

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Natural Resource Development in Indian  
Country (Summer Conference, June 8-10)

1988

---

6-10-1988

### The Wind River Litigation: Quantification and Implementation

Gordon W. Fassett

Follow this and additional works at: <https://scholar.law.colorado.edu/natural-resource-development-in-indian-country>



Part of the [Aquaculture and Fisheries Commons](#), [Courts Commons](#), [Indian and Aboriginal Law Commons](#), [Judges Commons](#), [Land Use Law Commons](#), [Natural Resource Economics Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Property Law and Real Estate Commons](#), [State and Local Government Law Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

---

#### Citation Information

Fassett, Gordon W., "The Wind River Litigation: Quantification and Implementation" (1988). *Natural Resource Development in Indian Country (Summer Conference, June 8-10)*.  
<https://scholar.law.colorado.edu/natural-resource-development-in-indian-country/19>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



William A. Wise Law Library  
COLORADO LAW

UNIVERSITY OF COLORADO BOULDER



Getches-Wilkinson Center Collection

Gordon W. Fassett, *The Wind River Litigation: Quantification and Implementation*, in NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1988).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

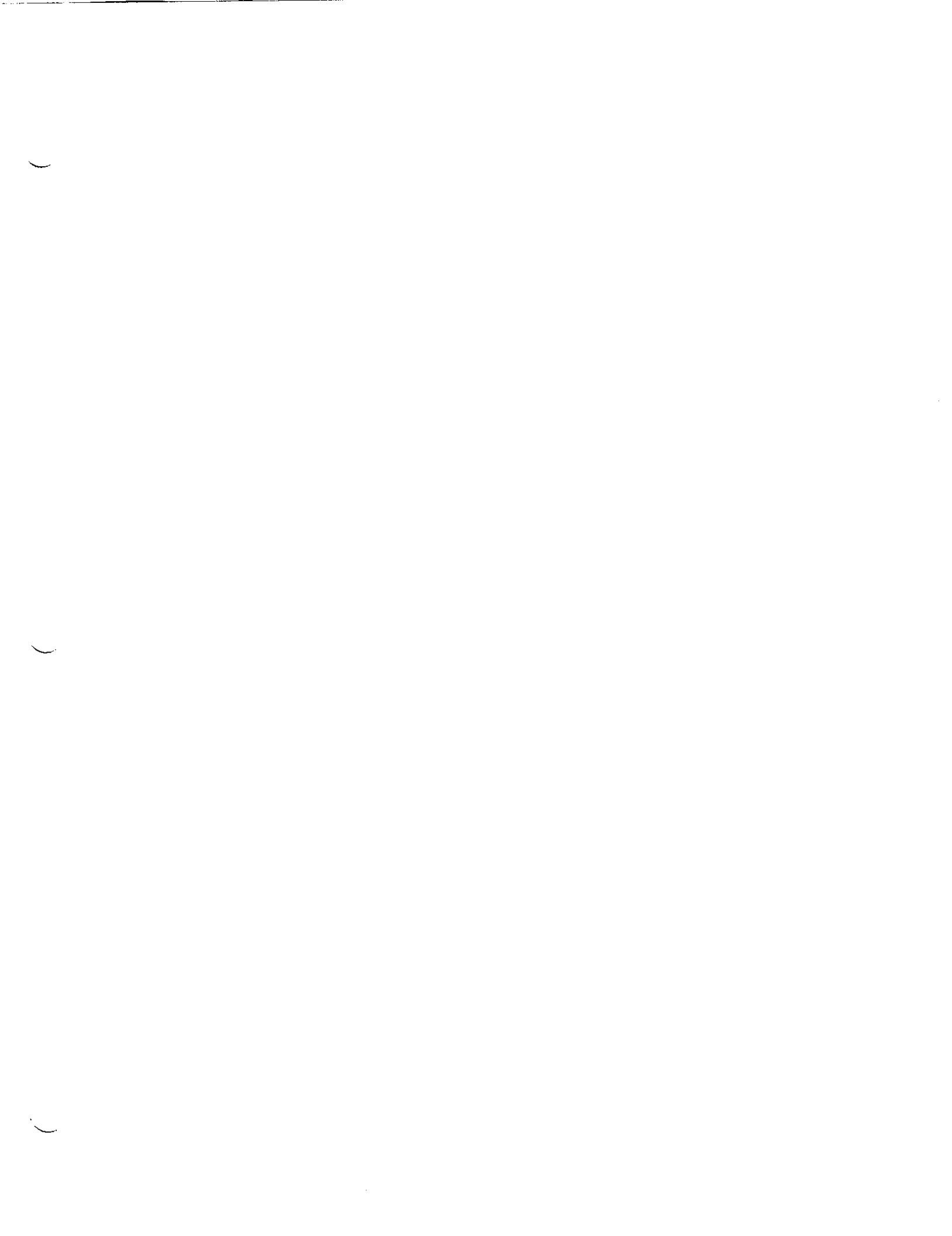
THE WIND RIVER LITIGATION:  
QUANTIFICATION AND IMPLEMENTATION

Gordon W. Fassett, P.E.  
Wyoming State Engineer  
Cheyenne, Wyoming

NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY

Natural Resources Law Center  
University of Colorado  
School of Law

June 8-10, 1988



THE WIND RIVER LITIGATION:  
QUANTIFICATION AND IMPLEMENTATION  
Gordon W. Fassett, P.E.

I. Background and History of Case

- A. The Big Horn General Adjudication was initiated pursuant to Section 1-37-106, W.S. 1977, on January 22, 1977, and after argument, remained under state court jurisdiction (McCarren Amendment) since that time. This proceeding involved all rights to the use of water in Water Division No. 3 (Big Horn And Wind River Drainages) in Northwestern Wyoming.
