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Administration of Reserved and Non-Reserved Water Rights on an Indian Reservation: Post-Adjudication Questions on the Big Horn River

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COMMENT

Administration of Reserved and Non-Reserved Water Rights on an Indian Reservation: Post-Adjudication Questions on the Big Horn River

I. INTRODUCTION

In the beginning, tells the Arapaho creation myth, the earth was covered by the waters of a flood. On the protruding peak of a high mountain sat the first Arapaho, weeping because he was lonely and homeless. The Creator came to him and commanded a dove to go in search of a home for the Arapaho. The dove searched but found only water over the whole world. Finally, a turtle dived once into the water and surfaced with a mouthful of mud, reporting that the earth was under the water. The Creator then said, "Let the waters flow away . . . ."[1]

The waters of the Big Horn River in Wyoming have been the subject of an ongoing battle—first over adjudication, then over administration of the respective water rights of all users of the river system. Wyoming courts have been able to adjudicate the rights in the Big Horn and its tributaries (in terms of quantity and priority date) among various claimants, including the Shoshone and Arapaho Tribes. In 1988 the Wyoming Supreme Court approved the first state adjudication of Indian reserved water rights in the United States with the decision in *In Re Rights To Use Of Water In Big Horn River.*[2] The most recent litigation, however, does not focus on the adjudication of water rights. Instead, it centers on the apportionment of power. Who will have the authority to administer the rights recognized?

The Shoshone and Arapaho Tribes occupy the Wind River Indian Reservation in west central Wyoming. The Big Horn River cuts across the

1. W. Ziegler & M. Capron, Wyoming Indians 61 (1944). *See also* V. Trenholm, The Arapahos, Our People 3 (1970).

2. 753 P.2d 76 (Wyo. 1988), *aff'd mem. sub nom.*, Wyoming v. United States, 492 U.S. 406 (1989), *reh'g denied*, 492 U.S. 938 (1989) [hereinafter *Big Horn I*].

eastern edge of the reservation and forms the spine of a watershed that drains much of western Wyoming, eventually flowing north into Montana and the Missouri River drainage. The Reservation takes its name from a tributary to the Big Horn that rises in the Wind River Range and flows east across the Reservation, turning north at Riverton, Wyoming to eventually become the Big Horn.

The water rights held by the Shoshone and Arapaho Tribes are protected by the federal government from appropriation under the mechanisms of state water law. These rights were reserved for the Tribes when Congress created the Reservation in 1868.[3] Yet, the adjudication and administration of water rights—at least when they do not involve disputes between states—traditionally has been left to state courts and agencies, in Wyoming and throughout the West. Herein lies the heart of the conflict between federal protection and state regulation. This conflict has pitted the Shoshone and Arapaho Tribes against the state engineer of Wyoming in a dispute over interpretation and administration of a 1985 decree.

The McCarran Amendment[4] functions as a key by which state adjudicative processes can gain access to protected federal water rights. This access takes the form of jurisdiction—a jurisdiction that is necessary if the federal rights are to be accommodated within a statewide system of interrelated water rights. The McCarran Amendment is a waiver of United States sovereign immunity for the limited purpose of basin-wide water rights adjudications.[5] But once the rights have been adjudicated, how, and *by whom*, is the resulting decree to be monitored and administered? While the McCarran Amendment allows state courts jurisdiction over reserve rights, there is no parallel provision for state administrative agencies. The state engineer is thus powerless to enforce the decree against the Tribes.

The Big Horn dispute has brought two important questions before the Wyoming Supreme Court: First, may the Tribes use their reserved water right for instream flow, without regard to Wyoming state water law? And second, should the Tribal water agency be designated to replace the state engineer as the authority charged with administration and control of nonIndian water rights on the Wind River Reservation? The answer to the first question lies firmly anchored in existing concepts of federal water law. The answer to the second question is less secure. In

3. The Wind River Indian Reservation was created by the Treaty Between the United States of America and the Eastern Band of Shoshones and the Bannock Tribe of Indians, July 3, 1868, 15 Stat. 673 [hereinafter Second Treaty of Fort Bridger].

4. 43 U.S.C. § 666 (1988). For a discussion of the McCarran Amendment, see *infra part VI.*

5. "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States [owns] or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise . . . ." 43 U.S.C. § 666 (a).

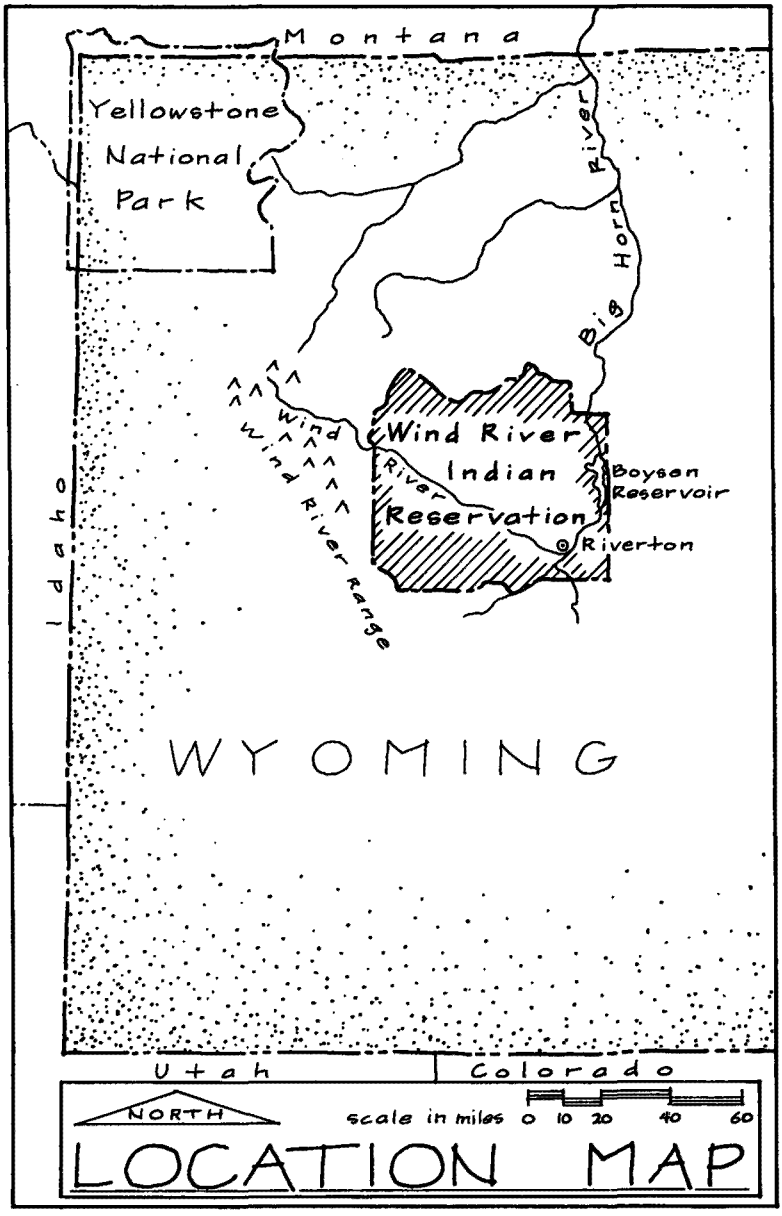

FIGURE 1. Wind River Indian Reservation

defining the Tribes' reserved right, the Wyoming courts have been able to turn to a body of federal case law establishing a framework for determining the size and scope of a federally reserved water right.[6] However, there is no comparably definitive authority on the subject of *enforcing* such a right on an Indian reservation. This Comment will examine both the immunity to state law inherent in a federally reserved water right and some obstacles to the enforcement of such a right on an Indian reservation.

