



## **An Agricultural Law Research Article**

### **Who Shall Administer Water Rights on the Wind River Reservation: Has Wyoming Halted an Environmentally Sound Indian Water Management System?**

by

Michelle Knapik

Originally published in TEMPLE ENVIRONMENTAL LAW & TECHNOLOGY  
JOURNAL

12 TEMP. ENVTL. L. & TECH. J. 233 (1993)

# NOTES

**ENVIRONMENTAL LAW—Who Shall Administer Water Rights on the Wind River Reservation: Has Wyoming Halted an Environmentally Sound Indian Water Management System?—*In re the General Adjudication of All Rights to Water in the Big Horn River System*, 835 P.2d 273 (Wyo. 1992).**

## INTRODUCTION

At the turn of the 17th century, an itinerant band of Indians, the Shoshones, freely roamed and hunted buffalo in what is now a region that comprises parts of Wyoming, Colorado and Utah.<sup>1</sup> Explorers, traders and trappers began to infiltrate the region in the early 1800's.<sup>2</sup> Neither group immediately infringed on the other's activities. However, in 1865, in an effort to preserve peace and stability in the region, the United States government reached an agreement with the Shoshones whereby 44,672,000 acres were delineated as Shoshone land.<sup>3</sup> Only three years later the government realized that the surging western movement would demand more space, so the land set aside for the Shoshones was reduced by the 1868 Treaty of Fort Bridger.<sup>4</sup>

At first the Indians sustained themselves through their usual buffalo hunting, but as the supply of buffalo decreased, the Indians turned to agriculture.<sup>5</sup> The pressures of a failing agricultural economy compelled the Tribes to sell land back to the United States.<sup>6</sup> From 1895 to 1953 the Indian reservation was in a state of flux.<sup>7</sup> Additionally, the steady stream of homesteaders continued to have a negative impact on the Tribes' economic base.<sup>8</sup> What land the Tribes retained after a 1904 agreement, termed the diminished reservation,<sup>9</sup> was subject to further reductions through rental and sale of additional land to incoming ranchers and farm-

---

<sup>1</sup>*In re Rights to use Water in Big Horn River*, 753 P.2d 76, 83 (Wyo. 1988) [hereinafter *Big Horn I*], *aff'd* by an equally divided court, *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam), *cert. denied*, *Shoshone Tribe v. Wyoming*, 492 U.S. 926 (1989).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* The treaty established the Wind River Indian Reservation. *Id.* The reservation originally was established for the Shoshone and Bannock Indians, but in 1878, despite cultural and tribal differences, the Arapaho tribe was moved on to the reservation when settlers displaced them from their lands. *Id.* The Shoshones were able to name their large site partially due to the efforts of Sacajawea, their famous guide who assisted the 1805 Lewis and Clark expedition in the North West. Mark Wexler, *Sacred Rights*, NATIONAL WILDLIFE, June/July 1992, at 20.

<sup>5</sup>*Big Horn I*, 753 P.2d at 83.

<sup>6</sup>*Id.* at 83-84. The Shoshones ceded land back to the United States in the 1872 Brunot Agreement. *Id.*

<sup>7</sup>*Id.* at 84. The Tribes were economically dependent on the government by 1895. *Id.* They responded by selling more land back to the United States, under the Thermopolis Purchase, for a cash payment in 1897. *Id.* Thereafter, the Tribes ceded an additional 1,480,000 acres back to the government between 1904-1905. *Id.*

<sup>8</sup>*Id.* The Congressional land disposal acts helped many settlers obtain their land. *Id.* The influx of ranchers and farmers forced expansion onto lands which required irrigation in order to be productive. *Id.*

<sup>9</sup>*Id.* The money derived from the sale of land was used to develop what remained of the reservation, commonly referred to as the diminished reservation. See *supra* notes 6-7 and accompanying text for the history of reservations land reductions.

ers.<sup>10</sup> Finally, in the mid-1900's, government efforts helped to restore some land to what is presently known as the Wind River Reservation.<sup>11</sup>

This Tribal story examines much more than just the contracting and expanding reservation boundaries. Before the onslaught of geographic boundary shifts, the Tribes had unlimited access to the natural resources in the region. The western population experienced a direct decline of available resources in response to the population growth. There was a visible environmental strain on water.<sup>12</sup> A growth in farm numbers and size concomitantly triggered a need to draw an increased supply of water from the rivers in order to irrigate them.<sup>13</sup>

Just who had the right to divert water from the river? Western states claimed control and jurisdiction of all waters within their boundaries.<sup>14</sup> Wyoming appropriated the precious resource under state law.<sup>15</sup> The state appropriation system worked fine for all who came under state law, but the Indians claimed to have water rights which pre-dated the settlers' rights.<sup>16</sup> The intensified tension concerning Tribal water rights directly corresponded to the increased competition over water resources.<sup>17</sup> The historical norm unveils a practice under which non-Indian, junior water right holders borrowed Indian water.<sup>18</sup> This established practice among junior water users fuels their resistance toward returning Indian water rights.<sup>19</sup> Questions concerning how much water the Indians had a right to appropriate, the basis on which their water quantity should be determined, the uses the Indians may make of their water, and who should control and administer that water have led to controversy and litigation.

The first two questions are fairly settled. The United States Supreme Court, in *Wyoming v. United States*,<sup>20</sup> confirmed the *Big Horn I* proposition that the Tribes

<sup>10</sup>*Big Horn I*, 753 P.2d 76, 84 (Wyo. 1988), *aff'd* by an equally divided court, *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam), *cert. denied*, *Shoshone Tribe v. Wyoming*, 492 U.S. 926 (1989).

<sup>11</sup>*Id.* Restoration of the land was initiated in 1940 by the Secretary of Interior. *Id.* Additionally, ceded land and land which had been acquired through private transactions were reacquired, in trust for the Tribes, through government actions. *Id.*

<sup>12</sup>*See supra* note 8 for description of pressures.

<sup>13</sup>*See supra* note 8 for description of pressures.

<sup>14</sup>*Big Horn I*, 753 P.2d at 86. The Tribes argued that a disclaimer provision in Article 21, § 26 of the Wyoming constitution barred state courts from adjudications concerning Indian water rights. *Id.* Article 21, § 26 of the Wyoming constitution provides, in part, that "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . ." *Id.* The federal policy governing that provision is the McCarran Amendment. *Id.* at 87. (citing *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 561-63 (1983)). The interpretation of the McCarran Amendment is that in water right adjudication proceedings the United States is to represent, as guardian, the Indian Tribes. *Id.* (citing *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1130 (10th Cir. 1979)). It has not been held that the disclaimer provisions are a cession of state jurisdiction. *Id.* Therefore, the *Big Horn I* court concluded that the district court was correct in assuming jurisdiction as no federal law had barred it. *Id.* at 88.

<sup>15</sup>*Id.* at 91. Article 8, § 1 of the Wyoming Constitution states that "[t]he 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." *Id.*

<sup>16</sup>*Id.* The *Big Horn I* court held that the Ft. Bridger Treaty intended to reserve water for the reservation. *Id.*

<sup>17</sup>*See supra* notes 7-8 for discussion of competition.

<sup>18</sup>Jana L. Walker and Susan M. Willaims, *Indian Reserved Water Rights*, 5-SPG NATURAL RESOURCES ENV T 6, 52 (1991).