- B. The proceeding was divided into three phases of activity associated with the quantification (adjudication) of all rights to use water: Phase I - Indian reserved rights (Wind River Indian Reservation); Phase II - Non-Indian federal reserved rights and; Phase III - State-awarded water rights.
  1. Phase II - Settlement between major parties signed and presented to court for review, with partial interlocutory decree entered by court on February 9, 1983. No appeal was taken from this action. Currently in force and administered by State Engineer.
  2. Phase III - Ongoing court supervised process to address approximately 4000 unadjudicated state-awarded permits. All previously adjudicated (by

State Board of Control) rights confirmed by court.

3. Phase I - Was the subject of extended litigation before a special master, with review by two state district courts and the Wyoming Supreme Court (February 24, 1988 decision).

C. Factual Background of Region near Wind River Indian Reservation.

1. Currently the Wind River Indian Reservation (WRIR) encompasses 2-1/2 million acres of land and was initially established by the 1868 Treaty of Ft. Bridger. 15 Stat. 673 (1869).
2. The WRIR has a "checkerboard" or "patchwork quilt" pattern of land ownership and land use by indians and non-indians throughout the area, which includes shared canal and reservoir systems for the distribution and use of water.
3. Within the Wind River drainage, there are approximately 200,000 irrigated acres of which 40-50,000 acres are indian irrigation projects. A major (70,000 Ac.) USBR federal irrigation project (Midvale Irrigation District) is also located in the heart of the WRIR, west of Riverton, Wyoming.
4. The total estimated "natural flow" of the entire Wind River drainage upstream of Boysen Reservoir

- is approximately 1.4 million acre-feet per year.
5. There is limited upstream storage for carryover water supply purposes, less than 100,000 acre-feet of capacity. On a direct flow (run-of-the river) basis, 80-90 percent of the available firm water supply is currently appropriated and used. Future expansion of use for irrigation and other purposes will rely upon storage.

II. Wyoming Supreme Court February 24, 1988 Decision concerning Indian Reserved Rights.

A. The majority opinion generally upheld the lower courts decision and consistently found that the court below did not err in its findings.

