Inc.* (*Nordic Village*).[49] "The only feasible interpretation of the Amendment after *Nordic Village*,"

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[47] Justice Thomas interview, August 24, 1997.

[48] Stephen Feldman, "Supreme Court's New Sovereign Immunity Doctrine," 18 *Harvard Environmental Law Review* (1994) at 443-444.

[49] 112 S. Ct. 1011 (1992).

Feldman argues, "is that the Amendment fails to confer jurisdiction over Indian water rights to state courts. Federal or tribal should thus constitute the exclusive forums – indeed they have always been the proper forums – in which to adjudicate Indian water rights."[50]

The Big Horn cases depict another negative response to an American Indian tribe asserting its sovereignty. In order for self-determination to be realized, Indians tribes need to administer Indian water to satisfy cultural and economic needs. To usurp water rights from a tribe in the name of state authority violates important legal principles protecting tribes from states. Federal action should be taken to enforce these principles.

Can Law Adequately Settle Indian Water Rights?

The confirmation and quantification of Indian water rights in court has proven long, expensive and unsatisfactory. A tribe may attain impressive paper water rights but without the means to develop or use water. The uncertainty for the state and its water users about the potential size of threat to their junior rights might be resolved, but not the uncertainty about whether or when the quantified tribal rights will be exercised. At a 1991 Senate hearing in Washington, D.C., Tribal Chairman John Washakie said that the previous fourteen years of Big Horn litigation had been a war of experts who exported $22 million in legal fees. Negotiations were prevented, he said, because the federal attorney wanted to "win" the Big Horn case for the Indians despite the Indians' admonitions that they, unlike the attorneys, had to continue living in the area.

Other tribes have had similar frustration with litigation and attorneys

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50 Stephen Feldman, 18 *Harvard Environmental Law Review* at 443-444.

while asserting their water rights. In 1982, Navajo Chairman Peter McDonald said to a crowd at an Indian lawyers training in water rights program:

> There are a lot of lawyers here. You lawyers shouldn't just have one-track minds. Don't just sell us rights and lawsuits. We can't drink them. We can't afford to assert them, in some cases, in court. And we won't have them very long. We need you to be more innovative, rather than just saying it's unconstitutional, it's this, it's that. . . . Finally, I am not interested in claims awards. I am interested in water. I am interested in survival.[1]

"At best," David Getches says, "litigation is a starting point for sharpening the issues and articulating the positions of the parties so that they can negotiate a meaningful, practical resolution that provides the Indians with deliverable water and non-Indians with genuine certainty."[2]

In addition to legal and social effects, the Big Horn cases hold critical environmental implications. The Wind River Tribes' initiative to permit an instream flow held, and still holds, great promise for the ecological health of the Wind River system. For the time being however, *Big Horn III* has delayed this promise. The following chapter discusses the present state of the Wind River ecosystem as a result of Wyoming water policy, and the nation's water resources in general.

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[1] "Indian Water Policy in a Changing Environment," *American Indian Lawyer Training Program, Inc.*, 122 (1982). (A collection of papers delivered as addresses to the Symposium on Indian Water Policy in a Changing Environment at Oakland, CA, November 1981.)

[2] Testimony of David Getches, *Indian Water Policy: Hearing Before the Select Committee on Indian Affairs, United States Senate, One Hundred First Congress, 1st Session, April 6, 1989, Washington, D.C.*

CHAPTER FIVE

ECOLOGICAL EFFECTS ON THE WIND RIVER

Wyoming's water policy has pandered to irrigation interests, mainly ranching, for close to a hundred years. Though state water administrators hesitate to admit it, ranchers still maintain primary influence over Wyoming's scarce water resources. Not only has this arrangement subverted the Wind River Tribes' water right, it also precludes a healthy Wind River ecosystem.

Supported by the State of Wyoming and extended by *Big Horn III*, irrigation withdrawals from the Wind River dramatically alter stream flows. Scott Roth, Fisheries Biologist for the Wyoming State Game and Fish Department, said that most of the Wind River on the reservation disappears in late summer. "However," Roth said, "we have nothing to do with controversies."[1] David Skates, Project Leader for the U.S. Fish and Wildlife Service Lander office that assists the Wind River Tribes in fish and wildlife management, said, "In July through early September, 90 to 98% of the water is taken out of the river for a seven to ten mile stretch above the confluence with the Little Wind River. There are times that we've documented the river completely dry in that stretch."[2] On August 22, 1997, Skates added:

> This year, we've had an exceptional water year – snowpacks of 120 to 170 percent going into the spring, great seasonal rains practically every month this summer. And in checking flows today, 90% of that water is taken from Diversion Dam (the first irrigation diversion) to Riverton Valley (the third irrigation diversion).[3]

[1] Scott Roth, interview by author, notes, Lander, WY, March 22, 1995.

[2] David Skates, interview by author, video, Lander, WY, August 22, 1997.

[3] Ibid.

In addition, spring runoffs that normally flush sediment and debris out of the system also become lowered by irrigators taking substantial amounts of water from the Wind River as early as mid-April.[4]

Following the 1989 United States Supreme Court's affirmation of the Shoshone and Northern Arapaho Tribes' water right, the Tribes called for a minimum instream flow of 252 cubic feet per second (cfs), based upon recommendations for trout habitat on the Wind River developed in 1981 by the U.S. Fish and Wildlife Service.[5] The Fish and Wildlife Service originally recommended 325 cfs, but the tribes opted to go with a lower flow of 252 cfs in order to pacify irrigators.[6] The summer after *Big Horn III* was a normal water year and a section of the Wind River was again severely de-watered, averaging 89 cfs in August and 83 cfs in September.

Extremely high or low flows impact all ecological aspects of a river system. Low flows decrease oxygen, increase temperatures and reduce habitat for both aquatic and terrestrial life. Effect on the insect community begins as soon as flows fall below natural low-stage conditions. In fact, densities and biomass of macroinvertebrates have been reduced by as much as 75 percent during low flow periods.[7] Thus, food supply for fish declines and fish numbers, biomass and diversity also decline.

Stream flows not only affect fish and insects. They determine river-bank storage and riparian growth. Riparian areas, where streambanks meet

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4 Personal observation, Diversion Dam, Midvale Irrigation District, WY, April 1997.

5 D.A. Vogel, *Instream flow recommendations for the fishery resources in the major rivers and streams on the Wind River Indian Reservation, Wyoming.* US Fish and Wildlife Service, Lander, Wyoming 1981.

6 Dick Baldes, interview by author, video, Fort Washakie, April 21, 1997.

7 J.A. Gore, "Hydrological change," In *The rivers handbook: hydrological and ecological principles.* Edited by P. Calow and G. Petts. Blackwell Scientific Publications, Oxford, England 1994.

the land, hold great ecological importance as a central influence in the structure of stream and river communities.[8] Leaves and woody debris from riparian zones contribute an estimated 99 percent of in-stream nutrients to the aquatic food web.[9] Woody debris also contributes to the physical structure of the system by slowing water velocity and deflecting its course. As water is slowed and deflected, it pushes against the banks and into the soils underlying the adjacent floodplain, contributing to the local water table. Riparian vegetation also protects stream banks from erosion and damage by ice, logging, or animal tramping.[10] Trees provide shade, helping to maintain water temperatures to which native species are best adapted.

Riparian habitats support the greatest biodiversity of any aquatic habitat type, including lakes and springs.[11] They serve as migratory routes for a variety of species, including migratory birds. In fact, almost 80 percent of terrestrial species in the West are dependent on riparian vegetation for food, habitat or migration corridors.[12]

In a California study, in areas where reduced flows prevailed, decreased soil moisture caused lower growth rates and declining abundance of riparian

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8 M.E. Power, R.J. Stout, C.E. Cushing, P.P. Harper, F.R. Hauer, W.J. Matthews, P.B. Moyle, B. Statzner, I.R. Wais DeBadgen. "Biotic and abiotic controls in river and stream communities." *Journal of North American Benthological Society*, 7(4) 456-479 (1988).

9 Platts, "Influence of Forest and Rangeland Management on Anadromous Fish Habitat in Western North America: Effects of Livestock Grazing," 1 USFS Gen. Tech. Report No. PNW 124 (1981).

10 K.W. Cummins, "Structures and Functions of Stream Ecosystems," *Biological Science*, 24:631-641. (1974).

11 J.E. Williams, and R.J. Neves, "Introducing the elements of biological diversity in the aquatic environment." *Trans. 57th North American Wildlife and Natural Resources Conference*, 57:345-354 (1992).

12 R.J. Naiman and H. Decamps, *The Ecology and Management of Aquatic-Terrestrial Ecotones.* UNESCO and Parthenon Publishing Group, Paris, France,1990.

plants, especially of juveniles.[13] Another study predicted that the elimination of floods and high flows could lead to selective mortality of juvenile plants and the reduction of riparian zone width.[14] Tree growth-instream flow models at Rush Creek in the Eastern Sierra Nevada suggest that stream flow requirements of terrestrial vegetation may be greater than those of the fisheries.[15]

Don Aragon, Director of Environmental Quality for the Shoshone and Arapaho Tribes, said his department has been studying wetland area wildlife and crustaceans in the lower part of the Wind River. Aragon said that low flows cause the wetlands to dry up in the "lower Arapaho area." "This, in itself," he said, "starts effecting the migration of wildlife – geese, ducks, and so forth – that nest in those areas."[16] Aragon added that the Fish and Wildlife Service, from the Cheyenne office, performed waterfowl egg counts in 1993 and 1994. They found "a drastic reduction in the amount of geese and ducks that were along the river, versus the amount in other nearby wetland areas," he said. "Another marked thing that we noted down in the Riverton area, when the river was low, and the wetland area seemed to drain, we found a lot of dead salamanders, tadpoles, and other aquatic life that we thought would survive just about anything." Also, "When the river level was real low, in the wetland areas and riparian zones, we found that the livestock had to track through those areas to get down to the water level. And they caused a lot of damage. And see, if the water level were brought up, you would not have

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13 J.C. Stromberg and D.C. Patten, "Riparian vegetation instream flow requirements: a case study from a diverted stream in the eastern Sierra Nevada, CA, USA." *Environmental Management* 14:185-94 (1990).

14 S.D. Smith, A.B. Wellington, J.L. Nachlinger, C.A. Fox, "Functional responses of riparian vegetation to streamflow diversion in the eastern Sierra Nevada." *Ecological Applications* 1: 89-97 (1991).

15 Stromberg and Patten, *Environmental Management*.

16 Don Aragon, interview by author, video, Ft. Washakie, WY, April 24, 1997.

that kind of traffic that causes a lot of riparian damage, as well as a lot of wetlands damage." Aragon also said that with low flows in the Wind River, "a lot of the plants and brush die. And when it's dead, there's nothing to hold the banks and the soils there. And it does effect life in the long run because we have flooding in those areas in the springtime, when the water's up. And there's nothing to hold the river bank."[17]

Harris and others used a tree growth-instream flow model that observes tree rings to determine affects of streamflow on riparian vegetation.[18] Further development and use of instream flow methodologies for riparian vegetation could lead to more conclusive findings on the Wind River riparian habitat. Present methodologies typically focus on needs of aquatic animals, usually fish, and underestimate the needs of the entire river system.

Lee Bergstedt, Fishery and Wildlife Biology Master's Candidate at Colorado State University at the time, conducted a two-year study in 1991-92, in cooperation with the U.S. Fish and Wildlife Service, to determine the effects of water management practices on fish and macroinvertebrates on the Wind River.[19] The study was conducted along the entire river within the boundaries of the Wind River Indian Reservation, both above and below Midvale's irrigation diversion dam.

In the study, Bergstedt observed changes in fish species composition in the lower stretches of the river consistent with what would be predicted in a de-watered western stream; a decrease in trout populations while more

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17 Don Aragon interview, April 24, 1997.