Under the decree issued pursuant to the Big Horn adjudication, the Shoshone and Arapaho Tribes were awarded 500,717 acre-feet per year[7] as a federal reserved water right with a priority date of 1868. This quantity was based on a finding that the Wind River Indian Reservation had been created with a "sole agricultural purpose,"[8] and was calculated using the total practicably irrigable acreage (PIA)[9] on the Reservation. It is thus more water than the Tribes have ever historically used for irrigation.[10]

In the Spring of 1990 the Tribes enacted an Interim Tribal Water Code and issued to themselves Instream Flow Permit No. 90-001 under that code.[11] Instream Flow Permit No. 90-001 authorized the dedication of 252 cubic feet per second (cfs) of water in a particular stretch of the Wind

6. See *infra part IV*, "Federal Reserve Water Rights."

7. *Big Horn I* affirmed most of the May 1985 Amended Judgment and Decree issued by the state district court. The Wyoming Supreme Court, however, reversed the lower court's 10 percent reduction in quantity awarded. The district court had made the reduction to compensate for an estimated 10 percent margin of error in the calculations. The Supreme Court correctly reasoned that such a margin of error could go either way—i.e., it could as easily result in an underestimate as an overestimate—and reinstated the 10 percent deleted from the calculations. *Big Horn I*, 753 P.2d at 105–106.

8. *Big Horn I*, 753 P.2d at 96. In explaining this holding, the Court distinguished agriculture from other occupations and stated: "Article 7 of the treaty refers to 'said agricultural reservations.' Article 6 authorizes allotments for farming purposes; Article 8 provides seeds and implements for farmers; in Article 9 'the United States agreed to pay each Indian farming a $20 annual stipend, but only $10 to "roaming" Indians'; and Article 12 establishes a $50 prize to the 10 best Indian farmers. The treaty does not encourage any other occupation or pursuit." *Id.* at 97.

For two critiques of the purpose-of-the-reservation analysis used by the Court in *Big Horn I*, see P. Rogers, Note, *In Re Rights To Use Water In Big Horn River*, 30 Nat. Res. J. 439 (1990); and D. Stanton, Note, *Is There a Reserved Right for Wildlife on the Wind River Indian Reservation?—A Critical Analysis of the Big Horn River General Adjudication*, 35 S.D. L. Rev. 326 (1990).

9. Determining practicably irrigable acreage involves an analysis of the engineering and economic feasibility of irrigation development on the land area in question. The resulting figure for the number of acres that can be practicably irrigated is then used to determine the quantity of water reserved for the purpose of irrigation on an Indian reservation when it is found that such a purpose was intended at the creation of the reservation. See *infra* notes 68–70 and accompanying text for some further discussion of the use and origin of the PIA standard.

10. Any remaining dispute about the quantity of the Tribes' award was settled when an equally divided United States Supreme Court affirmed the Wyoming court's use of PIA as the applicable standard for quantifying the Tribes' reserved water rights. Wyoming v. United States, 492 U.S. 496 (1989)(O'Connor, J. abstaining).

11. The Wind River Interim Water Code was enacted on April 11, 1990. Chapter I of the Code includes in its list of "beneficial uses" instream flow for "fisheries, wildlife, and pollution control, aesthetic and cultural purposes."

River for fisheries enhancement and other purposes.[12] In Early May, 1990, the Tribes' acting tribal water engineer contacted the state engineer seeking enforcement of Permit No. 90-001. Maintaining that the permit attempted to authorize an impermissible use of water, the state engineer refused to enforce it and instead sought negotiation with the Tribes.[13]

On July 30, 1990, the Shoshone and Arapaho Tribes filed suit in Wyoming District Court to compel the state engineer to enforce the Tribes' water rights against those upstream appropriators holding junior rights under state law.[14] The main issues before the court-appointed special master were whether the Tribes' reserved water right, which had been awarded based on the PIA standard, could be changed to instream use, and whether the state engineer should continue as the official charged with administration and enforcement of the Tribes' reserved water rights.

On October 4, 1990, the special master issued his findings and concluded that the Tribes were entitled to make any use of their reserved water right that they deemed advisable.[15] The only restrictions on this freedom of use are those imposed by federal law: that water use be confined to the boundaries of the reservation, and that consumptive use not be increased above the quantity reserved.[16] The special master found that the use of the PIA standard to quantify the Tribes' water right did not restrict the application of that water to irrigation.[17] The Tribes were thus free to dedicate their reserved water right to instream use without regard to state law.[18] The special master, however, found that it was not appropriate to remove the state engineer of his duty and authority to enforce the Tribes' federal reserved water rights.[19] On March 11, 1991, the district

12. Report and Recommendation of the Special Master, October 4, 1990, *In re:* General Adjudication of All Rights to Use Water In the Big Horn River System and All Other Sources, State of Wyoming, Fifth District Court of Wyoming (No. 86-0012)[hereinafter Special Master's Report]. To maintain a minimum flow of 252 cfs, the Tribes dedicated about 80,000 acre-feet/year, or about 16 percent of their total right of 500,717 acre-feet/year, to instream flow. *Sullivan: State Role Needed in Flow Issue,* Casper Star-Tribune (Casper, Wyoming), August 1, 1990, at A1, A14.

13. Brief for Appellees Shoshone and Northern Arapaho Tribes at 7, *In re:* The General Adjudication of All Rights to Use Water In the Big Horn River System and All Other Sources, State of Wyoming, 835 P.2d 273 (Wyo. 1992) [hereinafter Brief for Tribes]. *See also* Brief for Appellant State of Wyoming at 4–5, [hereinafter *Brief for State*].

14. *In re:* The General Adjudication of All Rights to Use Water In the Big Horn River System and All Other Sources, State of Wyoming, 835 P.2d 273 (Wyo. 1992) [hereinafter *Big Horn III*].

In Re Big Horn River System [*"Big Horn II"*], 803 P.2d 61 (Wyo. 1990), involved questions of appellate procedure concerning the rights of nonIndian water right claimants.

15. Special Master's Report, *supra* note 12, paragraph No. 59.

16. *Id.* The rationale for limiting the use of the water to the confines of the reservation is that any exportation of the water off the reservation would contravene the purposes for which the water was reserved by Congress (i.e., the benefit of the Tribes). For an opposing view on this issue, see Judge Hanscum's dissent in *Big Horn I,* 753 P.2d at 135.

