

NOTE

Changing Water Use for Federally Reserved Indian Water Rights: Wind River Indian Reservation

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INTRODUCTION

In February 1988, the Wyoming Supreme Court set aside water from the Big Horn River system¹ for the tribes of the Wind River Indian Reservation.² The court's decision was part of a statutorily authorized adjudication of all the water rights in the river system.³ In *Big Horn I*,⁴ the court quantified⁵ the water rights reserved by the federal government⁶ for the Wind River tribes (the Tribes).⁷ The quantification process required the court to quantify the amount of water the Tribes needed for present and future agricultural uses.⁸

After *Big Horn I*, the Tribes attempted to convert their water rights reserved for future agricultural uses into a present water use.⁹ The Tribes wanted to enhance the reservation's fisheries by increasing the quantity of water flowing down the Wind River.¹⁰ This type

¹ The Big Horn River system is located in northwestern and west central Wyoming. *In re The General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 83 (Wyo. 1988) (*Big Horn I*), *aff'd sub nom.*, Wyoming v. United States, 492 U.S. 406, *and cert. denied*, 492 U.S. 926 (1989). The system consists of water from the Wind River, Clark's Fork of the Yellowstone River, Shoshone River and Big Horn River. *Id.*

² *Id.* The United States executed the Second Treaty of Fort Bridger with the Shoshone and Bannock tribes in 1868. *Id.* The treaty established the Wind River Indian Reservation. *Id.* The Arapaho tribe joined the Shoshone and Bannock tribes on the reservation in 1878. *Id.* This Note refers to the Wind River tribes as the "Tribes."

³ *Id.* at 83-84. In 1977, the state of Wyoming commenced an action for a system-wide adjudication of all parties' rights to use the waters of the Big Horn River system. *Id.* at 84. The district court divided the case into three phases. *Id.* at 85. Phase I consisted of determining the Indian water rights that became the issue in *Big Horn I*. *Id.* Phase II consisted of determining all non-Indian federally reserved water rights. *Id.* Finally, phase III consisted of determining all state water rights evidenced by a state permit or certificate. *Id.*

⁴ See *infra* notes 86-98 and accompanying text (describing *Big Horn I*).

⁵ In water law, quantification is the process of determining the amount of water rights specific parties possess. See *infra* notes 57-68 and accompanying text (discussing quantification of Indian reserved water rights).

⁶ See *infra* notes 20-56 and accompanying text (defining federally reserved water rights and their relationship to state water rights).

⁷ *Big Horn I*, 753 P.2d at 84.

⁸ *Id.* at 100-12; see *infra* notes 87-95 and accompanying text (discussing court's quantification process); *infra* notes 61-68 and accompanying text (discussing federal precedent *Big Horn I* followed).

⁹ *In re The General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273, 275 (Wyo. 1992) (*Big Horn III*); see *infra* note 13 (discussing interim case *Big Horn II*).

¹⁰ *Big Horn III*, 835 P.2d at 275.

of present water use is called a present instream flow.¹¹ When the State Engineer failed to deliver the requested water to the reservation, the Tribes petitioned the state district court to enforce their water rights.¹² In June 1992, the Wyoming Supreme Court denied the Tribes the right to convert their future water rights to present instream flows in *Big Horn III*.¹³ The court also determined that the State Engineer, not a tribal entity, should decide all issues related to water use on the reservation.¹⁴

This Note focuses on the Tribes' ability to convert their water rights reserved for future agricultural uses into present instream flows.¹⁵ Part I discusses the legal background of federally reserved

¹¹ See generally INSTREAM FLOW PROTECTION IN THE WEST (Lawrence J. MacDonnell et al. eds., 1989) (providing various articles on instream flows); A. Dan Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211 (discussing philosophy of instream water flow preservation); see also *infra* notes 99-105 and accompanying text (discussing procedure employed by tribes to obtain instream flows and benefits of instream flows).

¹² *Big Horn III*, 835 P.2d at 276.

¹³ *Id.* at 279; see *infra* notes 99-147 and accompanying text (describing facts of *Big Horn III* and Wyoming Supreme Court's decision). For additional analysis of *Big Horn III*, see Berrie Martinis, Note, *From Quantification to Qualification: A State Court's Distortion of the Law in In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 68 WASH. L. REV. 435 (1993). See also B. Kevin Gover, Catherine B. Stetson, & Susan M. Williams, *In re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources in the State of Wyoming*, 46 ARK. L. REV. 237 (1993) (providing copy of Tribes' brief to Wyoming Supreme Court for rehearing *Big Horn III*).

In re The General Adjudication of All Rights to Use Water in the Big Horn River System, 803 P.2d 61 (Wyo. 1990) (*Big Horn II*), addressed a jurisdictional issue regarding the standing of non-Indian water users who did not appeal the *Big Horn I* decision. *Big Horn II* did not address the issues in *Big Horn III*.

¹⁴ *Big Horn III*, 835 P.2d at 283; see *infra* notes 125-31 and accompanying text (discussing Justice Thomas' reasoning regarding State Engineer). A part of the State Engineer's responsibility included granting or rejecting requests from water users seeking to change the manner in which they use water. *Big Horn III*, 835 P.2d at 285.

¹⁵ This Note does not address the Tribes' ability to convert water presently used for agriculture (historic water rights) to present instream flows. Three justices believed the Tribes had the right to convert their historic water rights to present instream flows. Justice Cardine explicitly dissented from the portions of the majority opinion that denied the Tribes the right to convert their historic water rights to other beneficial uses. *Big Horn III*, 835 P.2d at 285. Justice Brown decided that the Tribes could convert their reserved water rights to present instream flows. *Id.* at 288-90 (Brown, J., dissenting). Justice Brown did not distinguish between future and historic water rights while

water rights and American Indian water law.¹⁶ Part II then describes the factual background of the Big Horn River dispute and discusses the court's reasoning in *Big Horn III*.¹⁷ Part III analyzes the Wyoming court's decision and its impact on the Wind River Tribes and other tribes litigating water rights issues.¹⁸ Finally, Part IV offers an alternative approach for courts faced with a tribe attempting to change its water use.¹⁹ This Note concludes that the Wyoming Supreme Court misinterpreted both state and federal law. The Tribes should have the ability to change their future water rights to present instream flows.

I. THE LAW

A. Federally Reserved Water Rights

In 1908, the United States Supreme Court laid the foundation for federally reserved Indian water rights in *Winters v. United States*.²⁰ *Winters* involved the Fort Belknap Indian Reservation in Montana and the waters of the Milk River.²¹ The Court found that the

discussing the Tribes' ability to make the conversion. *Id.* Justice Golden held that the Tribes could use their future or historic water rights for any use the Tribes deemed beneficial. *Id.* at 294 (Golden, J., dissenting).

¹⁶ See *infra* notes 20-85 and accompanying text.

¹⁷ See *infra* notes 86-147 and accompanying text.

¹⁸ See *infra* notes 148-200 and accompanying text.

¹⁹ See *infra* notes 201-18 and accompanying text.

²⁰ 207 U.S. 564 (1908). See generally MICHAEL C. BLUMM, 4 WATER AND WATER RIGHTS § 37.01(b) (Robert E. Beck ed., 1991) (discussing origin of reserved water rights).

²¹ *Winters*, 207 U.S. at 565. The Milk River did not run through the Indian reservation, but made up the reservation's northern boundary. *Id.* at 565-66. In the early 1890s, non-Indians established communities near the reservation and began diverting water from the Milk River. CHARLES J. MEYERS ET AL., WATER RESOURCE MANAGEMENT 774 (3d ed. 1988). In 1898, the federal government initiated an irrigation project to divert water for the Indian reservation. *Winters*, 207 U.S. at 566-67. Because of the competition, the non-Indians moved their diversion works upstream from the Indians' diversion, which greatly diminished the Indians' water supply. MEYERS ET AL., *supra*, at 774. A drought in 1905 prevented the parties from receiving all their water needs. BLUMM, *supra* note 20, at 209.

The federal government initiated the *Winters* case by seeking an injunction against the non-Indian water users to protect the Indian diversions. *Winters*, 207 U.S. at 565; see also MEYERS ET AL., *supra*, at 774 (describing events leading up to *Winters* and arguments of litigants).

United States and the Fort Belknap tribes²² created the reservation as a permanent homeland for the tribes.²³ However, the treaty creating the reservation did not address water rights,²⁴ and the Court found the land nearly valueless without water for irrigation.²⁵ Therefore, the Court concluded that the parties implicitly reserved sufficient amounts of water from state appropriations²⁶ to fulfill the purposes²⁷ of the Indian reservation.²⁸ The Court further held that the parties reserved the water at the time they set aside the land for the Indians.²⁹ This holding became known as the *Winters* doctrine.³⁰

²² The Gros Ventre and Assiniboine tribes lived on the Fort Belknap Indian Reservation. *Winters*, 207 U.S. at 565.

²³ *See id.* at 565, 575-76.

²⁴ *Id.* at 576-77.

²⁵ *Id.* at 576.

²⁶ *See generally infra* notes 31-56 and accompanying text (discussing prior appropriation system and *Winters*' effect on it).

²⁷ The *Big Horn I* court investigated whether the purposes for creating the Wind River Indian Reservation included agricultural, fishery, mineral, industrial, municipal, domestic, commercial, livestock, wildlife and aesthetic purposes. *In re The General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 95-99 (Wyo. 1988) (*Big Horn I*), *aff'd sub nom.*, *Wyoming v. United States*, 492 U.S. 406, *and cert. denied*, 492 U.S. 926 (1989).

²⁸ *Winters*, 207 U.S. at 577; *see* Michael S. Laird, Note, *Water Rights: The Winters Cloud over the Rockies: Indian Water Rights and the Development of Western Energy Resources*, 7 AM. INDIAN L. REV. 155, 160-62 (1979) (discussing *Winters*' water rights implications for western water users).

The *Winters* Court stated, "the Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this?" *Winters*, 207 U.S. at 576. The Court determined that the Indians did not give up all their water rights when they agreed to reduce the area of their land occupation to the Indian reservation. *Id.* at 576-77.

²⁹ *Winters*, 207 U.S. at 577. The date the parties reserved the water affects their priority in the state appropriation system. *See generally infra* notes 35-42, 49-56 and accompanying text (discussing prior appropriation system's priority scheme).