18 R.R. Harris, C.A. Fox, R. Risser, "Impacts of hydroelectric development on riparian vegetation in the Sierra Nevada Region, California, USA." *Environmental Management*, 11:519-527 (1987).

19 Lee Bergstedt, "Fishery and Macroinvertebrate Responses to Water Management Practices in the Wind River on the Wind River Indian Reservation, Wyoming." Thesis, Dept. of Fishery and Wildlife Biology, Colorado State University, Ft. Collins, CO (1994).

tolerant species such as carp and white suckers increased but were limited to pools. Populations of two other fish species decreased due to the lack of riffle habitat. A section of river that had supported sauger, walleye, and mountain whitefish in 1991 (with instream flows in effect) was devoid of these species in 1992. Bergstedt concluded that when adequate water flows are available, this section can support a population of both cool water and cold water species. The study reports that reduced flows resulted in elevated temperatures, increased conductivities, and impeded fish movement. The lower river sections showed large increases in conductivity which Bergstedt attributed to the in-flow of poorer quality irrigation return flows.

In 1934, the Bureau of Reclamation constructed a low-head diversion dam, called Diversion Dam, across the entire width of the Wind River to channel water into Wyoming Canal, the main ditch for the Midvale Irrigation District. Because large amounts of sediment build up behind the dam and impede the flow of water into Wyoming Canal, irrigation district operators routinely open the dam gates to release huge amounts of sediment down river to unblock or "sluice" the dam. District records indicate, for example, this was done 25 times during the 1988 irrigation season and 32 times in 1989. Sluicing takes from forty-five minutes to one and a half hours. The Midvale district reports that suspended solid levels during these events increase from as low as 2 mg/L to over 14,000 mg/L in minutes.

Sedimentation directly and indirectly effects a river ecosystem; direct effects on fish include killing the fish, reducing growth rates and lowering resistance to disease.[20] Fine clay and silt can clog gills and interrupt breathing. Other effects include abnormal development of fish eggs and

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20 J.S. Alabaster and R. Lloyd, *Water Quality Criteria for Freshwater Fish*, Butterworth Publishing, London 1982.

larvae, alteration of movements and migrations, and a reduction in the abundance of forage organisms. Survival of juvenile fish decreases significantly in conditions of large sediment input.[21] Sedimentation adversely affects aquatic insects as well, a vital component of the regional energy chain, through suffocation[22] and hindering their upstream movements.[23]

Bergstedt observed dramatic increases in suspended solids during sluicing events at Diversion Dam. A concentration of nearly 18,000 mg/L was recorded below the dam during one event. This compares to a heavy rainstorm that produced suspended solid concentrations as high as 2,298 mg/L. Suspended solids declined as they moved downstream and deposited along the river bottom.

Bergstedt observed that fish condition was always lower below the dam than above. Mean condition values for mountain whitefish, brown trout, and rainbow trout were all significantly higher above the dam in 1991. In 1992, mean values for these three species were again all higher above the dam but the difference for rainbow trout was not significant. Significantly more fish had abnormal gills below the dam. Bergstedt also observed erosion of fins, probably caused by sediment scouring.

Trout movement averaged 1.8 km above the dam and 4.3 km below the dam. Sluicing may cause the increased movement below the dam due to decreased spawning and feeding habitat, resulting in higher energy costs. This is supported by the significantly poorer conditions, particularly lower fat

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21 A.M. Milner, "System Recovery," in *The Rivers Handbook: Hydrological and Ecological Principles*. Edited by P. Calow and G. Petts. Blackwell Scientific Publications, Oxford, England 1994.

22 C.P. Newcombe and D.D. McDonald. "Effects of Suspended Sediments on Aquatic Ecosystems," *N. Am J. of Fisheries Mgmt.* 11:72-82 (1991).

23 Milner, *The Rivers Handbook.*

index, observed in most species below the dam in both years. Other reasons for increased movement include behavioral responses such as avoidance response or some other factor as yet unknown.

Catch per unit effort (CPUE) for brown trout and rainbow trout was significantly lower below the dam than above in 1991. Various factors may have acted together to suppress these populations; direct mortality at all life stages, reductions in suitable spawning habitat, and a reduction in forage organisms probably occurred concurrently. The CPUE for brown trout and mountain whitefish in 1991 indicated that the dam acts as a barrier for fish migrating upstream. While spawning habitat may be limited by high sediment deposition, the dam may further limit reproduction by reducing access to alternative spawning grounds in the upper reaches of the river and its tributaries. Shifts were seen in the insect community as well. The trends Bergstedt observed in dominance of Orders, functional groups, and habitat preference from above and below the dam were attributable to the sluicing operation.

Bergstedt's study on the Wind River concludes that irrigation practices of diverting large amounts of water and sluicing have adversely affected the fish and macroinvertebrate community. The study provides definitive evidence that sluicing sediment downstream results in poor physical condition of fish below the diversion dam. It also shows that de-watering a stretch of the Wind River results in lower populations of less tolerant fish species, such as trout, and that habitat has been degraded to the point that it limited and excluded native species.

Designated minimum instream flows became recognized as a "beneficial use" of water in western states relatively recently, in 1986 in

Wyoming. Tom Aneer, the Wyoming Game and Fish Department's Instream Flow Biologist, said the state defines instream flow as the "minimum flow needed to improve or maintain a targeted fishery. It cannot be established for wildlife, riparian, aesthetic or other values."[24] An instream flow right can only protect what stream flows exist at the time of application, it cannot effect existing rights even if they are drying up a stream. Resembling an agricultural mentality, Aneer said, "A lot of places go dry – if you had water, you could grow trout."[25]

Only the Game and Fish Department can apply for an instream flow water right in Wyoming. The State of Wyoming owns the instream flow right, not the Game and Fish Department. Like any other water right applicant, the agency must wait in line for approval by the State Water Development Commission and the State Engineer.

In regards to the time it takes for approval of instream flow rights, in April 1997, Aneer said, "We've got applications that we filed in 1987 that still have not been approved. In the early years, there were some filings that were getting approved in about four years. So, I'd say the minimum amount of time is four years." As of April 1997, seven instream flow rights had been permitted and over sixty applications lay on the desk of State Engineer Jeff Fassett, awaiting approval.[26] As to the delay in addressing the applications, Fassett said "There's been some technical controversies" resulting from the public hearing process required before instream flow approval.[27] Since only a handful of permits had been approved in over ten years, Dick Baldes

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24 Tom Aneer, telephone interview by author, notes, October 9, 1994.
25 Tom Aneer, interview by author, video, Casper, Wyoming, April 23, 1997.
26 Ibid.
27 Jeff Fassett, interview by author, video, Casper, WY, April 23, 1997.

questioned whether Fassett is genuinely concerned about instream flows.[28]

Dick Baldes was U.S. Fish and Wildlife Service Project Leader in Lander from 1972-1996. In an August 1997 interview, Baldes argued:

> The entire Wind River system on the Wind River Indian Reservation could be one of the last jewels of fish and wildlife and natural resources in the country. At the present time it isn't because of irrigation. Diversion Dam is the worst thing that ever happened to the Wind River. You've got algae, first, that build up on the rocks, and you've got invertebrates that feed on the algae, and you've got other small fish that feed on the invertebrates and algae. Well, when they sluice that river, and flush all that sediment – tons, I mean, tens of thousands of tons every year scouring the bottom – it just devastates that fishery. The other major thing it does is it covers up the spawning habitat. Fish spawn in fine gravels, depositing eggs in 4 to 6 inches of gravel. Well, imagine them doing that right after a sluice. The fish population work that we've done on the Wind shows that that certainly is a major impact on the fishery. And you can never bring it back if that kind of sluicing continues.[29]

Baldes said that if adequate flows were allowed to stay in the stream channel beyond Diversion Dam, it would disperse sediment downstream in less concentrated manner. "With instream flows and doing something about controlling the amount of sediment they sluice, that river can come back. We can bring it back," Baldes said.[30]

When the Wind River flowed at the level the Tribes had prescribed in 1990, David Skates observed signs that the de-watered stretch of the Wind River could provide habitat for healthy populations of fish. "We started to pick up fish in that stretch of river; not significant numbers of trout but we did see trout," said Skates. "More significant were the sauger and the ling

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28 Dick Baldes, interview by author, video, Ft. Washakie, WY, August 21, 1997.
29 Ibid.
30 Ibid.

burbot, or freshwater cod, which are both extremely important fish species to the Native American tribes that live on the reservation."[31]

Asked if native trout once survived in the presently de-watered stretch of the Wind River, Skates said, "I would have to say yes, because most of the flows were in the river. There was very little irrigation prior to 1930. Today, we've got 2,000 cfs in the forebay of Diversion Dam. So the water temperatures were probably a lot lower with that volume of water flowing. There's no question." Skates added, "Eight or nine months of the year, there are trout in that stretch, from October to May. They may be migrating through, in and out of other local streams or they may stay until temperatures get too low. If they get caught in those pools (when flows drop), we lose those fish."[32]

State Engineer Jeff Fassett expressed doubt that the historically de-watered stretch of the Wind River can provide good fish habitat. "You don't see people fishing on the Wind River outside of Riverton. It's an area that has, had been heavily irrigated for a very long time." Asked whether it's feasible for the Wind River to get back to a more natural ecosystem, Fassett replied, "I don't think it is. There's just too much development on the river. You have a hundred thousand acres of irrigated land, it's the backbone of the agricultural economy there, for both the tribes and the non-Indians." (Relatively few Indians actually irrigate on the reservation.) Fassett stated:

> I'm not the biologist to know whether – if you can establish some long-term, reliable, predictable in-stream flows – whether that river would begin to stabilize and change or not. Or whether there's just a certain natural situation there, together with the unnatural diversions, where you're never going to be able to create some world-class fishery in that part of the state. I just don't think it

31 David Skates interview, August 22, 1997.

32 Ibid.

can physically happen.[33]

When asked how many streams and rivers in Wyoming become dried up such as the Wind River, due to irrigation, Fassett said, "It would depend on the kind of year (how wet or dry). But they're generally the smaller streams. We don't have any major rivers that, sort of dried up in that sense." When asked if he considered the Wind River a major river and if it dries up, Fassett responded, "There certainly are times late in the summer when the Wind River would be, for the most part, the waters would all be diverted into the major canals in that system. The Wind River is certainly a major river, it flows over a million acre feet a year." When asked how many streams are 'fully appropriated,' meaning no water remains for new rightholders, Fassett replied:

> The concept of fully appropriated is sort of hard. If you define fully appropriated people who get water all the time, then we're there on a lot of rivers, you see. But we have lots of people that are still applying for water rights today, in 1997, 110 years after statehood, who say, I can still make a beneficial use of water for just a month. And so, it's been a difficult situation to say, no, you can't, I'm gonna deny the right to make use of water during that peak aspect of the hydrograph, knowing that the rest of the year he probably will be out of priority and he really won't get much water.[34]

One can see that Wyoming has few scruples about completely de-watering its rivers in order to satisfy private rightholders.

A 1982 U.S. Fish and Wildlife Service survey reports that 81 percent of fish communities in streams and rivers in the U.S. have been adversely affected by environmental degradation, 30 percent of that degradation due to

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33 Jeff Fassett interview, April 23, 1997.

34 Ibid.

agriculture. The survey found that 69 percent of streams were impacted by flow alteration and 49 percent by degradation of physical habitat, neither of which are addressed by existing US EPA programs.[35] An estimated 70-90 percent of natural riparian vegetation has been lost or is degraded due to human activities nationwide.[36]

The proportion of freshwater organisms threatened with extinction far exceeds that of terrestrial organisms; 10-15 percent of terrestrial vertebrate organisms are classified as rare to extinct, while 33-75 percent of aquatic organisms are rare to extinct.[37] Overall, one third of all North American fish are endangered, threatened, or of special concern, with an increase of 45 percent during the past decade.[38] At least forty freshwater fishes have become extinct in North America in the past century, fifteen of these since 1970.[39] Only 4 percent of federally listed endangered and threatened aquatic species demonstrate an improving trend, according to a 1990 report to Congress by the U.S. Fish and Wildlife Service.