17. Special Master's Report, *supra* note 12, paragraph No. 49.

18. Special Master's Report, *supra* note 12, paragraph No. 60.

19. Special Master's Report, *supra* note 12, paragraph No. 64.

court adopted most of the special master's findings but granted the Tribes' motion that the state engineer be relieved of all further duty to enforce federal reserved water rights.[20] In his stead the court appointed the Tribal Water Resources Control Board to enforce all rights—both state and federal—within the boundaries of the Reservation.[21]

If the district court's March 1991 Decree is upheld by the Wyoming Supreme Court, *Big Horn III* will mark an important step in the evolution of Indian water law. It will represent a concrete limit to the jurisdiction over federal reserve water rights granted to the states under the McCarran Amendment and developed by subsequent case law.[22] If the Wyoming Supreme Court upholds the district court's replacement of the state engineer, it will provide a guide for the administration of future decrees involving Indian and nonIndian water rights on Indian reservations.

II. THE WIND RIVER RESERVATION: LAND, PEOPLE, AND HISTORY

The Big Horn River drainage basin lies just east of the Continental Divide and covers much of northwestern and west central Wyoming. The Big Horn Basin is designated by the State of Wyoming as Water Division Three, and includes the Wind, Popo Agie, Greybull, Shoshone, and Clark's Fork Rivers, all of which feed the main stem of the Big Horn. Division Three extends to the Montana border, where the Big Horn River flows north out of Wyoming. It encompasses parts of Yellowstone National Park, the Shoshone and Big Horn National Forests, and other federal entities, including the Wind River Indian Reservation.

The Wind River Reservation covers approximately 4,000 square miles of some of the "choicest and best-watered" land in Wyoming.[23] It stands astride the confluence of the Wind and Popo Agie Rivers, where they meet to form the Big Horn River in the southern portion of the drainage basin. Elevations range from the 12,500 foot alpine environs of the Wind River Range in the western portion of the Reservation, to 4,500 feet in the Wind River Canyon at the northeast corner.[24]

The Shoshone and Arapaho Tribes have each made a long journey to arrive in the valley of the Wind River. For the Shoshones, the journey

20. Judgment and Decree, March 11, 1991, *In re*: General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, Fifth District Court of Wyoming (No. 4993), reprinted in 18 Indian L. Rep. 5073 (April 1991) [hereinafter March 1991 Decree].

21. March 1991 Decree, *supra* note 20, at 18, 18 Indian L. Rptr., *supra* note 20, at 5076.

22. *See infra* notes 88–92 and accompanying text.

23. United States v. Shoshone Tribe, 304 U.S. 111, 114 (1938).

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

began in the West, in the Great Basin beyond the Rocky Mountains. For the Arapahos, the journey began in the East, in the woodlands of the Great Lakes. For both peoples, it has been an odyssey from the "Bison Path"[25] to the "Corn Road"[26]—from the nomadic life of hunters, to a settled life of metes and bounds, of farming and ranching, of John Deere tractors and water rights.

The Arapahos believed that Manibus, or "Man-Above" (the "Manito" common to tribes of Algonquian origin),[27] created the Rockies as a barrier to separate them from their enemies, the Shoshones and the Utes.[28] For their part, the Shoshones had, by the early nineteenth century, retreated west of the Continental Divide to seek refuge from the depredations of the Plains tribes, including the Arapaho.[29] A mix of historical accident, necessity and government edict has brought the two Tribes together on the Wind River Reservation.

The terms "Shoshone" and "Snake" appear, often interchangeably, throughout the ethnographic literature of the Rocky Mountain and Great Basin regions.[30] Pre-equestrian Shoshone culture had subsisted on various forms of hunting, gathering and fishing.[31] When the Eastern Shoshones began, in the 1840s, to venture regularly east of the Wind River Mountains to hunt buffalo in the Big Horn Basin,[32] they carried with them some of the characteristics of this earlier culture:

> [T]he culture of the Wind River Shoshoni exhibits a strange conflicting situation. It belongs neither to the foodgatherers of the west nor to the hunting cultures of the east—it is something sui generis. To ascribe it to anyone of its bordering cultures is to lose the dynamic aspect of the evolution of the tribe.[33]

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25. Trenholm, *supra* note 1, at 4.
26. Trenholm, *supra* note 1, at 242.
27. Trenholm, *supra* note 1, at 13.
28. Trenholm, *supra* note 1, at 33.
29. R. and Y. Murphy, Shoshone-Bannock Subsistence and Society 295 (1960).
30. *See generally* Murphy, *supra* note 29, at 296–97 (a good overview of various attempts at a taxonomy of Shoshonean groups and sub-groups); J. Steward, Basin-Plateau Aboriginal Sociopolitical Groups (1938)(a very thorough analysis of the many cultural, political and linguistic variations within the related Shoshone, Bannock and Mono groups).
31. See Steward, *supra* note 30, at 203. Fish, especially trout, were "of fundamental importance" to the Eastern Shoshone. Murphy, *supra* note 29, at 308. (See Steward at 40–43 for a detailed account of the various fish species relied upon by Shoshones west of the Divide.) This is particularly noteworthy in light of the Big Horn I Court's denial of a reserved water right for fisheries. Big Horn I at 98. For a critique of the Big Horn I holding that the Wind River Reservation was created with a sole agricultural purpose, and an assertion that the Court erred in declining to award a reserved right for wildlife, see D. Stanton, Note, *Is There a Reserved Water Right for Wildlife on the Wind River Indian Reservation?—A Critical Analysis of the Big Horn River Adjudication*, 35 S.D. L. Rev. 326 (1990).
32. Murphy, *supra* note 29, at 303.
33. Ake Hultkrantz, Kulturbildningen hos Wyoming's Shoshoni-indianer (1949), quoted in Murphy, *supra* note 29, at 294.

The Eastern or Wind River Shoshone gathered every September to hunt buffalo on the Wind River.[34] It was with this group, under the leadership of Chief Washakie, that a treaty was signed in 1868, promising the Tribe's "absolute and undisturbed use and occupation" of the land reserved as the Wind River Indian Reservation.[35]

The "absolute" rights of the Eastern Shoshones to the Wind River Reservation lasted 10 years. In 1878, with the reluctant consent of Chief Washakie, their old enemies the Arapahos were moved onto the Reservation.[36] Washakie, seeing the poverty and depletion of the Arapahos[37], had "too great a heart to say no" to their temporary placement on the Reservation until another home could be found for them.[38] The Arapahos, however, never left. The permanence of their occupancy was acknowledged by the United States Supreme Court in 1937, when it upheld an award of damages to the Shoshone Tribe for a taking of an undivided one-half interest in the Reservation, effected by the settlement of the Arapaho on land originally reserved to the Shoshone.[39]

The Arapaho are believed to have moved onto the Plains from the Red River area of Minnesota.[40] They were one of three Algonquian-derived groups on the Plains—the other two being the Blackfeet and the Cheyenne.[41] The Arapaho were nomadic hunters of big game—buffalo, deer and elk. The game animals provided hides for clothing and tipis, as well as the main part of the Arapaho diet.[42]

By the 1830s the Arapaho had separated into Northern and Southern Bands. The Northern Arapaho, after years of sporadic warfare with various tribes and the United States Army, were moved onto the Wind River Reservation in 1878.[43]

NonIndian explorers, trappers, and traders began to enter the region in the early 1800s. Relations with the Shoshone Indians inhabiting the area were peaceful. In the interest of preserving this peace the United States entered into the First Treaty of Fort Bridger[44] in 1863, setting aside over 44 million acres of what is now Wyoming, Colorado, and Utah as "Shoshonee Country."[45] Only five years later, increasing pressure from