³⁰ *See* MEYERS ET AL., *supra* note 21, at 773-75; *see also* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 578-96 (1982 ed.) (discussing *Winters* doctrine); PETER C. MAXFIELD ET AL., NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 207-30 (1977) (discussing *Winters* doctrine).

The Supreme Court's recognition of federally reserved water rights affects state prior appropriation systems³¹ for distributing water.³² Most western states, including Wyoming,³³ use some form of the prior appropriation system.³⁴ This system gives water rights to the first user who appropriates³⁵ water and uses it for beneficial purposes.³⁶ It applies to all water users, including individuals, municipalities, water companies, corporations, and other entities.³⁷ The system guarantees that the first user who appropriates water can continue to take the same amount without subsequent appropriators interfering.³⁸ Therefore, the date a water user first begins

³¹ See *infra* notes 33-56 and accompanying text (discussing prior appropriation system).

³² See Laird, *supra* note 28, at 161 (discussing *Winters* rights' effect on state water distribution systems).

³³ WYO. STAT. § 41-3-101 (1992); WELLS A. HUTCHINS, 3 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 613-49 (1977) (discussing Wyoming water law).

³⁴ See generally Frank J. Trelease, *New Water Legislation: Drafting for Development, Efficient Allocation and Environmental Protection*, 12 LAND & WATER L. REV. 385, 409-16 (1977) (stating that in 1977, nineteen states used some form of prior appropriation system to distribute water).

³⁵ "Appropriate" means to take possession of or make use of exclusively for oneself. THE AMERICAN HERITAGE DICTIONARY 122 (Pamela B. DeVinne et al. eds., 2d ed. 1982). An appropriation of water consists of the capture, impounding or diversion of the water from its natural course or channel. BLACK'S LAW DICTIONARY 101-02 (6th ed. 1991). The water must be used for a beneficial use to the exclusion of all other water users. *Id.*

³⁶ MEYERS ET AL., *supra* note 21, at 262. The prior appropriation systems generally have three requirements for perfecting a water right over subsequent appropriators. *Id.* First, a party must demonstrate an intent to appropriate water. *Id.* Second, the party must divert water from the stream. *Id.* And third, a party must apply the water to a beneficial use. *Id.* Once the party perfects the water right, she may lose it through non-use. *Id.* at 283. Most of the appropriation states have water use permit systems which regulate the acquisition, use, transfer, and loss of water rights. *Id.* at 262. An appropriator can acquire rights to any water not yet appropriated or that earlier users have lost. WILLIAM GOLDFARB, WATER LAW 34-35 (2d ed. 1988). See generally *id.* at 32-41 (describing prior appropriation system and states using system); JOSEPH L. SAX, WATER LAW 53-88 (1965) (providing overview of prior appropriation system).

³⁷ See, e.g., *Elk-Rifle Water Co. v. Templeton*, 484 P.2d 1211 (Colo. 1971) (adjudicating prior appropriation rights between water company and corporation); *City and County of Denver v. Northern Colorado Water Conservancy Dist.*, 276 P.2d 992 (Colo. 1954) (adjudicating prior appropriation rights between municipality, water district, and individual landowners).

³⁸ GOLDFARB, *supra* note 36, at 33.

to use water becomes her priority date in the distribution system.³⁹ The system employs the priority dates to determine which water user possesses the oldest rights and therefore obtains the highest priority to receive water.⁴⁰ But even the highest priority appropriators can lose water rights by not continuously using their water for beneficial purposes.⁴¹ Once an appropriator stops applying her water to beneficial uses for a sufficient length of time, other water users can appropriate the unused quantity.⁴²

The prior appropriation system requires a precise quantification of the amount of water each appropriator uses.⁴³ State officials add the quantified amounts and compare the total to the amount of water in a stream.⁴⁴ This comparison indicates whether water users have appropriated all of the water in a stream or whether some water is still available for appropriation.⁴⁵ Precise quantification becomes especially important in times of drought when the prior appropriator receives all of her water before any subsequent appropriators.⁴⁶

Because holders of state and federal water rights take water from the same sources, courts must reconcile the federal rights with the state distribution system.⁴⁷ In doing so, courts must respect the requirements and characteristics of both types of water rights.⁴⁸ For example, the state prior appropriation system sets an appropriator's priority date as the date the appropriator begins to use

³⁹ See *id.* (discussing priority date); see also MAXFIELD ET AL., *supra* note 30, at 209-10 (discussing importance of priority date).

⁴⁰ MAXFIELD ET AL., *supra* note 30, at 209-10.

⁴¹ NATIONAL WATER COMMISSION, A SUMMARY-DIGEST OF STATE WATER LAWS 34-35 (Richard L. Dewsnup & Dallin W. Jensen eds., 1973) [hereafter NATIONAL WATER COMMISSION].

⁴² An appropriator in Wyoming forfeits her water rights if she does not put her water to beneficial uses for five consecutive years. WYO. STAT. § 41-3-401. Also, if an appropriator does not use the full measure of her water rights for beneficial uses, she loses the unused portion. NATIONAL WATER COMMISSION, *supra* note 41, at 42.

⁴³ MEYERS ET AL., *supra* note 21, at 774; see GOLDFARB, *supra* note 36, at 33; MAXFIELD ET AL., *supra* note 30, at 209.

⁴⁴ MAXFIELD ET AL., *supra* note 30, at 209-10.

⁴⁵ *Id.*

⁴⁶ COHEN, *supra* note 30, at 578; GOLDFARB, *supra* note 36, at 33-34; MAXFIELD ET AL., *supra* note 30, at 210; MEYERS ET AL., *supra* note 20, at 3.

⁴⁷ MEYERS ET AL., *supra* note 21, at 774 (stating courts must constantly integrate Indian water rights with state water rights).

⁴⁸ *Id.*

water.⁴⁹ In the case of Indian water rights, however, the Supreme Court set the date of an Indian reservation's creation as the priority date the state system should use.⁵⁰ Since the federal government created most Indian reservations before settlers moved West, Indians possess prior rights over most non-Indian water users.⁵¹

Indian water rights, unlike state rights, can exist even though the Indians have never used any water.⁵² Although the Indians ultimately possess the rights, state officials can distribute any unused amount to state appropriators having inferior rights.⁵³ However, the state appropriators must relinquish the water when the Indians develop a use for the water and claim their water rights.⁵⁴ Therefore, many state appropriators hold their water rights precariously because they may lose them to a tribe that has not previously claimed all of its water.⁵⁵ For this reason, state appropriators often want to know how much water they risk losing, which requires a court to quantify tribal water rights.⁵⁶

⁴⁹ See GOLDFARB, *supra* note 36, at 33 (discussing priority date); see also MAXFIELD ET AL., *supra* note 30, at 209-10 (discussing importance of priority date).

⁵⁰ *Winters v. United States*, 207 U.S. 564, 577 (1908).

⁵¹ MEYERS ET AL., *supra* note 21, at 773.

⁵² See MAXFIELD ET AL., *supra* note 30, at 212-13 (discussing areas of conflict between state water rights and federally reserved water rights).

⁵³ *Id.*

⁵⁴ *Id.* at 212.

⁵⁵ See Laird, *supra* note 28, at 161-62. For example, the Navajo Indian Reservation in Arizona presently uses only a small portion of its *Winters* water rights. William D. Back & Jefferey S. Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River?*, 20 NAT. RESOURCES J. 71, 74 (1980). However, experts have estimated that the Navajo tribe possesses rights to two million acre-feet of water per year from the Colorado River. *Id.* at 74 & n.12. In comparison, Arizona receives a total of 2.8 million acre-feet per year of the Colorado River's base flow. Boulder Canyon Project Act, 43 U.S.C. § 617c(a) (1988). Indian tribes often do not use their water because they lack resources to develop the necessary water systems. J. FOLK-WILLIAMS, *WATER IN THE WEST—WHAT INDIAN WATER MEANS TO THE WEST* 7 (1982).

⁵⁶ See MAXFIELD ET AL., *supra* note 30, at 212-13 (discussing threat of Indian water rights to state water users). On January 22, 1977, the state of Wyoming passed a statute allowing the state to begin adjudicating water rights throughout entire water systems. *In re The General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 84 (Wyo. 1988) (*Big Horn I*). Two days later the state filed a complaint to initiate *Big Horn I*. *Id.*

B. Quantification

Although the Court in *Winters* recognized federally reserved Indian water rights, it did not specify a procedure⁵⁷ to quantify those rights.⁵⁸ The Court merely stated that Indians possessed rights to sufficient amounts of water to fulfill the purposes of an Indian reservation.⁵⁹ This broad definition of Indian water rights made the precise quantification required by the state prior appropriation system difficult to achieve.⁶⁰

In 1963, nearly half a century after *Winters*, the Supreme Court finally addressed quantification of Indian water rights in *Arizona v. California*.⁶¹ This case involved the rights of five Indian reservations in Arizona, California, and Nevada to use water from the Colorado

⁵⁷ The quantification procedure determines the scope of a party's water rights. See *supra* note 5 (defining quantification).

⁵⁸ See generally MAXFIELD ET AL., *supra* note 30, at 228-30 (discussing why Court did not address quantification issue). *Winters* involved only the historic water uses of the Fort Belknap tribes, so the Court did not address the problem of quantifying future uses. See *Winters*, 207 U.S. at 577 (1908).

⁵⁹ *Winters*, 207 U.S. at 577.

⁶⁰ See BLUMM, *supra* note 20, § 37.02(c), at 224-26. The federal government has withdrawn and reserved land from the public domain for use as Indian reservations, forest reserves, national parks, and national monuments. *United States v. New Mexico*, 438 U.S. 696, 699 (1978). For non-Indian federal land reservations, the United States Supreme Court has limited the land's reserved water rights more strictly than for Indian reservations. See generally *id.* at 700 (holding scope of reserved water rights extend only to quantity needed so that purposes of land reservation are not entirely defeated); *Cappaert v. United States*, 426 U.S. 128, 141 (1976) (holding scope of reserved waters extends only to amount needed to fulfill purposes of land reservation); *supra* notes 43-46 and accompanying text (explaining why prior appropriation system requires precise quantification).