Degradation of riverine ecosystems not only detracts from biodiversity, but also impacts economics and society. Perhaps a short-term perspective can argue that the prior appropriation doctrine has worked, when one looks at the vast amounts of cattle and ranchers in the West. However, 'traditional'

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35 R.D. Judy, Jr., P.N. Seeley, T.M. Murray, S.C. Svirsky, M.R. Whitworth, and L.S. Ishinger. *1982 National Fisheries Survey,* Volume 1. Technical Report: initial findings. US Fish and Wildlife Service FWS/OBS-84/06 (1984).

36 J.T. Windell, "Streams, Riparian and Wetland Ecology" (University of Colorado, unpublished) cited in U.S. EPA Region 10, *Characteristics of Successful Riparian Restoration Projects in the Pacific Northwest* 9 (1991).

37 L. Master, "The Imperiled Status of North American Aquatic Animals." *Biodiversity Network News* (The Nature Conservancy) 3(3): 1-2, 7-8 (1990).

38 J.E. Williams and others, "Fishes of North America Endangered, Threatened or of Special Concern," *Fisheries* (Bethesda) 14(6): 2-20 (1989).

39 J.E.Williams and R.J. Neves, "Introducing the Elements of Biological Diversity in the Aquatic Environment." Trans. 57th N.A. Wildlife and Nat. Res. Conf. 57:345-354 (1992).

large-scale western agriculture has been unable to reverse the serious soil erosion and water pollution problems affiliated with its water management practices. In the irrigation districts of the Wind River Reservation, where irrigators primarily grow hay for cattle, selenium concentrations run high. This salting results from excessive amounts of water applied to the land, rendering it unproductive. As Aldo Leopold said, "The loss of soil is the most serious of all losses." Current rates of soil erosion, increasing water temperatures and pollution cannot sustain healthy economies.

Many westerners view instream flow rights as "institutionalized stupidity," mandating the loss of precious water to downstream states. Ironically, though, the prior appropriation doctrine breeds tremendous wastefulness of the scarce resource it covets. The Soil Conservation Service estimates that total annual irrecoverable water loss from stream systems, due to irrigation, amounts to twenty-four million acre feet per year.[40] If this figure is roughly accurate, each year irrigators waste almost double the annual flow of the Colorado River, and that exceeds the total volume of water consumed by all municipalities and industries in the nation.[41] In 1990, irrigators along the Wind River achieved about 48 percent efficiency, which means about 48 percent of diverted water actually got to the crops, while the rest evaporated, leaked from canals or returned to the river. Tribal water experts say 70 percent efficiency or higher is possible.[42] Including the huge increase in the water needs of the cities, irrigation today consumes nearly

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40 U.S. Soil Conservation Service, "Crop Consumptive Irrigation Requirements and Irrigation Efficiency Coefficients for the United States" (1976).

41 Charles Wilkinson Testimony, *Indian Water Rights: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, 94th Congress 2nd Session*, at 72 (1976).

42 Geoff O'Gara, "Waterless in Wind River," *High Country News*, August 27, 1990.

ninety percent of all water in the West.[43]

When asked for his opinion whether the Wind River system has enough water for both irrigation and instream flows without new dam-construction, Dick Baldes adamantly stated, "There isn't any question about that. People that advocate dams are primarily irrigators who want to use as much water any time of year that they want. But with conservation practices, there's plenty of water – there's no need for any more dams on this system. . . . For many years, they've (Midvale irrigators) been taking *more* than double their water right, that's in the record books." Baldes continued:

> You can check the records at USGS, anybody can, to see that 1977 and 1988 were the lowest flow years on record in the Wind River valley. Yet, all three of the irrigation districts had bumper crops. And we asked Craig Cooper and other state irrigation people, 'Well, why was that?' at a meeting. And their answer was, 'We made the irrigators use water efficiently.' Well, give me a break. Isn't that what we all want to do? Then everybody benefits from the water in the system. With instream flows it benefits the irrigators, it benefits the Tribes, it benefits the fishermen, it benefits the floaters, it benefits the people that want to take pictures, it benefits the people that live along the river.

Asked why irrigators would take more water than necessary, Baldes gave the opinion, "I think its tradition – they've been able to get all they've ever wanted for all these years. And then, finally, someone is saying, 'Wait a minute, you know, there's a lot of other uses of water in the Wind River.'" David Skates said, "1990 was a year that they (the Tribes) were able to implement instream flows and never caused injury to anyone that I know of."[44]

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43 Charles Wilkinson, "Western Water Law in Transition," 56 *UC Law Review* (1985) at 321.

44 David Skates interview, August 22, 1997.

When asked if irrigators might be taking more than enough water from the Wind River, Craig Cooper, Deputy State Engineer for Water Division III, responded:

> A lot of people, again, depending on who you're talking to, will tell you that Wyoming law allows irrigators to just run amok, divert the streams dry and take as much water as they want. Again, that theory or that concept demonstrates a lack of understanding of the way the law works and we hear that a lot, that, oh well, the state engineer's office is just letting people divert the streams to the max, and they're allowing people to break the law. This is not true. The law allows them to do that, if they're placing it to beneficial use. The law allows that.[45]

Cooper described beneficial use as, "a judgment call based on the administrator's history and experience. It's not vague, it's judgment." Cooper added:

> If an irrigator is creating state value with the state's water, we're not going to bother him. As long as there are no complaints from rightholders, I trust ranchers to use the water they need. . . . If the (diverted) water is flooding the neighbor and going across the county road then I'm going to go out and close the gate. It's not my judgment as to how much water they need to use.[46]

According to Wyoming law, irrigators can take one cubic foot per second (cfs) for each seventy acres of land, referred to as the "one to seventy" rule.[47] Wyoming surplus and excess water laws allow most irrigators to appropriate an additional one cfs for each seventy acres.[48] "The law says we have to use it to protect it," Cooper said, and "the law allows them (irrigators)

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45 Craid Cooper, interview by author, video, Riverton, WY, April 22, 1997.

46 Craig Cooper, interview by author, notes, Riverton, WY, March 18, 1994.

47 Wyoming statute 41-4-317 (1977).

48 Marc Squillace, "A Critical Look at Wyoming Water Law," 24 *Land and Water Law Review* at 324 (1989).

to dry up the river in a super-dry year, but it's not a goal. Our intent is to keep enough water in the river to keep the fishery from disappearing."[49] Historically, Cooper said, the priority has been to tie the water to the ground so as not to lose water from the state.

As we have seen, water policy in Wyoming and generally in the West, often precludes ecological values, values that also effect economics. The Wind River Tribes dedicated a minimum instream flow on the Wind River recognizing the importance of a diversified economy. Prices of irrigated crops most important to Wind River Basin farmers – alfalfa hay, barley and oats – fluctuated widely throughout the 1980's. Agricultural income dropped significantly in proportion to overall income in Fremont County, including the reservation. Services and retail sectors rose dramatically, consistent with increases in tourism and recreation, the second largest industry in Wyoming and number one employer in the state.

Tourism and recreation holds tremendous growth potential on and around the reservation due to its proximity to nationally prominent parks and recreation areas. Already, over one million cars pass through the Wind River area each year, many of them traveling to Yellowstone National Park. If reliable, adequate instream flow rights were established, stopovers and destination tourism would increase on the Wind River Reservation along with the reputation of enhanced fishing and recreational opportunities on the river. Recreational tourism has unique advantages as a source of income and employment in that it relies upon but does not diminish, with careful management, Wyoming's vital natural resources.

To get an idea of revenues associated with fishing, a Fish and Wildlife

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49 Craig Cooper interview, March 18, 1994.

Service study reports that $17.8 billion was spent for non-Great Lakes freshwater fishing in 1985 and that 45% of the anglers fished in rivers and streams. If anglers spent comparable amounts regardless of fishing location, the economic value of flowing-water fisheries at the time was more than $8 billion annually.[50] More recently, the American Sportfishing Association reports that $30 billion was spent in 1996 directly on freshwater fishing with $108 billion spent on associated costs. In Wyoming, $175 million was spent directly with $293 million associated to fishing.[51] Non-consumptive recreation, such as kayaking, canoeing, swimming, and wildlife observation also provide great economic value.

Prior to *Big Horn III*, the National Wildlife Federation and the Wyoming Wildlife Federation filed a "friend of the court" brief with the Wyoming Supreme Court. The organizations argued for the right of the Wind River Tribes to dedicate their water rights to instream flow. "Some appellants have implied that the purpose for the tribes' acquisition of an instream flow right is not for protection of the river, but for monetary gain," federation attorneys wrote. "To the contrary, the motivation for the tribes' instream flow allocation is to produce real environmental, cultural and economic benefits to the tribes, the people of Wyoming and the environment." The attorneys pointed out that 16 Western states, including Wyoming, allow the acquisition of instream flow rights without the necessity of a diversion.

More and more people want healthier streams and rivers. During the past two decades, people have increasingly recognized and appreciated

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[50]Doppelt, Scurlock, Frissell, J.R. Karr, *Entering the Watershed: A New Approach to Save America's River Ecosystems.* Pacific Rivers Council. Island Press, Wash D.C. 1993.

[51] *The Missoulian* (Montana). January 8, 1998.

instream values for fish, wildlife, aesthetic, cultural and recreational purposes. In fact, people have begun to pay out of their own pockets to help keep water in the streams, whether for fish habitat or other inherent aspects of the riverine ecosystem. Montana's Nature Conservancy, for example, purchases leases through the state's Fish, Wildlife and Parks Department to maintain instream flows.

As described in this chapter, Wyoming's neglect of riverine-riparian ecology has resulted in seriously degraded water resources. In short, Wyoming's archaic water policy discounts other values of water as important as, if not more than, the (subsidized) economic interests that originated it. To this day however, it is difficult to find people within Wyoming's government willing to stand up for river ecosystems. Here's what Tom Aneer, the state's instream flow biologist, said about the situation:

> It doesn't really serve any productive purpose to get frustrated with the fact that the Game and Fish Department can't do something that they would like to do just because the law prohibits them from doing that. I think it's important for everybody to recognize and respect the limitations of law, and go slowly. And, you know, if and when changes are made, they'll occur on their own time. Things like that happen on their own agenda, not mine.[52]

Continued neglect of the Wind River and other watersheds by Wyoming officials will further damage biological communities. Water policy needs to evolve more quickly with current scientific awareness. Given the current health of the Wind River, or lack thereof, what better time to let the Wind River Tribes administer their water for a change?

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52 Tom Aneer interview, April 23, 1997.

CHAPTER SIX

ATTITUDES AND VOICES FROM THE WIND RIVER'S PEOPLE

After the U.S. Supreme Court let the tribes' water right stand in 1989, non-Indian irrigators began to express fears that their livelihoods would be lost to tribal water use. This sense of anxiety was new. Water had been virtually unlimited to them, supported by state policy and in most cases, federal money. Then, when the tribes acted to maintain minimum flows on the river, irrigators began to accuse Indians of cutting off water needlessly and putting them in danger of losing their crops.[1]

Tribal members on the other hand, saw their newly confirmed water rights resemble a balancing of old wrongs. For generations, the Indians of the Wind River had felt powerless. For example, they remembered that non-Indians – sometimes their childhood schoolmates – had taken some of the reservation's best resources after land was ceded by the federal government. They knew also that irrigators would dry up the Wind River and that Midvale District would frequently sluice its diversion dam without notifying tribal officials.