34. Murphy, *supra* note 29, at 309.
35. Second Treaty of Fort Bridger, *supra* note 3, art. 5.
36. Trenholm, *supra* note 1, at 262.
37. Trenholm, *supra* note 1, at 260.
38. Trenholm, *supra* note 1, at 262 (quoting former Wyoming Governor John W. Hoyt's account of his visit to the Wind River Reservation on July 17, 1878, in his unpublished autobiography on file at the Wyoming State Archives in Cheyenne).
39. Shoshone Tribe v. United States, 299 U.S. 476 (1937).
40. Trenholm, *supra* note 1, at 9.
41. Trenholm, *supra* note 1, at 9.
42. Trenholm, *supra* note 1, at 65–66.
43. Trenholm, *supra* note 1, at 262.
44. 18 Stat. 685 (1869).
45. *Big Horn I*, 753 P.2d at 83.

white settlers after the Civil War led to the Second Treaty of Fort Bridger.[46] The Second Treaty reduced the land area to approximately three million acres, and established the Wind River Indian Reservation on July 3, 1868. A series of land cessions and restorations between 1872 and 1953 have produced the present boundaries of the Reservation.[47]

III. WYOMING STATE WATER LAW

> [T]he federal government has left the creation, definition, and control of private water rights to the states.[48]

The conflict on the Big Horn River is essentially a fight for control. It is a conflict between the traditional power of the state to control the allocation of waters within its borders, and the federal power to reserve waters from such state control. The origins of the Big Horn dispute lie, then, in the historical vagaries that created such a dual system.

The doctrine of "prior appropriation," as practiced in Wyoming and most of the Western states, allows the acquisition of private property interests in the use of water. This doctrine is based on the assumption—born out of the necessity of delivering water to those locations and activities where it could be beneficially used, regardless of their proximity to natural streams or lakes—that the right to hold land, and the right to use the naturally occurring waters on or adjacent to that land, are separate property interests. This "severance" of the land and water estates was formally acknowledged by Congress with the passage of the Desert Lands Act in 1877.[49] The first section of the Act provided that the right to use water on any land patented to a homesteader under the Act was subject to prior appropriation under local law. This proviso of the Desert Lands Act is often cited as the origin of the state power to control water allocation. Trelease points out, however, that it is probably best viewed as a mere recognition of a power that had long been exercised by the states (and territories) with the theretofore "silent acquiescence" of the federal government.[50]

Wyoming law gives the state engineer stringent control over the award of water rights within the state. This control, however, only applies to those who must seek their water rights through the state. A reservation of water rights by the federal government can preempt state control over the resource.[51] Such is the case on the Big Horn River.

46. Second Treaty at Fort Bridger, *supra* note 35.
47. *Big Horn I*, 753 P.2d at 83-84.
48. F. Trelease & G. Gould, Water Law 22 (4th ed. 1986).
49. 44th Cong, Sess. II, Ch. 107, 19 Stat. 377 (1877).
50. Trelease & Gould, *supra* note 48, at 694.
51. Winters v. United States, 207 U.S. 564, 577 (1908).

IV. FEDERAL RESERVE WATER RIGHTS

The water rights held by the Wind River Tribes are a species within the broader genus of federal reserve rights. In *Winters v. United States*,[52] in 1908, the Supreme Court first held that an agreement reserving lands for the purpose of an Indian homeland also reserved water as a necessary appurtenance to the land.[53] That holding, however, was merely an outgrowth of earlier decisions confirming the federal government's power to reserve property interests from state control in order to further some federal purpose.[54]

Three years before *Winters*, in the 1905 *United States v. Winans*[55] decision, the Court found that an 1859 treaty with the Yakima Indians of Washington reserved to the Tribe the right to fish at a certain traditional spot along the Columbia River. This location, however, was outside the Reservation lands and had passed into private ownership under patents from the United States and grants from the State of Washington.[56] The Court held that the private owners' title was still subject to the Tribe's right to fish, and that the United States had the power to enforce a reserved easement on behalf of the Tribe in order to further a public purpose—the effectuation of a treaty with the Yakima Indians.[57]

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them —a reservation of those not granted.[58]

A right to the use of water is, of course, a property right. Having confirmed the federal power to reserve rights from state control the Court applied this doctrine to the field of water rights in *Winters v. United States*.[59] *Winters* involved rights to the use of water in the Milk River in Montana. A 1888 agreement with the Gros Ventre and Assiniboine Tribes had resulted in the creation of the Fort Belknap Indian Reservation. The Court found that "[t]he lands were arid and, without irrigation, were practically valueless."[60] While the agreement reserving the lands made no

52. *Id.*
53. *Id.* at 577.
54. *See* Shively v. Bowlby, 152 U.S. 1 (1894); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702 (1899); United States v. Winans, 198 U.S. 371 (1905).
55. United States v. Winans, 198 U.S. 371 (1905).
56. *Id.* at 379.
57. *Id.* at 381.
58. *Id.* (emphasis added).
59. 207 U.S. 564 (1908).
60. *Id.* at 576.

specific mention of water, neither reserving nor ceding it, the Court reasoned that since it was the policy of the Government to change the Indians into "a pastoral and civilized people"[61] the agreement implied a reservation of water in order to carry out that policy.[62] The appellants argued that even if the agreement had reserved water for the Tribes in 1888, such a reservation was repealed by the admission of Montana into the Union in 1889 "upon an equal footing with the original States."[63] The Court rejected this argument, stating: "The power of the government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be."[64] The Court held that the Tribes' water right had been reserved at the creation of the Fort Belknap Reservation, and thus had a priority date of 1888.[65] This right was senior to that of nonIndian irrigators upstream from the Reservation.

Cases in the 80 years since *Winters* have refined the doctrine of reserve water rights first articulated in that case. The outlines of this doctrine were clearly drawn by the Court in *Cappaert v. United States*.[66] In that case the Court held that the creation of Devil's Hole National Monument in Nevada reserved a water right sufficient to protect a pool containing a unique species of desert pupfish. In reaching that decision the Court gave a thorough overview of the federal power to reserve water rights, and the sources of that power:

> This court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other

61. *Id.*
62. *Id.*
63. *Id.* at 577 (construing Enabling Act of Feb. 22, 1889, 50th Cong., Sess. II, Ch. 180, 25 Stat. 676 (1889)(admitting North Dakota, South Dakota, Montana, and Washington to the Union)).
64. *Winters*, 207 U.S. at 577 (citing United States v. Winans, 198 U.S. 371 (1905)). This argument—that admission to the Union upon an "equal footing" with the other states negates the reservation of water for federal purposes—has been consistently rejected by the courts. See *Big Horn I*, 753 P.2d at 92; United States v. New Mexico, 438 U.S. 696, 698 (1978); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 564 (1983).
65. *Winters*, 207 U.S. at 577.
66. 426 U.S. 128 (1976).

> federal enclaves, encompassing water rights in navigable and nonnavigable streams.[67]

These general principles apply to all federally reserved water rights—Indian and nonIndian alike.