⁶¹ 373 U.S. 546 (1963) (*Arizona I*). Lower court decisions, primarily from the Ninth Circuit Court of Appeals, addressed the quantification issue before the *Arizona I* decision. These cases, however, did not agree as to the time used to fix the extent of the tribes' rights. See cases cited *infra*. The courts fixed the rights at the time of the reservation's creation, or did not specify a time in order to adjust the rights as the tribes' needs changed. Compare *Conrad Inv. Co. v. United States*, 161 F. 829, 832 (9th Cir. 1908) (holding tribes entitled to amount of water reasonably necessary for present and future requirements) and *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 327 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957) (holding tribe's water rights should expand as Indians' needs changed) with *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 339-40 (9th Cir. 1939) (holding tribe's reserved water rights limited to past use, assuming amount would meet future needs).

River.⁶² The *Arizona* Court examined the Act of Congress creating the reservations and determined that Congress intended the Colorado River tribes to farm the irrigable land on their reservations.⁶³ This determination led the Court to find that the parties created the reservations for agricultural purposes.⁶⁴ The Court also found that the tribes required water to meet their present and future needs on the reservations.⁶⁵ The Court held that the quantity of water reserved equaled the amount necessary to irrigate all the "practicably irrigable acreage"⁶⁶ (PIA) on a reservation.⁶⁷ This holding gave the tribes water rights for lands then utilized for agri-

⁶² *Arizona I*, 373 U.S. at 595. *Arizona I* centered on determining the five lower Colorado River states' rights to use water from the Colorado River system. *Id.* at 550-51. Arizona brought an original action in the United States Supreme Court against California to determine rights to the Colorado River water. *Id.* Utah, Nevada, New Mexico, and the United States later joined the case. *Id.* at 551. The United States Supreme Court has original jurisdiction in all controversies between two or more states. U.S. CONST. art. III, § 2; 28 U.S.C. § 1251(a) (1988). Because the Indian reservations took water from the Colorado River, the Court had to address their water rights as well. See *Arizona I*, 373 U.S. at 595-96. The Fort Mohave, Yuma, Cocopah, Chemehuevi, and Colorado River Indian Reservations' water rights were at issue. *Id.* at 595 n.97.

⁶³ *Arizona I*, 373 U.S. at 599.

⁶⁴ *Id.* at 599-600. The Court followed *Winters* by first finding the purposes of the Indian reservations. *Id.* The Court then determined if the United States intended to reserve water to fulfill the purposes. *Id.* Finally, the Court accepted the Master's quantification of the reserved water rights. *Id.* at 600-01.

⁶⁵ *Id.* These findings required the court to determine the amount of water needed to meet the reservations' present and future agricultural purposes. *Id.*

⁶⁶ The Court did not give a precise definition of practicably irrigable acreage (PIA), but did approve a rough formula for quantifying the water rights. *Id.* The Court concluded that the only feasible way to measure the reservations' reserved water was by measuring irrigable acreage. *Id.* In a supplemental case to *Arizona I*, the Special Master gave detailed guidelines for determining the PIA. Walter Rusinek, Note, *A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine*, 17 *ECOLOGY L.Q.* 355, 371 (1990) (referring to *Arizona v. California*, 460 U.S. 605 (1983)). The guidelines included finding all the arable land on the reservation, considering available technology, and determining the economic feasibility of actually irrigating the land. *Id.*; see also *infra* note 90 (describing PIA analysis utilized in *Big Horn I*).

⁶⁷ *Arizona I*, 373 U.S. at 600. The *Arizona I* Court reasoned that irrigable acreage constituted the only equitable methodology for quantifying the Indians' reserved water rights. *Id.* at 601. The Court rejected a quantification standard based on the tribes' "reasonably foreseeable needs." *Id.* at 600-01. The Court reasoned that a judge could only guess at the future needs of an Indian reservation and the Indians living there. *Id.* at 601. Therefore, the "needs" standard left too many uncertainties in the quantification process. *Id.*

culture and for undeveloped lands that could support future agricultural uses.⁶⁸

C. Change of Use

In *Arizona*, the United States Supreme Court assigned a Special Master⁶⁹ to investigate and report on all the parties' rights.⁷⁰ After finding the PIA standard quantified the tribes' water rights, the Master stated that the standard did not require the tribes to limit their water use to agricultural purposes.⁷¹

The Supreme Court acknowledged the Master's finding in a 1979 supplemental decree⁷² to *Arizona*.⁷³ However, the Court held that if the tribes used the water for non-agricultural purposes, the total amount used could not exceed the amount quantified under the PIA standard.⁷⁴ This restriction ensured that non-Indian water

⁶⁸ See *id.* at 600-01.

⁶⁹ A Water Master is the person in charge of the distribution of irrigation water from a major canal. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2584 (1986). A Special Master is a Water Master appointed by a court to investigate specific water rights issues. See, e.g., *Arizona I*, 373 U.S. at 551 (describing Special Master's duties).

⁷⁰ *Arizona I*, 373 U.S. at 551. Simon H. Rifkind served as the Special Master. *Id.* He held a two-month trial which filled 25,000 pages of transcript. *Id.* Finally, the Master submitted a 433-page report giving his findings, conclusions, and recommended decree. *Id.* The Supreme Court approved most of the Master's report, but did not address all of the issues he raised. *Id.* at 602. The dispute between California and Arizona over rights to water from the Colorado River consumed most of the Court's attention. Rusinek, *supra* note 66, at 368. For a thorough analysis of the litigation over the Colorado River waters, see NORRIS HUNDLEY, JR., WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST (1975).

⁷¹ Report of Special Master Simon H. Rifkind at 265-66, *Arizona v. California*, 373 U.S. 546 (1963) (No. 8, Original). The Court did not address this issue in accepting the Master's report. See *supra* note 70 (discussing *Arizona I*).

⁷² The *Arizona I* Court allowed the parties to form the decree that put the *Arizona I* decision into effect. *Arizona I*, 373 U.S. at 602.

⁷³ *Arizona v. California*, 439 U.S. 419, 422 (1979) (per curiam). The Court approved the parties' agreement stipulating their rights to the Colorado River waters and the conditions of those rights. *Id.* at 420-21. The decree stated that even though the PIA standard quantified Indian water rights, it did not limit the use of the water to agricultural purposes. *Id.* at 422. See COHEN, *supra* note 30, at 592 (discussing change in place or nature of water use).

⁷⁴ *Arizona v. California*, 439 U.S. at 422.

users would not lose any water if the tribes changed to non-agricultural uses.⁷⁵

The United States Court of Appeals for the Ninth Circuit followed *Winters* and *Arizona* in *Colville Confederated Tribes v. Walton*.⁷⁶ In *Walton*, the court of appeals concluded that the federal government created the Colville Indian Reservation for agricultural and fishery purposes.⁷⁷ The court found a fishery purpose and corresponding water rights because the Colville tribes traditionally relied on salmon and trout for food.⁷⁸ However, dams on the Columbia River destroyed the tribes' traditional fishing grounds and their traditional fishery.⁷⁹ The tribes used the water reserved for the traditional fishery to develop and maintain a replacement fishery.⁸⁰

⁷⁵ Cf. *infra* notes 213-17 and accompanying text (describing expectations of non-Indian water users when tribes change their water use).

⁷⁶ 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). The Colville Confederated tribes included the Methow, Okanogon, Sampoil, Nespelem, Lake, and Colville tribes. *Id.* at 44 n.1.

⁷⁷ *Id.* at 47-48. In *Walton*, the court of appeals accepted the trial court's quantification of the federally reserved water rights belonging to the tribes living on the Colville Indian Reservation in central Washington. *Id.* at 48. The court recognized that the United States created the reservation for the broad purpose of providing a home for the Indians. *Id.* at 47. But the court needed to find other, more specific purposes to quantify the Indians' water rights. *Id.* To find these purposes, the court looked at three items. First, the court examined President Grant's Executive Order, dated July 2, 1872, creating the reservation and the circumstances surrounding the reservation's creation. *Id.* at 44, 47-48. Second, the court looked at the history of the Colville tribes. *Id.* at 47-48; *see also infra* note 78 and accompanying text (discussing tribes' history). Finally, the court determined that the tribes needed to maintain their society as circumstances changed over time. *Walton*, 647 F.2d at 47.

The court noted that allowing the tribes to determine how to use their reserved water rights met the broad purpose of the reservation. *Id.* at 49. "Providing a homeland for the survival and growth of the Indians and their way of life" meant the tribes should control the resources on their reservation. *Id.*

⁷⁸ *Walton*, 647 F.2d at 48. Fishing had economic and religious significance for the Colville Indians. *Id.*; *see also* cases cited *infra* note 161 (allowing water rights for fisheries).

⁷⁹ *Walton*, 647 F.2d at 45, 48.

⁸⁰ *Id.* The tribes established a new fishing ground in Omak Lake by introducing a new species of trout to replace the species destroyed by the dams. *Id.* at 45. In 1968, the tribes introduced Lahontan cutthroat trout to Omak Lake, and the fish have thrived in the lake's saline water. *Id.* However, the new species needs the fresh water at issue in the case to spawn. *Id.*

The *Walton* court stated that the loss of the traditional fishery did not divest the tribes of their reserved water rights.⁸¹ The court used the traditional fishery to quantify the tribes' reserved rights, even though it no longer existed.⁸² The court held that once the rights vested in the tribes at the creation of the reservation, they became property rights that the tribes could use in any lawful manner.⁸³ Before the Big Horn River dispute, all other appellate courts that faced the change-of-use⁸⁴ issue also concluded that tribes could use their reserved water for any uses they deemed advisable.⁸⁵

II. THE BIG HORN RIVER DISPUTE

A. Big Horn I

The Big Horn River dispute began in 1977 when the state of Wyoming brought an action to determine all parties' rights to use water from the Big Horn River system.⁸⁶ In 1988, the Wyoming Supreme Court followed the analysis in *Winters* and *Arizona* to quantify the Wind River Tribes' (the Tribes') reserved water rights in *Big Horn I*.⁸⁷ The court interpreted the treaty⁸⁸ that established the Wind River Indian Reservation as having the sole purpose of creating an

⁸¹ *Id.* at 48. Once a tribe obtains a vested water right, the tribe can use the water for any lawful purposes. *Id.* The destruction of the historically intended use for the water does not divest the tribe of its water rights. *Id.*

⁸² *Id.*

⁸³ *Id.*; see *supra* note 77 (describing court's rationale). The court suggested that quantifying reserved water rights is the best way to avoid creating uncertainty for non-Indian water rights. *Walton*, 647 F.2d at 48. The court observed that limiting the Indians' water use would not resolve the uncertainty. *Id.*

⁸⁴ As used in this Note, "change of use" refers to changing the manner in which an appropriator uses water. See generally GOLDFARB, *supra* note 36, at 34 (providing general discussion on changing water use). For example, switching from an agricultural use to an industrial use, or from a municipal use to an instream flow, constitutes a change of use. *Id.*

⁸⁵ *In re The General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273, 289 (Wyo. 1992) (Brown, J., dissenting) (*Big Horn III*). See cases cited *infra* note 161.