In late spring of 1990, flows on the Wind River had begun to run below the tribes' dedication of 252 cfs because of irrigation diversions. On May 8, 1990, Kate Vandermoer, the Tribes' Water Engineer at the time, wrote Jeff Fassett requesting him to cooperate with the district court and uphold the tribes' instream flow. She asked Fassett "to persuade Midvale to voluntarily comply with the law to avoid conflicts with the Tribes" so as to fulfill the

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1 "Irrigators Nearing Desperation," *Wyoming State Journal*, Lander, Wyoming, May 22, 1990.

tribes' instream flow right. In the May 14, 1990 *Riverton Ranger*, Fassett replied that the state supports "justifiable instream flows. . . . We're not anti-instream flow, but we're sure against the kind of process the Tribes have used to generate instream flows. We don't think it's valid." Fassett also said personal threats had been made to some non-Indians and that tribal officials threatened to shut off non-Indian headgates. . . . "Any such threats only serve to heighten the tension in an already volatile situation and could lead to personal injury," Fassett said.[2]

On May 22, 1990, the *Riverton Ranger* reported that Vandermoer complained that the creek draining wastewater from Midvale Irrigation to Boysen Reservoir was running "about 165 cfs. That's just exactly the quantity we need in the main stem (of the Wind River) to meet the other irrigators' needs as well as our own," she said.[3] Later that month, after tribal instream flows had not been met for over two weeks, Vandermoer said tribal technicians had "received tremendous hassles" from non-Indians as they measured flows throughout the reservation. She said that someone pulled a rifle on the technicians when they attempted to measure irrigation flows to his property. Vandermoer said threats had been made against herself, tribal workers, Indian irrigators and others and that tribal leaders had asked the FBI to investigate the threats. "We're not interested in violence. We don't put ourselves in confrontative situations," she said. "I told my guys to get out of there if they are threatened." In a message to tribal members, Vandermoer said, "By and large, the state of Wyoming is waging a battle against you. They've had 13 years to tell their constituents about this stuff."[4]

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2 "State 'can't recognize' flow level," *The Riverton Ranger*, May 14, 1990.

3 "Tribes ask canals to meet flow," *The Riverton Ranger*, May 22, 1990.

4 "Water shortage fuels tensions on reservation," *The Wind River News*, Lander, Wyoming, May 29, 1990.

In late May, the *Wyoming State Journal* ran an article quoting irrigator Fran Fox, an 18-year resident of the basin, who said:

> If we don't get water real soon, we are history. The governor's office is not doing anything. We are trying to do everything we can. If we don't keep talking somebody is going to get their face blown away. Is it really the water they (tribes) want? No. It's money, that's the bottom line. We are captives in our own land. They can cut us off whenever they want to and our lives are hanging in the balance. . . . Everything about this place is my blood and soul. I have raised three sons here. For years I have said I would not move for anybody. But, if somebody made me an offer I would probably sell.[5]

On May 29, 1990, the *Wind River News* quoted Wes Martel, co-Chairman of the Tribes' Joint Business Council at the time, as he explained the cultural and environmental significance of the tribes' decision for instream flow on the Wind River. "What we do with this water can make a difference on this reservation and in streams all over the country," he told a non-Indian audience at the Platte River Strategy Conference in Casper. The tribal leader said the Shoshone and Northern Arapaho people are concerned about preserving the environmental integrity of the land and water of their 2.2 million acre reservation for future generations. "This is the best of all reservations," he said, describing a reservation with 265 lakes, 1104 miles of streams and rivers and 118,000-acre wilderness area, "where there is some of the prettiest, cleanest water, and the best scenery in the whole country." Martel said that instream flow "may be the best thing that's ever happened to the river."

Martel said opposition to the tribal instream flow is an "Indian and non-Indian issue. You know a country which fosters heroes can foster

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5 "Irrigators nearing desperation," *Wind River News*, Lander, WY, May 22, 1990.

bigots," he said. "But I want to tell Lander and Riverton that they will both benefit from what we're doing on the reservation. Everyone will see that we can stand up for ourselves and we're going to make people accountable. . . . We want to do on the reservation what is best for our people and best for the state of Wyoming, too." Later that year Martel responded to accusations that the Tribes just wanted to make non-Indians pay for water: "Fisheries and wildlife – they're our relations, and we want to see them thrive, just like us. If they start going, we're gone. Maybe we'll just never go back to the bargaining table. I don't care if we never get any money out of the state."[6]

Chad Baldwin, current editor of the *Riverton Ranger*, the most widely distributed newspaper in Fremont County, said the Big Horn litigation and related events on the Wind River have been "probably the biggest story in our county over the past twenty years."[7] Baldwin said:

> The impact has been more a psychological effect, I think, as people worried about the future, if they can plan on having water. I would say it is something everybody has followed because it has been somewhat racially divisive. So I would say it has been more an impact of not necessarily an economic consequence, although that's there, the impact is just on what it has done to our community in general and the way people get along. . . . Socially, the morale of the reservation does have an effect on town here. Maybe not to the extent that it should. Our county is one of the worst in the nation for alcohol-related problems – drunk-driving, liver cirrhosis, arrests. People who know realize it's not just an Indian problem.

Bill Brown is Manager of the Midvale Irrigation District. The district consists of 650 private/state water users owning 1500 headgates, 100 miles of main irrigation canals and 300 miles of lateral canals on 73,000 acres of land. Brown said the Midvale District uses 350,000 cfs of water per year. (The Wind

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6 Geoffrey O' Gara, "A Wind River Runs Through It," *Northern Lights*, Summer 1993.

7 Chad Baldwin, interview by author, video, Riverton, WY, August 22, 1997.

River Tribes were awarded 500,000 acre feet.) The district is the seventh junior right on the river, he said.

In August, 1997, Brown began an interview by saying, "Every irrigator on this project, I think, is an environmentalist. People here like to hunt and fish." In an earlier interview, Brown admitted that efficiency of water use in the Midvale district was "seventy-eight percent in delivery from the river to the farmers' headgates, but it's another story on other side of headgates. It's not too good."[8] Asked whether sugar beets, an increasingly common crop in Midvale, require very large amounts of water, Brown said, "Yep, but not as much as corn. That might come as a surprise. Corn takes a lot of water."

Brown responded to the question of whether Midvale District irrigators might be wasting water:

> The state dictates if it's beneficial use, is he (an irrigator) wasting it? I don't think so. When he's done with it, it gets back into a return flow, back into the river, back in the reservoir. We take 350,000 acre feet of water and it all ends up in that reservoir twenty-five miles later. It's not going out into the desert – it all ends up in Boysen Reservoir, it just diverts for thirty-five miles.[9]

Brown argued that by 'regulating' stream flows on the Wind River, irrigation has actually helped the river. "He [Baldes] can plan until he's blue in the face and there'll be nothing but trash fish," he said. Brown maintains that the excessive sedimentation of the Wind River results from the river leveling out and not from sluicing Diversion Dam.[10] He added:

> Do we put silt in the river? We pass it through. We pass it through the canal gates. We're not manufacturing silt, it's sending it on through. People don't understand water hydraulics – that's where this bad P.R. comes from. It's just something that you have to do if you're gonna divert

[8] Bill Brown, interview by author, notes, Pavillion, WY, March 23, 1995.

[9] Bill Brown, interview by author, video, Pavillion, WY, August 24, 1997.

[10] Bill Brown interview, March 23, 1995.

water, you have to keep your system cleaned out.[11]

(Baldes said that if natural flows occurred, and Diversion Dam did not exist, sediment would be taken downstream gradually, causing significantly less impact on the ecology of the Wind River.)

Brown said this about the water rights conflict along the Wind River:

> I can see their (tribes) concern – here again, what rule do you follow – the first in right, the first in use? Who's entitled to the water? The project was here, it was in place, it demands so much water and of course the less the demand, the more for the river. But the river has never dried up. With the exception of a short reach between LeClair ditch, I think it is, and Riverton. That 7-mile or so reach gets pretty dry. There's no access to fishing there, as I've been told. In the summertime, the water's too warm for good fish habitat there, anyway. But the rest of the river, the other 30 miles has always got plenty of water in it because you've got to keep it in there because you've got irrigation people diverting below it, so it has to be in there. . . . It's the lag time that hurts that one reach of the Wind River. But is it a good fishery area? Most of the fisherman I talk to say it never was a good fishery area, so it's hearsay because I don't fish it and I don't know. But the rest of the river's got some awful fine fishing in it.[12]

Brown described the people of Midvale and their situation. "A lot of people here are special, independent, who want to be their own boss," Brown said. "We are sensitive to the tribes, we want to accommodate them without tearing our heads off," he said. "If the Tribes develop their irrigation, it's going to be a big problem. We're getting squeezed tighter and tighter. There are some third generation farmers out here, and they don't want to move," he stated, "but I bet half of them would sell it (the farm) and get out of the mess."[13]

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11 Ibid.

12 Ibid.

13 Bill Brown interview, March 23, 1995.

Brown voiced opinions that illustrate the paradox of federal water development on Indian reservations. "The federal government got us into this mess," he said. Later, however, Brown said, "Irrigation projects are one of the best things government ever did. It took $9.4 billion to build them and in 1947 they had generated $8.3 billion."[14] "A subsidy is a grant to one person or a group that benefits society. I think they're a good thing. The only problem I have is that some are misused. They can't police themselves," the District Manager said.[15]

In 1995, Brown said, "We want to be good neighbors with the tribes. It's easier to be friends than enemies – it's too expensive not to."[16] "Indian values are different," he said, "but the fact is, this is how it is right now and the government got us here. You have two cultures in one reservation. I have two Indian friends, good friends, they're ranchers. They got into the competitive world. White man is a greedy damn animal. Indians don't emphasize material things. That's the problem with white people, we try to turn them into white people."[17]

In a more recent interview, Brown said:

> If the tribes were gonna take this water and develop their lands and use it for agriculture so that they're going to be more self-sufficient and not depend on the government, I don't have a problem with that at all, it's their right to do that, but to impact somebody else for the fish is a little hard for me to understand. What is that fish, what is that value? If it's a tool to get us off the reservation, well, then, I don't like that. If they can control this project and tax us, that would be a pretty good benefit for them, and if they could sell their water and have control and charge us whatever they want to – maybe they have that right, maybe because we're on the reservation they have that

14 Ibid.

15 Bill Brown interview, August 24, 1997.

16 Ibid.

17 Bill Brown interview, March 23, 1995.

> right but the fact is the federal government bought this land from the tribes, *paid* them, and opened it up to homesteading and now the government has committed themselves to us and the tribes feel like they've been cheated and where does it all end?[18]

Brown contemplated possible outcomes of the water rights conflict:

> I don't know, I just don't have the answer. You know when I bought my farm on this project, I was a young fella and full of energy. If I'd known how the Indians felt about us farming on the reservation, I would have *never* considered investing in this country, but I've got a lifetime invested in this project and what am I supposed to do with it? If the government wants to re-locate me, I'd probably consider that. I think the government should correct this problem whatever it takes. The government hasn't shown me they can manage much of anything. All the government does is distribute money, and the wheel that squeaks the loudest is the one that gets it.[19]

When asked if it's possible to have instream flows on the Wind River without building more dams, Brown said, "Yes – efficiency. The more you can save, the more for the river. We can look at it as water savings for us, too. It's economics, too, in the long run, even though it's expensive, we eliminate maintenance."[20]

Johnny Hubenka, LeClair Irrigation District Manager since 1987, grew up on the reservation and went to school with tribal leaders John Washakie and Wes Martel. When asked about the social climate following the 1989 affirmation of the tribe's water right, Hubenka said, "It basically wasn't a good feeling for the water-users. They (the tribes) seemed to think they should have their water when we needed it the worst. This land ain't worth a damn without irrigation." Hubenka talked about the tribes' instream flow right:

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18 Bill Brown interview, August 24, 1997.