<sup>19</sup>*Id.*

<sup>20</sup>492 U.S. 406 (1989).

had an implied reserved federal water right with a priority date which flowed from the 1868 Treaty.<sup>21</sup> Additionally, the issue concerning the quantity reserved for the Tribes was based on a "practicably irrigable acreage" methodology ("PIA").<sup>22</sup> "PIA", in this context, meant "those acres susceptible to sustained irrigation at reasonable costs."<sup>23</sup>

Therefore, the only unsettled questions revolve around the issues of water usage and control.<sup>24</sup> Wyoming's response to these questions was an array of opposing opinions which emerged among *Big Horn III* justices as they contemplated whether "PIA" was merely a basis of calculating water quantity, or whether it served as proclamation of agricultural use.<sup>25</sup> This determination is a key factor in resolving the question of how the quantity of reserved water should be utilized. Another factor courts look to when determining water usage rests on an old western principle termed, "beneficial use."<sup>26</sup> Similar to the *Big Horn III* justices' treatment of the PIA standard, conflicting views emerged in their opinion on whether the Indians fell under the scope of state defined "beneficial use" or under a more liberal, federal interpretation,<sup>27</sup> a standard more consistent with the federal goal of promoting Indian self sufficiency.<sup>28</sup>

The latest litigation arose out of Wyoming's challenge to the Tribes' unilateral decision to adopt their own Tribal water code.<sup>29</sup> Actions taken pursuant to the new code devoted a portion of reserved water to an instream flow.<sup>30</sup> When an instream flow is established, water levels in the river must remain high enough to sustain fish.<sup>31</sup> The unilateral Tribal decision was part of a larger plan to address the growing environmental problems in the area, as well as an effort to boost the

<sup>21</sup>*Id.* The United States Supreme upheld *Big Horn I* in reference to the implied water right and the priority date. *Big Horn I*, 753 P.2d 76, 112 (Wyo. 1988), *aff'd* by an equally divided court, *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam), *cert. denied*, *Shoshone Tribe v. Wyoming*, 492 U.S. 926 (1989).

<sup>22</sup>*Big Horn I*, 753 P.2d at 101. See *infra* note 50 for further discussion of PIA.

<sup>23</sup>*Big Horn I*, 753 P.2d at 101. See *infra* note 50 for further discussion of PIA.

<sup>24</sup>*In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273 (Wyo. 1992) [hereinafter *Big Horn III*] (under *Big Horn I*, claims asserted by non-Indian successors to land interests connected to the Wind River Reservation were tried separately and referred to as *Big Horn II*, 803 P.2d 61, 65 (Wyo. 1990)).

<sup>25</sup>See *infra* notes 54-55 and accompanying text for additional comments on PIA.

<sup>26</sup>See *infra* note 65 for further discussion of beneficial use. The statutory reference to a water right states that it is a "right to use the water of the state, when such use has been acquired by the beneficial application of water under the laws of the state," with beneficial use described as "the basis, measure and limit of the right to use water at all times . . ." WYO. STAT. § 41-3-101 (West Supp. 1977).

<sup>27</sup>See *infra* note 135 and accompanying text for comment on the more liberal interpretation of beneficial use.

<sup>28</sup>*Big Horn III*, 835 P.2d at 299. The court acknowledged that the federal policy of promoting self-sufficiency and economic development required no express congressional statement in order to find that a state law has been pre-empted. *Id.* (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980)). The court in *White Mountain* realized that the federal policy was an effort to "help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." *White Mountain*, 448 U.S. at 144 n. 10 (quoting 25 U.S.C. § 1451 (1974)).

<sup>29</sup>See *infra* note 41 for comment on the Tribes' water code.

<sup>30</sup>See *infra* note 41 for comment on the Tribes' water code.

<sup>31</sup>Mark Wexler, *Sacred Rights*, NATIONAL WILDLIFE, June/July 1992, at 22.

Tribes' economic base by restoring fish to the river.<sup>32</sup> An instream flow right had the potential to constrain any state action which might operate to diminish the water level. Such right could have translated into Wyoming's reduction of water rights among its upstream area farmers.<sup>33</sup>

Additionally, the Wyoming Supreme Court delivered an answer to the water administration question.<sup>34</sup> The fragmented majority<sup>35</sup> of *Big Horn III* determined that control of the water was vested in the State of Wyoming and that any Tribal attempt to change usage to an instream flow was subject to the authority of the state engineer.<sup>36</sup> The decision was a victory for the state and its junior water appropriators, namely the farmers who occupied the region.<sup>37</sup> The decision removed any farmer's fear of having to alter some of their water usage in order to accommodate the Tribal desire for increased water levels in the Big Horn River. Moreover, the decision thwarted the Tribes' implementation of a progressive resource management system.<sup>38</sup>

This Note will enter the labyrinth of the *Big Horn III* court's reasoning and separately track state, federal and Indian sovereignty claims to authority. In examining the evolving concept of "beneficial use," this Note will also attempt to illuminate alternative decisions which would manifest the historic intent of Indian self-determination, as opposed to the majority's maintenance of political oppression. This Note will also explore the environmental ramifications of labelling the state engineer as administrator of the reservation water. Lastly, this Note endeavors to dispel the majority's fear that permitting absolute Tribal discretion over the use of water might invite the Indians to impinge on the well being of society.<sup>39</sup> This Note will conclude with an overview of the Tribes' unprecedented environmental efforts and their clear ability to effectively manage and use the water to meet the various demands of society, a task the *Big Horn III* majority entrusted to the state.

## I. IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM

This Wyoming water rights adjudication focuses on the administration of water.<sup>40</sup> The Tribes of the Wind River Reservation sought to exercise their re-

<sup>32</sup>See *infra* notes 41-43 and accompanying text for discussion of the purpose for the Tribal water code.

<sup>33</sup>See *supra* note 31 at 22-23.

<sup>34</sup>*Big Horn III*, 835 P.2d 273 (Wyo. 1992).

<sup>35</sup>See *infra* note 54 for majority composition.

<sup>36</sup>See *infra* note 64 and accompanying text for comment on state control.

<sup>37</sup>*Big Horn III*, 835 P.2d at 276. If the Tribes had prevailed, the Midvale Irrigation District would have been required to curtail part of their water use in order to fulfill the Tribes' instream flow. *Id.*

<sup>38</sup>See *infra* notes 168-170 and accompanying text for discussion of the Tribes' environmental efforts.

<sup>39</sup>See *infra* note 177 and accompanying text for comment on Tribal discretion.

<sup>40</sup>In *Big Horn I*, a special master, in order to avoid perceived unnecessary complexities, divided the proceedings into three phases. *Big Horn I*, 753 P.2d 76, 85 (Wyo. 1988), *aff'd* by an equally divided court, *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam), *cert. denied*, *Shoshone Tribe v. Wyoming*, 492 U.S. 926 (1989). Phase one concerned the claims of the United States and the Shoshone and Arapahoe Tribes in reference to water rights on the Wind River Reservation and any other water rights established by federal law. *Id.* Phase two focused on non-Indian successors and their interest in lands within the reservation that had been owned by Indian allottees and were subse-

served water rights in what they believed to be a legitimate process by announcing their intent to dedicate a portion of their future waters to an instream flow.<sup>41</sup> The latest conflict concerning control over water usage along Wyoming's Wind River arose when the state-awarded water rights of the Midvale Irrigation District prevented the Tribes from maintaining the water level necessary to support their own newly created permit for an instream flow.<sup>42</sup> The Tribes sought a resolution through the state engineer by requesting a curtailment of Midvale's water rights.<sup>43</sup> When the state engineer refused the request, the Tribes commenced action in the District Court.<sup>44</sup> A special master considered issues presented by both the Tribes and the State.<sup>45</sup>

On March 11, 1991, the district court declared "that the Tribes were entitled to use their reserved water right on the reservation as they deemed advisable, including instream flow use, without regard to Wyoming water law."<sup>46</sup> The district court also enabled the Tribes' control board to displace the state engineer as administrator of Indian and non-Indian water rights within the reservation.<sup>47</sup> On May 3, 1991, the Wyoming Supreme Court stayed the judgment of the district court.<sup>48</sup> The Wyoming Supreme Court considered whether the Tribes, without regard to Wyoming water law, could dedicate their future project water to instream flow for the purposes of maintaining fisheries, recreational uses and ground water recharge.<sup>49</sup>

The State objected to the Tribes' assertion that the quantification of their water

---

quently conveyed. Phase three was reserved for litigation of all claims arising from state level authorities. *Id.*

<sup>41</sup>*Big Horn III*, 835 P.2d 273, 275 (Wyo. 1992).