While *Winters* stands for the power of the United States to reserve a water right for federal purposes, it provides no guidance for quantifying that right. Not until 1963, in *Arizona v. California*,[68] was a method for the quantification of a federally reserved water right judicially adopted. *Arizona* involved the apportionment of water in the Lower Colorado River Basin between the United States, five Indian reservations, and five states. The United States Supreme Court adopted a special master's use of the "practicably irrigable acreage" (PIA) on the Indian reservations as the applicable standard for quantifying the rights awarded to the Tribes.[69] While the PIA standard has been criticized[70] it is still the accepted standard for calculating the quantity of water awarded to Indian reservations for agricultural purposes.[71]

However, determining the "purpose" for which a reservation, Indian or nonIndian, has been set aside can become a struggle in itself. The leading case in this area is *United States v. New Mexico*,[72] where the Court held that water is reserved for the primary purpose for which the reservation is created, but not for any "secondary" uses of the reservation.[73] *New Mexico* dealt with the adjudication of the waters of the Rio Mimbres in southwestern New Mexico. In awarding water for the Gila National Forest, the Court relied on the Organic Administration Act of 1897[74] to conclude that the only purposes recognized for the national forest at the time of its creation were timber production and watershed protection.[75] Any other uses of the forest, the Court held, were "secondary" and did not reserve a federal water right.[76] Thus, water for any of these

67. *Id.* at 138.

68. 373 U.S. 546 (1963).

69. *Id.* at 600.

70. See M. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 Nat. Res. J. (1991); and L. Boomgaarden, Note, *Practicably Irrigable Acreage Under Fire: The Search for a Better Legal Standard*, 25 Land & Water L. Rev. 417 (1990).

71. Though perhaps not for long . . . . The U.S. Supreme Court barely approved its use in Big Horn I with a 4-4 affirmance in Wyoming v. United States, 492 U.S. 496 (1989). Justice O'Connor did not participate, and the Court did not write an opinion.

72. 438 U.S. 696 (1978).

73. *Id.* at 695.

74. 16 U.S.C. § 473 *et seq.* (1988).

75. The Court held that the enactment of the Multiple Use Sustained Yield Act of 1960, 16 U.S.C. §528 *et seq.* (1988)—which enumerated a range of uses beyond timber production and watershed protection for which the national forests were to be managed—was not merely a codification of already existing purposes, but created new purposes. The Act, therefore, did not affect the dual purposes for which the national forests had been created, and thus did not reserve water for those additional purposes. *New Mexico*, 438 U.S. at 713.

76. *Id.* at 702.

secondary uses—such as livestock, wildlife, fish, aesthetics, et cetera—had to be acquired by appropriation under state law.[77]

The basis for the *New Mexico* Court's narrow interpretation of a nonIndian reserved right can be traced to *Cappaert*, where the Court emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."[78] The Court's rationale for this restrictive standard seems to be a finding of general Congressional deference to state water law.[79]

It is useful to remember, however, that the "minimal need" standards of *Cappaert* and *New Mexico* both involved water for nonIndian federal reserves. "The purposes for which the federal government reserves land are strictly construed. The purposes of Indian reserved rights, on the other hand, are given broader interpretation to further the federal goal of Indian self-sufficiency."[80] Also, the deference to state law presumed in *New Mexico* and *Cappaert* would not apply to Indian reservations, which are generally presumed to be beyond the reach of state laws.[81] It is therefore not clear what standard the Court would apply to determine the quantity of water reserved for an Indian reservation if anything other than a PIA-based agricultural purpose were found to exist.[82]

V. STATE JURISDICTION VIA McCARRAN

River basins are complex and intradependent systems. A thorough adjudication of the rights to use water from a given stream, therefore, must determine the right of each user in relation to the rights of all

77. Most of these uses, however, would involve leaving water in the stream. Rights for such uses could not be established under New Mexico state law because there would have been no "diversion." See State *ex rel.* Reynolds v. Miranda, 83 N.M. 443, 493 P.2d 409 (1972).

78. Cappaert v. United States, 426 U.S. 128, 141 (1976).

79. See New Mexico, 438 U.S. at 702, 716–17.

80. State of Montana, *ex rel.* Greely v. Confederated Salish and Kootenai Tribes, 712 P.2d 754, 767–68 (Mont. 1985)(citations omitted). *Greely* draws the distinction between federally reserved water rights and Indian reserved water rights. "Federal reserved water rights are created by the document that reserves the land from the public domain. By contrast, aboriginal-Indian reserved water rights exist from time immemorial and are merely recognized by the document that reserves the Indian land. Federal reserved water rights . . . cannot predate the document that reserved the federal land from the public domain." *Id.* at 767. Although the Shoshones, because of their historical use of the Wind River Valley, might have at least a colorable claim to water rights that predate the 1868 Treaty, there is no contention in the current litigation that any rights predate 1868.

81. Colville Confederated Tribes v. Walton, 647 F.2d 42, 53 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). See also P. Rogers, Note, *In Re Rights To Use Water In Big Horn River*, 30 Nat. Res. J. 439, 449, n. 64 (1990); Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

82. For example, if a more general "homeland" purpose were found by the court to include an implied reservation for fish propagation, how much water does that reserve? Such a reserved right for fish propagation could hypothetically include up to 100 percent of historic natural flow.

other users on the stream. Power to regulate—and hence adjudicate—the flowing surface waters of the West has traditionally been left to the states. The Wyoming Constitution, however, declares that the state disclaims any title to, or jurisdiction over, all federal and Indian lands within the state.[83] The constitutions and Enabling Acts under which most of the Western states were admitted to the Union contain nearly identical disclaimers as a condition of being granted statehood.[84] The result of these disclaimers was to place federally reserved water rights at least arguably beyond the reach of any state court jurisdiction. This created an obvious obstacle to the meaningful adjudication of water rights on any stream system where the United States held a reserved right. Without state power to join the United States as a defendant in system-wide stream adjudications, the federal right would remain an unknown quantity—a wild card that could threaten the reliability of an otherwise "settled" allocation of rights.

In response to this perceived problem, Congress passed the McCarran Amendment in 1953.[85] Senator McCarran described the purpose of the Amendment:

> S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.[86]

The McCarran Amendment is a waiver of federal sovereign immunity for the limited purpose of stream system adjudications in state courts.[87] The extent of the jurisdiction conferred by the Amendment has been challenged by the United States on several occasions. Each time, the jurisdiction of the state court has been upheld.

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83. Wyo. Const., art XXI, §26.

84. *See* Enabling Act of Feb. 22, 1889, *supra* note 63, at § 4 (admitting North Dakota, South Dakota, Montana, and Washington); Enabling Act of July 16, 1894, 53rd Cong., Sess. II, Ch. 108, § 3, 28 Stat. 107, 108 (1894)(admitting Utah); Enabling Act of June 16, 1906, 59th Cong., Sess. I, Ch. 3335, § 3, 34 Stat. 267, 270 (1906)(admitting Oklahoma); Enabling Act of June 20, 1910, 61st Cong., Sess. II, Ch. 310, §§ 2, 20, 36 Stat. 557, 558–559, 569 (1910)(admitting New Mexico and Arizona); Enabling Act of July 7, 1958, Pub. L. No. 85-508, § 4, 72 Stat. 339 (1958), as amended by Act of June 25, 1959, Pub. L. No. 86-70, § 2(a), 73 Stat. 141 (1959)(admitting Alaska). See also Ariz. Const., art. XX, § 4; Idaho Const., art. XXI, § 19; Mont. Const., Ordinance No. 1; N.M. Const., art. XXI, § 2; Utah Const., art. III.

