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## This Century's Battle of the Big Horn: Calculating Reserved Indian Water Rights in the Arid West

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## *This century's Battle of the Big Horn: Calculating reserved Indian water rights in the arid West*

by Robert H. Abrams

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**State of Wyoming**

v.

**United States, et al.**  
(Docket No. 88-309)

*Argument Date: April 25, 1989*

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For the arid states of the western United States, this is a potentially vital case. Masquerading as a narrow dispute about the role of "necessity" in the quantification of the water rights of Indian tribes in the Big Horn River system of Wyoming, this case could restructure the whole fabric of Indian water entitlements throughout the region. Should the U.S. Supreme Court reverse the Wyoming Supreme Court and abandon the longstanding method of using an irrigable acreage-based method for assigning a quantity of water to benefit tribal lands, tribal claims to water in the West will be dramatically reduced.

### ISSUES

The case below is a massive one involving literally thousands of parties and water rights claims. Nevertheless, the U.S. Supreme Court accepted jurisdiction on only one of several important water law issues for which review was sought. Specifically, the Court agreed to review this question:

In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the reservation, may a reserved water right be implied for all practicably irrigable lands within a reservation set aside for a specific tribe?

The briefs of the parties reflect this orientation, with the State of Wyoming urging the Court to consider tribal needs for the water. The tribal respondents and the United States seek to limit the judicial role to a more narrow question, the applicability of the "practicably irrigable acreage" (PIA) standard, rather than the de facto revision of that standard which would accompany consideration of necessity.

### BACKGROUND AND SIGNIFICANCE

This is a case about implied Indian reserved water rights in the arid West where most other water rights are created under state law in accordance with the doctrine of prior appropriation. Under prior appropriation, water rights are

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established by putting the available water to use for a beneficial purpose. Rights are protected on the basis of seniority in time. If there is a shortage of water, more senior appropriators can insist that the juniors take no water until the senior rights are fully satisfied. To avoid waste and speculation, water rights that are not used are subject to abandonment or forfeiture.

The water rights at issue in this case are quite different from appropriative rights. Federal reserved rights are created by virtue of congressional or federal executive action in setting aside federal lands for some identified federal purpose, not by putting water to actual use. Their seniority reaches back to the date on which the land was set aside for the particular reservation purpose and remains intact even if no actual use is made of the water.

In this case, for example, the reserved rights of the tribes carry an 1868 priority date, which makes them the most senior rights in the Wind River system. In the event that these rights are exercised, they will be superior to state law appropriative rights having post-1868 priority dates. If in any given year there is not enough water to meet the needs of all water users, these very senior reserved rights have the potential to eclipse long-exercised rights based on state law. This potential of previously dormant Indian reserved rights to displace existing economies based on actual beneficial use is anathema to the Western states.

Reserved rights such as those under review in this case are most frequently *not* the product of express federal action such as a statutory declaration by Congress using its constitutional authority to claim a certain amount of water for the benefit of specified federal lands. Historically, beginning with the famous case of *Winters v. United States*, 207 U.S. 564 (1908), the U.S. Supreme Court has held in a number of settings that when Congress or the executive withdraw federal lands from the public domain and "reserve" them to a particular purpose, there is also implied a reservation of then-unappropriated water in a quantity sufficient to fulfill the purposes for which the land is withdrawn and reserved.

The settlement of the Indians on reservations has frequently been held to include an intent to alter their lifestyle from nomadic to agrarian and to carry with it an implied reservation of water for farming. The amount of water involved has traditionally been fixed by reference to the PIA standard, a mechanical calculation that provides sufficient water to irrigate all of the lands that it would be practical to irrigate, where practicality is a function of arability, cost of irrigation and the like.

Frequently, use of the PIA standard will result in very large awards of water. Owing to the large number of Indian reservations located in the nation's arid regions, any case in which the U.S. Supreme Court is concerning itself with the working of the PIA standard is of intense interest and has vast potential significance for the water rights systems on which all economic activities in the region are dependent.