⁸⁶ *In re The General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 84 (Wyo. 1988) (*Big Horn I*), *aff'd sub nom.*, Wyoming v. United States, 492 U.S. 406, *and cert. denied*, 492 U.S. 926 (1989); see *supra* notes 1, 52-56 and accompanying text (describing Big Horn River system and Wyoming's motivation for instigating *Big Horn I*).

⁸⁷ *Big Horn I*, 753 P.2d at 94-112.

⁸⁸ The Second Treaty of Fort Bridger, signed July 3, 1868, created the reservation. *Id.* at 83.

agricultural reservation.⁸⁹ Therefore, the court quantified the Tribes' reserved water rights based on the PIA standard outlined in *Arizona*.⁹⁰

The court quantified both the Tribes' present and future water rights.⁹¹ The present water rights represented the water the Tribes used to irrigate existing agricultural land on the reservation.⁹² The future water rights represented the quantity of water needed to irrigate undeveloped land that could support future agricultural uses.⁹³ On the basis of this approach, the court determined that the Tribes possessed rights to nearly 500,000 acre-feet⁹⁴ of water per year.⁹⁵

The state of Wyoming appealed various issues in *Big Horn I* to the United States Supreme Court.⁹⁶ However, the Supreme Court granted certiorari with regard only to the use of the PIA standard

⁸⁹ *Id.* at 96.

⁹⁰ *Id.* at 101; *see supra* notes 61-68 and accompanying text (describing the *Arizona I* Court's quantification process). The *Big Horn I* court adopted a two-part analysis to determine the practicably irrigable acreage. *Big Horn I*, 753 P.2d at 101. First, the court investigated whether the PIA could sustain irrigation. *Id.* This investigation required proof of the land's arability and the engineering feasibility of installing an irrigation system. *Id.* Second, the court required proof that the Indians could irrigate the land at a reasonable cost. *Id.* The Special Master in charge of the process began by classifying all the lands based on arability. *Id.* Then he subjected the arable lands to an engineering analysis and finally to an economic analysis. *Id.*

⁹¹ *Big Horn I*, 753 P.2d at 100-12.

⁹² *Id.* at 106-11; *see supra* note 90 (describing court's PIA analysis).

⁹³ *Big Horn I*, 753 P.2d at 101-06.

⁹⁴ An acre-foot of water is the amount of water that would cover one acre of land to a depth of one foot. RAY K. LINSLEY & JOSEPH B. FRANZINI, *WATER-RESOURCES ENGINEERING* 23 (3d ed. 1979). An acre-foot is approximately 326,000 gallons. *Id.* at 683.

⁹⁵ *See Big Horn I*, 753 P.2d at 101-12.

⁹⁶ *See Rusinek, supra* note 66, at 393-94. The Supreme Court denied certiorari on the question of whether the reserved rights existed at all. *Id.* The Court also denied certiorari for the question of what priority date should be recognized for the different land classifications on the reservation. *Id.* The Tribes cross-petitioned on numerous issues, including the validity of the "permanent homeland" purpose, the ban on export of reserved water, and reserved rights to groundwater. *Id.* at 394; *see also id.* at 393-94 (analyzing case before United States Supreme Court); *see also* Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 *LAND & WATER L. REV.* 1 (1992) (using *Big Horn I* as backdrop for discussion of numerous Indian water law issues).

for measuring water rights.⁹⁷ The Court voted 4-4 to affirm the Wyoming decision without issuing an opinion.⁹⁸

B. Big Horn III

After *Big Horn I*, the Tribes sought to convert their future water rights to present instream flows.⁹⁹ They intended the instream flows to enhance the reservation fisheries,¹⁰⁰ to recharge the groundwater basin,¹⁰¹ and to benefit all downstream irrigators.¹⁰² The Tribes asked the State Engineer to release the water reserved under their future water rights.¹⁰³ When the State Engineer refused to deliver the requested amount, the Tribes petitioned the state district court to force delivery.¹⁰⁴ In *Big Horn III*, the district

⁹⁷ Wyoming v. United States, 488 U.S. 1040 (1989); see Rusinek, *supra* note 66, at 394.

⁹⁸ 492 U.S. 406, *reh'g denied*, 492 U.S. 938 (1989). Justice O'Connor attended the oral arguments, but did not participate in the decision. *Id.* Generally, the Court does not write an opinion when it affirms a decision by an evenly divided vote. JAMES W. MOORE ET AL., 12 MOORE'S FEDERAL PRACTICE ¶ 400.05-3 (2d ed. 1993).

⁹⁹ *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System, 835 P.2d 273, 275 (Wyo. 1992) (*Big Horn III*). After *Big Horn I*, the Tribes adopted the Wind River Interim Water Code and created the Wind River Water Resources Control Board. *Id.* The Board granted the Tribes a permit for instream flows of up to 252 cubic feet per second during the 1990 irrigation season. *Id.* at 275-76; see *supra* notes 10-11 and accompanying text (discussing instream flows); Rusinek, *supra* note 66, at 392-94 (discussing events following *Big Horn I*).

¹⁰⁰ *Big Horn III*, 835 P.2d at 276, 291 (Golden, J., dissenting). The Tribes wanted to develop world-class fisheries to attract anglers. Julia Prodis, *Wind River Indians Lose Water Suit*, L.A. TIMES, Sept. 13, 1992, at B6.

¹⁰¹ *Big Horn III*, 835 P.2d at 291 (Golden, J., dissenting). Some of the water flowing down the river will percolate into the groundwater to replace water that parties previously pumped out. LINSLEY & FRANZINI, *supra* note 94, at 77. This process is called groundwater recharge. *Id.* at 77-78.

¹⁰² *Big Horn III*, 835 P.2d at 291 (Golden, J., dissenting). Under the state appropriation system, the downstream irrigators will benefit because they can appropriate the extra water flowing down the river. See *supra* notes 31-56 and accompanying text (discussing prior appropriation system and how *Winters* doctrine affects system).

¹⁰³ *Big Horn III*, 835 P.2d at 276.

¹⁰⁴ *Id.* *Big Horn I* mandated that the Tribes turn to the State Engineer to enforce the Tribes' water rights against the state appropriators before turning to the courts. *Big Horn I*, 753 P.2d at 115.

court concluded that the Tribes had the right to convert their reserved future water rights to present instream flows.¹⁰⁵

The Wyoming Supreme Court voted 3-2 to reverse the state district court's ruling.¹⁰⁶ The supreme court held that the Tribes could not convert their future water rights to present instream flows.¹⁰⁷ However, the three justices making up the majority each wrote separate opinions and applied different rationales to arrive at this conclusion.¹⁰⁸ The two dissenting justices also wrote opinions criticizing the majority's rationales.¹⁰⁹

¹⁰⁵ *Big Horn III*, 835 P.2d at 276. The district court appointed a Special Master to hear the case and eventually the court adopted the Master's report. *Id.* The district court also concluded that the Tribes, not the State Engineer, should act as the Water Master on the reservation. *Id.* The court appointed the Tribes' Water Resources Agency as the administrator of all the surface water on the reservation. *Id.*

¹⁰⁶ *Id.* at 273. All appeals go directly to the Wyoming Supreme Court because Wyoming does not have an intermediate appellate court. Wyo. Ct. R.A.P. 1.04(a). Justice Macy presented the facts of the case. *Big Horn III*, 835 P.2d at 275. First, Justice Macy indicated that the court would limit the scope of review on appeal to two issues. *Id.* at 276. He stated that the first issue was whether the Tribes could convert their future water rights to instream flows without following Wyoming water law. *Id.* He stated that the second issue involved who should administer the reservation's water rights. *Id.* In concluding, Justice Macy held that the Tribes could not unilaterally convert their future water rights to instream flows. *Id.* at 279-80. He then determined that the State Engineer should administer the tribal water rights. *Id.* at 283. Justice Thomas joined Justice Macy's opinion and wrote a concurring opinion, agreeing with both of Justice Macy's conclusions. *Id.* at 283-85 (Thomas, J., concurring). Justice Cardine's opinion concurred on the first issue, and dissented on the second. *Id.* at 285-88 (Cardine, J., concurring in part and dissenting in part). Justice Brown dissented on the first issue and concurred on the second. *Id.* at 288-90 (Brown, J., concurring in part and dissenting in part). Justice Golden joined Justice Brown's dissenting opinion on the first issue. *Id.* Justice Golden also wrote a separate opinion that presented the facts of the case and dissented on both issues. *Id.* at 290 (Golden, J., dissenting). Justice Brown joined Justice Golden's dissenting opinion on the first issue. *Id.*

¹⁰⁷ *Big Horn III*, 835 P.2d at 278-79; see *infra* notes 110-42 and accompanying text (explaining reasoning of *Big Horn I* court).

¹⁰⁸ See *supra* note 106 (briefly describing each justice's conclusion); *infra* notes 110-42 and accompanying text (discussing majority rationales).

¹⁰⁹ *Big Horn III*, 835 P.2d at 288-304 (Brown & Golden, JJ., dissenting); *supra* note 106 (describing dissenting conclusions).

