

6-19-1985

US' Brief on Reserved Right to Instream Flows for Fisheries

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Recommended Citation

Flint, Myles E.; Clear, James J.; and Echohawk, Tom W., "US' Brief on Reserved Right to Instream Flows for Fisheries" (1985). *Bighorn*. 156.

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JUN 29 1981

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

STATE OF WYOMING)
)
COUNTY OF WASHAKIE) SS

FILED

IN RE: THE GENERAL ADJUDICATION OF ALL) JUN 19 1985
RIGHTS TO USE WATER IN THE BIG HORN)
RIVER SYSTEM AND ALL OTHER SOURCES) Gerrie E. Bishop Civil No. 4993
STATE OF WYOMING) Clerk of the District Court

UNITED STATES' BRIEF ON RESERVED RIGHT
TO INSTREAM FLOWS FOR FISHERIES

In response to the Court's request, the United States submits the following brief concerning the legal authority for the United States' claim to a reserved water right to maintain instream flows for fisheries on portions of streams on the Wind River Indian Reservation. A number of cases bear directly on this issue and support the Government's claim on behalf of the Wind River Reservation.

In United States v. Anderson, No. 3643 (E.D. Wash. decided July 23, 1979) the federal district court found that "maintenance of the [Chamokane Creek] for fishing was a purpose for creating the [Spokane Indian] reservation." Slip Op. at 9. The court held that the "tribe has the reserved right to sufficient water to preserve fishing in Chamokane Creek." Slip Op. at 10. To measure that right the court reviewed both the quantity and quality of water needed for the fishery. It ruled that there should be not only a minimum flow but also that at no time should water temperatures in the stream be caused to exceed a specified maximum. It appears from the opinion that the court recognized that factors directly related to water temperature are the rate and volume of stream flow, factors which are affected by diversions from the stream for other uses.

United States v. Adair, 478 F. Supp. 336 (D. Ore. 1979), involved the reserved right to water to preserve hunting and fishing rights on the terminated Klamath Indian Reservation. The court ruled that termination

had not extinguished the hunting and fishing rights of the Indians and concluded that they were entitled to "as much water on the Reservation lands as they need to protect their hunting and fishing rights." 478 F. Supp. at 345. The court reasoned that the Klamath Treaty had as its principal purpose the establishment of an area for the

"exclusive occupation of the Indians so that they could become self-sufficient. The Treaty provided two ways for the Indians to be self-sufficient. First, it ensured that the Indians could continue their traditional way of life which included hunting, fishing, trapping, and gathering. Article I of the Treaty secured to the Indians their right to pursue their traditional way of life. Second, it encouraged the Indians to adopt agriculture." Id.

If water is reserved for preservation of hunting and fishing rights on a terminated reservation, then water rights must continue in streams which have not lost their reservation status, including not only those on the so-called "diminished" portion of the Wind River Reservation, but also on the portion opened to settlement by the 1905 Act.

Earlier this month the Ninth Circuit Court of Appeals issued an opinion based on its rehearing of Colville Confederated Tribes v. Walton, Nos. 79-4297, 4309 and 4383 (9th Cir. June 1, 1981). There the court ruled that there was an implied reservation of water for the Colville Reservation "for the development and maintenance of replacement fishing grounds." Slip Opin. at 2623. The court so ruled after observing that the Indians' "principal historic fishing grounds on the Columbia River have been destroyed by dams. The Indians have established replacement fishing grounds . . . by planting a non-indigenous trout." Id. As did the district court in Adair, the Court of Appeals recognized that "[p]roviding for a land-based agrarian society . . . was not the only purpose for creating the

reservation." Id. See also Cappaert v. United States, 426 U.S. 128 (1976), in which the Supreme Court held that in setting aside Devil's Hole National Monument there was impliedly reserved sufficient water to preserve fish.

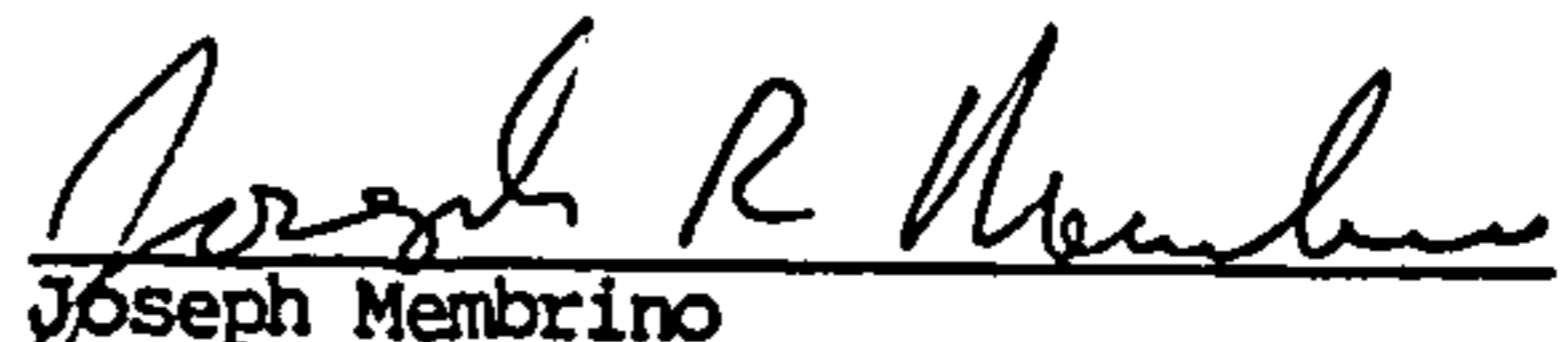
These cases clearly support the Government's claims in this case. Previous discussions of this issue may be found in the "United States Proposed Findings of Fact, Conclusions of Law and Brief Concerning the Boundaries of the Wind River Indian Reservation and the Priority of Water Rights for Lands Within the Reservation," August 1980, and the "Legal Parameters for United States' Statement of Claims," March 1980.

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JUN 24 1981

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of United States' Amended Motion to Take Judicial Notice and for Order that Adjudicated State Water Rights are Prima Facie Evidence of Irrigability in Determining Reserved Water Rights was deposited in the United States mail, postage prepaid thereon, this ~~28th day of May, 1981~~, addressed to the following:

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