B. A brief summary of the major provisions of the decision is presented below.

1. Jurisdiction. The Tribes challenged the jurisdiction of the state court to adjudicate Indian water rights in spite of the McCarran Amendment, 48 U.S.C. 666, and Section 1-37-106, W.S. 1977, The Tribes argued that the "disclaimer provision," Article 21, Section 26 of the Wyoming Constitution, barred state adjudication of Indian water rights. The special master, the state district court and the federal district court all held that state court jurisdiction existed. The Wyoming

Supreme Court agreed with the State and affirmed that conclusion.

2. Implied Reserved Water Right. The State has maintained that in the specific case of the Wind River Indian Reservation, the United States did not impliedly reserve water rights for the Indians in 1868 Treaty of Ft. Bridger, 15 Stat. 673 (1869). Even if such a reservation were implied in the treaty, the State argued that Congress subsequently abrogated such rights by expressly deferring to state law for the acquisition of water rights and by declining to create reserved rights for the Reservation when it had the opportunity to do so, after Winters vs. United States, 207 U.S. 564, 285 S.Ct. 207 (1908). The Wyoming Supreme Court agreed with the district court's conclusion that in spite of Congress' inconsistent actions, the United States did intend to reserve Indian water rights. The Wyoming Supreme Court also held that the State was not collaterally estopped from litigating the reserved rights issue and that the United States was not equitably estopped from asserting reserved rights claims for lands upon which it aggressively encouraged non-Indian



settlement and appropriation of water under state law.

3. Purposes of the Wind River Indian Reservation.

The United States Supreme Court has stated that the quantity of water reserved by the United States when a reservation is created is that amount necessary to fulfill the primary purposes of the reservation. United States - vs. New Mexico, 438 U.S. 702, 98 S.Ct 3012, 3013 (1978). The special master, accepting this proposition, found that the primary purpose of the Wind River Indian Reservation was to create a "permanent homeland" for the Indians. He therefore awarded reserved water rights, for agriculture, fisheries, mineral and industrial development, municipal, domestic and commercial use, fishery instream flows, livestock, wildlife and aesthetic purposes. The district court disagreed, ascertaining the primary agriculture purpose of the Reservation from the treaty itself. The Wyoming Supreme Court agreed and also found that the purpose was purely agricultural. The Tribes and the United States argued that the basis quantifying of the reserved right should not be so limited, but the Wyoming Supreme Court, after extensive

review of the treaty agreed with the State and upheld the conclusion of the district court. The dissent, however, would have adopted the "permanent homeland" conclusion.

4. Scope of the Reserved Water Right.

a. Although during the proceedings before the special master the United States and the Tribes generally claimed reserved groundwater rights, the district court held, and the Wyoming Supreme Court affirmed, that there was no reserved groundwater right. However, the Wyoming Supreme Court did not specifically address the lower courts confirmation of the Tribes right to continue to use existing groundwater supplies for primarily stock watering and domestic uses on the WRIR.

b. The Wyoming Supreme Court's majority decision regarding exportation cites the district court holding that "the Tribes can sell or lease any part of the water covered by their reserved water rights but the said sale or lease cannot be for exportation off the Reservation." The Wyoming Supreme Court, however, did not

specifically rule on this issue. A dissenting opinion finds that marketing water off the reservation should be permitted.

c. The Tribes argued that the district court decree should not be final but that jurisdiction should be retained to provide for future modifications. Citing the Uniform Declaratory Judgments Act, Sections 1-37-101 to 1-37-115, W.S. 1977, the Wyoming Supreme Court found that the decision has have the effect of a final judgment.

5. Quantification. The State argued that quantification of the reserved right in this specific case should be based upon the water rights originally applied for and issued by the state to the United States on behalf of the Tribes. The special master, nevertheless, adopted the standard of quantification known as Practicably Irrigable Acres (PIA). Much of the trial was devoted to technical expert testimony regarding the arability, engineering feasibility, and water availability and economic feasibility of proposed future irrigation projects under the PIA definition

adopted by the parties, located within the original boundaries of the Reservation. Except when the State unequivocally convinced the special master otherwise, he adopted many of the conclusions of the United States' experts. To compensate for doubts concerning the United States studies, the special master reduced the overall award by 10 percent in his report to the court. The district court adopted the special master's findings. The Wyoming Supreme Court affirmed the findings of the district court but disallowed the 10 percent reduction.