19 Ibid.

20 Ibid.

> There's times when that river don't have that much water in it of natural flow. So, in other words, they'd have to steal some from Midvale in order to meet their instream flow. . . . There's basically no game fish in this river anyway. Even with instream flow, it's not cool enough for 'em. The instream flow, I'll tell ya, was for money, it had nothin' to do with fish, really. They planted fish at Diversion Dam and asked Midvale to sluice their dam so they could shoot the fish on down to Boysen Reservoir so they could live, so it was kind of a joke. The worst thing that ever hit this country was Richard Baldes. He was kind of a thorn in everybody's side. He gave us a lot of problems and everybody else. Midvale had a lot of problems with him. He was kind of a one-man-band, I guess you'd say.[21]

Hubenka expressed doubt that the tribes could adequately manage water on the reservation. "Can you imagine the tribes managing anything?," he asked with a grin. "Anything you do over there, it's just a matter of gettin' em to do it," he said. "If they had the right people runnin' it, there's no limit what they could do with that reservation. They're way of life is basically different than ours." If they can use the water, fine, but just runnin' it down the river here, it's not benefiting nobody. That's not puttin' it to beneficial use. . . . I still think if you're gonna have instream flow, it's gotta be tied to storage, ya gotta build some dams. The reservation's got some good places for dams."[22]

When asked about water efficiency on the irrigation districts, Hubenka replied, "Due to evaporation and seep, every canal loses a certain amount and actually, if the water runs through our system or Midvale's, and gets to Boysen Reservoir, it really aint going to waste, it's going to the same place just another route."[23]

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21 Johnny Hubenka, interview by author, Riverton, WY, August 24, 1997.

22 Ibid.

23 Ibid.

Since leaving the tribal council following *Big Horn III*, Wes Martel started a consulting business, wherein he advises tribes around the country on water rights issues and how to avoid situations like the Wind River, amongst other things. In a recent interview, Martel said:

> In our present water rights case, we just went one way, the scientific/technical white-man way on this. The traditional and cultural and Indian side of things never really came into our case. And I think that's why we ended up losing 2/3 of our surface water and reserved right to groundwater. And that's a pretty hard concept to perceive if you understand the hydrologic cycle. How can we separate what comes from the sky, and what's on the surface and what's under ground? It's all one resource. So that's some of the legal and political games that tribes are encountering right now, we're getting boxed-in to the white man's definition of what a federal Indian reserved water right is. More elders and less attorneys, that's what I say, because I've seen where the opposite of that has taken us.[24]

Regarding the atmosphere on the reservation during the late 80's and early 90's, Martel said:

> When we adopted our tribal water code, we almost started World War III, you know. All the non-Indians went bonkers on us, the governor and the state engineer were goin' goofy on us, because they said, 'Oh, them Indians are gonna burn us out, them Indians are gonna dry us out, them Indians are gonna destroy the economy, them Indians are actin' up again.' And so, that's part of that whole political climate that we have to deal with. . . .
> . . . The point here is, number one, we're trying to develop an economy. And they're always saying, 'Aw, them Indians are on welfare,' and 'Aw, them Indians get commodities,' and 'Aw, them Indians get federal handouts.' We hear that all the time around here. Here we are, finally trying to do something. To not only recognize our own sovereignty, but to try to make some progress here and improve things. Well, when that hits the non-Indian world, for some reason, there's a lot of

[24] Wes Martel, interview by author, video, Ft. Washakie, WY, April 21, 1997.

negative reaction.[25]

When asked about the importance of water to the tribes' economy, Martel responded:

> We're just a microcosm of Wyoming, here. Recreation and tourism, agriculture and livestock and energy development, is the mainstay of the Wyoming economy, and that's the same way as our reservation. So recreation and tourism is a big part of that. And recreation and tourism isn't going to thrive if you've got a riverbed that's dry.[26]

Martel described other important aspects of water:

> As I mentioned earlier, the fish and the plants are our relatives, they have spirits just like us. That's the way we believe it. And if we're denying that resource and depriving the fisheries – when we de-water that river and when we lower that river – we're killing our relatives out there, we're killing their reproductive habitat and that reproductive cycle. I grew up along the Big Wind River. And I remember that river when I was young. There were fish and deer and birds and trees and plants and berries and we could go swimmin' and fishin' and huntin' all day, and we were just little kids, livin' off the land, basically, eatin' berries and you know, there was all kinds of natural foods out there. That area that I grew up in, because of all the de-watering and chemicals and fertilizers and pesticides and everything else that comes into that river, the Big Wind River below Diversion Dam is a dying river. And that really affects me personally. . . . . Right now, every year, there's non-Indian irrigation districts and other interests stealing Shoshone and Arapaho tribal water. Every year it happens. We've got to put a stop to that.[27]

Asked for his opinion regarding the way water has been managed on the Wind River by the state of Wyoming, Martel said:

> 'Use it or lose it,' right? So you've got these non-Indians

25 Ibid.

26 Ibid.

27 Ibid.

> out there takin' as much as they can, because if they don't, they're gonna lose it. And they're destroying the land, they're destroying water quality, they're altering hydrological cycle of our areas, mismanaging water. They're wasting water every day. And this instream flow, to irrigation districts and to western water law, could be considered a four-letter word, because agriculture has the lock on western water. And any time any entity, whether it's a tribe or even a non-Indian irrigator, if they want to transfer use of water from the beneficial use of agriculture to another beneficial use – that's a tough task. And they don't even do it for non-Indians, so how do you expect them to do it for Indian people, right?[28]

When asked for his opinion about the different outlooks toward water between the tribes and the state, Martel said:

> For us as tribal people, it's really hard to separate church and state, which state and federal governments constantly try to accomplish. For Indian people, our society, our religion, our culture, our way of life, our ceremony, our belief, all tie in, all tie in together in our social and governmental functions. Discarding any of these doesn't work for us.[29]

Regarding the interpretation that the Wind River Indian Reservation was established solely for the tribes' agricultural purpose, Martel responded:

> The sole purpose of the reservation as agricultural is shocking, astounding and terrifying all at once. Most people that aren't from this area, that don't know about it, when you tell them that, the average person just can't believe it, they're shocked. And that five supposedly educated, rational, level-headed, open-minded court justices decided that, that's pretty sad, not just for the tribes but for everyone.[30]

Martel also responded to the Supreme Court's interpretation of the McCarran Amendment that enables state courts to hear Indian water rights

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28 Ibid.

29 Ibid.

30 Wes Martel, interview by author, Ft. Washakie, WY, August 22, 1997.

cases:

> Well I think that's probably one of the worst things that ever happened to us. The McCarran Amendment, which was originally adopted in the early 1950's, was never meant to include Indian reservations. It was meant for military reservations, BLM land, Forest Service land, Park Service land. 'Federal reserved.' The distinction is federal *Indian* reserved rights. And we were the first major Indian water rights case to go through the process of the McCarran Amendment.[31]

Finally, asked if he foresees a solution for the water rights conflict on the Wind River, Martel stated:

> I think that, again, tribal water law negates some of these decisions, if we do it right. If we carry this law out right and have the good scientific, technical, and administrative capabilities, we can negate some of these bad effects. And we're not in it to destroy anybody. We're not here to hurt anybody or burn out the white man or kill the economy. We're here to protect our future. And I think it can be a win-win situation. But we've got the battle lines drawn, and it's really hard to crack that mentality that the non-Indians have. And we, as Indian people, we have our own mentality about what the white man is trying to do to us. And I think we both have that mentality that the other side is gonna do us in, but in fact, if we just sat down and talked about it, we could help each other out quite a bit. . . .
> . . . There's a lot of young, bright students up and coming, there's some leadership up and coming, and that's where we have to take it. We're just like anybody else. We want to have good homes, we want to have education for our young people, we want to have good health care for our people, we want to enjoy life. . . .
> . . . I think *people* are the ones that are gonna figure this thing out. Just our regular community – Indian and non-Indian community. Just our rank and file people – we're the ones that are gonna carry this out.[32]

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31 Wes Martel interview, April 21, 1997.

32 Ibid.

Starr Weed is considered an elder by fellow Shoshone tribal members and one of few remaining speakers of the Shoshone language on the Wind River Indian Reservation. Weed served on the Shoshone Business Council in the early 90's. When asked about the effects of the 1992 Big Horn decision, Starr Weed said:

> Well, that ain't very good. We told them we could handle it ourselves, didn't have to go through Fassett or whatever you call it. The rules for water went to the tribal council. We had several people appointed on the water board. . . . The favoritism is for farmers and ranchers, but what we want is not taking place. We've argued about that for a long time. We even went up to D.C. It looks to me if we have all that water, they could give us our instream flow.[33]

Asked about the importance of water to the Shoshone people, Weed said:

> One Sun Dance chief, he told me, he said, I use fish, I go fishing before I go into sun dance, I use a spear, don't use no line, he says, I get fish. He runs sun dance. When I'm going to pray, I eat fish, that's what he told me. That's a thirst dance. That's why he used to do that, he told me. That's how important instream flow is, for us and our fish. . . . In our religions, we pray for the water to be all right. Everything needs water you know, that's the way we pray, pray for all our food, our fish, wild game and everything. . . . My people, they don't do much farming either, but some do. Some of us do. But we're not hearin' anything. We don't know what's going on now about decisions they're making over there for our water.[34]

State water administrators have not been receptive to cultural expressions about water from Indian leaders. State Engineer Fassett said:

> I've heard those lectures. I've tried to know them better. They're not very motivated to understand the other way. And our way is certainty. Their government is not designed that way. That may be good for some things, but

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33 Starr Weed, interview by author, video, August 25, 1997.

34 Ibid.

not water.[35]

Fassett said he had nothing against in-stream flow, liked it, in fact, at least in the rarely used form allowed by the state, but he wasn't going to shut off non-Indian irrigators to make it happen.[36] Asked if he thought the tribes should control their own water, Fassett said:

> I think they should. The issue becomes – do they have the right to administer their own water to the detriment of anybody else? Are there not other rights that are worthy of analysis and of protection in that process? Can they have 1,000 cfs instream flow, if they'd like it? I don't think the tribes would go to that extreme. But there are some who would argue they could. So it creates this uncertainty, again. . . . I think what the (state) water users resisted is that there was no certainty in what the tribes might want, or what they might like to do next. They wanted instream flow now, but what would they like next year? . . . Ultimately, the tribes very well may be successful having an instream flow water right in that area of the river, if that's what they want to do. And that's gonna take a lot of water away from a lot of people, and I think people just want to have the certainty that that's a legal, predictable process.[37]

As to the cause of the water rights conflict on the Wind River Indian Reservation, Fassett said, "It's no fault of the tribes, no fault of the state, that we're in the mess we're in. It's the doctrines of federal law and reservation policy by the federal government that have created the mess. It's created the patchwork quilt."[38]

In 1997, John Washakie was re-elected Chairman of the Shoshone Business Council. Washakie served on the Council during most of the Big Horn litigation from 1981-1992, much of that as Chairman. In describing the

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35 Geoffrey O'Gara, *Northern Lights*.

36 Ibid.

37 Jeff Fassett, interview by author, video, Casper, WY, August 23, 1997.

38 Ibid.

litigation's effect on tribal-state relations, Washakie noted that the Governor of Wyoming at the time had met fewer times with the tribal council than the territorial governor did in the 1800's.[39]

In 1995, Washakie gave his perspective on Wyoming state water policy:

> The prior appropriation doctrine is a totally new concept to us. The state's policy is real rigid and doesn't account for environmental and cultural interests. Our way of life is concerned with dealing with those aspects of water. In a lot of instances, they (irrigation districts) were diverting more water than necessary, in cases, to reach the end of the canal. We would never go beyond what policy allowed to take. Let's face it, to take much more hurts the land – too much water can do more damage than less water.[40]

Washakie brought up the huge discrepancy between Bureau of Reclamation dollars into non-Indian irrigation development versus Indian development, adding that the $4 million invested into tribal infrastructure was paid back to the Bureau, unlike the over $75 million spent on Midvale. "The Tribes have a conflict with the Department of Interior because the trust responsibility has not been lived up to," Washakie said. However, he remained optimistic. "Bruce Babbitt is the first (Secretary) to recognize that the Department of Interior better do something. We see this as a good sign." Washakie concluded the 1995 interview by saying, "the issue of streamflow on the reservation involves issues of sovereignty, racism and sociology."[41]

Burton Hutchinson was Chairman of the Northern Arapaho Tribe during *Big Horn III*. When asked about the water rights conflict, Hutchinson claimed:

> Elders and traditional people they used to tell us certain

[39] John Washakie, interview by author, notes, March 23, 1995.