85. 43 U.S.C. § 666 (1988).

86. S. Rep. No. 755, 82d Cong., 1st Sess., 9 (1952)(quoted in United States v. District Court For Eagle County, 401 U.S. 520, 525 (1971)).

87. See *supra* note 5 for the relevant text of the McCarran Amendment.

In *United States v. District Court for Eagle County*,[88] the Supreme Court rejected the United States' claim that only those federal rights acquired by appropriation under state (in this case, Colorado) law were subject to state adjudication under the McCarran Amendment. The Amendment was thus held to apply to federal reserve rights as well as those acquired pursuant to state law.[89] More pertinent to the Big Horn cases was the decision in *Arizona v. San Carlos Apache Tribe*.[90] That case dealt with the disclaimers of state jurisdiction contained in the Arizona Enabling Act and Constitution. The Court stated clearly: "[W]e are convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on state-court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment."[91] The Court also held that, to the extent that any bar to state court jurisdiction is premised on a state constitution, that is a question of state law over which state courts have final authority. Thus, when a state court elects to take jurisdiction in the face of such a disclaimer, the federal courts must assume that jurisdiction exists.[92] The rationales of *San Carlos Apache* were central to the Wyoming courts' assumption of jurisdiction in the Big Horn cases.[93]

VI. LIMITATIONS ON STATE JURISDICTION

It may appear at first that the question of using a PIA-based reserved right for instream flow, and the question of the proper authority to administer the 1985 Big Horn Decree, are separate and discreet issues. In this case, however, the two issues are inextricably bound together. The state engineer premised his refusal to shut down junior appropriators to protect the Tribes' reserved right on his view that the use to which the Tribes were going to put that water—instream flow—was illegal and thus unenforceable.[94] It was this failure of the state engineer to enforce the Tribes' right that prompted Judge Hartman to replace him with the Tribal Water Resources Control Board as the agency assigned to administer both Indian and nonIndian water rights within the boundaries of the Wind River Indian Reservation.[95] Both issues—at least as decided by the district

88. 401 U.S. 520 (1971).

89. *Id.* at 524.

90. 463 U.S. 545 (1983).

91. *Id.* at 564. For a discussion of this issue, see W. Schwartz, *Comment, State Disclaimers of Jurisdiction Over Indians: A Bar To The McCarran Amendment?*, 18 Land & Water L. Rev. 175 (1983)(concluding that such a bar to jurisdiction would run counter to federal Indian policy, and was thus not the intended purpose of the state disclaimers).

92. *San Carlos Apache Tribe*, 463 U.S. at 561.

93. *Big Horn I*, 753 P.2d at 87–88.

94. Brief for State, *supra* note 13, at 5. See also Brief for Tribes, *supra* note 13, at 7.

95. March 1991 Decree, *supra* note 20, at 14.

court on March 11, 1991—involve a limitation on state jurisdiction and authority. The more straightforward of these two issues is the use of the Tribes' reserved water right for instream flow.

A. Use of PIA-based Reserved Right for Instream Flow

> The Tribes may change their reserved water right to instream flow without regard to Wyoming state water law.[96]

The 1985 Decree does not specifically provide that the Tribes may use their award for instream flow.[97] Nor does the 1988 *Big Horn I* decision. Still, there is ample authority for the proposition that the method used to quantify a reserved right does not restrict the actual use of that water once awarded.

Any claimed restriction on the use to which a federally reserved water right may be put, at least within the geographic boundaries of the Reservation[98], is necessarily a construct of state, not federal law. Federal law does not place any restriction on the use of such a water right. In a 1979 supplemental decree issued pursuant to its 1963 *Arizona v. California*[99] decision—the case in which the PIA standard was first articulated—the United States Supreme Court stated that "reference to a [PIA-based] quantity of water necessary to supply consumptive use required for irrigation . . . shall constitute the means of determining the quantity of adjudicated water rights but shall not constitute a restriction on the usage of them to irrigation or other agricultural application."[100]

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96. March 1991 Decree, *supra* note 20, at 18.

97. During the district court's adjudication of Tribal water rights in *Big Horn I*, Judge Joffe denied the Tribes' claim to additional quantities reserved for the purpose of "fishery flows." Findings of Fact, Conclusions of Law, and Judgment, May 10, 1983, *In Re* Rights To Use Of Water In Big Horn River, Fifth District Court of Wyoming, at 19, 60, 63 and 69 [hereinafter 1983 Decision]. While relying solely on PIA to quantify the Tribes' reserved right, Judge Joffe was careful to point out that such a ruling did not restrict the use of that water to agriculture: "If the Tribes desire to use so much of their water for other purposes, they may do so." *Id.* at 20. Later, after the district court case had been taken over by Judge Johnson, he too denied a request by the Tribes for an additional water right reserved for instream flow. As had Judge Joffe, Judge Johnson made it clear that such a denial should not be construed as restricting the Tribes in the use of their reserved water right. Judge Johnson, however, went still further to specifically state that "[t]he Tribes may seek to dedicate their stream flows for fish habitat by using flows reserved to them by the decision." Order Ruling on Motions to Alter or Amend the Decision of May 10, 1983, June 8, 1984, *In Re* Rights To Use Of Water In Big Horn River, Fifth District Court of Wyoming, at 36. In *Big Horn III*, the Tribes contend that these decisions were incorporated as part of the 1985 Amended Decree and have thus become the law of the case. Tribes' Brief at 15.

98. See *supra* note 16 for the rationale behind this geographic limitation.

99. 373 U.S 564 (1963).

100. Arizona v. California, 439 U.S. 419, 421–22 (1979)(emphasis added). See also D. Getches, Water Law 305 (1984).

In *Big Horn I* the Wyoming Supreme Court only hinted that the Tribes might legally change the use of their reserved water right from irrigation to some other use.[101] The Court did, however, make it abundantly clear that it is federal law which governs a reserved water right.

> The decree entered in the instant case does not require application of state water law to the Indian reservation. The decree recognizes reserved water rights based on federal law. The role of the state engineer is thus not to apply state law, but to enforce the reserved rights as decreed under principle of federal law.[102]

Since federal law places no restrictions on the on-reservation use of a reserved water right, it seems apparent that the Tribes may dedicate any portion of that right to instream flow. Still, the more difficult question remains: Is it indeed the state engineer who should enforce the reserved rights on the Wind River Reservation?