To that end, the Tribes adopted a Wind River Interim Water Code, created the Wind River Water Resources Control Board, and on April 12, 1990, granted themselves Instream Flow Permit No. 90-001, which authorized the dedication for the 1990 irrigation season of up to 252 cfs of water in the Wind River for 'fisheries restoration and enhancement, recreational uses, ground water recharge downstream benefits to irrigators and other water users.'

*Id.* at 275-76.

<sup>42</sup>*Id.* at 276.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* The Tribes filed a motion in district court for an order to show cause why the state engineer should not be held in contempt or be relieved of his duties, and why a special master should not be appointed to enforce the Tribes' reserved water right. *Id.*

<sup>45</sup>*Id.* "The special master agreed to hear all the issues raised except for the contempt issue involving the state engineer." *Id.* The court considered three questions: (1) whether the Tribes were permitted to convert their water right reserved for future agricultural projects to an instream flow; (2) whether the Tribes properly accomplished the allocation of future project water to instream flow use pursuant to the Wind River Interim Water Code and Permit No. 90-001; and (3) whether the state engineer had an obligation to enforce the tribal instream flow permit. *Id.* The State's pertinent questions were: (1) whether the state engineer had the authority to administer the Tribes' reserved water right; (2) whether, if the Tribes' future project water may be changed to instream uses, the change must be made in accordance with Wyoming water law; and (3) whether a change in use of future project water may be made without consideration of injury to junior appropriators. *Id.*

<sup>46</sup>*Id.* "The district court did not distinguish that portion of the Tribes' reserved water right quantified on the basis of historic use from that portion quantified on the basis of future practicably irrigable acres . . . ." *Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* The *Big Horn III* court found that the district court had "not distinguish[ed] that portion of the Tribes' reserved water right quantified on the basis of historical use from that portion quantified on the basis of future [PIA] when it issued its judgment and decree. *Id.*

rights through the “practicably irrigable acreage” methodology (“PIA”)<sup>50</sup> awarded in *Big Horn I* “in no way limited their use of the water.”<sup>51</sup> In contesting the Tribes’ position, the State argued that the 1985 amendment<sup>52</sup> to its 1983 decision which led to *Big Horn I*, stated that the Tribes’ reserved water rights were only to be achieved by actually diverting water from the stream and therefore precluded the Tribes from continuing to use their water in the form of an instream flow.<sup>53</sup>

A majority<sup>54</sup> of the Wyoming Supreme Court rejected the proposition that the PIA award was merely a methodology to determine the amount of water the Tribes could use at their discretion.<sup>55</sup> They underscored the finality and controlling authority of that position by emphasizing the United States Supreme Court’s affirmation of *Big Horn I* which did not specifically provide for such discretion.<sup>56</sup> This position served as the majority’s justification for eliminating any need to comment on the Tribes’ assertion that the principles of federal law do not limit any uses to which the Tribes may put their water.<sup>57</sup>

Next, the majority examined the district court’s decree which focused on the Tribes’ future project water.<sup>58</sup> The district court had held that the Tribes could “change the use of their reserved future project water right from agricultural to any other purpose, including an instream flow, without regard to Wyoming water

<sup>50</sup>See, *Big Horn I*, 753 P.2d at 101. When measuring a reserved water right, courts apply the “PIA” standard. In *Big Horn I*, the parties agreed upon a definition of “PIA” as “those acres susceptible to sustained irrigation at reasonable costs.” *Id.* “The determination of practicably irrigable acreage involves a two-part analysis, i.e., the PIA must be susceptible to sustained irrigation (not only proof of the arability but also of the engineering feasibility of irrigating the land) and irrigable at reasonable cost”. *Id.* The Tribes assert that “PIA” is merely a methodology and they have the right to use the quantified amount for any purpose. *Big Horn III*, 835 P.2d at 278. The *Big Horn III* majority denies this claim and states that *Big Horn I* only gave them the right to use the water “solely for agricultural and subsumed purposes and not for an instream flow.” *Id.*

<sup>51</sup>*Big Horn III*, 835 P.2d at 277. The Tribes relied on language from the district court judgment and decree which stated that when the court calculated the Tribes’ water entitlement, based on the purpose of agriculture, they did not intend to tell the Tribes “how they must use water that comes under a reserved water permit.” *Id.* The Tribes also pointed to the order ruling on motions to alter or amend the 1983 decision where, although the Tribes were denied additional reserved water for an instream flow, the district court stated that the Tribes “may seek to dedicate their stream flows for fish habitat by using water reserved to them by the decision.” *Id.*

<sup>52</sup>*Id.* The state contended that since the district court’s 1985 amendment to their 1983 decision regarding adjudication of water rights in the Big Horn River System lacked the instream flow provision from the 1983 decision the Tribes would only be permitted to divert water from the river. *Id.* The *Big Horn III* court rejected both the state’s and the Tribes’ arguments by stating that neither the 1983 district court decision nor its 1985 amendment were final. *Id.* It declared that *Big Horn I* was controlling on the issue and that *Big Horn I*’s decision did not imply a “fishery flow right absent a treaty provision.” *Id.* at 277-78.

<sup>53</sup>*Id.* at 277. The State reasoned that since the 1985 amendment to the 1983 district court decision did not refer to an instream flow use, then such use was not awarded. *Id.*

<sup>54</sup>*Id.* at 283. Justices Macy, Thomas and Cardine formed the majority on the denial of a right to dedicate future waters to an instream flow. *Id.* Justices Macy, Thomas and Brown formed the majority which deemed the state engineer as the administrator over Tribal water. *Id.* Justice Thomas based his specially concurring opinion on a sovereignty rationale. *Id.* Justice Cardine dissented on the issue of the state engineer as administrator. *Id.* Justice Brown, with whom Justice Golden joined, dissented on the issue of instream flow; and Justice Golden, with whom Justice Brown joined in the part referring to instream flow, dissented on both issues. *Id.*

<sup>55</sup>*Id.* at 278. The majority asserted that if the method for quantification would have enabled the Tribes to put the water to any use, the opinion would have specifically so stated. *Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

law.”<sup>59</sup> The *Big Horn III* majority flatly rejected a unilateral Tribal change of use.<sup>60</sup> Relying on their interpretation of *Big Horn I*, the majority concluded that if any uses beyond the stated agricultural purposes were intended they would have been mentioned in the 1983 decision.<sup>61</sup>