[40] Ibid.

[41] Ibid.

> things about what they used, and that was water. They used to call it the Water of Life, where all life comes from. Our mother used to tell us, she said, you always respect water. You always respect yourself, you have to respect everything that's made, that was created for all people. Not just Indians. All different nationalities, along with their traditions, their cultures, whatever, we all have different things that we believe in. How we use things. But water has always been essential to each, every one. The way it was blessed at the beginning of time, and it's still here. . . .
> . . . And today, (the tribal water right) is still not really recognized. The state engineer, and district water engineer, they're still up in the air of what we're going to do next. . . . And I always told people that we were trying to take care of these things for you, for the future of our grandchildren, like that. Through my own way I know that this water does belong to us. And we can use it any way we want. I think today it's still recognized as that, only the control is still not there yet. They still want to control it for us.[42]

Gary Collins, Arapaho Chairman in the late 1980's, talked about the significance of water rights for the Wind River Tribes:

> I believe there are two issues involved with the future of water rights within the Wind River Indian Reservation. Those issues being, one, a recognition that sovereignty is valid in terms of government policy by the tribes. And the second things is, if the tribes are able to thrive and do well and manage their resources along with their people, then the whole community benefits from that, and also, the state benefits even more. That recognition needs to be recognized somewhere within the general population. The hurdle is getting that recognition, of understanding where the tribes are coming from. And we're not adversarial. But we're finding roadblocks all over. For example, two years ago, Congress proposed taxing Indian gaming. But not taxing non-Indian gaming. Those kinds of things always come up. Why can't there be a level playing field?[43]

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42 Burton Hutchinson, interview by author, video, Ethete, WY, August 24, 1997.

43 Gary Collins, interview by author, video, Ft. Washakie, WY, April 25, 1997.

Collins said that managing water on the Wind River Indian Reservation, "is an issue of paramount significance, in that it's a natural resource that's renewable, as compared to oil and gas. . . . We need to diversify our income stream, and our initial concern – and most reasonable one – would be the management of water." Collins added, "We feel that the federal government now should be in a position to make a decision on our case that would set some positive precedent for all Indian tribes in their settlement negotiations."[44]

Ralph Urbigkeit, non-Indian farmer and former long-time Fremont County Commissioner, said in May 1990 that the water rights conflict was "causing tension in the community that we never had before. Statements are being made that will never be forgotten," Urbigkeit said.[45]

In August 1997, Urbigkeit said:

> Up until the state took the tribes to court over water, there was no problem with water on the reservation. From then on, everything deteriorated. They (the court cases) caused hard feelings amongst neighbors, they caused hard feelings between the state and the tribes and it has never been settled yet. The state attorney hired to institute the suit worked for the state for 16 years and never won a suit. And it still isn't won. Of course, he collected $7 million in fees. So that tells us something. I don't know what.[46]

Regarding the question of whether both the tribes and irrigators can co-exist, Urbigkeit said, "It was a contrived shortage from the very beginning by the state to cause a confrontation. Some of these irrigators put on 25 acre feet a year. They don't have to but they do. Others put on five or six." When asked for his opinion about the tribes' instream flow, he said, "They (the

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44 Ibid.

45 "Water shortage fuels tensions on reservation," *Wind River News*, May 29, 1990.

46 Ralph Urbigkeit, interview by author, video, Crowheart, WY, August 26, 1997.

tribes) were interpreting instream flow as a beneficial use. It probably would be beneficial if they had fishing camps or fishing outfitters or someone using fish in the river."[47]

At the end of a 1994 interview, Craig Cooper said that he worked in the Wyoming Game and Fish Department for six years before taking the Deputy State Engineer position. "I left Fish and Game because they're never satisfied with what they get and because of their failure to understand the other side," he said. Cooper said he has since learned "the reality of the past hundred years in the West – peoples' economic values are permanent where a fishery is temporary, it can be important later."[48]

To this latter statement, Dick Baldes responded that a properly managed fishery will always be important. He said, "That's what we do, that's what biologists are supposed to do. I don't understand that statement, 'It can be important later.' It can be important now, it can be important later, it can be important forever."[49]

Cooper said that from 1988 to 1990 were the worst years of his life because of the Big Horn cases.[50] When asked for his opinion about the *Big Horn III* decision, Cooper replied, "Well, as a matter of law, I guess, it put priorities back in place. I guess, to the extent, to the maximum extent possible. It maintained, or allowed maintenance of the status quo, so that no injury was created by any arbitrary acts of one or the other parties. And I think it was an attempt, and a very good one, on the part of the supreme court justices, to avoid a war in this place. I think they astutely diverted from

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47 Ibid.

48 Craig Cooper, interview by author, notes, Riverton, WY, March 18, 1994.

49 Dick Baldes, interview by author, video, Lander, WY, April 22, 1997.

50 Cooper interview, March 18, 1994.

that."[51]

Regarding attitudes about water rights on the Wind River Indian Reservation, Dick Baldes claimed:

> Jeff Fassett and the State of Wyoming, their philosophy isn't any different than the irrigators. It seems that they should have a responsibility to all people of Wyoming, not just irrigators. And from a tribal standpoint, that isn't even a consideration, it's like the two tribes, the Shoshone and Arapaho, don't exist, and I think most of the irrigators would like to see that they be gone. Well, the tribes are tied to this land and this water more than anybody else. And they don't have a role to play in this? Somebody's missing the boat. And it's not the tribes. . . . I mean, just think when the Crows lost the Big Horn River in Montana – what that did to them – it was like tearing their heart out. And they still feel that way. In a sense, that's what's been done by the irrigators to the Wind River Indians. And it doesn't have to be that way.[52]

As for Wyoming's Congressional delegation, its declaration that it wanted to help resolve the Wind River conflict did not include fulfilling federal trust responsibilities. Instead, the delegation interfered with federal agencies that were helping to restore the Wind River. In mid-May 1990, following the U.S. Fish and Wildlife Service's stocking of trout in the Wind River, as requested by the tribes, Wyoming's U.S. Senator Al Simpson decided it was time to get involved. Of particular concern to Simpson was the tribes' decision to use part of their water for an instream flow. "That is not right and this delegation is not going to sit by while we see people injured or see a very crafty form of enforced confrontation," he said, "especially putting the fish in a part of the river that's been dust in August for about the last memory of man. The purpose, of course, is to enforce that minimum flow, which has

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51 Craig Cooper, interview by author, video, Riverton, WY, April 23, 1997.

52 Dick Baldes interview, April 22, 1997.

never been enforced by a court, and to enforce confrontation and we are not just going to sit and observe that."[53] Senator Simpson later wrote a letter to Secretary of Interior Manuel Lujan requesting him to fire Dick Baldes. The request was unsuccessful, but the Fish and Wildlife Service stopped planting fish. The agency said it would resume planting in late August, but by then Fassett had refused to protect the tribal instream flow.

In late May, 1990, Wyoming's other Senator, Malcolm Wallop said, "The tribes are after sovereignty and self-sufficiency. They'll never get the self-sufficiency until they have clarity in their water circumstances. They can't make their reservation economy grow and it's in their interests, as well as in the interests of the state of Wyoming, to have a prosperous pair of tribes on the reservation with certainty in their water."[54] Wallop nor any other Wyoming official has specified what aspect of the Wind River Tribes' water code lacked certainty.

Geoff O'Gara is a Lander writer who has contributed to *National Geographic, High Country News* and other publications. O'Gara reported on the Big Horn cases for several years and is writing a book about the people of the Wind River. O'Gara said there has been belligerence on both sides of the issue and that people in the basin generally perceive the tribes as unstable.[55] "The underlying fear within non-Indians is that they are losing their water and are afraid of giving Indians control of anything," he said. When asked about the possibility of a solution, O'Gara said, "No agency can impose a workable decision because the jurisdictions are parsed among narrow, partisan interests." However, O'Gara said, "In the heat of the litigation, a

53 "Simpson involving self in Wind River talks," *The Casper Star-Tribune*, May 23, 1990.
54 Dan Whipple, "Wallop defends delegation stance on Indian water," *The Casper Star-Tribune*, May 31, 1990.
55 Geoff O'Gara, interview by author, notes, Lander, WY, March 18, 1994.

glimmer of understanding passed between Midvale and the tribal water engineer's office." O'Gara pointed out that due to high alkalinity, the Midvale District appears to be a poor project in terms of agricultural and economic assets and that its economic future appears uncertain.[56]

O'Gara talked of a possible solution that he first heard in 1988 from now Interior Secretary Bruce Babbitt. It consists of the federal government buying up Midvale Irrigation District and giving the land back to the Tribes. Meanwhile, O'Gara solemnly stated, "As long as the reservation is dysfunctional, this whole valley will be dysfunctional."[57]

O'Gara writes:

> For the state of Wyoming, history is a Biblical contest over the region's most precious resource, jealously guarded against federal authority or any radical alternatives to the scripture of the state water code. For the tribes, it is an even older story: a losing, but unrelenting, struggle against the expropriation of their way of life, their lands, and even those things, like water, that the white man's courts had agreed to let them keep.[58]

In the past few years, there has been little confrontation over water between the state and the tribes, mainly because ample snowpack and precipitation have provided plenty of water. "We've been quietly sort of getting along, trying to take advantage of these good, wet years to work through problems," said Jeff Fassett. "When it's dry, tensions get high very quickly, and it's easy to lose a little control of the issue."[59]

Each summer, meanwhile, flows on the Wind River drop far below the level dedicated by the instream flow right of the Shoshone and Arapaho

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56 Ibid.

57 Ibid.

58 Geoffrey O'Gara, *Northern Lights*.

59 "State, feds, tribes, again talk water," *Riverton Ranger*, August 21, 1997.

tribes. In August 1997, the Wind River Tribes, the State of Wyoming and the federal government launched a new round of negotiations over water rights. The last round of negotiations ended over a year before, at least partially due to personnel changes in state, tribal and federal governments. "The leadership and staff on all sides look to be very stable for the next year or so, and we want to take advantage of the stability we now have," Fassett said. "The things we're interested in talking about are 'Where do the tribes want to go – what do they want to do with their water?" Fassett declined to discuss specifics, but he said one item on the agenda is the possibility of state investment in water development on the reservation.[60] Last April, John Washakie said he hoped that future talks would go better than previous negotiations had gone.[61]

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60 Jeff Fassett interview, August 21, 1997.

61 John Washakie, interview by author, video, Ft. Washakie, April 24, 1997.

CHAPTER SEVEN

CONCLUSION

Throughout its case in *Big Horn III*, the State of Wyoming argued that the Wind River Tribes were awarded the right to divert water and not the right to leave water in a stream. Perhaps when considering legal arguments and jargon, one can overlook the simple absurdity of it all; that a Western state supreme court actually agreed that a senior rightholder, let alone a pair of (supposedly) sovereign tribes, cannot let their water flow down its natural stream channel. Ironically, the state presented no evidence of injury to any of its water rightholders in *Big Horn III*.

In its muddying of the Shoshone and Northern Arapaho Tribes' water rights, the modern-day "Battle of the Big Horn" exemplifies law as the language of western empire. Wyoming water management manifested in the prior appropriation doctrine has proven unable to adapt to water rights and uses outside of its political realm. An empire of private interests has managed to retain exclusive control of water. The Big Horn adjudication illustrates the great extent to which the State of Wyoming has gone and will go to maintain status quo control of water for these 'traditional' private interests. If the rights of an Indian reservation, inhabited by distinct tribal nations, have yet to inspire the state to adapt its water law, then what *will* lead to necessary reforms in Wyoming water policy?