B. Who Should Administer . . . ?

The Wind River Reservation is home to both Indians and nonIndians. There are fee lands, allotment lands and trust lands on the Reservation. There are reserved water rights and state water rights. The choice between the state engineer and the Tribal Water Resources Control Board to administer water rights on the Reservation is really a choice between two generally disfavored situations. Either the state will be allowed to regulate activity on an Indian reservation, or the Tribes will be given civil jurisdiction over nonIndians. This choice actually concerns only the regulation of the middle ground: holders of state water rights on fee lands. No one claims that the Tribes should have any jurisdiction over activities outside the Reservation. Conversely, it is equally settled that the state engineer has no enforcement powers against the Tribes, nor jurisdiction over their water rights.[103]

1. The Case Law

The assertion of state regulatory authority over tribal reservations may be preempted by federal law, or it may be barred for unlawfully infringing on the right of reservation Indians to self-government.[104] The

101. In discussing the amount of water reserved for historically irrigated lands on the Wind River Indian Reservation, the Court wrote: "The award does not interfere with the Tribes' right to administer their own affairs; it merely quantifies the reserved right for historic lands by awarding only the amount of water necessary to irrigate all the PIA." *Big Horn I*, 753 P.2d at 111.

102. *Id.* at 115 (emphasis added).

103. *Big Horn I*, 753 P.2d at 115.

104. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–43 (1980).

United States Supreme Court has recognized that the unique origins of tribal sovereignty make it generally unhelpful to apply those standards of federal preemption have that emerged in other areas of the law.[105] In 1980, in *White Mountain Apache Tribe v. Bracker,* the Court sketched the rough outlines of a balancing test for evaluating competing claims of regulatory jurisdiction that was gradually refined over the course of the ensuing decade. The Court called for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake" to determine whether, in any specific case, the exercise of state authority on a reservation would violate federal law.[106]

The following year, in *Montana v. United States,*[107] the Court held that the Crow Tribe of Montana lacked jurisdiction to regulate nonIndian hunting and fishing on nonIndian lands within the reservation. Reasoning that the dependent status of Indian tribes has implicitly divested them of full sovereignty over relations between the tribes and nonmembers,[108] the Court did, however, note some specific and very important exceptions to this general divestiture of sovereignty:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over nonIndians on their reservations, even on nonIndian fee lands. . . . A tribe may . . . retain inherent power to exercise civil authority over the conduct of nonIndians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[109]

Two subsequent cases addressed the question of regulatory jurisdiction in the context of water rights. In *Colville Confederated Tribes v. Walton*[110] the Ninth Circuit considered whether the State of Washington could regulate the use of water by a nonIndian farmer on fee land within the Colville Reservation. Walton was diverting water from No Name Creek, a stream arising and ending entirely within the boundaries of the reservation. The court relied on the "health or welfare" exception delineated in Montana in holding that "[e]specially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important [tribal] sovereign power."[111] The court noted, however, that the fact that the No Name stream system is contained entirely within the reserva-

105. *Id.* at 143.
106. *Id.* at 145.
107. 450 U.S. 544 (1980), *reh'g denied,* 452 U.S. 911 (1981).
108. 450 U.S. at 564.
109. *Id.* at 565–66.
110. 647 F.2d 42 (9th Cir. 1981), *cert. denied,* 454 U.S. 1092 (1981).
111. *Id.* at 52.

tion made the decision easier than it might otherwise be.[112] Indeed, it was this geographic peculiarity of Walton that allowed the same court to distinguish it three years later in *United States v. Anderson.*[113]

In *Anderson* the Ninth Circuit again considered the issue of regulatory authority over water use by nonIndians on an Indian reservation. This time, however, the court found the balance of interests to be tipped in favor of state regulation. The court noted that the stream in question in *Anderson,* Chamokane Creek, has both its source and end off the reservation. The stream does not flow through the reservation, as in *Walton,* but only forms part of its boundary. The court further noted that the state's interest in developing a comprehensive water plan for the entire basin (which extends well beyond the reservation) weighed heavily in favor of permitting state regulation of non-reserved water rights on the reservation.[114] Also central to the court's decision was the fact that the water rights in the Chamokane Basin were being administered by a federal water master who would protect the rights of the Spokane Tribe.[115]

The United States Supreme Court has most recently addressed the issue of conflicting regulatory jurisdiction in *Brendale v. Confederated Yakima Nation.*[116] This case involved a challenge to tribal zoning laws by nonIndian landowners and by Yakima County. The Court allowed Yakima County zoning authority over the "open" (largely nonIndian populated) portion of the reservation, and upheld tribal zoning authority in the "closed" (almost exclusively Indian populated) portion of the reservation. The Court, however, could produce no majority opinion on the rationales supporting these outcomes.

Justice White, writing for a plurality of four, opined that the question of regulatory authority was not a choice between state or tribal sovereignty. He reasoned that tribal sovereignty over nonmembers in the open area was inconsistent with the Tribe's dependent status.[117] Thus, the only question was whether the specific land uses permitted by Yakima County's zoning board themselves threatened some protectable interest of the Tribe.[118] The proper place for the Tribe to begin such a challenge, Justice

112. *Id.*

113. 736 F.2d 1358 (9th Cir. 1984).

114. *Id.* at 1366.

115. *Id.*

116. 492 U.S. 408 (1989).

117. Justice White found it significant that the second *Montana* exception (conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," 450 U.S. at 566) "is prefaced by the word 'may'—[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation.' " *Brendale* at 428–29 (quoting *Montana* at 566)(emphasis added by Justice White). Justice White thus reasoned that tribal authority does not necessarily extend to all conduct contained within the exception, "but instead depends on the circumstances." *Brendale* at 429. This view seems to dictate that a separate inquiry must precede (or follow?) the sort of balancing of interests mandated by *Bracker.*

118. *Brendale,* 492 U.S. at 431.

White believed, was in the county zoning proceedings—not to challenge the county's jurisdiction, but to challenge the specific actions permitted under that jurisdiction. If the county fails to respect the rights of the Tribe under federal law, the Yakima Nation could then turn to the federal courts for injunctive relief.[119]

Justice Stevens, joined by Justice O'Connor, delivered an opinion concurring with the result of Justice White's opinion but concluding that the power of a tribe to regulate land use is necessarily included within the power to exclude nonmembers from its reservation.[120] This power to exclude derives from both the tribe's aboriginal sovereignty and—at least in the case of the Yakima Nation—from the express provisions of its treaty with the United States.[121] Under this analysis the question becomes: To what extent has this inherent power to exclude been either diminished by statute or voluntarily surrendered?[122] Justice Stevens concluded that in those portions of the reservation where large tracts of land have been sold in fee to nonmembers, Congress could not have intended that the Tribe retain the power to regulate the use of land by nonmember landowners who have no voice in setting tribal policy. Conversely, the sale of a few lots in the closed portion of the reservation does not divest the Tribe of its inherent power to determine the character of its tribal community through regulation.[123]

Distilled to its essence, *Brendale* suggests that a tribe's power to assert regulatory authority over nonmembers will depend to a large extent on the demographics of the particular land area in question. Where nonmembers have acquired significant property interests, a tribe's sovereignty is proportionately diminished and may be outweighed by the state's interest in protecting the rights of those with no influence over the policies governing such regulation. On the other hand, the extent to which nonIndian activities on the reservation imperil those tribal interests articulated in *Montana* will function as the counterbalance in making this determination.

2. Balancing the Interests

In determining whether the exercise of state regulatory control over non-reserved water rights on the Wind River Indian Reservation is preempted by federal law, the Wyoming Supreme Court will not be able to rely on any hard and fast rule of law. Instead, it will probably have to wade into the kind of fact-dependent, particularized inquiry suggested by

119. *Id.*
120. *Id.* at 433.
121. *Id.* at 435.
122. *Id.* at 436–37.
123. *Id.* at 437.

