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Big Horn River Litigation Experience: The Second Generation – Post Decree Administration

Gordon W. Fassett

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Citation Information

Fassett, Gordon W., "Big Horn River Litigation Experience: The Second Generation – Post Decree Administration" (1991). *Innovation in Western Water Law and Management (Summer Conference, June 5-7)*.

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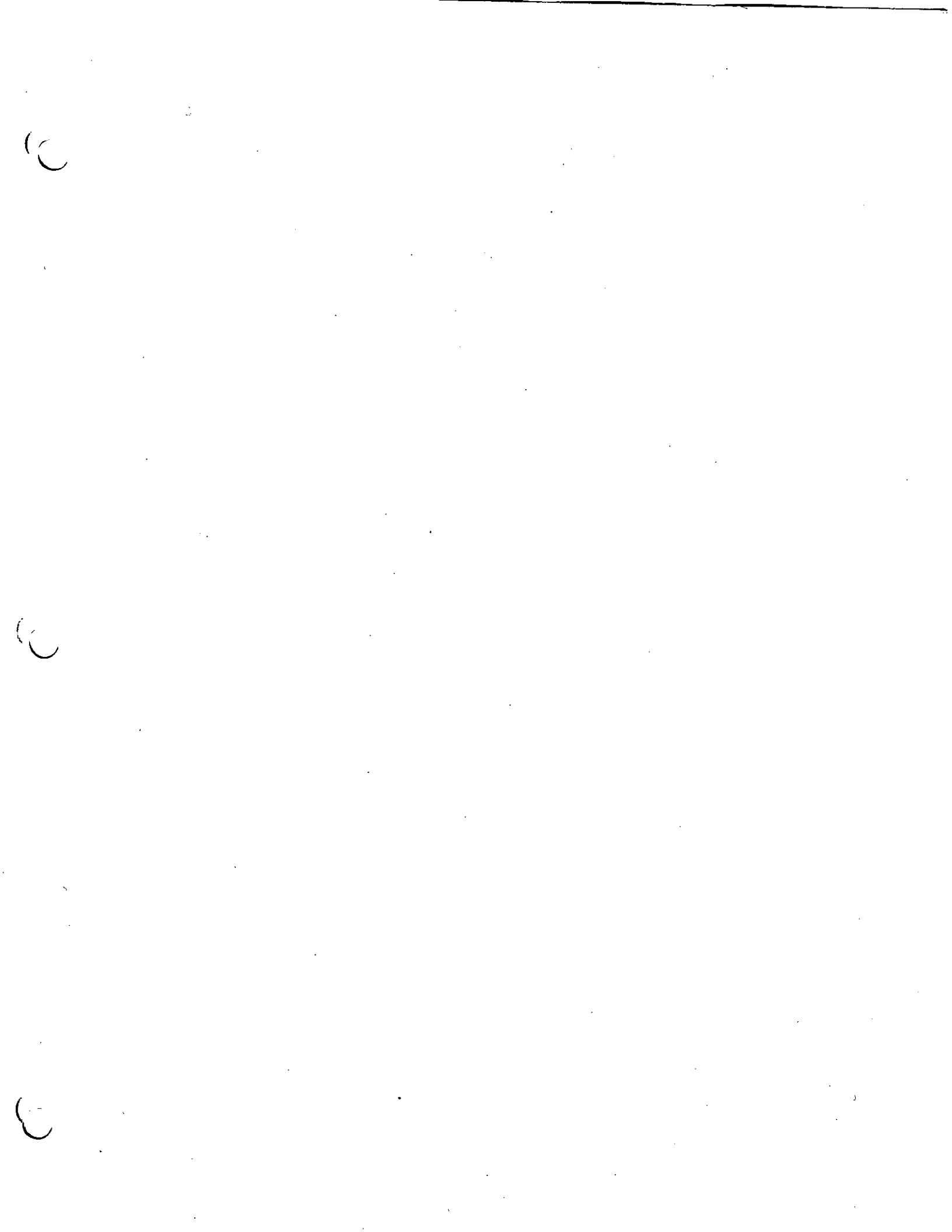
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Big Horn River Litigation Experience
The Second Generation - Post Decree Administration

Gordon W. Fassett
Wyoming State Engineer

**Innovation In Western Water Law
And Management**

**Natural Resources Law Center
University of Colorado School of Law
June 5-7, 1991**



**INNOVATION IN WESTERN WATER LAW
AND MANAGEMENT**

**Big Horn River Litigation Experience - the Second Generation
Post Decree Administration**

Gordon W. Fassett

Wyoming State Engineer

- I. Introduction to topic**
- II. Administration of Water Rights**
 - A. General Discussion - Wyoming Water Law**
 - 1. Constitutional Basis**
 - 2. 100 Years of Statutory and Case Law History**
 - B. Flexibility or Evolution of Administration
and Regulation of Water Rights**
 - 1. Unified System of Administration - Hydrologic
Boundaries**
 - 2. Defined Process, Procedures, Rules and
Regulations of Administration**
 - C. Key factors of "Administration"**
 - 1. Definition or Parameters of a Water Right**
 - 2. Regulation**
 - 3. Enforcement Action**
 - 4. Changes to Water Rights**
 - 5. Data Collection**

III. Big Horn River General Adjudication - The Wyoming Experience

- A. Litigation vs. Negotiated Settlement**
- B. Quantification - Three Phases of Effort**
 - 1. Treaty Based Water Rights**
 - 2. Federal Reserved Water Rights**
 - 3. State Awarded Water Rights**
- C. Big Horn I (753 P. 2d 76)**
 - 1. Indian Reserved Water Rights Quantified**
 - a. PIA - Agriculture is Primary Purpose**
 - b. Quantity of Water or Water Right**
 - 2. What's Next! - Implementation and Administration**
 - a. Result of Litigation - Decree to Enforce**
 - b. Factual Setting of Wind River Basin -
Hydrology, Lands, Water Rights**
- D. Practical Problems**
 - 1. Lack of Specifics in the Decree**
 - 2. Process of Administration - What are the "Rules of
the Game" as Guided by Law**
 - 3. Not Enough Reliable Supply - Hydrologic Limits**

IV. Implementation

- A. Establish a Process of Administration**
 - 1. Define the Role of the Players:
State, Tribal, Water Users, Courts**
 - 2. State Process - with modification, Can and Should
Provide Basis of Administration**
 - 3. Due Process by Administrative Agency With Equal
Access to Courts**

B. On-the-Ground Reality

1. Water Interest vs. Textbook Idealism vs. Historic Tradition
2. Results more Important than Egos
3. Expansive Reserved Rights Doctrine - Not "in the cards" for the second generation of issues
 - a. Law Not Clear
 - b. Negotiation is Preferred
4. Standards of Review and Technical Questions of Limitations, Injury Test, and of Factors or Attributes of Water Right Changes

V. Litigation Update and Status

- A. Phase I - Big Horn II (November 30, 1990, 803 P.2p 61)
Walton Rights Standing and New Process
Reopened, 2 more years to complete
- B. Phase III - Still Going - State Awarded Water Rights Adjudication, 2 Years Left - (5 already completed)
- C. Phase I "Leftovers"
 1. Overlap Cancellation
 - a. PIA vs. State Law Based Water Rights
 - b. Technical Efforts
 - c. Court Review and Confirmation
 2. Change of Type and Nature of Right- Big Horn III ?!
 - a. 1989 Interim Settlement
 - b. The Summer of 1990
 - c. New Litigation Issues and Decisions to Date, Through May 1991
 - d. Revived Settlement Discussions - Short and Long Term

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