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

Gordon W. Fassett

Follow this and additional works at: https://scholar.law.colorado.edu/innovation-in-western-water-law-and-management

Part of the Administrative Law Commons, Courts Commons, Indian and Aboriginal Law Commons, Litigation Commons, Natural Resources and Conservation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, State and Local Government Law Commons, Water Law Commons, and the Water Resource Management Commons

Citation Information

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.

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.
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