In addressing the Tribes’ contention that federal law, not state law, should be applied to the issue, the majority distinguished the reserved treaty right from state oversight of such rights.<sup>62</sup> The majority stated that a change of use from the primary agricultural purpose to an instream flow would constitute a secondary purpose for the water, and therefore be subject to the process of State approval.<sup>63</sup> The majority went on to 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.”<sup>64</sup>

Interpreting the concept of beneficial use is the one area where the majority disagreed with the State’s position.<sup>65</sup> The state purported that beneficial use must constitute an actual diversion of water, and therefore they would have denied the Tribes’ request for a non-diversional instream flow even had they pursued their change of use request under state law.<sup>66</sup>

The majority embraced beneficial use as an evolving concept not restricted to diversional uses.<sup>67</sup> The majority recognized that the Tribes could apply for a change of water use under state law if it was necessary to meet societal changes in the valuation of new resource uses; however, they ultimately held that current state law would preclude the Tribes from obtaining an instream flow.<sup>68</sup> The applicable Wyoming statute provides: “No person other than the state of Wyoming shall own any instream flow water right.”<sup>69</sup> Relying on Wyoming’s Constitution<sup>70</sup>, the court reasoned that the State must have control over the vital re-

---

<sup>59</sup>*Id.*

<sup>60</sup>*Id.*

<sup>61</sup>*Id.* The majority said, “It makes no sense whatsoever for this court to limit the use of the water for agricultural purposes and then to permit the Tribes to unilaterally change that use.” *Id.*

<sup>62</sup>*Id.* “Federal law has not preempted state oversight of reserved water rights.” *Id.* (quoting *Big Horn I*, 753 P.2d 76 (Wyo. 1988), *aff’d* by an equally divided court, *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam), *cert. denied*, *Shoshone Tribe v. Wyoming*, 492 U.S. 926 (1989)).

<sup>63</sup>*Big Horn III*, 835 P.2d at 279. The *Big Horn III* court relied on *United States v. New Mexico*, 438 U.S. 696 (1978). However, that case dealt with a federal forest reservation when it held that water was “impliedly reserved only to the extent necessary to meet the primary purpose(s) for which a reservation is made and that where water is valued for a secondary purpose the inference arises that Congress intended water to be acquired in the same manner as is employed by any other private or public appropriator.” *Big Horn III*, 835 P.2d at 278 (citing *United States v. New Mexico*, 438 U.S. 696, 701 (1978)). See *infra* note 98-112 for further discussion on *United States v. New Mexico*.

<sup>64</sup>*Big Horn III*, 835 P.2d at 279. However, the majority did not decide “the question of whether the Tribes may dedicate their historically used water to instream flow . . . .” *Id.*

<sup>65</sup>*Id.* The State argued that the Tribes were only entitled to make a physical diversion of water and therefore restricted their beneficial use to those changes which follow such a diversion. *Id.* On the other hand, the district court stated that the term divert was “used generally to describe water use and was never used as a word of limitation.” *Id.* The majority also recognized that while the “statutory scheme regulating the appropriation of water has contemplated an actual physical diversion of water, we have never said that a requirement to do so existed.” *Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*Id.* “Appropriation of water for instream flow is not a beneficial use which is presently available to the Tribes.” *Id.*

<sup>69</sup>WYO. STAT. § 41-3-1002(e) (West Supp. 1977).

<sup>70</sup>WYO. CONST. art. 8, § 1.

source.<sup>71</sup> The majority maintained what they termed, "traditional wisdom" of water, reflected in the idea that "water is simply too precious to the well being of society to permit water rights holders unfettered control over its use."<sup>72</sup>

A different assemblage of justices<sup>73</sup> comprised the second majority which disagreed with the district court's decision to permit the Tribal agency to administer the water within the reservation.<sup>74</sup> This second majority considered the state's argument that the district court, in removing the state engineer as administrator, had violated the Wyoming Constitution.<sup>75</sup> This raised a threshold issue concerning the ability of the State to raise this concern for the first time on appeal. The majority determined that the state's argument about the district court's actions implied a violation of the separation of powers doctrine, and therefore raised an issue of such a fundamental nature as to require the court's consideration.<sup>76</sup>

From the Tribes' perspective, the district court acted within its broad equitable authority in assigning the duties of administration to the Tribal agency.<sup>77</sup> The second majority relied on several Wyoming constitutional provisions in supporting its position that the state engineer is an executive officer appointed and subject to removal only by the governor of Wyoming. For those reasons the second majority found the district court had no "inherent equitable enforcement authority" to replace the state engineer.<sup>78</sup> On the other hand, the second majority indicated that the district court would have been constitutionally empowered to enforce action if the state engineer had "shunned" the duties of "equally guarding all the various interests" in Wyoming water.<sup>79</sup>

---

<sup>71</sup>*Id.* at 280.

<sup>72</sup>*Id.*

<sup>73</sup>See *supra* note 54 for description of the different majorities.

<sup>74</sup>*Big Horn III*, 835 P.2d at 283. Justices Macy, Thomas and Brown comprise the majority for the second issue. Justice Cardine, who took part in the first majority, dissented on the second issue. *Id.* This second majority disagreed with the district court's decision which stated:

The Tribal agency which regulates reserved water matters shall have the authority to administer all water rights within the stipulated boundaries of the reservation. Non-Indian rights will be administered according to state water law by the Tribal agency, with appropriate judicial review in state district court pursuant to Title 41 of the Wyoming statutes.

*Id.* at 280.

<sup>75</sup>*Id.* The state contended that removal of the state engineer by the district court amounted to an "unlawful infringement by the judiciary on the rights, powers, and privileges reserved to the executive branch of government by the Wyoming Constitution." *Id.* at 280-81. See also, WYO. CONST. art. 2, § 1 (West Supp. 1977) (separation of powers).

<sup>76</sup>*Big Horn III*, 835 P.2d at 280. The majority also based their decision to consider the constitutional issue on the ongoing nature of this litigation and the "need for certainty in future proceedings." *Id.* The majority sought to "define the respective roles of the various branches of state government" as they related to the dispute. *Id.*

<sup>77</sup>*Id.* The Tribes relied on case law which denounced a rigid separation of powers and instead interpreted the separation as a way to achieve a balanced, workable government. See *Billis v. State*, 800 P.2d 401, 415 (Wyo. 1990).

<sup>78</sup>*Big Horn III*, 835 P.2d at 282. The majority cited WYO.CONST. art. 8, § 1, for the declaration that all water within State boundaries is state property. *Id.* at 281. See also, WYO. CONST. art. 1, § 31 which supports the majority's position that the State must control the water. The majority traced the constitutional development of water control, including the process by which the state engineer is removed from office. WYO. CONST. art. 8, § 1 (1977) (for state administration of water); WYO. CONST. art. 8, § 2 (1977) (establishes position of state engineer); WYO. CONST. art. 8, § 5 (1977)(state engineer appointed by governor). The majority also relied on legislation to support its contention that the district court lacked the authority to replace the state engineer. WYO. STAT. § 9-1-202 (West Supp. 1977).

<sup>79</sup>*Big Horn III*, 835 P.2d at 282. The majority recognized the state engineer's duty to protect the

Relying on an interpretation of *Big Horn I*, the second majority asserted that the only person authorized to distribute the water within the river system according to the nature, extent, and priority of right was the state engineer.<sup>80</sup> However, the second majority did recognize the state engineer's duty to exercise his authority over the state appropriators when they fail to respect "clear" Indian reserved rights.<sup>81</sup> In contrast, when a violation of Indian reserved rights is "impossible to determine" because the right is "ill-defined," the second majority concluded that the state engineer is governed by statute to "seek clarification from the district court so that the appropriate remedial action, if needed, may be undertaken."<sup>82</sup> However, the final message conveyed by the second majority was that the Indians are subject to state water control.

