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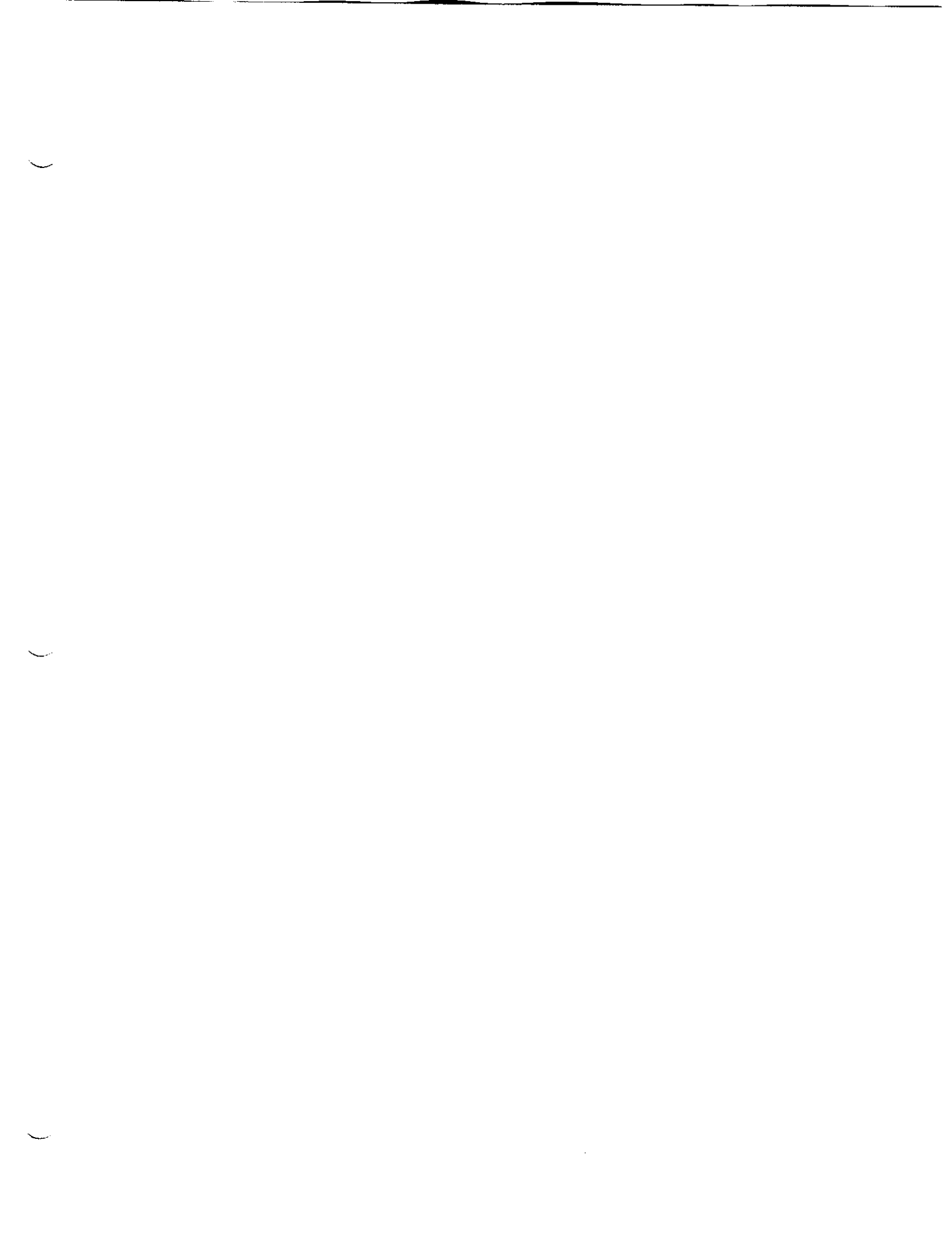
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**THE WIND RIVER LITIGATION:
EFFECTS OF THE WYOMING SUPREME COURT'S DECISION
ON THE WIND RIVER RESERVATION'S WATER USE AND
IMPLICATIONS FOR OTHER RESERVATIONS' WATER RIGHTS**

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I. Introduction

On February 24, 1988, the Wyoming Supreme Court handed down its decision on the Wind River Reservation water rights case. The district court had reviewed and modified the special master's recommended decree, which itself was modified by Judge Jaffe before being reviewed by the district court. Unless the case is reviewed by the United States Supreme Court and the decision modified again, the Wind River Case has been concluded.

