

5-14-1982

Wyoming's Response to the US and Tribes, Volume IX, Appendix B, Part 4

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WYOMING'S RESPONSE TO THE UNITED STATES'
AND TRIBES' PROPOSED FINDINGS OF FACT, CONCLUSIONS OF
LAW, INTERLOCUTORY DECREE AND
SUPPORTING BRIEFS

VOLUME IX

Appendix B

(Part 4)

Case # 4993

File # 327

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FILED

4993

5/14

1982

Margaret V. Hampton

CLERK

DEPUTY

IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

IN RE: THE GENERAL ADJUDICATION)
OF ALL RIGHTS TO USE WATER IN)
THE BIG HORN RIVER SYSTEM AND)
ALL OTHER SOURCES, STATE OF)
WYOMING)

CIVIL NO. 4993

VOLUME 9

APPENDIX B

(PART 4)

This Part 4 of Appendix B responds to the Tribes' Proposed Findings of Fact 266 through 330. Each Proposed Finding to which Wyoming responds is reproduced verbatim on a single page with Wyoming's response thereto on the page or pages immediately following.

N.B. Wyoming has not responded to every finding of fact proposed by the Tribes but the lack of a response to a finding should not be construed as an admission of the relevance or accuracy of such finding.

Tribes' Proposed Finding of Fact:

269. U.S. Ex. C-20 shows the daily per capita water uses for various communities (Tr. V. 4, pp. 438, 457). This exhibit along with the testimony of Mr. Merchant (Tr. V. 5, p. 486) indicates that the current per capita water use per day is as follows:

<u>Area</u>	<u>Gallons Per Day</u>
Riverton	165
Fort Washakie	325
Boulder Flat	135
Ethete	135
Arapahoe	185
Pavillion	135
Other Rural	100

Wyoming's Response:

269. Mr. Fassett testified specifically in rebuttal to the unusually high value presented by Mr. Merchant for Fort Washakie. Mr. Fassett's work indicated a value of 220 gallons per capita per day would be more appropriate. Mr. Merchant's estimate for Fort Washakie was challenged by many parties and was specifically held "in limbo" by the Master while admitting the remaining values on U.S. Exh. WRIR C-20. Tr. 457. Neither the United States nor the Tribes cross-examined Mr. Fassett regarding his qualifications or testimony regarding the alternate value. Tr. 11622-11623.

Tribes' Proposed Finding of Fact:

270. Mr. Merchant concluded that the municipal, domestic and commercial needs on the Reservation currently are approximately 1,041 acre-feet per year, that they would be approximately 1,524 acre-feet per year in the year 2000, and that they would be 2,226 acre-feet per year in the year 2020 (Tr. V. 5, p. 482). Mr. Merchant also determined the sources of water serving these claims (Tr. V. 4, p. 403; V. 5, p. 482). He determined the amount of water needed from each of the various sources which is included in the record (Tr. V. 5, pp. 482-85), and upon which I make my ultimate finding, which follows, on this subject.

Wyoming's Response:

270. As discussed more fully in Wyoming's Proposed Findings of Fact 12-3 and 12-7, Mr. Fassett is far more qualified than Mr. Merchant to determine municipal, domestic and commercial water requirements. Mr. Fassett presented alternative values to the Court. Tr. 11621-11622.

Tribes' Proposed Finding of Fact:

271. I find that Mr. Merchant's study is a conservative estimate of the Indian population, its growth, and the present and projected need for water for municipal, domestic and commercial purposes. I find that the Tribes are entitled to a reserved water right with a priority date of 1868 for those purposes in amounts based on Mr. Merchant's conclusions but increased by a contingency factor of 20%, as follows:

<u>Area</u>	<u>Source</u>	<u>Acre-Feet Per Year</u>		
		<u>1980</u>	<u>2000</u>	<u>2020</u>
Riverton	Big Wind River	18	32.4	45.
	Groundwater	18	32.4	45.
Fort Washakie	Little Wind River	455	799.2	1,166.
Ethete	Little Wind River	257	450.0	652.
Boulder Flat	Popo Agie River	26	44.4	67.
Arapahoe	Groundwater	155	273.6	397.
Pavillon	Groundwater	2	3.6	4.
Remainder of Reservation	Groundwater	<u>110</u>	<u>193.2</u>	<u>283.</u>
	TOTAL	1,041	1,328.8	2,571.

Wyoming's Response:

271. There is no evidence in the Record to support the addition of a 20% "contingency" to Merchant's values. The Record does not demonstrate that need exists or that water would be available to meet the increased amounts sought by the Tribes. There is also no evidence in the Record to show that Mr. Merchant's estimates are conservative; in fact they were rebutted by Mr. Fassett as being excessive with respect to Fort Washakie. See Wyoming's Proposed Findings of Fact 12-1 et seq. It is not surprising that no transcript page or exhibit is cited to support this finding because none exists.

Tribes' Proposed Finding of Fact:

274. Dr. Stewart documented in great detail that the Shoshone use of fish was so pervasive and evident that 19th century written reports from Shoshone country and 20th century anthropological and ethnohistorical literature regularly state that the Shoshone fished and that fishing has always been an important element of their culture and economy (Tr. V. 100, pp. 9070-86; Tribes' Ex. OCS-1-A, pp. 4-26).

Wyoming's Response:

274. Neither the United States nor the Tribes presented any evidence to show that any portion of the claimed streams is important to the Tribes today for fishing. The only evidence presented concerning fishing by the Tribes was historic use of fish by the Shoshones. Dr. Omer Stewart testified only that when the Shoshones found fish, they ate them. Tr. 9114. They also relied upon many other food items. Tr. 9116, 9120. There was no evidence prescribed that the Shoshone were ever dependent upon fish. Dr. Stewart also admitted that the Arapahoe traditionally were not fishermen. Tr. 9234. Also, there is no evidence that Congress was aware of a reliance on fish by the Shoshone Tribe when the Wind River Indian Reservation was created and, therefore, Congress could not have intended to reserve water for fisheries.