Although the special master adopted the PIA standard to quantify the Indians' reserved water right, he did not apply that standard to lands considered historically irrigated. Although the State consistently argued that certain historically irrigated lands could not meet the stipulated PIA requirements, the district court accepted the special master's award of reserved rights for historically irrigated lands. The Wyoming Supreme Court upheld the decision of the district court. The resultant decision awarded reserved water rights for approximately 480,000 acre-feet of water based on the irrigation of about 103,000

acres (PIA) on the reservation, for both "historic" and "future" categories of lands (about a 50/50 split and between categories).

Recognizing the "sensitivity doctrine," i.e., that reserved water rights must be awarded with sensitivity to the impact on other appropriators, United States vs. New Mexico, 438 U.S. 718, 98 S.Ct. 3023 (1978), the special master provided for phasing in of the future reserved rights over time and for prerequisite upstream storage provisions. The district court deleted these provisions and the Wyoming Supreme Court dismissed the state's claims that the "sensitivity doctrine" had not been applied below.

6. Priority Dates. Although the State argued that an 1868 priority reserved water right should be limited to diminished reservation lands (those lands never ceded), the district court awarded a treaty priority date to not only tribal lands on the diminished reservation, but to reacquired lands, restored (disestablished) lands and Indian fee lands. The Wyoming Supreme Court upheld the 1868 priority date and reversed and remanded the portion of the decision of the district court which had denied

a treaty priority date to Indian allottees' grantees. The dissent would have denied reserved water rights to all of the disestablished reservation (everything north of the Big Wind River about one-third of PIA Award).

7. Monitoring of the Decree by the State Engineer.

The United States and the Tribes appealed the district court's finding that the State Engineer should in the first instance administer the reserved water rights awarded claiming that there should be a separate suit to determine administration. They also argued that allowing the State Engineer to administer and enforce Indian reserved water rights would interfere with tribal self-government. The Wyoming Supreme court held for the State noting that the State Engineer must be able to monitor and enforce the reserved water rights in order to properly regulate state awarded water rights. The role of the State Engineer, the court stated, "...is not to apply state law, but to enforce the reserved rights as decreed on the basis of federal law." All quantified rights to the use of water in this basin are intimately bound together, and one set of

rights does not necessarily jeopardize the other. Initial administration by the State Engineer does not preclude review by the courts.

8. Expenses of the Special Master. At the insistence of the United States, the district court appointed a special master. The district court's order appointing the special master provided that the expenses of the special master were to be borne equally by the United States and the State. Since the McCarran Amendment, 43 U.S.C. Section 666, prohibits taxing of costs against the United States, the United States vigorously argued that the district court erred in requiring the United States to pay half of the master's expenses. The Wyoming Supreme Court held for the State finding the expenses not to be "costs" as contemplated by the Mccarran Amendment. Throughout the course of the litigation before the special master, the United States had routinely paid these expenses.

C. Brief summary of key aspects of opinion where they did not agree with the district court.

1. The Wyoming Supreme Court reversed the finding of the special master, adopted by the district

court, that the reserved water right award for future irrigation projects should be reduced by 10 percent to correct "unavoidable errors" in the United States' land classification studies. The Wyoming Supreme Court reasoned that although the State had demonstrated uncertainties in the United States' studies, nevertheless, the special master had found the studies supported by a preponderance of the evidence.

2. Wyoming Supreme Court disagreed with the district court's finding that the pro rata share of an Indian allottee's reserved water right does not pass to a non-Indian grantee. The Wyoming Supreme Court's mandate was that upon remand the district court must award reserved water rights with a treaty priority date of 1868 to the appellants who were successors to non-Indian grantees of Indian allottees.