Justice Thomas, concurring specially, considered that the battle was not over water, but over sovereignty.<sup>83</sup> He found that "the ceded portion of the Wind River Reservation was disestablished as a reservation and that the efficacy of the constitution and law of the State of Wyoming within the ceded portion must be recognized."<sup>84</sup> In viewing reserved water rights as strictly a property law issue, Justice Thomas suggested that sovereignty does not come into play because "such a property right is subject to state regulation."<sup>85</sup> On the other hand, he admitted that the Indians would have sovereign control over the diminished portion of the reservation.<sup>86</sup> He bridged the conflict over administrative authority by appealing to the notion of continuity. His insurance against dividing the regulatory function between the ceded and diminished portions of the reservation was to order the state engineer to assume that function.<sup>87</sup> In this regard, Justice Thomas resolves the question of instream flow; it must comply with Wyoming water law.<sup>88</sup>

## II. HISTORY OF RESERVED WATER RIGHTS

### A. What Is the Power Behind the Grant?

The seminal case on Indian reserved rights is *Winters v. United States*.<sup>89</sup> In *Winters*, the United States Supreme Court held that when Congress created the land reservation, they impliedly reserved water rights.<sup>90</sup> The *Winters* court reasoned that just because the area of Indian occupation was reduced, there was no logic to support an Indian or congressional intent for the Tribes to abandon their

---

Tribes' reserved water rights. *Id.*; WYO. CONST. art. 1, § 31 (1977); *Big Horn I*, 753 P.2d 76, 115 (Wyo. 1988), *aff'd* by an equally divided court, *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam), *cert. denied*, *Shoshone Tribe v. Wyoming*, 492 U.S. 926 (1989).

<sup>80</sup>*Big Horn III*, 835 P.2d at 283; *Big Horn I*, 753 P.2d at 114-15.

<sup>81</sup>*Big Horn III*, 835 P.2d at 283.

<sup>82</sup>*Id.*; WYO. STAT. § 1-37-106 & 1-37-110 (West Supp. 1977).

<sup>83</sup>*Big Horn III*, 835 P.2d at 283.

<sup>84</sup>*Id.* at 284.

<sup>85</sup>*Id.* Justice Thomas interpreted the *Winters* reserved water rights as strictly a property concept, having nothing to do with sovereignty, and therefore subject to state regulation. *Id.*

<sup>86</sup>*Id.* Given that the state engineer is the exclusive regulatory authority of the water on the ceded portion of the reservation, Justice Thomas' "pragmatic" resolution extends the state engineer's authority to include regulatory powers over the diminished portion of the reservation in order to avoid divided regulatory functions. *Id.*

<sup>87</sup>*Id.*

<sup>88</sup>*Id.*

<sup>89</sup>207 U.S. 564 (1908).

<sup>90</sup>*Id.* at 576.

water rights.<sup>91</sup> Justice McKenna asked why the Indians would abandon water rights necessary to irrigate the land, to aid pastoral life and all the rights necessary for the purposes of the reservation.<sup>92</sup>

This implied reservation of water was articulated in *Arizona v. California*.<sup>93</sup> That court stated that:

It [was] impossible to believe that when Congress created the great Colorado River Indian reservation and when the Executive department of the nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorched sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.<sup>94</sup>

The *Arizona v. California* court also held that the reserved right would be a right sufficient to “irrigate all the practicably irrigable acreage on the reservation.”<sup>95</sup> This measure was to be employed for present as well as future needs.<sup>96</sup>

The *United States v. New Mexico* court examined the implied-reservation-of-water doctrine and recognized that Congress reserved “only that amount of water necessary to fulfill the purpose of the reservation, no more.”<sup>97</sup> However, the reservation referred to in that case concerned the creation of national forest lands.<sup>98</sup> This creation was prompted by the fear that the public domain was ravaging the timber supply.<sup>99</sup> Early congressional debates resulted in only two expressed purposes for the reservation of forests: 1) “[t]o conserve the water flows” and 2) “to furnish a continuous supply of timber for the people.”<sup>100</sup> In interpreting this limited congressional intent for forest reservation, the *United States v. New Mexico* court had little trouble denying that there was any reserved right for aesthetic, recreational, wildlife preservation, or stockwatering purposes.<sup>101</sup> They realized Congress’ “principled deference to state water law . . . ” in these areas.<sup>102</sup>

Extending the *United State v. New Mexico* court’s logic, the *Big Horn III* majority claimed that the sole purpose of the Wind River reservation was for agricultural use and, consequently, that the Tribal Water Agency’s permit for an instream flow must be subjected to state water law.<sup>103</sup> The majority looked to *United States v. Adair*<sup>104</sup> to support the notion that “because the reserved rights doctrine is an exception to Congress’s explicit deference to state water law in other areas, the Supreme Court has emphasized the importance of the limitation of such rights to only so much water as is essential to accomplish the purpose for which the land was reserved.”<sup>105</sup> In *Adair*, when the government acquired Indian reser-

<sup>91</sup>*Id.* at 567-68 (contained in the statement delivered by Justice McKenna).

<sup>92</sup>*Id.*

<sup>93</sup>373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964).

<sup>94</sup>*Id.* at 598-99

<sup>95</sup>*Id.* at 600. *See supra* note 50 and accompanying text for additional comment on the *Big Horn III* application of PIA.

<sup>96</sup>*Arizona v. California*, 373 U.S. at 600.

<sup>97</sup>*Id.* at 700 (quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976)). *See supra* note 63 and accompanying text for further discussion of reservation purpose.

<sup>98</sup>*Arizona v. California*, 373 U.S. at 697.

<sup>99</sup>*Id.* at 705.

<sup>100</sup>*Id.* at 707.

<sup>101</sup>*Id.* at 718 (Marshall, J., dissenting in part).

<sup>102</sup>*Id.* (majority opinion).

<sup>103</sup>*Big Horn III*, 835 P.2d 273, 278-79 (Wyo. 1992).

<sup>104</sup>723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

<sup>105</sup>*Id.* at 1419.

vation lands it was still necessary to determine the scope and priority of its rights.<sup>106</sup> The *Adair* court stated that "it would be inconsistent with the principles expressed in *United States v. New Mexico*<sup>107</sup> to hold that the government may "tack" a currently claimed *Winters* right to a prior one by asserting that it has merely changed the purpose of its previously reserved water right."<sup>108</sup>

The *Big Horn III* majority purported that even if the Tribes were to petition for a change of use, Wyoming statute section 41-3-1002(e)<sup>109</sup> precludes anyone, except the State, from owning an instream flow.<sup>110</sup> This conclusion subjected the Tribes to a state definition of beneficial use.<sup>111</sup> In contrast to this state concept of beneficial use, the *Winters* court reasoned that in the creation of the Fort Belknap Reservation, the Indians had "command of the lands and the waters, —command of all their beneficial use" which would lead them to become a "civilized community".<sup>112</sup> The *United States v. New Mexico* court also examined the "history of congressional intent in the field of federal-state jurisdiction with respect to the allocation of water."<sup>113</sup> They recognized that when Congress has "expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."<sup>114</sup> However, when water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.<sup>115</sup>

## B. State Engineer - Administrator or Monitor of the Reservation Waters

Wyoming's appeal of the district court's decision to replace the state engineer with the Tribal water agency as the authoritative voice for administering the water rights within the Indian reservation led the *Big Horn III* majority to examine Wyoming's statutory and constitutional provisions regarding a separation of powers issue.<sup>116</sup> The majority rejected the Tribes contention that under a "balanced, workable government" approach to the separation of powers, the district court was not foreclosed from assigning the duties of administering state water within the reservation to the tribal water agency."<sup>117</sup> The majority relied on state constitutional provisions which guide the appointment and removal of the state water

<sup>106</sup>*Id.* at 1419-20

<sup>107</sup>*See supra* note 97 and accompanying text for the purpose expressed in *United States v. New Mexico*.