1. Justice Macy's Opinion

In one of the majority opinions, Justice Macy concluded that *Big Horn I* prevented the Tribes from diverting any of their future water rights from agricultural uses.¹¹⁰ He noted that *Big Horn I* concluded the United States and the Tribes created the reservation for an agricultural purpose.¹¹¹ Therefore, he found the *Big Horn I* court reserved enough only water to meet the reservation's agricultural needs.¹¹² Because *Big Horn I* quantified only agricultural water rights, Justice Macy reasoned this quantification process necessarily limited the Tribes' ability to change their water use from agricultural purposes.¹¹³ He noted that nothing in *Big Horn I* suggested the court intended to reserve water for agricultural uses only as a method of quantifying the water rights.¹¹⁴ Justice Macy reasoned that if the court had this intention, it would have stated it explicitly.¹¹⁵

Justice Macy found additional support for his position in *Big Horn I*.¹¹⁶ The *Big Horn I* court noted that the Tribes had no traditional dependence on fishing, nor a traditional lifestyle involving fishing.¹¹⁷ Furthermore, the *Big Horn I* court stated that because the treaty did not create a reservation with a fishery preservation purpose, it did not reserve a fishery water right.¹¹⁸ Justice Macy argued

¹¹⁰ *Big Horn III*, 835 P.2d at 277-78.

¹¹¹ *Id.* at 277.

¹¹² *Id.* at 278; *see supra* notes 90-95 and accompanying text (discussing *Big Horn I* court's quantification process).

¹¹³ *Big Horn III*, 835 P.2d at 278.

¹¹⁴ *Id.*; *see also Big Horn I*, 753 P.2d at 95-98 (interpreting treaty creating reservation to find agricultural purpose).

¹¹⁵ *Big Horn III*, 835 P.2d at 278.

¹¹⁶ *See infra* notes 117-19 and accompanying text.

¹¹⁷ *Big Horn I*, 753 P.2d at 98. The Special Master found a reserved water right for the reservation fisheries because the Tribes had partially depended on fishing for food. *Id.* The district court disagreed and vacated the judgment. *Id.* The Wyoming Supreme Court affirmed the district court's ruling. *Id.* The supreme court recognized that courts in other jurisdictions had awarded reserved water rights for fisheries. *Id.* However, the court noted in those instances a treaty provision provided the fishery flow right, or the Tribes depended heavily on fishing for a livelihood. *Id.* The *Big Horn I* court concluded a treaty provision did not exist. *Id.* Also, the Wind River Tribes did not provide enough evidence to show a traditional heavy dependence on fishing for a livelihood. *Id.*

¹¹⁸ *Id.* Justice Macy explained that the absence of a fishery preservation purpose provided further evidence that the Tribes could not convert their future water rights to instream flows. *Big Horn III*, 835 P.2d at 278.

that these findings by the *Big Horn I* court justified his conclusion that the Tribes were not entitled to shift their water to nonagricultural uses.¹¹⁹

However, in reaching this conclusion, Justice Macy did not address federal precedents that would have allowed the Tribes to change their water use to nonagricultural uses.¹²⁰ He determined that *Big Horn I* decided the change-of-use issue.¹²¹ Since the United States Supreme Court had affirmed *Big Horn I*,¹²² Justice Macy reasoned that *Big Horn I* took precedence over previous federal cases.¹²³

2. Justice Thomas' Opinion

Justice Thomas joined Justice Macy's opinion and wrote a concurring opinion.¹²⁴ Justice Thomas stated that the key issue in *Big Horn III* centered on who was to regulate the water rights on the reservation.¹²⁵ Justice Thomas first stated that the State Engineer, not the Tribes, had the responsibility of administering¹²⁶ the water rights.¹²⁷ He then stated that a tribal entity, as a party with a signifi-

¹¹⁹ *Big Horn III*, 835 P.2d at 277-78.

¹²⁰ *Id.* at 278; *see supra* notes 71-85 and accompanying text (describing federal precedents allowing Indian tribes to change water use).

¹²¹ *Big Horn III*, 835 P.2d at 278; *see supra* notes 110-19 and accompanying text (discussing Justice Macy's rationale).

¹²² *Wyoming v. United States*, 492 U.S. 406, *reh'g denied*, 492 U.S. 938 (1989); *see supra* notes 96-98 and accompanying text (discussing United States Supreme Court decision).

¹²³ *Big Horn III*, 835 P.2d at 278.

¹²⁴ *Id.* at 283.

¹²⁵ *Id.* at 284. Justice Thomas argued that *Big Horn III* centered on tribal sovereignty rather than water law. *Id.* at 283. He stated that *Big Horn I* did not address the doctrine of sovereignty. *Id.* at 283-84.

¹²⁶ The State Engineer administers the Big Horn River system's water by distributing it to the appropriate water users. NATIONAL WATER COMMISSION, *supra* note 41, at 810. The State Engineer administers the water according to the nature, extent, and priority of each user's rights. *Big Horn III*, 835 P.2d at 283.

¹²⁷ *Big Horn III*, 835 P.2d at 284. Justice Thomas based his opinion in part on his dissent in *Big Horn I*. *Id.* Justice Thomas believed a 1905 Act of Congress disestablished certain lands from the Indian reservation by taking title to the land away from the Indians. *Big Horn I*, 753 P.2d at 120. The Tribes later regained title to most of the land, but Justice Thomas stated that this did not reestablish the land as an Indian reservation. *Big Horn III*, 835 P.2d at 283. Therefore, he reasoned that the land fell under the jurisdiction of the state of Wyoming, just like any other non-Indian reservation land. *Id.* at 284. Justice Thomas stated that the State Engineer administered the water

cant interest in the litigation, could not administer the reservation's water because of the tribal entity's conflict of interest.¹²⁸ Justice Thomas then reasoned that since the State Engineer only had authority to apply state law, state water laws must govern the Tribes' water rights.¹²⁹ In Justice Thomas' opinion, applying state water laws did not foreclose the possibility of the Tribes converting their future water rights to present instream flows.¹³⁰ But under his reasoning, the Tribes would have to follow state procedures to do so.¹³¹

3. Justice Cardine's Opinion

Justice Cardine joined the majority, but did not base his argument on who should administer the reservation's water.¹³² Justice Cardine instead stated that the Tribes could set their own standards for instream flow rights and for changing their water use.¹³³ But he also stated that, before any change in use, the Tribes must first use the water for irrigation.¹³⁴ Justice Cardine reached this conclusion

rights on state lands, so he should administer the water on these portions of the reservation. *Id.* Since two regulatory agencies could not pragmatically administer the reservation's water, Justice Thomas concluded the State Engineer must also administer the Tribes' water. *Id.*

¹²⁸ *Big Horn III*, 835 P.2d at 284. Presumably Justice Thomas did not believe a conflict of interest existed in the State Engineer, a state entity, even though the State of Wyoming was a participant with significant interest in the litigation. *See id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 284-85.

¹³¹ *Id.*; *see generally* WYO. STAT. § 41-3-104 (stating Wyoming change of water use procedures); Gover, Stetson, & Williams, *supra* note 13, at 239-53 (arguing in petition for rehearing that federal law, not state law, controls Tribes' water rights); Martinis, *supra* note 13, at 451-52 (arguing that since Tribes possess federal water rights, state laws and procedures should not control).

¹³² *Big Horn III*, 835 P.2d at 285-88.

¹³³ *Id.*

¹³⁴ *Id.* at 285-87. Justice Cardine reasoned that the Tribes needed to first use the water for irrigation purposes to be fair to the state appropriators. *Id.* at 286. The state appropriators followed the state prior appropriation system which required the appropriators to put the water to beneficial use. *Id.* However, the state prior appropriation system did not govern federally reserved water rights. *See supra* notes 31-56 and accompanying text (discussing effect of federally reserved water rights on state prior appropriation system). Justice Cardine felt this unfair to the state appropriators, so he determined the court should limit the reserved rights. *Big Horn III*, 835 P.2d at 286. He proposed the limitation that the Tribes must first use the water for the purposes for which the United States reserved the water. *Id.* Justice Cardine

because the *Big Horn I* court quantified the future water rights to serve the reservation's agricultural purpose.¹³⁵ He reasoned that the Tribes gained the right to change their water use only after using the water for present agricultural purposes.¹³⁶ Justice Cardine based his opinion on his common sense and the general principles of the prior appropriation system, rather than state or federal precedent.¹³⁷

Justice Cardine partly justified his requirement that the Tribes first use their water for irrigation before changing to other uses by claiming it would protect non-Indian water users.¹³⁸ Since the Tribes had never used all the water they were entitled to, non-Indians had appropriated the excess.¹³⁹ Justice Cardine stated that these non-Indian users would lose beneficial use of the water while

considered this use as the only beneficial use available to the Tribes. *Id.* Therefore, once the Tribes used the water for the beneficial purpose of irrigation, they could change the water's use. *Id.* at 287.

¹³⁵ See *supra* notes 87-95 and accompanying text (discussing the *Big Horn I* decision).

¹³⁶ See *supra* note 134 (explaining Justice Cardine's reasoning).

¹³⁷ *Big Horn III*, 835 P.2d at 285.

¹³⁸ *Id.* at 287. Justice Cardine used two arguments to justify his rationale. First, he used the beneficial use concept to protect the state appropriators. *Id.* at 286; see *supra* note 134 (discussing Justice Cardine's application of beneficial use concept). Justice Cardine found the Tribes needed to use the water for a beneficial use before they could interfere with state appropriators. *Big Horn III*, 835 P.2d at 286. But agricultural irrigation constituted the only beneficial use available to the Tribes. *Id.*

Justice Cardine also cited a federal rule which states that federally reserved water rights are reserved only to fulfill the primary purpose of a land reservation. *Id.*; see *United States v. New Mexico*, 438 U.S. 696, 700 (1978). This rule distinguishes between primary and secondary purposes for the land reservation. *Id.* However, the United States Supreme Court stated this rule in a non-Indian context and has never applied the principle to an Indian water rights case. *Id.*; see BLUMM, *supra* note 20, § 37.02(a), at 219 (discussing non-Indian reserved water rights); see also COHEN, *supra* note 30, at 583-84 (arguing primary/secondary distinction is irrelevant for Indian reservations).