The purpose for which water may have been, reserved for the Wind River Indian Reservation, to establish a land-based agrarian society, stands in sharp contrast to, for example, the parallel purpose found in Colville Confederated Tribes v. Walton, 647 F. 2d 42, 48 (1981):

The Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them. [Citations omitted].

The Tribe's principal historic fishing grounds on the Columbia River have been destroyed by dams. The Indians have established replacement fishing grounds in Omak Lake by planting a non-indigenous trout.

In contrast with the Colville Tribe, the Shoshone and Arapahoe settled on the Reservation to pursue agriculture rather than live as nomadic hunters. The Colvilles' traditional and extensive reliance on fishing continued long after their settlement on a reservation and represents a central factor of their existence, culture and religion.

In addition, Dr. Stewart's documentation of Shoshone use of fish is of little use to the Court because it dealt with the entire population of Shoshoni-speaking people, whereas the history of only the Eastern band or "Snakes" is relevant to the fishing background of the Shoshone residents of the Wind River Indian Reservation. Dr. Stewart was unable to substantiate reliance by the Wind River Shoshone on fishing. See, e.g., Tr. 9199, 9201 et seq.

Tribes' Proposed Finding of Fact:

275. Reports concerning Chief Washakie's people (the Eastern Shoshones or Snakes) with whom the treaty was made show this same fact. For instance, in 1860, Superintendent F. W. Lander of the United States Wagon Road Expedition wrote:

"The Eastern Snakes range from the waters of Wind river or latitude 43° 30' on the north and from the South Pass to the head waters of the North Platte on the east, and to Bear river near the mouth of Smith's Fork on the west. They extend south as far as Brown's Hole on Green River. Their principal subsistence is the roots and seeds of the wild vegetables of the region they inhabit, the mountain trout, with which all the streams of the country are abundantly supplied, and wild game. The latter is now very scarce in the vicinity of the new and old emigrant roads."

(Tribes' Ex. CCS-33, p. 1).

Wyoming's Response:

275. Dr. Stewert admitted that the "Snakes" generally ate any food they could find, including crickets. Tr. 9221. There is no evidence that this group of Shoshones relied on fish as a regular or important item in their diet or that fish played any other role in their culture. Tr. 9201 et seq.

Tribes' Proposed Finding of Fact:

276. The Shoshones' reliance on fishing continued after settlement on the Wind River Reservation. In 1870 the Superintendent of Indian Affairs for Wyoming Territory reported:

"The eastern band of Shoshone Indians are at the present on the reservation set aside for them by the treaty of 2d July, 1868. . . . Fear of the Sioux and other hostile tribes, the scarcity of game and fish, on which they are dependent, and a distrust of the intention of the Government, has made them leave the reservation during the summer months and go south to Fort Bridger, and next to the Bear River, where they subsist on small game, and the fish which are so abundant in that river."

(Tribe's Ex. OCS-22).

Wyoming's Response:

276. See Wyoming's Response to Tribes' Proposed
Finding of Fact 275.

Tribes' Proposed Finding of Fact:

277. The State and other parties presented no evidence on the fishing habits of the Shoshones or their understanding of the Treaty of 1868 in regard to fishing.

Wyoming's Response:

277. Wyoming presented extensive evidence supporting the conclusion that Congress' intent and purpose in creating the Wind River Indian Reservation was to end the nomadic habits of the Shoshone and establish an agricultural lifestyle. See Wyoming's Amended Proposed Findings of Fact and Conclusions of Law 3-1 et seq. and 5-1 et seq., Wyo. Exhs. WRIR I & P 1 through '237. The purposes for which water may have been reserved for the Reservation did not include maintenance of fisheries.

Tribes' Proposed Finding of Fact:

278. I find that the Shoshone Indians in agreeing to give up their other lands and settle on the Wind River Reservation which was to be their "permanent homeland" understood that they were receiving the right to hunt and fish on the Reservation and that no one without their consent could reduce the water in the streams so as to impair their hunting and fishing.

Wyoming's Response:

278. No evidence exists in the Record to support the "contract" theory of this finding. The Treaty of 1868 was not a contract and its interpretation turns entirely on a factual inquiry concerning the intent of Congress in entering into the Treaty and a legal analysis of these facts. The Shoshones' consent or nonconsent to a reduction of streamflows is irrelevant, since the quantity of water that may have been reserved by Congress for the Wind River Indian Reservation depends entirely on the primary purpose for which Congress created the Reservation. See Wyoming's Proposed Findings of Fact and Conclusions of Law 5-1 et seq.

Tribes' Proposed Finding of Fact:

279. The United States presented evidence on the level of water needed in the various Reservation streams to preserve a healthy fishery. This evidence was presented by David A. Vogel, a fishery management biologist with the United States Fish and Wildlife Service (Tr. V. 71, p. 6323). Mr. Vogel used a methodology developed by the Instream Flow Group (IFG) of the United States Fish and Wildlife Service. This is an accepted methodology (Tr. V. 71, pp. 6358-59).

Wyoming's Response:

279. The United States admits that it is seeking to optimize habitat, not provide for minimum flows. See U.S. Exh. C-280 (p. 1); cf., Cappaert v. United States, supra, United States v. New Mexico, supra.

The statement in the finding referring to Mr. Vogel's methodology is misleading. The United States only used the PHABSIM portion of the Instream Flow Group ("IFG") Incremental Methodology. See Wyo. Exh. WRIR FISH 1A (p. 21).