<sup>108</sup>*Id.*

<sup>109</sup>*Big Horn III*, 835 P.2d 273, 279 (Wyo. 1992) (citing, WYO. STAT. § 41-3-1002(e) (West Supp. 1977)).

<sup>110</sup>*Id.* "No person other than the state of Wyoming shall own any instream flow water right." WYO. STAT. § 41-3-1002(e) (West Supp.1977).

<sup>111</sup>*Big Horn III*, 835 P.2d at 279. Wyoming statute § 41-3-101 states: "Beneficial use shall be the basis, the measure and limit of the right to use water." WYO. STAT. § 41-3-101 (West Supp. 1977).

<sup>112</sup>*Winters v. United States*, 207 U.S. 564, 576 (1908).

<sup>113</sup>*United States v. New Mexico*, 438 U.S. 696, 701-702 (1978).

<sup>114</sup>*Id.* at 702.

<sup>115</sup>*Id.* *See supra* notes 101-102 and accompanying text for discussion of how the *United States v. New Mexico* court interpreted the purpose of that reservation.

<sup>116</sup>*Big Horn III*, 835 P.2d 273, 281 (Wyo. 1992).

<sup>117</sup>*Id.* Wyoming's Constitution provides for a separation of powers which states:

The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly

administrator in concluding that the position fell within the executive branch and, as such, there was no authority for the district court's replacement actions.<sup>118</sup>

Wyoming's constitution charges the state engineer with "general supervision of the waters of the state."<sup>119</sup> It also obligates the state engineer to "equally guard all the various interests" in Wyoming waters.<sup>120</sup> The *Big Horn III* majority recognized that the Tribes' reserved water right was an interest the engineer was obligated to uphold.<sup>121</sup> Therefore, while they deemed this removal by the district court improper, they also realized the engineer was not immune from judicial enforcement of the Tribes' declared *Big Horn I* water rights.<sup>122</sup> The majority interpreted the provisions as granting a proceeding for an enforcement action if the engineer has "shunned [the] constitutional mandate," but not as authority for the district court's method of removal.<sup>123</sup>

The *Big Horn III* court agreed with the *Big Horn I* court when the latter stated that "the role of the state engineer is . . . not to apply state law, but to enforce the reserved rights [of the Tribes] as decreed under principles of federal law."<sup>124</sup> They further acknowledged that "[i]ncidental monitoring of Indian use . . . has carelessly been termed administration of Indian water by the state engineer."<sup>125</sup> The *Big Horn III* majority held that their reversal of the district court's removal of the state engineer would render the engineer as the party responsible for water distribution.<sup>126</sup> If the engineer were ever in doubt over the nature of the Tribal right, the engineer should seek clarification from the district court.<sup>127</sup> This reasoning led the *Big Horn III* majority to conclude that their decision was consistent with *Big Horn I*.

Justice Thomas, in his specially concurring opinion, conceded that logically the Indians have sovereignty over the diminished portion of the Reservation.<sup>128</sup> His conclusion that the state engineer should manage the use of the water on the reservation stemmed not from law, but from the "pragmatism" he felt must control in this instance.<sup>129</sup> He claimed that it makes "little sense to divide the regulatory function because of the clear interrelationship of the water courses and systems on

---

belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

WYO CONST. art 2, § 1. The majority agreed with the Tribes assertion that an air tight compartment view of the separation of powers doctrine had been rejected in favor of a more "balanced, workable government" approach, but disagreed that the district court's equitable authority to take remedial action in this case was in their command. *Big Horn III*, 835 P.2d at 281.

<sup>118</sup>*Big Horn III*, 835 P.2d at 281-82 (Wyoming Constitution article 8, § 2 provides for the creation and composition of a board of control. WYO. CONST. art. 8, § 2. Article 8, § 5 spells out the appointment and duties of the state engineer. WYO. CONST. art. 8, § 5. Article 3, § 19 provides for the removal of state officers by the governor. WYO. CONST. art. 3, § 19).

<sup>119</sup>*Big Horn III*, 835 P.2d at 282 (Wyoming Constitution article 8, § 5 charges the that the state engineer shall have general supervision of the waters of the state. WYO. CONST. art. 8, § 5).

<sup>120</sup>*Big Horn III*, 835 P.2d at 282. (Wyoming Constitution article 1, § 31 states that the state engineer is obligated to equally guard all the various interests in the water WYO. CONST. art. 1, § 31).

<sup>121</sup>*Big Horn III*, 835 P.2d at 282 (citing *Big Horn I*, 753 P.2d at 115.)

<sup>122</sup>*Id.*

<sup>123</sup>*Id.*

<sup>124</sup>*Id.* at 282-83 (relying on *Big Horn I*, 753 P.2d at 114-15).

<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

<sup>127</sup>*Id.* at 283.

<sup>128</sup>*Id.* at 284.

<sup>129</sup>*Id.*

the ceded and diminished portions of . . . the Reservation."<sup>130</sup>

### III. THE FEDERAL GOAL OF INDIAN SELF-SUFFICIENCY: HONORING THE TRIBES' INDEPENDENCE WOULD HERALD AN ENVIRONMENTAL VICTORY

The Wyoming Supreme Court has rendered a decision which is inconsistent not only with the prior *Big Horn* litigation, but also with the federal goal of Indian self-sufficiency. *Big Horn I* could have been the first step toward an economic and political manifestation of the Tribes' rightful independent status. *Big Horn I* affirmed the Tribes' reserved water rights and quantified them based on the standard PIA computation. The Tribes' efforts to support an instream flow did not reach beyond their rightful amount of water. This most recent *Big Horn III* majority even recognized the evolving concept of beneficial use as not necessarily requiring the diversion of water for the purposes of irrigation.<sup>131</sup> Unfortunately, the majority decision relegated the Tribes to a position like that of any state water appropriator. The terms "sovereign" and "senior water rights holder" are ascribed to the Tribes, but the *Big Horn III* decision negates their inherent powers. This conclusion stifles the progressive measures contemplated by the Tribes' environmental agency.<sup>132</sup>

The majority chose to determine the purpose of an Indian reservation on the same set of principles one would use to decide whether Congress set aside forest land solely for timber or, more broadly, for recreation.<sup>133</sup> At least the court in *United States v. New Mexico* undertook an extensive analysis of the legislative history behind the congressional intent to reserve forest land.<sup>134</sup> If the majority had explored the federal intent of Indian reservations, its sole agricultural argument would have encountered drastic challenges. The decision in *Winters* supports the proposition that beneficial use as applied to an Indian reservation necessitates a more liberal interpretation of the reservation's purpose than any other appropriator of water would be granted.<sup>135</sup>

The outcome in *Big Horn III* might have been different if the court had looked to its neighboring state, Montana, and its discussion of Indian water rights in *Greely Confederated Salish and Kootenai Tribes of the Flathead Reservation*.<sup>136</sup> The *Greely* court cited numerous cases which establish that treaty interpretations must be liberally construed in favor of the Indians,<sup>137</sup> ambiguities must be resolved in favor of the Indians<sup>138</sup> and they must be interpreted as the Indians themselves would have understood them.<sup>139</sup> However, where the "purposes for which

<sup>130</sup>*Id.*

<sup>131</sup>*Id.* at 279.