Bracker. What follows is a brief look at some of the factors in the Big Horn Basin that might weigh into such an inquiry.

Though there are no distinct "open" or "closed" areas on the Wind River Reservation, as there were on the Yakima Reservation in *Brendale,* there are significant nonIndian landholdings and populations. Determining the relative extent of sovereignty either retained or divested by the Tribes in various areas of the Reservation would almost certainly require additional proceedings in the district court. This kind of fact-finding could become quite difficult. On the one hand, treating the entire Reservation as a single unit would be most efficient from the standpoint of administering an integrated system of water rights. On the other hand, in the interest of fairness to all affected parties, a *Brendale*-type inquiry could be carried out *ad absurdum* resulting in an unmanageable patchwork of areas determined to be subject to the respective jurisdictions of the Tribes or the state.

The fact that the jurisdiction at issue involves water raises the stakes on both sides. As noted by the *Walton* court, water is critical to the sustenance and development of tribal communities and thus triggers the Montana "health or welfare" exception to the implied withdrawal of regulatory power over nonmembers.[124] The weight accorded to this exception will depend on whether the Wyoming Supreme Court accepts the interpretation of the "*may* retain inherent power" language espoused by Justice White's plurality opinion in *Brendale.*[125] If the Court accepts the White view that tribal jurisdiction is not necessarily mandated by the implication of tribal health or welfare, then the exception is not dispositive and a further balancing of all the circumstances is required.

The McCarran Amendment itself is an implicit congressional recognition of the great interest states have in control and regulation of water resources within their borders. In *Anderson* the court reasoned that a state's interest in regulating water use for the benefit of all its citizens is a concern "shared with, not displaced by, similar tribal and federal interests when water is located within the boundaries of both the state and the reservation."[126] Such an observation, however, could just as easily be read as an argument in favor of tribal, rather than state jurisdiction.[127] The weight of the state's interest depends, in large part, on the extent to which the water system in question transcends the boundaries of the reservation.[128]

The relationship of the Wind River to the Reservation is neither as exclusive as that of No Name Creek in *Walton,* nor as attenuated as that of Chamokane Creek in *Anderson.* After rising in the Bridger-Teton National

124. *Walton,* 647 F.2d at 52.

125. See *supra* note 117.

126. *Anderson,* 736 F.2d at 1366.

127. As a means of resolving a conflict between two parties, this kind of assertion that no real conflict exists seems less than satisfactory.

128. *Anderson,* 736 F.2d at 1366.

Forest west of the Reservation, the Wind River flows southeast then north for over 100 miles fully within the boundaries of the Reservation, eventually becoming the main stem of the Big Horn River. After leaving the Reservation, however, the Big Horn River continues on for another 100 plus miles through north central Wyoming before flowing north into Montana. Thus, the interests of both the state and the Tribes in the Regulation of the River are substantial.

3. Administration

> Incidental monitoring of Indian [water] use . . . has carelessly been termed "administration" of Indian water by the state engineer.[129]

If it is to be effective, the power to administer the interrelated water rights on a stream system must include the power to enforce those rights. And ultimately, the power to enforce means the power to close the headgates of a junior appropriator so that the rights of a senior appropriator can be fully satisfied. In *Big Horn I*, any such power over the Tribes was explicitly denied the state engineer. The court ruled that if the state engineer finds that the Tribes are in violation of the 1985 Decree, "it is clear that he must then turn to the courts for enforcement of the decree against the United States and the Tribes and that he cannot simply close the headgates."[130] This lack of direct administrative power over a large proportion of the water rights on the Wind River Indian Reservation could make effective administration by the state engineer cumbersome if not impossible.

There is no parallel obstacle to tribal administration of state water rights on the Reservation. If the Wyoming Supreme Court upholds the district court's March, 1991 Decree, the Tribal Water Resources Control Board will have power to administer all the water rights on the Wind River Indian Reservation. The Tribal agency would have enforcement power against on-reservation holders of state water rights, but would administer those rights according to state, not federal water law.[131] If sheer practicality and efficiency of administration are considered by the court, administration by the Tribal agency would have a distinct advan-

129. *Big Horn I*, 753 P.2d at 115.

130. *Id.*

131. March 1991 Decree, *supra* note 20, at 18. One commentator advocates a departure from tribes' strict application of state law to state permitted water rights on Indian reservations. Instead, she proposes a "public interest" standard for tribal administration of Indian and nonIndian water rights on reservations. "Such a standard would enable tribes either by code or regulations to weigh, for example, with respect to a transfer of use application—possible injury to junior users, the economic value of the new and existing uses, environmental and cultural concerns, and other important tribal government interests." S. Williams, *Indian Winters Rights Administration: Averting New War*, 11 Pub. Land L. Rev. 53, 79–80 (1990).

tage over the kind of partial authority that could be granted the State Engineer. Such a practical advantage, coupled with the Tribes' strong sovereign interest in the regulation of water within the confines of the Reservation, would seem to counsel strongly in favor of Tribal rather than state administration.

VII. CONCLUSION

Wyoming's adjudication of the Indian reserved water rights to the Big Horn River was the first of its kind in the nation. Now that the proceedings have moved beyond adjudication and into questions of administration, the Wind River Reservation will again be a legal testing ground. *Big Horn III* will provide an example of one approach to the administration, on an Indian reservation, of Indian and nonIndian water rights adjudicated pursuant to a McCarran suit.

POSTSCRIPT

This Comment was written before the Wyoming Supreme Court issued its decision in *Big Horn III*. On June 5, 1992 the court issued that decision.[132]

The court's disposition of the case can be most charitably described as confusing. In five separate opinions the five Justices spin out a variety of rationales for their respective positions. Two different majorities hold that 1) the Tribes may not use for instream flow water rights that were awarded based on the PIA of future projects, and 2) the district court erred in replacing the state engineer with the Tribal water agency as the administrator of water rights on the Wind River Indian Reservation. The opinion of the court, written by Justice Macy, manages to misinterpret or ignore a significant body of authority, including much of the court's own opinion in *Big Horn I*, in asserting that the purpose for which the Tribes' water rights were reserved limits the use of those rights. Thus, the Tribes may use their PIA-based future project water rights "solely for agricultural and subsumed purposes and not for instream purposes." On the subject of administration, Macy seems to reason that Indian water rights are subject to the authority of the state engineer because the federally reserved water is actually "Wyoming water" owned by the state.[133]

At the end of a lengthy and often scathing dissent, Justice Golden concludes:

132. It is published at 835 P. 2d 273.
133. See *id.*, at 283.

> "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." Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 Land & Water L. Rev. 1, 14 (1992).
>
> Today some members of the court sound a warning to the Tribes that they are determined to complete the agenda initiated over 100 years ago and are willing to pervert prior decisions to advance that aim. I cannot be a party to deliberate and transparent efforts to eliminate the political and economic base of the Indian peoples under the distorted guise of state water law superiority.[134]

On June 30, 1992, the Wyoming Supreme Court denied the Tribes' petition for rehearing.

ERIC HANNUM

134. 835 P.2d 273, 303–04.