In this paper, I will discuss what I feel are some of the key points of that decision as it affects water use on and off the Wind River Reservation and water rights quantifications for other Indian reservations.

(Reference: The following citations are taken from the Wyoming Supreme Court's Decision: The General Adjudication Of All Rights To Use Water In The Big Horn River System And All Other Sources, State Of Wyoming, October Term 1987.)

II. Context of the Litigation

A. States Will Decide Indian Reservation Water Rights

The court said,

"Congress' policy under the McCarran Amendment is to allow state courts to adjudicate Indian water rights as part of general stream adjudications." (p. 9)

The attorneys and witnesses for the United States and the Tribes thought that would make it very difficult for the tribes to obtain a fair judgement, but as we have seen from the Wind River decision it is not necessarily true. In fact, it seems that the Wind River Tribes received a water right that is nearly as large as they might have hoped for. It also appears that the few issues that were decided against the Tribes' interests were not asserted as firmly as those that were decided in their favor. While that may be a small consolation to the Wind River Tribes, it may be cause for optimism among those tribes whose water rights will be determined in the near future. I will discuss these issues below.

B. Federal Government Participation

However, before I discuss the issues of the case itself, one point is worth mentioning. I understand that in the Wind River litigation, both sides spent a considerable amount of money, and Wyoming spent considerably more than the United States and Wind River Tribes combined. And, it appears to me from the Wind River experience, and from other ongoing Indian water rights cases, that the United States is committed to devoting considerable resources to assert Indian water rights claims. This, plus the fact that the United States and the Tribes were extremely successful in Wind River, will hopefully send a message to other states that it will be in their best interests to negotiate and not spend the large sums of money required to litigate Indian water rights.

Certainly, the Wind River case has provided most of the ground rules upon which Indian water rights can be determined. Hopefully, it will not take too many more cases to develop the necessary remaining rules and to demonstrate to the states that it would be less expensive to negotiate than to litigate.

III. Principal Points of the Decision

A. Purpose of the Reservation is Key in Determining Acceptable Uses for which Water will be Awarded.

The Wyoming Supreme Court leaned very heavily on the "purpose" of the reservation in determining a basis for the Tribes' water rights. This worked in the Indian's favor on the Wind River Reservation, where agricultural development potential is very large, but it could pose a problem on some other reservations where the stated purposes do not hold much promise for justifying a water claim.

The court asserted that it is not sufficient simply to assert that a reservation is a homeland where Indians can establish a permanent place to live. It said,

"The district court correctly found that the reference to 'permanent homeland' does nothing more than permanently set aside lands for the Indians; it does not define the purpose of the reservation." (p. 24)

1. Agriculture and Access to Fishing - Acceptable Purposes

The court then focused on the economic activities which were the primary purposes of the reservation. At Wind River, the court said that there were two primary purposes/economic activities:

- agriculture, for which "practicably irrigable acreage" (PIA) was determined to be the correct measure
- to preserve access to fishing (p. 23)

By applying a very detailed analysis of PIA, the United States was able to obtain a large water rights award for agriculture uses. However, it was curious that even though the court declared "access to fishing" as a primary purpose of the Reservation, it overruled the special master and did not award any instream flow rights to preserve the fisheries themselves.

2. Fisheries: Not Acceptable for Water Rights Quantification

"Instream fishery flows have . . . been recognized where the Indians were heavily, if not totally, dependent on fish for their livelihood. . . . The master, erroneously concluding that a reserved right for fisheries should be implied when the tribe is 'at least partially dependent upon fishing,' awarded an instream flow right for fisheries. The district court, however, finding neither a dependency upon fishing for a livelihood nor a traditional lifestyle involving fishing, deleted the award. The district court did not err. The evidence is not sufficient to imply a fishery flow right absent a treaty provision." (p. 26)

The underlines are mine, not the court's.

So, "access to fishing" (one of the reservation purposes) was not judged to be the same as an instream fishery flow. No water right was given for "access to fishing". But it is not clear to me what the implication might be if the streams were to dry up because of water use by junior users upstream from the reservation. Could the Tribes claim they had lost "access to fishing" and therefore claim a right to stream flow?

Some implications for other reservations are indicated by the underlined portions of the court's decision. If the Wyoming Supreme Court's decision can be used as a guide, reservations that (1) are totally dependent upon fish for their livelihood, (2) have a traditional lifestyle involving fishing, and/or (3) have a treaty provision specifically referring to fishing as a primary purpose of the reservation would presumably be entitled to a water right for its fisheries.