<sup>132</sup>See *infra* notes 168-171 and accompanying text for discussion of the Tribes' environmental efforts.

<sup>133</sup>*United States v. New Mexico*, 438 U.S. 696, 706-10 (1978).

<sup>134</sup>*Id.*

<sup>135</sup>See *Winters v. United States*, 207 U.S. 564, 576. (1908).

<sup>136</sup>712 P.2d 754 (Mont. 1985).

<sup>137</sup>*Id.* at 763 (citing *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *United States v. Walker River Irr. Dist.*, 104 F.2d 334, 337 (9th Cir. 1939)).

<sup>138</sup>*Id.* (citing *Confederated Salish & Kootenai Tribes, Etc. v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982), *cert denied* 459 U.S. 977 (1982)).

<sup>139</sup>*Id.* at 762-63 (citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970), *reh. denied*, *Choctaw Nation v. Oklahoma*, 398 U.S. 945 (1970), appeal after remand *Cherokee Nation v. State of Oklahoma*, 461 F.2d 674 (10th Cir. 1972), *cert. denied*, *Oklahoma v. Cherokee Nation*, 409 U.S. 1039

the federal government reserves land [is] strictly construed . . . the purpose of Indian reservation rights . . . are given broader interpretations in order to further the federal goal of Indian self-sufficiency.”<sup>140</sup> The *Greely* court, unlike the *Big Horn III* majority, articulated the difference between the government’s own federally reserved waters and Indian reserved rights.<sup>141</sup> “The United States can lease, sell, quitclaim, release, encumber or convey its own federal reserved rights.”<sup>142</sup> In contrast, “its powers regarding Indian water rights are constrained by its fiduciary duty to the tribes . . . .”<sup>143</sup> Additionally, federal reserved water rights are calculated on a minimal need standard.<sup>144</sup> The *Greely* court found support in the *United States v. New Mexico* court’s assertion that the reservation of water is “only that amount of water necessary to fulfill the primary purpose of the reservation”<sup>145</sup> and therefore, secondary purposes are not factored into quantification of water rights.<sup>146</sup> In contrast, the Indian reserved water rights “include water for future needs and change in use . . . .”<sup>147</sup>

Unlike federally reserved lands, the Wind River Tribes have ever changing human and social needs. The Tribes wanted to support themselves by committing their reserved water rights “to an instream flow on three critical stretches of the Big Wind River for the purposes of fishery enhancement, groundwater recharge, benefit to downstream irrigators and other benefits.”<sup>148</sup> The Tribes’ use was an effort to be more self-sufficient, and as such it should have been enforced by the state engineer.

Justice Golden, in his dissent, acknowledged that tribal sovereignty was initially the basis for recognizing Indian rights, but he realized that the power of “inherent sovereignty” today is more of a strong backdrop upon which to consider the rights acquired through treaties and any federal enactments.<sup>149</sup> The *Big Horn I* decision was similarly sensitive to the delicate entanglement of state and Indian rights. The *Big Horn I* court stated, “This court is also cognizant of the fact that exercise of the reserved water rights are intimately bound up with the state water rights of off-reservation users.”<sup>150</sup> The court in *White Mountain Apache Tribe v. Bracker*<sup>151</sup> also conceded that there is no “rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to

(1972), appeal after remand, *Choctaw Nation v. State of Oklahoma*, 490 F.2d 521 (10th Cir. 1974), *cert. denied*, *Choctaw Nation v. Oklahoma*, 417 U.S. 946 (1974)).

<sup>140</sup>*Id.* at 767-68.

<sup>141</sup>*Id.* at 766. Differences between federal reserve rights and Indian reserved rights occur in “origin, ownership, determination of priority date, the manner in which the purpose of the reservation is determined, and quantification standards.” *Id.*

<sup>142</sup>*Id.* at 767.

<sup>143</sup>*Id.*

<sup>144</sup>*Id.*

<sup>145</sup>*Id.* (citing *United States v. New Mexico*, 438 U.S. 696, 700 (1978)).

<sup>146</sup>*Id.*

<sup>147</sup>*Id.* See *supra* notes 101-102 for additional discussion of this topic in *United States v. New Mexico*.

<sup>148</sup>*Big Horn III*, 835 P.2d 273, 291 (Wyo. 1992) (Gordon, J. and Brown, J., dissenting).

<sup>149</sup>*Id.* at 298-99.

<sup>150</sup>*Big Horn I*, 753 P.2d 76, 115 (Wyo. 1988), *aff’d* by an equally divided court, *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam), *cert denied*, *Shoshone Tribe v. Wyoming*, 492 U.S. 926 (1989).

<sup>151</sup>448 U.S. 136 (1980).

tribal members.”<sup>152</sup>

What emerges from the conflicting assertions is that the tradition of Indian sovereignty and the federal policy of promoting tribal self-sufficiency and economic development does not require an express congressional statement in order to find that a particular state law has been preempted.<sup>153</sup> The Tribes need an opportunity to actualize this notion of self government over their reservation. Environmentalists already recognize that the Tribes restoration of the Wind River and its ecosystem will not only benefit them, but will provide a model for all who must contend with the prospects of managing the scarce commodity of western water.<sup>154</sup>

The Tribes of the Wind River Reservation took the opportunity to govern their awarded water rights by enacting an instream flow permit for the purpose of restoring trout to the river.<sup>155</sup> This latest Wyoming decision censures the Indian initiate, flies in the face of federal policy and is based upon political, not legal, assertions. The *Big Horn III* majority relied, improperly, upon *Adair* when concluding that the Tribes must comply with Wyoming water law in order to “change the use of their reserved future project water from agricultural purposes to any other beneficial use.”<sup>156</sup> Their reliance is flawed because *Adair* was concerned with the government’s rights as purchaser of the Klamath Indians’ land.<sup>157</sup> The government claimed to have converted the Indian water rights to forest and wildlife preserve purposes upon purchase.<sup>158</sup> In an illogical leap, the *Big Horn III* majority compared the Tribal Agency’s permit for an instream flow to *Adair*’s Government assertion of property rights conversion.

In addressing the role of the state engineer in regard to the administration of water rights on the Wind River Reservation, the *Big Horn III* majority missed the distinction between the engineer’s duties over state water and the engineer’s role as enforcer of Tribal water rights.<sup>159</sup> Justice Golden, in his dissent, clarified the State’s authority over the Reservation’s water rights.<sup>160</sup> He said, “The state does not provide for the use of reserved water rights on the reservation . . . .”<sup>161</sup> He asserted that since the Indian reserved waters are not state property, Justice Macy, in writing for the majority, had incorrectly applied Wyoming’s Constitutional provision stating that control of the water must be in the state.<sup>162</sup> The court in *Big Horn I* clearly stated that “the role of the state engineer is thus not to apply state law, but to enforce the reserved rights as decreed under the principles

<sup>152</sup>*Id.* at 142.