### III. Practical Problems and Implementation

- A. The decision lacks specificity. The quantification of the Indian reserved rights reflected in the Wyoming Supreme Court decision is without much specific definition of individual awarded water rights. Although much detail was provided during the PIA



quantification procedures before the special master, the resultant award represents a significant "block" of senior priority water, which has reserved rights attributes that leave many questions for the future. Specific information regarding source, place of use and type of use are difficult to ascertain or to analyze the anticipated potential impact to other appropriators within and off of the reservation.

- B. The decision does not present a process to handle the awarded flexibility, changes to and specific use of the reserved water rights. The extended implication of the treaty priority date award to successor non-Indian grantees from Indian allottees may have a dramatic conclusion. The result may be the award of 1868 priority rights to a significant portion of all irrigated land in the basin (regardless of current land ownership or state-awarded rights) if, in essence, their chain of title related to the original reservation boundaries. This may also add to and leave behind a complex water administration issue.
- C. There is not enough water to go around. An important practical issue for the future will be conflicts arising between existing appropriators and those portions of the reserved water rights which were quantified for the "future" PIA irrigated land, not currently in use. The new senior rights when put to

use, may "call out" existing, junior (post 1868) priority water rights. Future construction of carryover reservoir storage projects will help, but may not resolve this potential problem.

D. Implementation will require coordinated management of the limited resource for all users, where needed in the areas of complex interaction of reserved water rights and state-awarded permits on smaller streams and within shared irrigation ditch systems across the reservation.

1. Further implementation may require joint water development projects for the region, which is a single economic and homeland unit in many respects.

2. Once quantified, the decree needs to be blended with all other rights in a single administration and regulation system. Hydrologic and geographic factors of the existing conditions in the basin support the need for consistent monitoring and enforcement of all rights to use water, with review by the courts.

3. Complexity of the decree is a non-issue. Many river basins in Wyoming and across the Western states have very complex water right administration and regulation situations which

are adequately addressed. All rights in the Wind River drainage can and must be equally protected under the State Constitution.

#### IV. What's Next!

A. Upon review of the Wyoming Supreme Court decision the State, Tribes and United States each submitted a motion for rehearing and/or reconsideration of selected issues. These matters are listed below. These motions were denied by the Wyoming Supreme Court on April 22, 1988.

1. State issues for rehearing.

- a. Nature and distinction between permits and certificates, basis of reserved right.
- b. Allottees grantees reserved rights.
- c. 10 Percent reduction reversal.
- d. Selection and Application of discount rate.
- e. Water availability.
- f. 1868 priority for disestablished portion of the Reservation.
- g. Award of reserved rights to meet only the minimal needs necessary to insure the primary purpose of the Reservation would not be entirely defeated.

2. Tribal issues for rehearing.

- a. Sole purpose of Reservation was to

establish an agricultural reservation.

b. The denial of groundwater reserved rights.

3. United States issues for rehearing.

a. The denial of groundwater reserved rights.

b. Reserved water rights measured by municipal, domestic, commercial and livestock needs.

c. The courts discussion on the sale and lease of reserved water off the Reservation.

B. As of this date, all major parties are evaluating their options and positions on key issues and questions for possible review by the United States Supreme Court. Final decisions by the parties and submittals to the court, if any, are not expected until July 21, 1988.

C. Settlement opportunities of outstanding issues and potential future implementation problems will always be investigated to avoid future litigation. A new tone of mutual cooperation should be explored now that the quantification has been nearly completed. Further review of the factual situation of the awarded rights, together with the finalization of the Phase III efforts for state-awarded rights on and near the WRIR, should

occur. This analysis should review the existing and potential conflicts between users in the basin and future water development opportunities, strategies and management.

- D. The Administration issues and questions should be resolved and understood by all parties, and achieved through cooperative implementation, negotiation or litigation. Peace in the valley is a goal worthy of dedicated effort by all appropriators.