#### FACTS

The litigation of this case began in 1977 as a general adjudication proceeding initiated by the State of Wyoming to quantify the water rights of over 20,000 water users in the Big Horn River Basin, an area of more than 13 million acres that includes the Wind River. Among the parties served with process was the United States, in its own proprietary capacity and as trustee for the Shoshone and Arapahoe Tribes of the Wind River Reservation. Eventually, after a few years of procedural sparring, the case went forward in the Wyoming state court system with both the United States (as trustee) and the tribes (as parties in intervention) representing the Indians' water rights claims.

For purposes of management, the case was trifurcated, splitting off (1) claims based on state law and (2) federal claims for Yellowstone National Park and two national forests from (3) the Indian claims that are here under review. Still, even the severance of the state law claims did not prevent a 45-week trial before a special master on the federal claims that cost both sides millions of dollars to present.

In the end, the special master ruled for the Indians in several quintessentially important respects. Despite the fact that the tribes had obtained state law-based appropriative rights based on actual irrigation use of substantial quantities of water, the special master held that the tribes also enjoyed reserved rights to sufficient water to irrigate all of the practicably irrigable acres found on the reservation.

These federal rights are superior to the Indians' state law appropriative rights because they grant a greater amount of water and, as noted above, their priority date is the date of the founding of the reservation in 1868. That date is so early in the developmental history of the region that it is senior to virtually every non-Indian right in the basin.

Moreover, the special master also ruled that the Indians' reserved water rights were not restricted to use on the reservation for irrigation. The irrigable acreage standard was treated as determining the matter of quantification alone. It was not also germane as a limit on the forms of present use.

After reviewing the special master's rulings on reserved rights quantification and transferability, the Wyoming district court affirmed the use of the PIA quantification standard but reversed the rulings insofar as they permitted use for other than on-reservation agricultural pursuits. The Wyoming Supreme Court, by a 3-2 vote, affirmed these rulings of the district court, and the Indian tribes were awarded roughly 500,000 acre-feet of water (calculated as the product of slightly more than 100,000 acres of irrigable land times a water duty of 5 acre-feet per acre) for agricultural use on the

reservation bearing an 1868 priority date. See, *The Big Horn River General Adjudication*, 753 P.2d 76 (Wyo. 1988).

Certiorari was sought on numerous issues, but as noted above, granted only on the role of necessity in quantifying reserved water rights. In addition, the U.S. Supreme Court explicitly stayed its action on the tribal petition for review of the ruling that the reserved water rights were non-transferrable.

As suggested by the way in which the issue under review was framed, the Indian reservation involved in this case is one of a small number of reservations that has developed extensive irrigated agriculture based on state law appropriative water rights. A little sketch of the region's history is helpful here. The reservation was established and set aside for the Shoshone under the Second Treaty of Fort Bridger in 1868, a time when non-Indian settlement in the region was virtually non-existent. In the next three decades that changed, and white settlement of the region proceeded apace. During this same era, on three separate occasions the reservation was reduced in size, making additional land in the basin available for white settlement. In the last cession of Indian lands, the agreement included a "Water Proviso" under which a portion of the proceeds from the sale of ceded lands together with a supplemental appropriation by Congress were to be used to obtain water rights for the Indians under Wyoming law.

By the turn of the century the desirable and easily irrigated lands had been settled, and further development would be dependent on large scale irrigation projects. Beginning in 1904 with authorization of the Shoshone Reclamation Project and later the Riverton Irrigation Project, the federal government undertook the needed projects. Eventually these federal projects annually provided more than one-half million acres of land with irrigation water. Roughly one-quarter of that acreage is within the boundaries of the Wind River Reservation.

Between 1905 and 1915, using the funds raised under the Water Proviso, state law water rights were obtained that would permit the irrigation of as much as 145,000 acres of reservation land, if those lands could be brought into production as state law required. From 1915 to 1963 an increasing set of lands were actually irrigated by the Indians, but as of 1963 the United States allowed the unperfected state water rights to expire, leaving the tribes with state law water rights sufficient to irrigate roughly 87,000 acres of land. It is important to note that these state law-based water rights are markedly less valuable than the rights the Indians won under the Wyoming Supreme Court decision. The state law-based rights are for a lesser quantity of water and, rather than having an 1868 priority date that would be the most senior in the system, the state law rights bear a 1905 priority date that is junior to many non-project non-Indian water rights and equal to the priority date of many non-Indian water users who are served by the same federal reclamation projects as the Tribes.