¹³⁹ *Big Horn III*, 835 P.2d at 287; see *supra* notes 47-56 and accompanying text (discussing incorporation of *Winters* rights into state prior appropriation system). Justice Cardine reasoned that his limitation provided two benefits. *Big Horn III*, 835 P.2d at 287. First, the limitation would prevent the Tribes from ruining the non-Indian appropriators overnight by claiming all their reserved rights at one time. *Id.* And second, the Tribes' gradual appropriation of their water rights would serve as notice to the non-Indians that they needed to adjust their operations. *Id.* The non-Indians needed to realize that sooner or later the Tribes would claim all their rights, leaving the non-Indians without any water. *Id.*

the Tribes wasted the water by applying it to instream flows.¹⁴⁰ Justice Cardine never explained why he considered instream flows a waste of water.¹⁴¹ But he reasoned that the non-Indian users who had grown dependent on the water would unjustly pay the price of this "waste."¹⁴²

Thus, the three justices comprising the majority in *Big Horn III* agreed that the Tribes could not convert their future water rights to present instream flows.¹⁴³ However, all three offered different rationales for reaching this conclusion. Justice Macy relied on *Big Horn I* as the sole authority on the change-of-use issue.¹⁴⁴ Justice Thomas reasoned that state law governed the reservation's water, and state law prevented the Tribes from making the conversion.¹⁴⁵ Justice Cardine based his opinion on his common sense, which required that the Tribes use the water for irrigation before converting the water to other uses.¹⁴⁶ Yet none of these rationales are sufficiently persuasive to justify preventing the Tribes from applying their future water rights to present instream flows.¹⁴⁷

¹⁴⁰ *Big Horn III*, 835 P.2d at 286. However, Wyoming state law defines an instream flow as a beneficial use of water as declared by the State Engineer. WYO. STAT. §§ 41-3-1001(a)-(b). So when the Tribes convert their water use from agriculture to instream flows, state law dictates that the Tribes will not waste any water. *See id.* The Tribes simply convert from one beneficial use to another. *See infra* notes 202-18 and accompanying text (discussing theory allowing conversions between beneficial uses).

¹⁴¹ *Big Horn III*, 835 P.2d at 285-88.

¹⁴² *Id.* at 286. Justice Cardine stated that once the Tribes used the water for irrigation, they could apply for an instream flow right under guidelines more generous than state laws. *Id.* at 287. He did not specify the applicable guidelines. *Id.*

¹⁴³ *Id.* at 278, 284, 285.

¹⁴⁴ *See supra* notes 110-23 and accompanying text (describing Justice Macy's opinion).

¹⁴⁵ *See supra* notes 124-31 and accompanying text (describing Justice Thomas' opinion).

¹⁴⁶ *See supra* notes 132-42 and accompanying text (describing Justice Cardine's opinion).

¹⁴⁷ *See infra* notes 148-90 and accompanying text (explaining why opinions argue unpersuasively).

III. ANALYSIS OF THE *BIG HORN III* DECISION

A. Justice Macy

1. Misplaced Reliance on *Big Horn I*

Justice Macy concluded that the court in *Big Horn I* decided the Tribes could not unilaterally change their future water rights to present instream flows.¹⁴⁸ Justice Macy did not, however, cite any specific language in *Big Horn I* that supports his conclusion.¹⁴⁹ Instead, he stated that if the Tribes held the option to change their water use, the *Big Horn I* court would have expressly said so.¹⁵⁰

Justice Macy relied in part on the *Big Horn I* court's finding that the parties did not create the reservation for a fishery preservation purpose.¹⁵¹ Justice Macy concluded that this finding prevented any attempt to later change the use of reserved water rights to instream flows.¹⁵² His conclusion, however, takes the opinion out of context, as Justice Brown noted in his dissenting opinion.¹⁵³ The *Big Horn I* court focused on quantifying the Tribes' water rights, which required finding the purposes behind the reservation's creation.¹⁵⁴

¹⁴⁸ *Big Horn III*, 835 P.2d at 277-78; see *supra* notes 110-23 and accompanying text.

¹⁴⁹ *Big Horn III*, 835 P.2d at 288, 293 (Brown & Golden, JJ., dissenting). Justices Brown and Golden could not find any text in *Big Horn I* discussing the change-of-use issue. *Id.* Justice Golden expressed his frustration by providing a footnote that describes an incident involving Lewis Carroll's fictional character Alice:

"I see nobody on the road," said Alice.

"I only wish I had such eyes," the king remarked in a fretful tone. "To be able to see Nobody! And at that distance too! Why, it's as much as I can do to see real people in this light!" *Big Horn III*, 835 P.2d at 293 n.2 (quoting LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 136 (1872)).

¹⁵⁰ *Id.* at 278. Justice Golden reached the opposite conclusion. *Id.* at 293 (Golden, J., dissenting). The *Big Horn I* court could have expressly stated that the Tribes could never change to instream flows, but it did not. *Id.*

¹⁵¹ *Id.* at 278; see *supra* notes 116-19 and accompanying text.

¹⁵² *Big Horn III*, 835 P.2d at 277-78; see *supra* notes 116-19 and accompanying text (discussing Justice Macy's arguments).

¹⁵³ *Big Horn III*, 835 P.2d at 288 (Brown, J., dissenting).

¹⁵⁴ *Big Horn I*, 753 P.2d at 94. Justice Macy relies on and provides quotations regarding fisheries from *Big Horn I*, but the quotations come under the section titled "Purposes of the Wind River Indian Reservation." *Id.* The court investigated the purposes of the reservation in order to determine if federally reserved water rights existed. *Id.*; see *supra* notes 88-90 and accompanying text (discussing court's investigation). The Tribes provided evidence that they traditionally included fish in their diet. *Big Horn I*, 753 P.2d

The *Big Horn I* court concluded that the federal government did not establish the Indian reservation for the purpose of preserving reservation fisheries.¹⁵⁵ Since a fishery preservation purpose did not exist, the court held a reserved water right for instream flows did not exist.¹⁵⁶

However, the *Big Horn I* court did not state how the absence of a reserved water right for instream flows affected the Tribes' ability to later change their water rights to instream flows.¹⁵⁷ The court was silent on the issue because it did not need to address the future uses of the water to quantify the Tribes' reserved water rights.¹⁵⁸ Justice Macy misinterpreted the court's silence to mean that the Tribes could not change their water use.¹⁵⁹ This conclusion draws an

at 94. The *Big Horn I* court concluded, however, that a partial dependency on fish did not warrant a flow right. *Id.*

¹⁵⁵ *Big Horn I*, 253 P.2d at 98.

¹⁵⁶ *Id.*

¹⁵⁷ *Big Horn III*, 835 P.2d at 293 (Golden, J., dissenting). Justice Macy based his argument partly on the dissenting opinions in *Big Horn I*. *Id.* at 278, 284. He stated that the dissenters objected to the majority limiting the Tribes to only using the water for agricultural purposes. *Id.* at 278. However, the dissenters only expressed their disagreement over limiting the quantification process to agricultural purposes. *Big Horn I*, 753 P.2d at 119, 135 (Thomas & Hanscum, JJ., dissenting). The dissent did not address limiting the water's uses once quantified. *Big Horn III*, 835 P.2d at 289 (Golden, J., dissenting).

Since the dissenting opinions in *Big Horn I* do not state the issue clearly, a careful analysis must consider how the case developed. First, the state district court assigned a special Water Master to make a report on all parties' rights to the Big Horn River waters. *Big Horn I*, 753 P.2d at 85. The district court charged the Special Master with determining the extent and priority of any water rights held by the Wind River Tribes. *Id.* The Special Master found the Tribes possessed reserved water rights for irrigation, fisheries, stock watering, wildlife, aesthetic, mineral, industrial, commercial and municipal purposes. *Id.* The Special Master quantified water rights for each of these purposes. *Id.* The district court did not agree with the Special Master and limited the quantification to only the agricultural purpose. *Id.* at 86. The Wyoming Supreme Court affirmed the district court's limitation to quantifying the water rights only for agricultural purposes. *Id.* at 99. Justice Thomas dissented and stated that he disagreed with the majority in affirming the district court's limitation to the agricultural purpose. *Id.* at 119. No limitation on water uses existed for Justice Thomas to dissent against. *See Big Horn III*, 835 P.2d at 288 (Brown, J., dissenting). Justice Hanscum's dissent agreed with Justice Thomas' statement. *Big Horn I*, 753 P.2d at 135. Therefore, the dissenters only addressed the limitation on the quantification process, not any limitation on the water's uses. *Big Horn III*, 835 P.2d at 293 (Golden, J., dissenting).

¹⁵⁸ *See Big Horn I*, 753 P.2d at 98; *supra* note 157.

¹⁵⁹ *Big Horn III*, 853 P.2d at 277-78.

inference from the *Big Horn I* court's silence regarding an issue not before the court.¹⁶⁰

2. Failure to Consider Controlling Federal Precedent

While *Big Horn I* did not address the change-of-use issue, other cases have.¹⁶¹ Justice Macy, however, failed to acknowledge the federal precedent allowing tribes to change from the uses the courts identified in quantifying the Tribes' water rights.¹⁶² He stated that the United States Supreme Court's affirmance of *Big Horn I* rendered the case controlling.¹⁶³ However, the Supreme Court granted certiorari only on the use of the PIA standard for quantifying federally reserved water rights.¹⁶⁴ The Supreme Court did not address whether the Tribes could change the use of their water once quantified.¹⁶⁵ Therefore, Justice Macy's contention that *Big Horn I* governs the change-of-use issue is unwarranted.

¹⁶⁰ See *id.* In *Arizona I*, the United States Supreme Court also did not mention the change-of-use issue when quantifying the Colorado River tribes' water rights. See *supra* notes 61-68 and accompanying text (discussing *Arizona I*). Justice Macy would have interpreted this silence to mean that the Colorado River tribes could not change their water uses from agricultural purposes. See *supra* notes 148-50 (discussing Justice Macy's interpretation of *Big Horn I* court's silence). However, the Supreme Court's 1979 supplemental decree to *Arizona I* did not recognize any limitation restricting the water to agricultural uses. See *supra* notes 72-75 and accompanying text (discussing supplemental decree). Therefore, Justice Macy would have unfairly burdened the Colorado River tribes by misinterpreting the United States Supreme Court's silence. He could just as easily have misinterpreted the *Big Horn I* court's silence.