<sup>153</sup>*Id.* at 144.

<sup>154</sup>Mark Wexler, *Sacred Rights*, NATIONAL WILDLIFE, June/July 1992, at 20-22.

<sup>155</sup>*Id.* at 22.

<sup>156</sup>*Big Horn III*, 835 P.2d 273, 279 (Wyo. 1992).

<sup>157</sup>*United States v. Adair*, 723 F.2d 1394, 1419 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

<sup>158</sup>*Id.*

<sup>159</sup>*See supra* notes 119-121 for further discussion of the state engineer’s role.

<sup>160</sup>*Big Horn III*, 835 P.2d at 290-91.

<sup>161</sup>*Id.* at 296.

<sup>162</sup>*Id.* Wyoming Constitution article 1 § 31 states that “[w]ater being essential to industrial prosperity, of limited amount, and easy diversion from its natural channels, its control must be in the state . . . .” WYO. STAT. art. 1 § 31. Justice Golden asserted that this section was “intended to confer control over waters in which the state has a role in providing for its use,” therefore the Indian reserved water does not come under its authority. *Big Horn III*, 835 P.2d at 296.

of federal law.”<sup>163</sup> This led Justice Golden to conclude that the engineer was not to act in his “constitutionally appointed role . . . but to provide monitoring or oversight of the reserved rights awarded by decree.”<sup>164</sup> This reasoning makes the engineer’s role comparable to that of a “water master” and therefore the power to replace the engineer was within the province of the district court.<sup>165</sup> Under this reasoning, the Tribes water administration plans would have been upheld and environmental restoration would be underway.

How can tribes meet the challenge of using their water awards amidst political pressures from non-Indian users? One commentator has suggested the following compromise:<sup>166</sup>

A possible compromise is for tribes to adopt beneficial use (to avoid waste) and public interest standards as criteria for reservation water use and transfers in particular. Such standards, adopted and enforced pursuant to a tribal water code, would require tribes to weigh with respect to a proposed transfer of use, possible injury to junior users, the economic value of the new and existing uses, the need for the water, environmental and cultural concerns, and other important tribal governmental interests.<sup>167</sup>

The Wind River Tribes are already in step with such a plan. They even consulted the United States Fish and Wildlife Service before committing their water to an instream flow.<sup>168</sup> A Wyoming conservation director said, “From a biological standpoint, the effort to restore fish in the Wind River was the right decision.”<sup>169</sup> These Wind River Tribes are setting a model for reservation management. Included in their recent conservation programs are a game code, a water code, and studies of pollution problems.<sup>170</sup> The Arapaho tribal Chairman was quoted as saying: “We realize that there’s no point in having control over a quantity of water if the quality of that water is no good.”<sup>171</sup> If neighboring farmers would match these tribal efforts, Wyoming might find that environmental concerns could provide the impetus for water management cooperation. A focus on conservation could provide the key that moves water disputes out of a court room and into settlement negotiations.

Justice Cardine’s concurrence in *Big Horn III*, suggested that a spirit of cooperation be adopted as a way to avoid “expensive, useless litigation” in reaching resolution of water administration.<sup>172</sup> This is an opportunity for the parties to realize that repeated adversarial meetings which produce “win-all and lose-all extremes” are not beneficial or efficient approaches to answering water administration questions.<sup>173</sup> Several settlements for the administration of reserved water rights have

<sup>163</sup>*Big Horn I*, 753 P.2d 76, 115 (Wyo. 1988), *aff’d* by an equally divided court, *Wyoming v. United States*, 492 U.S. 406 (1989) (per curiam), *cert. denied*, *Shoshone Tribe v. Wyoming*, 492 U.S. 926 (1989).

<sup>164</sup>*Big Horn III*, 835 P.2d at 297.

<sup>165</sup>*Id.* Wyoming Rule of Civil Procedure 53 empowered the district court to remove the state engineer from his role as a water master when he failed to enforce the decree relating to the Tribes’ instream flow. *Id.* (citing WYO. R. CIV. P. 53).

<sup>166</sup>SUSAN M. WILLIAMS, *The “Winters” Doctrine on Water Administration*, ROCKY MTN. MIN. L. INST. 24-43, 24-44 (Matthew Bender & Company, Inc., 1991).

<sup>167</sup>*Id.*

<sup>168</sup>Mark Wexler, *Sacred Rights*, NATIONAL WILDLIFE, June/July 1992, at 22.

<sup>169</sup>*Id.* (quoting John Zelazny, conservation director of the Wyoming Wildlife Federation.)

<sup>170</sup>*Id.* at 20.

<sup>171</sup>*Id.*

<sup>172</sup>*Big Horn III*, 835 P.2d 273, 288 (Wyo. 1992).

<sup>173</sup>*Id.*

been reached and are illustrative of the "increasing trend toward settling rather than litigating disputed rights . . . ." <sup>174</sup>

### CONCLUSION

There is no easy solution for water rights administration. History shows that junior water right farmers have, in effect, borrowed the Indian waters for decades. Political, environmental and social tensions now surround attempts to change the long pattern of use along many western rivers. The adversary model of resolution will exacerbate the existing pressures between Indian and state water appropriators. The complexity and intensity of interests associated with the competition for precious water supply calls for the diffusion of tensions through modes of conflict resolution which, by their nature, do not produce winners and losers.

Tribes should be granted the opportunity to initiate administration efforts on their reservations. For them, "water is more than a commodity in the religious or cultural beliefs" they hold. <sup>175</sup> Continual litigation is not a step toward realizing the federal policy of Indian self-sufficiency. Historical oppression need not propagate itself into the next century. This is a time to honor Indian sovereignty and recognize the sound, environmental approach these Tribes brought to resource management. The Wind River Tribes look upon the restoration of water not only as an economic tool towards "affording themselves," but also as one carrying cultural significance. Empowering the Tribes to initiate control over their waters would increase the chances of attaining higher water quality without posing the risk of a reversed exploitation of junior water rights holders. <sup>176</sup> The *Big Horn III* decision stands to severely restrict future Indian efforts aimed at achieving ecological balance and self-sufficiency. It will perpetuate the Tribes' dependence on the state for definition of their water rights. This definition puts an economic, not environmental, focus on water management. Western states may have the right to absolutely control their water appropriators, but they should not be permitted to dictate procedures that prevent the Tribes from protecting and restoring their culture and their reservation. The issues of reservation water quality and control which rightfully belong in Indian hands have been reduced and compromised by this decision.

*Michelle Knapik*

<sup>174</sup>Jana L. Walker and Susan M. Williams, *Indian Reserved Water Rights*, 5-SPG NAT. RESOURCES & ENV'T 6 (1991). Some examples of negotiated settlements include the Ak Chin and Seminole settlements, the Colorado-Ute settlement, the Salt River settlement and the Fort Peck settlement. *Id.* at 50. While most settlements impose few on-reservation water use restrictions, there is a conspicuous absence of tribal authority which may present potential problems and future litigation. *Id.*

<sup>175</sup>SUSAN M. WILLIAMS, *The Winters Doctrine on Water Administration*, ROCKY MTN. MIN. L. INST. 24-44 n.135 (Matthew Bender & Company, Inc., 1991).

<sup>176</sup>Jana L. Walker and Susan M. Williams, *Indian Reserved Water Rights*, 5-SPG NAT. RESOURCES & ENV'T 6, 52 (1991). "Indians have a remarkable record of extending generosity and forbearance to persons who often have not extended these gifts to Indians." *Id.* at 52.