Although the Wyoming Supreme Court decision was

rendered only in February 1988, its effects on irrigators in the Wind River system already has been felt even without the initiation of any new uses of Indian water. Relying on their newly decreed reserved rights, the tribes in June 1988 demanded that the federal government deliver reclamation project water to them in advance of other in-project non-Indian appropriators. The federal government complied and stopped altogether deliveries of water to the non-Indians during a crucial part of the irrigation season. Within a month, negotiations between the Tribes and Wyoming resulted in an agreement to resume the historic practice of rotating deliveries to Indians and non-Indians that had been devised when the Indian water rights had been based on state law alone. Additionally, to forestall interruption of deliveries to non-Indians in 1989, Wyoming agreed to forego certain tax revenues raised on the Reservation and to pay the tribes an additional \$5.5 million in cash.

#### ARGUMENTS

*For the State of Wyoming (Counsel of Record, Michael D. White, White & Jankowski, 511 16th Street, Suite 500, Denver, CO 80202; telephone (303) 595-9441):*

1. The federal reserved water rights doctrine was intended to cure retroactively oversights that created reservations lacking necessary water.
2. The PIA quantification standard should be limited in its application to cases in which there is no other means by which to quantify the water rights necessary to effectuate primary agricultural purposes.
3. The PIA quantification standard should be discarded because it creates unjustified windfalls for Indian reservations.
4. The PIA quantification standard should be replaced with a tailored approach that determines how much water is required to ensure that the reservation's primary purpose not be entirely defeated.

*For Tribal Respondents (Counsel of Record, Bruce M. Clagett, Covington & Burling, 1201 Pennsylvania Ave., N.W., Washington, DC 20044; telephone (202) 662-5316):*

1. The Wyoming Supreme Court has not inflicted an injustice on Wyoming state-law water users.
2. The Wyoming Supreme Court did not err in applying the PIA quantification standard to the Indian reservations involved in this case.
3. Any modification of the PIA quantification standard should be prospective only.

*For Bradford Bath, et al. (non-tribal on-reservation farmers) (Counsel of Record, Sky D. Pfifer, P.O. Box 1720, Lander, WY 82520; telephone (307) 332-5743):*

1. The purposes of the reservations in issue were to provide the tribes with a homeland and to assimilate the Indians

into American culture by way of education and agriculture.

2. An implied reservation of water was necessary to effectuate these purposes.
3. Awarding an 1868 priority date to the tribal reserved rights will dilute the state-law water rights of the non-tribal respondents and unduly limit the uses to which their water rights can be put.

*For the United States of America (Counsel of Record, William C. Bryson, Acting Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 633-2217):*

1. The Wyoming Supreme Court correctly applied the PIA quantification standard in this case.
2. The PIA quantification standard should not be modified, discarded or replaced, because it assures an orderly, efficient and certain resolution of this and other Indian water rights disputes.

#### AMICUS BRIEFS

##### *In Support of the State of Wyoming*

Numerous states, local governmental units and water suppliers filed briefs in support of the State of Wyoming. In general, all of those amici shared Wyoming's interest in limiting the extent of Indian reserved rights claims that remain adjudicated.

The principal additional arguments adduced by the amici were that (1) the use of the PIA quantification standard has led to unrealistic water rights claims by the various tribes, (2) equity demands limitation of the Indian water rights to an amount bearing a realistic relation to the needs of the particular reservation, (3) the reserved rights doctrine should not provide the Indians with more water than is needed for a "moderate living," (4) the PIA quantification standard has not produced the certainty that is claimed for it, (5) no implied water right should be found where the conduct of the United States and/or the tribe indicates a different intent, and (6) Indian water awards should permit optimal utilization of a particular tribe's resources with sensitivity to off-reservation impacts.

##### *In Support of the Tribal Respondents*

The Native American Rights Foundation and numerous Indian tribes supported the tribal respondents. The principal additional arguments adduced by the amici were that (1) Indian reservations were intended to provide permanent homelands for Indian tribes and necessarily include waters associated with the land, (2) Indians need the water awarded under the PIA quantification standard for self-sufficiency, (3) the PIA has provided a degree of certainty as to unquantified Indian water rights that permits negotiation over the rights to proceed, and (4) the use of the PIA is not unfair to state law appropriators.