¹⁶¹ See *United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984) (stating tribe may use irrigation water rights for instream flows); *United States v. Adair*, 723 F.2d 1394, 1409-10 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984) (finding Indian reservation created for purpose of maintaining tribe's right to hunt and fish on reservation). Both *Anderson* and *Adair* reserved water for sustaining the fish populations upon which the Indians had been economically dependent at the times of the respective reservation's creation. *Anderson*, 736 F.2d at 1365; *Adair*, 723 F.2d at 1409-10. The courts added these reserved water rights to the water rights needed to fulfill the respective reservation's agricultural purposes. *Anderson*, 736 F.2d at 1365; *Adair*, 723 F.2d at 1409-10.

¹⁶² *Big Horn III*, 835 P.2d at 278; see *supra* notes 120-23 and accompanying text (discussing Justice Macy's reasoning); *supra* notes 76-85 and accompanying text (discussing *Walton*).

¹⁶³ *Big Horn III*, 835 P.2d at 278.

¹⁶⁴ *Wyoming v. United States*, 492 U.S. 406 (1989); see *supra* notes 96-98 and accompanying text.

¹⁶⁵ See generally *Rusinek*, *supra* note 66, at 393-94 (discussing issues *Big Horn I* presented to United States Supreme Court).

Because *Big Horn I* did not address change of use, Justice Macy should have looked to the federal precedent allowing a change of use for guidance.¹⁶⁶ The dissenting opinions in *Big Horn III* both noted this flaw in Justice Macy's reasoning.¹⁶⁷ In *Walton*, the Ninth Circuit found *Winters* and *Arizona* did not restrict a tribe's water use to the purposes the court utilized in quantifying reserved water rights.¹⁶⁸ Although the *Walton* court found that a fishery preservation purpose existed,¹⁶⁹ the finding did not limit the tribes' use of the water to fishery purposes.¹⁷⁰ The court stated that once the water rights vested in the tribes at the creation of the reservation, the tribes could use the water in any lawful manner.¹⁷¹ The court further stated that even if the original purpose for the water no longer existed, the tribes still retained their rights to the water.¹⁷² Justice Macy should have considered this precedent, instead of relying on an unsupported inference from *Big Horn I*.

B. Justice Thomas: Unjustifiably Narrow Construction of the State Engineer's Authority

While Justice Macy misinterpreted *Big Horn I*, Justice Thomas overlooked it altogether.¹⁷³ Justice Thomas concluded that the State Engineer was responsible for administering the reservation's water rights.¹⁷⁴ Because Justice Thomas determined that the State Engineer only had authority to apply state law,¹⁷⁵ he concluded that state law must govern the management of the reservation's water rights.¹⁷⁶

¹⁶⁶ See generally *supra* notes 76-85 and accompanying text (discussing federal precedent).

¹⁶⁷ *Big Horn III*, 835 P.2d at 289, 293 (Brown & Golden, JJ., dissenting).

¹⁶⁸ *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981). See generally *supra* notes 81-85 and accompanying text (discussing how Ninth Circuit Court of Appeals allowed tribes to use fishery water right for non-traditional fishery).

¹⁶⁹ *Walton*, 647 F.2d at 48.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See *infra* notes 174-79 and accompanying text (explaining how *Big Horn I* refutes Justice Thomas' argument).

¹⁷⁴ *Big Horn III*, 835 P.2d at 284; *supra* note 127 and accompanying text.

¹⁷⁵ *Big Horn III*, 835 P.2d at 284.

¹⁷⁶ *Id.*; see *supra* note 127.

However, *Big Horn I* determined that the State Engineer could apply federal as well as state law.¹⁷⁷ *Big Horn I* gave the State Engineer the responsibility of enforcing the Tribes' federal water rights against state appropriators.¹⁷⁸ Because federal law created the Tribes' rights, *Big Horn I* required the State Engineer to apply federal law to enforce the Tribes' rights.¹⁷⁹ This determination contradicts Justice Thomas' conclusion that the State Engineer could apply only state law in administering the tribal water rights. Justice Thomas overlooked the *Big Horn I* determination to reach his result.

C. *Justice Cardine: Waste Inherent in his Common Sense Approach*

Justice Cardine did not join Justice Macy's or Justice Thomas' opinion because he concluded the Tribes could eventually change their water rights from agricultural to other uses.¹⁸⁰ But, relying on his common sense, Justice Cardine required that the Tribes first use the water for irrigation before making any change in water use.¹⁸¹ This common sense approach ignores the waste of resources inherent in this strategy.¹⁸² Under Justice Cardine's strategy, the Tribes must first expend resources developing land for agriculture and then irrigate the land for an unspecified length of time.¹⁸³ Only after using water for irrigation could the Tribes convert their water use to nonagricultural purposes.¹⁸⁴ Therefore, the Tribes could finally reach their goal of diverting water for instream flows only after abandoning newly developed land.¹⁸⁵

In abandoning this land, the Tribes would also abandon the money, time, and other resources invested in its development.¹⁸⁶

¹⁷⁷ See *infra* notes 178-79 and accompanying text.

¹⁷⁸ *Big Horn I*, 753 P.2d at 115.

¹⁷⁹ *Id.*

¹⁸⁰ *Big Horn III*, 835 P.2d at 285; see *supra* notes 132-42 and accompanying text (outlining Justice Cardine's opinion).

¹⁸¹ *Big Horn III*, 835 P.2d at 285-87; *supra* notes 134, 139 (discussing Justice Cardine's reasoning and benefits he foresaw from his opinion).

¹⁸² See *infra* notes 183-90.

¹⁸³ *Big Horn III*, 835 P.2d at 285-87 (discussing the scheme). This scheme will likely lead to more litigation. Two clear issues of dispute will be whether the Tribes properly used the water for irrigation and the length of time the Tribes used the water to irrigate the land. *Id.*

¹⁸⁴ *Id.* at 287; *supra* note 134.

¹⁸⁵ *Big Horn III*, 835 P.2d at 287.

¹⁸⁶ See Prodis, *supra* note 100, at 6 (stating development may cost four million dollars).

Justice Cardine's prior use requirement would thus drain resources from more beneficial community projects.¹⁸⁷ The Tribes could better use these resources on educational, health-care, employment, and drug and alcohol addiction projects.¹⁸⁸ In addition, developing the land for agriculture could harm the reservation's natural environment.¹⁸⁹ Any tribal goal of protecting the reservation's native plants and animals could be thwarted by changing the natural environment.¹⁹⁰ Therefore, an approach that appears rational from the viewpoint of the state appropriators is irrational from the Tribes' viewpoint.

D. *The Impact of Big Horn III*

Not only was *Big Horn III* irrationally decided, but it may adversely impact later court decisions.¹⁹¹ However, the Tribes may have lessened the impact by deciding not to appeal the case to the United States Supreme Court.¹⁹² The Tribes did not want to go before a

¹⁸⁷ The Tribes sought to build up the reservation's fisheries to attract tourism which could help the bleak economic and social conditions on the reservation. *Id.* Experts have estimated that 80 percent of the adult Indians in Wyoming are alcoholic. *Study Finds 80 Percent of Wyoming, Montana Indians Alcoholic*, U.P.I., AM CYCLE, Oct. 13, 1986, available in LEXIS, Nexis Library, UPI File. The Wind River Indian Reservation has a suicide rate fifteen times the national average. *Regional News, Fort Washakie, Wyoming*, U.P.I., BC CYCLE, Oct. 9, 1985, available in LEXIS, Nexis Library, UPI File. In 1988, the average family income on the reservation was only \$6,277, with forty-six percent of households having no income. 1 EXECUTIVE SUMMARY OF FINAL REPORT, WIND RIVER INDIAN NEEDS DETERMINATION SURVEY (W.I.N.D.S. PROJECT) 2-3 (Aug. 1988). The reservation had an unemployment rate of seventy-one percent. *Id.* at 4. The reservation lacks proper garbage services, adequate housing, basic transportation, medical care, and facilities for abandoned, neglected or abused children. *See id.* at 3-4.

¹⁸⁸ *See supra* note 187 (discussing conditions on Wind River Indian Reservation).

¹⁸⁹ *See* Brett J. Morris, *DFG-Legal Trustee of Wildlife, Habitat*, OUTDOOR CAL., Nov.-Dec. 1992, at 16 (stating that human modification of natural habitat is primary danger to fish and wildlife).

¹⁹⁰ *See generally* Frank J. Popper & Deborah E. Popper, *The Reinvention of the American Frontier*, THE AMICUS JOURNAL, Summer 1991, at 5 (suggesting that extractive uses of land such as agriculture and ranching have led to environmental damage). In the twenty-first century, the United States will replace exploitation of land with the preservation of land as the primary public policy. *Id.* at 4-7.

¹⁹¹ *See infra* notes 195-200 and accompanying text.

¹⁹² Katharine Collins, *Fear of Supreme Court Leads Tribes to Accept an Adverse Decision*, HIGH COUNTRY NEWS, Oct. 19, 1992, at 1.

Court that has lately been more sympathetic to state interests than to the interests of Indian tribes.¹⁹³ Appealing the case to the United States Supreme Court could have allowed the Court to set a precedent that would not only hurt the Wind River Tribes, but also other tribes litigating similar issues.¹⁹⁴

As *Big Horn III* stands, however, it still may adversely affect other tribes. *Big Horn III* set a precedent for a state court denying a tribe the right to convert its water rights to instream flows.¹⁹⁵ Moreover, the three different rationales articulated by the majority opinions confuse the law regarding change of use.¹⁹⁶ A tribe considering changing its water use can only speculate as to which rationale a court may focus on.¹⁹⁷ Also, the next state court addressing a change-of-use question can cite *Big Horn III* as persuasive authority for restricting a tribe's right to change its water use.¹⁹⁸ Although

¹⁹³ *Id.* After 1970, the United States Supreme Court has decided against tribes in six of the seven Indian water-related cases that have gone before the Court. See LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW 41-42 (1991); see, e.g., Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Arizona v. California, 460 U.S. 605 (1983); Montana v. United States, 450 U.S. 544 (1981); Nevada v. United States, 463 U.S. 110 (1983); Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983); Shoshone Tribe v. Wyoming, 753 P.2d 76 (Wyo. 1989), cert. denied, 492 U.S. 926 (1989). The tribes' only victory came in the 1979 supplemental decree to *Arizona I* in Arizona v. California, 439 U.S. 419, 422 (1979). See generally BURTON, *supra*, at 151 n.22 (outlining United States Supreme Court decisions).