The classic prior appropriation doctrine assumes that society's water use will remain stagnant. Today's poor water quality however cries for policies that place higher priority on conservation and ecology. "Use it or lose

it" is an antiquated notion that should be canceled. Also, the direction of water policy must include the tribes of the West, with their age-old connection to the Land and large quantities of reserved water rights.

It has been exclusively non-Indian irrigators and state water administrators who argue that the lower stretches of the Wind River have not ever held and/or cannot ever hold healthy fish populations. They claim that the de-watered stretch of the Wind River gets too warm to host fish or that it is too 'developed.' However, they provide no evidence for this outside of the current effects of low flows and sedimentation brought on by intensive irrigation.

At the center of debate on the Wind River is the ultimate question of whether tribal water administration, for example instream flows, and non-Indian irrigation can co-exist on the river. In April 1997, State Engineer Jeff Fassett said, "If you can make all the canal systems more efficient, both Indian and non-Indian, then there'll be less demand for irrigated agriculture, leaving the water in the river," said Fassett.[1] However, effective conservation and efficiency have yet to occur on the Wind River. If they have, where are the results? In light of the absence of these important initiatives, it appears promising that there is plenty of water for both tribal water use and non-Indian irrigation. Meanwhile, water is far too ecologically valuable to be used as a political pawn in the conflict between cowboys and Indians.

The best way to increase water supplies is to conserve water from existing supplies. This means no new water projects. Dams conserve only in that they catch and store water that would otherwise flow to sea. Indeed, dams often discourage conservation. True water conservation is a broader

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[1] Jeff Fassett, interview by author, video, Casper, WY, April 23, 1997.

concept requiring users to employ water-saving practices that substantially decrease or eliminate waste. In this sense, an enormous new water source exists already – wasteful, inefficient uses practiced today – that can be "tapped" by scrutinized use and conservation tomorrow.

The paradigm of traditional water control in the dry West will inevitably be forced to accomadate tribal water rights and additional values of water use. While the historic prior appropriation doctrine's time has come, necessary reform must be careful. The demise of agriculture would be a disaster not only for farmers and ranchers, but with its ensuing subdivisions and roads.

The history of river protection in the West resembles the evolution of America's environmental movement; in both, the focus originated with piecemeal protection of wild areas and/or pollution control. Only recently has attention turned to biodiversity or ecosystem issues. The historic emphases on protecting wild river stretches has generally limited protection to federal and state Wild and Scenic designations. This narrow approach requires separate legislative acts for a river or group of rivers to be protected. Also, this focus has not brought together what should be the natural constituency for rivers. People addressing clean water, human health, forestry and agriculture, soil productivity, fishery enhancement, or Wild and Scenic issues, even within the same water system, have generally failed to realize the inherent relationship they have with each other. The fragmentation of the advocates reflects the fragmentation of existing policies.[2]

The national environmental movement has done relatively little on issues of water quantity and its relationship to water quality. Until only

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2 Doppelt, Scurlock, Frissell, J.R. Karr, *Entering the Watershed: A New Approach to Save America's River Ecosystems.* Pacific Rivers Council. Island Press, Wash D.C. 1993

recently, rarely did organizations challenge state decisions regarding water allocation or general water policy and its environmental repercussions in the West. Increasing commitment has come from local and state groups whose goals include attaining natural flow levels in western streams. Idaho Rivers United, for example, includes in its mission the protection of free-flowing rivers and recreational water rights, solving instream flow problems around the state and helping local river advocates defend their home rivers.[3] A young journal, *Rivers*, out of Fort Collins, Colorado, is dedicated to studies in the science, environmental policy, and law of instream flow.[4]

The Wind River brings together critical scientific, social and legal questions regarding water in Wyoming and the West. Of course the big picture behind the Big Horn cases is more about power than fish and wildlife. At the heart of the matter though, is the Wind River and the life which depends on it. The living context of the Wind includes not only people but soil, insects, plants, birds, fish, trees, and animals that the people depend upon. Humans are inseparable from these components, lest they fade away.

Given its complex history, no court of law can truly "settle" a dispute such as the Wind River dispute. Courts are not equipped with the scope or tools to deal with such conflicts. As a result, Indian water rights litigation usually produces only incomplete, often abstract answers and prolongs uncertainties that do not serve any group. Meanwhile, courts throughout the West are hearing claims related to Indian water rights. The stakes have been estimated at 45 million acre-feet of water (enough water to cover 45 million acres of land with one foot of water) per year in sixty western water basins.

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[3] Idaho Rivers United, P.O. Box 633, Boise, ID 83701. (208) 343-7481.

[4] *Rivers* is published quarterly by S.E.L. & Associates, 19 Old Town Square, Ste. 238, Fort Collins, CO 80524. (303) 224-1220.

The affected parties include over 100 Indian tribes and non-Indian communities currently using the water which reservation communities claim.[5]

The Wind River Basin's diverse peoples have been embroiled in an exhaustive legal and emotional battle, pulling them away from each other and from the river they share. Conflict over Indian water in Wyoming and throughout the West is often an artifact of a larger problem. Non-Indians generally lack faith in the opportunity that what is good for Indian tribes will be good for their region's community. They resist tribal control and for that matter, tribal prosperity. Racism has been obvious. The extent to which Indians have suffered from non-Indian mistrust, and subsequent intrusion, has gone far enough.

Contrary to popular assumption, non-Indians can benefit greatly from tribal water decisions. Indian water rights can fortify local or regional communities with advantages such as a guaranteed water supply, an improved fishery, ecological integrity and improved water quality. All of these have positive economic implications. People in Wyoming should recognize that Indian water rights would more peacefully and profitably be addressed not by persistent calls for their compromise or extinction, but by making a respectful place at the table for Indians and their water resources.

The future of the Wind River Basin bears important messages for the West. The reality of reserved Indian water rights will not go away. If non-Indians continue to deny this, they ultimately hurt themselves and their families. Just because someone arrived at a place first does not necessarily

5 Monique Shay, "Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of the Relationship Between the Winters Doctrine and Federal Water Development in the Western United States," *19 Ecology Law Quarterly 547* (1992).

mean they should make all the rules. Nor should they be forced to leave or live under someone else's policies. Meanwhile, non-Indians who settled on or in the vicinity of Indian reservations should be treated fairly but should also understand the unique circumstances of living there. Can the Wind River people co-exist?

People can come together, even if only because they are concerned about a dying fishery, dying crops, or shared pride in a river. Everyone affected by the Big Horn cases seems to agree on one thing: the federal government made a critical mistake when it encouraged and funded reclamation projects for non-Indians on a river system where it had a legal obligation to protect Indian water. And after twenty years of litigation, the question remains: What is the solution? With every conflict, no matter whose "fault," comes opportunity.

For the Wind River people to peaceably sustain their livelihoods, they should understand and express their interrelationship with one another and their watershed. Unlike arbitrary political borders and land forms, river basins are well suited to regional governance. As John Wesley Powell first explained, the West's people are interdependent – a body of interests defined by hydro-geographic districts. Politics therefore, should follow watersheds, not the arbitrary, hand-drawn lines we have been following. Watersheds provide a unique and vital opportunity, if not necessity – for people to work together for a sustainable future based upon the common essential resource of water.

More informal communication is needed to develop trust and understanding of the needs and values in the Wind River Basin. A watershed forum could be a place where trust could grow, and where conflicts

could be mediated. Non-confrontational processes should be utilized. The organization's proceedings should be open to the public. Children who are interested should be encouraged to attend watershed meetings. The organization should stress involvement and communication of basin residents, addressing the distribution of resources in the basin, their role in regional economic development and long-term sustainability. It should be structured as an inter-sovereign organization and should have political clout, especially with Congress. To be most effective, it should include individuals technically-competent in geology, biology, ecology, and hydrology. Education of the council, as well as all other residents of the basin should be a high priority.

Watershed planning accommodates vital considerations of community since the most effective decisions will occur at the local level, closest to those affected. Three principles are critical to the creation of a successful community-based project or resource coalition: balance among the diversity of interests, a shared vision or collective goal for protecting or restoring healthy ecosystems, and a commitment to use the best available science. Perhaps the most important element of collaborative watershed planning is to involve everyone who has expressed interest. This ensures that if agreements are made, they can be safeguarded and implemented. The short terms of state and tribal governments, and the turnover of state officials, can make negotiating difficult. Tribal council members, for example, have two-year terms.

Before making decisions regarding the future of their watershed, people need to be well informed of current, and probable future, water uses. They should understand the ecology of their water system in order to plan

for its economic and ecologic sustainability. Children should learn the ecology of the basin as well as hydrology.

The health of a watershed reflects its ability to produce sustainable products, clean water, recreational opportunities, and fish and wildlife. Healthy watersheds retain natural flows; recharge aquifers; are resilient to disturbances such as flood, fire, and drought; and are more capable of absorbing the effects of human activities. Native fish populations are key indicators of the health of a watershed. Cutthroat trout, for example, would be a critical indicator species in the Wind River system. Understanding the physical and biological roles of tributaries and their native fish populations in the larger watershed unit will enhance capabilities in watershed protection and restoration.

A watershed community, like any community, begins with kindness and respect; if genuinely shared, the people north and south of the Wind River can begin to talk about the future of their watershed; without these, given their geographic connection to one another and their river, conflict is inevitable. As the seasoned farmer and writer, Wendell Berry, writes, "In private life, as in public, we are attempting to correct bad character and low motives by law and by litigation. 'Losing kindness,' as Lao-tzu said, 'they turn to justness'. . . And because such 'justice' cannot happen, litigation only prolongs itself."[6]

The type of community to strive for along the Wind River (and most watersheds) is astutely outlined, again, by Wendell Berry:

> The commonwealth and common interests, commonly understood, of people living together in a place and wishing to continue to do so. Community is a locally understood interdependence of local people, local culture,

6 Wendell Berry, *Sex, Economy, Freedom and Community*, Pantheon Books 1993 at 119.

> local economy, and local nature. . . . A community identifies itself by an understood mutuality of interests. But it lives and acts by the common virtues of trust, goodwill, forbearance, self-restraint, compassion, and forgiveness. If it hopes to continue long as a community, it will wish to – and will have to – encourage respect for all its members, human and natural. It will encourage respect for all stations and occupations. Such a community has the power – not invariably but as a rule – to enforce decency without litigation. It has the power, that is, to influence behavior. And it exercises this power not by coercion or violence but by teaching the young and by preserving stories and songs that tell (among other things) what works and what does not work in a given place.[7]

Politically and economically practical comprehensive watershed management takes time. A basic outline for forming a watershed council might look something like this: 1) all present jurisdictions within a watershed should cooperate and act in a reasonably coordinated manner, 2) develop an inventory of water supplies, existing uses, and potential uses, 3) future water uses should be prioritized after open hearings, and 4) implement the plan, monitor, and amend it. The plan must remain flexible enough to accommodate socioeconomic changes in the region and to incorporate new inventory and ecological data as it becomes available. Again, it cannot come from the top, it must be grass-roots.[8]

Once established, the Wind River Watershed Council should begin with an in-depth watershed analysis. Watershed analysis is a process to gather, generate and organize information about a watershed and aquatic ecosystem to provide a basis for making recommendations to help prevent further decline and degradation of watershed functions, structure, and species

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[7] Ibid at 120.

[8] Charles Wilkinson, "Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine," 24 *Land and Water Law Review* 1 (1989) at 5.

and help direct short and long term protection, restoration, and management efforts. It should bring together available and newly generated information for a practical and more comprehensive understanding of the watershed and aquatic ecosystem processes and elements. This information should lead to land use recommendations and decisions that will protect existing conditions and eventually restore the watershed. Such analysis should ultimately place the "burden of proof" where it rightfully belongs – on those proposing an action or to continue an action that may degrade the condition and function of the watershed and aquatic ecosystem.

Watershed analysis is not static. It should be used as an interactive, on-going process viewed as a key element of an adaptive management process. Information should be continually updated regarding the amount of water in the basin, the present distribution of benefits in the basin, water quality, and instream flow needs of fish and wildlife. The Pacific Rivers Council's recently published, "Healing the Watershed: A Guide to the Restoration of Watersheds and Native Fish in the West," provides detailed steps for watershed councils to refer to.

Management activities on the Wind River outside of the watershed context run the risk of being ineffective, at best, and can be destructive at worst by fragmenting and disconnecting the habitat segments. The current condition of the Wind River exemplifies the effects of a piecemeal, fragmented approach to water management. As David Getches says, "We need to think like a watershed; to understand the influences, the sources, the direction, the differing values and the future of watershed."[9]

The State of Oregon has moved watershed planning to center stage,

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9 David Getches at Public Land Law Review et al Conference: "Montana Rivers: Conflict or Confluence?," Montana State University, Bozeman, MT, April 21-22, 1994.

providing incentives and political clout to broad-based watershed councils throughout the state. Within these councils partnerships made up of local residents decide on watershed management strategies. These experiments are spreading. The Henry's Fork Watershed Council in Idaho and the Upper Clark Fork Steering Committee of Montana are just two examples of community watershed planning efforts in the West.

Unfortunately, due to narrow perceptions, hardened attitudes and denial, opponents to Indian water rights in Wyoming have for the most part refused to respect the tribe's reserved water rights. This resistance runs wide in the non-Indian community of Wyoming, from Wind River farmers to state water administrators to state court justices. In 1980, for example, the State of Wyoming gave this response to the reserved rights claims by the Wind River Tribes, "Wyoming affirmatively asserts that there are no reserved water rights for the Wind River Reservation."

Until their reserved water rights become fully recognized and protected, whether through the Supreme Court, Congress or the President, the Wind River tribes may not receive the respect they deserve in negotiation or other community forum. The Supreme Court and/or Congress should act in a timely fashion to ensure that reserved Indian water rights are protected from, let alone respected in, their regional community. The trust responsibility of the federal government, established in the early days of the United States, punctuate this need.

Again, attempts at collective watershed decision-making will be frivolous without mutual respect amongst its participants. Hopefully, people will respect the water rights of the Wind River Tribes not out of fear, but out of respect of the tribes' as neighbors. Otherwise, for the tribes to successfully

negotiate water rights they may be forced to pursue further litigation. For now, the Wind River tribes have agreed to confer with state and federal officials over water rights. But can officials from these three entities alone, behind closed doors, come up with a workable resolution for the Wind River community?

Despite the cost and protracted nature of water rights litigation, many consider it to be the only method that conclusively determines essential questions of water rights. Some Indian leaders are persuaded by unsuccessful negotiated settlements to never again discuss water rights outside the courthouse. Similarly, the Shoshone and Northern Arapaho Tribes may decide to pursue other avenues of law to gain administrative control of their water. In addition, from an Indian water right-opponent's standpoint, litigation is expensive but not when you consider you've been using someone else's water for over 70 years and you may now lose it.

If litigation becomes the only recourse, the tribes might find it beneficial to use other arguments to regain control of their water. Wind River Tribal Judge John St. Clair suggested, "Maybe a better argument is the spiritual aspect, that water is a part of the tribes' religion."[10] Shoshone tribal chairman John Washakie in 1995 said he regrets that the cultural aspects of the Wind River and groundwater issues were neglected by the Tribes and their attorneys during litigation. He said these topics had still been brought up at tribal council meetings.[11] Recent court decisions indicate that tribal culture carries significant weight in cases of resource use and protection.

The most appropriate resolution on the Wind River will come from the collective Wind River community. As this study has revealed, the people

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10 Judge John St. Clair, interview by author, notes, Ft. Washakie, WY, March 17, 1994.

11 John Washakie, interview by author, notes, Ft. Washakie, March 23, 1995.

of the Wind River valley can go a long way toward creating a healthier, more unified community. Different cultures and histories will require that people drop past assumptions and build mutual respect. Different ways of relating to the environment, and acceptance, will need to be resolved in order for the Wind River basin to become a healthy community.

New approaches and policies must be established in the Wind River Watershed and elsewhere to protect Indian water rights and prevent the impending collapse of riverine ecosystems. I recommend that full-scale watershed planning, involving all interested parties, becomes the vehicle for making water policy decisions in the Wind River Basin.

Epilogue

At the end of giving his opinion during an 1892 Colorado case in which one man murdered another in a dispute over an irrigation ditch, the judge cautioned, "Human blood is more precious than water, even in this thirsty land."[12] But ultimately, this statement begs questioning. Is it not water which is most precious, since without water, there can be no life?

At the end of an August 1997 interview, Shoshone elder Starr Weed agreed, with a big smile, to speak in Shoshone. He spoke with hands flowing for what seemed like a very long time and then translated with sparkling, far away eyes, "'As long as the grass grows and the waters flow, that's our water' – that's what the old timers told me."

Water knows no boundaries.

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12 Susan D. Brienza, "Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects," *11-12 Stanford Environ. L. J. 151* (1992) citing *Power v. People*, 17 Colo. 178, 186, 28 P.1121 (Colo. 1892).

Felix Cohen, *Handbook of Federal Indian Law* 62, (1982 ed.). This was the first compilation of Indian law and is still a relied upon overview of Indian law---very thorough.

Daniel McCool, *Command of the Waters: Iron Triangle, Federal Water Development, and Indian Water*, University of Arizona Press (1987). Describes the cozy and corrupt relationshipt that built the West's water paradigm simultaneously overlapping and ignoring Indian water rights.

Marc Reisner and Sarah Bates, *Overtapped Oasis*, Island Press, Wash. D. C. (1990). This book provides ideas, such as water leasing, to negotiate Indian water rights disputes in the context of a water supply already doled out to too many users.

Marc Reisner, *Cadillac Desert*, Viking Penguin, Inc., New York, NY (1986). An excellent, literary account of the irony of the American West's desert civilization. Reisner provides a history of the West and its relationship with precious water, before documenting the growth of the Bureau of Reclamation. He describes gross subsidization and the Bureau's false promises of economic and ecological benefit. He forecasts disaster due to the reality of an over-tapped oasis not so slowly salting over.

Periodicals

Geoffrey O'Gara, "A Wind River Runs Through It", *Northern Lights*, Summer 1993. A literary description of the local havoc generated by the Big Horn cases. O'Gara provides perspective of Tribes' relationship with the Wind River compared to that of the irrigators. Includes monumental statements from justices of the Wyoming Supreme Court.

Geoffrey O'Gara, "Waterless in Wind River?", *High Country News* August 27, 1990. Similar to O'Gara's story in Northern Lights, this being three years earlier and prior to the 1992 decision – the story of litigation and community struggle in the Wind River valley.

Cahd Baldwin, Editor, *The Riverton Ranger*, Riverton, Wyoming. Scores of articles regarding Big Horn litigation and surrounding issues, usually local and state issues.

Tom Reed, Editor, *Wyoming State Journal*, Lander, Wyoming.

Law Reviews

Michael C. Blumm, "Unconventional Waters: The Quiet Revolution in Federal and Tribal Minimum Streamflows," 19 *Ecology L. Q.* 445 (1992). As the title suggests, this looks at the revolutionary nature of the Indian and federal reserved water rights in permitting minimum instream flow levels. It contrasts the reserved water rights from traditional state laws regarding instream flows.

Susan D. Brienza, "Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects," 11 *Stanford Environmental L. J.* 151 (1992). A good discussion of the difficulties in converting paper rights to actual water, particularly the PIA quantification of allotment. An excellent detailing of the pros and cons of negotiations with some examples..

Stephen Feldman, "Supreme Court's New Sovereign Immunity Doctrine," 18 *Harvard Environmental Law Review* (1994). Feldman argues that tribes now have legal ammunition opposing state courts' adjudication of Indian water rights via the 1992 *Nordic Village* case.

David Getches, "Management and Marketing of Indian Water: From Conflict to Pragmatism" 58 *U. CO L. R.*, 515 (1988). Getches suggests cooperation and negotiation for solving water disputes over Indian reserved water rights and describes water marketing as a way of satisfying all parties.

Peggy Sue Kirk, Casenotes, "Cowboys, Indians and Reserved Water Rights: May a State Court Limit How Indian Tribes Use Their Water?", 28 *Land and Water L. R.*,467 (1993) This is an excellent general source for the series of Big Horn court cases. Kirk also gives a good critique of the cases, most specifically *Big Horn III.*

Michael Leider, "Adjudication of Indian Water Rights Under the McCarran Amendment: Two Courts Are Better Than One," 71 *Georgetown L. J.* 1023 (1983). A discussion of the McCarran Amendment in its history and implication for Indian water rights. Leider is concerned with the state courts' abilities to adjudicate Indian water rights---a critical perspective.

Joseph Membrino, "Indian Reserved Water Rights, Federalism and the Trust Responsibility," 27 *Land and Water L. R.* 1. Membrino gives a thorough and highly critical view of the Supreme Courts wavering on Indian reserved water rights. A segment of this criticism is quoted by Justice Golden in summarizing his opinion in Big Horn III. Membrino describes the importance of accommadation of the value of Indian water rights by regional economies, and presents water marketing as a way of fulfilling this need.

Jeff Taylor and Duane Birdbear, Note, "State Jurisdiction to Adjudicate Indian Reserved Water Rights" 18 *Nat. Resources J.* 221 (1978). This article critically dissects the cases, specifically the *Akin* case, which enable state jurisdiction of Indian water rights. The authors describe the overwhelming conflict of interest therein.

Walter Rusinek, "A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine," 17 *Ecology Law Quarterly* 355 (1990). Outlines curious behavior of the Supreme Court and its implications for Indian water rights in the future. Includes oral argument (there is no written opinion) of the Supreme Court regarding reserved Indian water rights.

Monique C. Shay, Comment, "Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of the Relationship Between the Winters Doctrine and Federal Water Development in the Western United States," 19 *Ecology Law Quarterly* 547 (1992).

Charles Wilkinson, "Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine," 24 *Land and Water L. R.*, 1 (1989). A thorough study of the prior appropriation doctrine in the context of ecology. Outlines the history of the doctrine, its earlier strengths, presents weaknesses, and need for reform. Basinwide watershed planning is suggested as a means to solving water problem. Examples are give. Grassroots planning is stressed over federal involvement.

Charles Wilkinson, "Western Water Law in Transition," 56 *UC Law Review* 317 (1985). Describes the expression of new values of water through the slow adaptation of law.

Key Cases and Legislation Influencing Indian Water Rights

Winters v. United States, 207 U. S. 564 (1908). *Winters* is the original major canon for federal reserved rights, including Indian reserved water rights. This case was the first to hold that the federal government could and did reserve water rights upon the creation of federal reservations, including Indian, from the public lands.

Arizona v. California, 373 U. S. 546 (1963). This brought about the quantification of *Winters* rights in terms of the PIA of the reservation. It also verified that *Winters* rights include reservations created by executive order and statute as well as those established through treaty.

The McCarran Amendment, 43 U. S. C. Statute 666 (1992) Through this act, the federal government waived its sovereign immunity and consented to suit in state court regarding federal reserved water rights in basinwide

adjudications. It has been interpreted by the following cases:
Colorado River Conservation District v. United States, 424 U. S. 800 (1976). This *Akin* case determined that Indian reserved water rights were under jurisdiction of state, as well as federal courts. Even though the McCarran Amendment did not expressly waive sovereign immunity of tribes, given the United States' role as trustee for Indian tribes, the federal waiver of sovereign immunity applies to tribes, the Court said. This case has had adverse effects for tribes attempting to actualize their paper rights.

Arizona v. San Carlos Apache Tribe, 463 U. S. 545 (1983). This case declared that state court is the preferred court in matters of Indian reserved water rights.

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