¹⁹⁴ Other tribes involved in fishery protection cases are the Karak, Tolowa, and Yurok tribes in California, the Salish and Kootenai tribes in Montana, and the Pyramid Lake Paiute tribe in Nevada. BURTON, *supra* note 193, at 50-57. Also the Spokane tribe, Swinomish, Sauk-Suiattle and Upper Skagit tribes, Muckelshoot tribe, Puyallup tribe, Skokomish tribe, 19 tribes and bands inhabiting Olympic Peninsula and mainland west of the Cascade Mountains, and 8 tribes and bands inhabiting Puget Sound areas are all litigating fishery protection issues in Washington state. *Id.*

¹⁹⁵ See *supra* note 107 and accompanying text.

¹⁹⁶ See Gover, Stetson & Williams, *supra* note 13, at 392 n.5; *supra* notes 110-47 and accompanying text (explaining three rationales).

¹⁹⁷ See *supra* notes 110-47 and accompanying text (explaining three rationales).

¹⁹⁸ See ALFRED J. LEWIS, USING AMERICAN LAW BOOKS 7 (3d ed. 1990) (noting that state courts look for persuasive authority from other state courts, scholarly commentary, attorney general opinions, and statutes).

the Wyoming court's reasoning was unconvincing,¹⁹⁹ other courts can use *Big Horn III's* conclusion as persuasive authority.²⁰⁰

IV. PROPOSAL FOR A BENEFICIAL USE APPROACH

This Note proposes that courts acknowledge the faulty reasoning in *Big Horn III* and resist following *Big Horn III's* conclusion.²⁰¹ Instead, courts should adopt an approach that would protect the reasonable expectations of all parties. This Note proposes an alternative based on the prior appropriation system's beneficial use concept.²⁰² Justice Golden raised the possibility of using this concept in his dissenting opinion in *Big Horn III*.²⁰³ A beneficial use approach would require all parties to use their water for beneficial uses only.²⁰⁴ As long as a party uses her water for beneficial uses, she could not lose her water rights.²⁰⁵ She could also convert her

¹⁹⁹ See *supra* notes 148-90 and accompanying text (explaining why court argued unpersuasively).

²⁰⁰ For example, Justice Macy cited the conclusion in *Big Horn I* as authority for his conclusion in *Big Horn III* without examining the content of *Big Horn I*. See *supra* notes 148-72 and accompanying text (analyzing Justice Macy's opinion).

²⁰¹ See *supra* notes 148-90 (showing *Big Horn I* court applied faulty reasoning).

²⁰² See *supra* notes 35-46 and accompanying text (discussing prior appropriation system's requirements which include beneficial use of water). The United States Supreme Court recognized this concept in its 1979 supplemental decree to *Arizona I*. See *supra* notes 73-75 and accompanying text. The decree only limits the tribes' consumptive use to what the consumptive use would have been if the tribes used the water for irrigation. *Arizona v. California*, 439 U.S. 419, 422 (1979) (per curiam). This meets the expectations of all the parties. See *infra* notes 210-18 and accompanying text.

²⁰³ *Big Horn III*, 835 P.2d at 293-94 (Golden, J., dissenting). Justice Cardine also used the concept, but with a weighty limitation. See *supra* notes 134, 138. He stated that irrigation constituted the only beneficial use available to the Tribes. *Big Horn III*, 835 P.2d at 293-94 (Golden, J., dissenting).

²⁰⁴ Cf. *supra* notes 35-42 and accompanying text (discussing prior appropriation system's requirement of beneficial use). Some uses of water that courts have found qualified as beneficial include domestic, municipal, irrigation, stock-watering, storage, power generation, mining, milling, recreation, scenic beauty, and ecological protection. GOLDFARB, *supra* note 36, at 35. Under the prior appropriation system, a water user wastes her water and forfeits her water rights if she does not apply the water to a beneficial use. See *id.* at 35-36.

²⁰⁵ See GOLDFARB, *supra* note 36, at 35-36.

water use from one beneficial use to another.²⁰⁶ The definition of a beneficial use of water varies from state to state,²⁰⁷ but Wyoming state law recognizes the use of water for instream flows as a beneficial use.²⁰⁸

This Note's proposed approach would protect the Tribes' and the state appropriators' expectations.²⁰⁹ *Big Horn I* quantified the Tribes' rights to use water from the Big Horn River system.²¹⁰ Under the beneficial use approach, the Tribes could expect to use water to meet all their beneficial uses, as long as they did not exceed their total water rights.²¹¹ If the Tribes have beneficial uses that require the full measure of their water rights, then the Tribes could expect to receive the full amount.²¹²

The beneficial use approach also protects the reasonable expectations of state appropriators. State appropriators have always used the water with the expectation that the Tribes might someday claim their full water rights.²¹³ A beneficial use approach would not change this expectation. Under the beneficial use approach, state appropriators could expect to receive the portion of the Tribes'

²⁰⁶ See HUTCHINS, *supra* note 33, at 631-33 (discussing Wyoming practice for changing from one beneficial use to another).

²⁰⁷ Most state prior appropriation systems have statutes defining beneficial uses. See, e.g., WYO. STAT. § 41-3-1001 (1992) (demonstrating Wyoming statute defining instream flow as beneficial use).

²⁰⁸ *Id.* The Wyoming statute states that releasing water to maintain new or existing fisheries constitutes a beneficial use. *Id.* Justice Golden stated that an instream flow is a beneficial use under traditional Wyoming water law. *Big Horn III*, 835 P.2d at 294 (Golden, J., dissenting). Federal courts have also defined instream flows as beneficial uses. See *generally supra* note 161 (discussing cases).

²⁰⁹ See *infra* notes 212-18 and accompanying text.

²¹⁰ See *supra* notes 86-95 and accompanying text.

²¹¹ See *supra* notes 204-08 and accompanying text. Under the prior appropriation system, a party may change its water use to another use as long as the water is used for beneficial purposes. See WYO. STAT. §§ 41-3-101, 41-3-103 (discussing nature of beneficial use and change of use in Wyoming).

²¹² See *supra* note 211 and accompanying text.

²¹³ See *supra* notes 52-55; Laird, *supra* note 28, at 160-62 (discussing uncertainty placed on western water users by *Winters* water rights). While all state appropriators using unclaimed Indian water may not expressly possess the expectation of losing that water, the *Winters* doctrine nevertheless legally places the expectation upon these water users. See *Winters v. United States*, 207 U.S. 564, 573, 577 (1908) (concluding that Indians possess prior rights that required the non-Indians to stop their water diversions).

water not applied to beneficial uses.²¹⁴ They could also expect to receive any water in excess of the Tribes' adjudicated amount.²¹⁵

Furthermore, the state appropriators' expectations would not change if the Tribes use their water for purposes other than irrigation.²¹⁶ The state appropriators could only expect the Tribes to use the water for beneficial uses.²¹⁷ Since the Tribes and Wyoming state law define instream flows as beneficial uses,²¹⁸ this Note's proposed beneficial use approach would allow the Tribes to convert their future water rights to present instream flows.

CONCLUSION

In *Big Horn III*, the Wyoming Supreme Court unjustifiably denied the Wind River Tribes the right to convert their future water rights to present instream flows.²¹⁹ The court should have looked to the controlling federal precedent allowing Indian tribes to change the use of their water from one beneficial use to another.²²⁰ The court should have also noted that the state prior appropriation system

²¹⁴ See *supra* notes 52-55 and accompanying text (explaining state appropriators can use tribal water until tribe develops beneficial uses for their water).

²¹⁵ Under the prior appropriation system, a party may appropriate any water not yet appropriated by earlier appropriators. See *supra* notes 35-46 and accompanying text (explaining prior appropriation system).

²¹⁶ See *infra* notes 217-18 and accompanying text (discussing state appropriators' expectations).

²¹⁷ See *supra* notes 36-42 and accompanying text (discussing prior appropriation system's requirements including beneficial use).

²¹⁸ See *supra* note 208 and accompanying text.

²¹⁹ See *supra* notes 148-200 and accompanying text (arguing against rationales of *Big Horn III* court). The Wyoming court's conclusion could effectively deny the Wind River Tribes from ever using their reserved future water rights for present instream flows. See *supra* notes 110-42 and accompanying text (explaining Tribes can only use water for agricultural purposes). However, the Tribes do have one option open to them. They may develop land for agriculture downstream from where they seek to establish instream flows. Collins, *supra* note 192, at 1. The water used to irrigate the new agricultural land will flow through the stretch of river where the Tribes seek to establish fisheries. *Id.* This meets the Wyoming Supreme Court's restriction that the Tribes use the water for irrigation, and also the Tribes' desire to enhance the reservation's fisheries. See *supra* notes 99-102, 109-41 and accompanying text (discussing court's restriction and Tribes' desire).

²²⁰ See *supra* notes 76-85 and accompanying text (discussing federal precedent).

allows a party to change its water use to other beneficial uses.²²¹ By properly applying the federal case law and the Wyoming state law, the court should have allowed the Tribes to change their future water rights to present instream flows.²²²

This Note's proposed beneficial use approach would have provided the court with a method for reaching this result.²²³ The proposed approach protects all parties' expectations and properly applies federal and state laws.²²⁴ This approach recognizes that the Tribes have the right to convert their future water rights to present instream flows.²²⁵ At the same time, it upholds state appropriators' expectations because the Tribes must develop beneficial uses before taking water from state appropriators.²²⁶ The proposed beneficial use approach thus provides a more equitable solution for the change-of-use question than the rationales articulated by the *Big Horn III* court.²²⁷

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²²¹ See HUTCHINS, *supra* note 33, at 631-33 (discussing Wyoming practice for changing from one beneficial use to another).

²²² See *supra* notes 148-200 and accompanying text (explaining why Tribes should have right to change their water use).

²²³ See *supra* notes 201-18 and accompanying text (discussing proposed beneficial use approach).

²²⁴ See *supra* notes 201-18 and accompanying text (discussing proposed beneficial use approach).

²²⁵ See *supra* notes 210-12 and accompanying text (discussing Tribes' rights).

²²⁶ See *supra* notes 213-18 and accompanying text (discussing state appropriators' expectations).

²²⁷ See *supra* notes 201-18 and accompanying text (discussing proposed approach and its benefits).