3. Minerals: Not a Reservation Purpose and Not Acceptable for Water Rights Quantification

The court said,

"All parties to the treaty were well aware before it was signed of the valuable mineral(s) . . . underlying the Wind River Indian Reservation. . . . The question of whether, because the Indians own the minerals, the intent was that they should have the

water necessary to develop them must be determined, of course, by the intent in 1868." (meaning the 1868 treaty) (p. 26)

The court went on to assert that there was no indication in the treaty that the purpose of the reservation was to develop the minerals.

"The fact that the Tribes have since used water for mineral and industrial purposes does not establish that water was impliedly reserved in 1868 for such uses." (pp. 26 & 27)

So, although the court conceded that:

". . . it was known to all before the treaty was signed that the Wind River Indian Reservation contained valuable minerals, nonetheless (the court) concluded that the purpose of the reservation was (only) agricultural." (p. 25)

The court concluded that no water right should be awarded for mineral or industrial development.

4. Municipal, Domestic and Commercial: An Appropriate Use, But Not for Water Rights Quantification

The court agreed that municipal, domestic and commercial water uses are appropriate. However, as I read the decision, the court did not award a water right for those uses based upon our analysis of the specific quantities which the uses would require. The court said that municipal, domestic and commercial uses are subsumed in agricultural reserved rights. In other words, it is all right for the Tribes to use the water quantified in the PIA analysis for municipal, domestic and commercial purposes.

This decision confuses me, because the Tribes must use water for domestic and municipal purposes if they are going to live on the reservation, but any such use would take water away from agricultural use - a primary purpose of the Reservation.

I think the evident contradiction arises, because the court expects municipal, domestic and commercial water to come from groundwater and

not surface water, and rights to groundwater are not tied to surface water rights. I will discuss this issue below.

5. **Livestock: An Appropriate Use, But Not for Water Rights Quantification**

There was not much to indicate the court's thinking regarding the livestock claim. It presented only a one-line comment.

"The court did not err in finding a sole agricultural purpose for the reservation or in subsuming livestock use within that purpose." (p. 27)

I infer from the word "subsume", that the court is saying it is all right to use the water awarded on the basis of PIA for livestock (as it is all right to use that water for municipal, domestic and commercial purposes), but no additional quantity of water is awarded specifically for livestock.

This decision confuses me, because I would have thought that livestock would be considered an agricultural activity. My guess is that no water was awarded for livestock, because the court used PIA as the sole method for the agricultural water right quantification.

Unfortunately, the Wyoming Supreme Court did not provide any guidance on what should be the basis for a water rights claim where a reservation's primary purpose is not agriculture and/or little or no agriculture potential exists.

6. **Wildlife and Aesthetics: Not a Reservation Purpose and Not Acceptable for Water Rights Quantification**

The court said,

(there is no) "tradition of wildlife and aesthetic preservation which would justify finding this to be a purpose for which the reservation was created and for which water was impliedly reserved." (p. 27)

7. Appropriate Future Uses

Although the court based the Tribes' water right award exclusively on irrigated agriculture uses, it was very interesting to me that both dissenting opinions (there were only two) said that the water right should not be limited exclusively to an agricultural purpose. Specifically, the first dissenter wrote,

"The fault that I find with such a limitation (that is, an agricultural limitation) is that it assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the same benefits of modern civilization. I would understand that the homeland concept assumes that the homeland will not be a static place frozen in an instant of time but that the homeland will evolve and will be used in different ways as the Indian society develops. For that reason, I would hold that the implied reservation of water rights attaching to an Indian reservation assumes any use that is appropriate to the Indian homeland as it progresses and develops." (First page of the dissenting opinions.)

The underlines are mine.

I think the dissenters saw this important issue very clearly. Using PIA as the exclusive measure of the tribes' water rights resulted in a reasonable water rights quantification in Wind River, because the Reservation has such a large irrigated agriculture requirement, and the non-agricultural claim was only 4 percent of the irrigated claim. But non-agricultural use potentials will be more important to tribes on other reservations, and hopefully the courts deciding those cases will understand that.

B. Groundwater - Logic versus Law

The court said,

"The logic which supports a reservation of surface water to fulfill the purposes of the reservation also supports reservation of groundwater." (p. 28)

That seems clear enough. Nevertheless, the court said that because no case law was cited applying the reserved water doctrine to groundwater, "there is no reserved groundwater right." (p. 28)

The wording of the decision sounded like the court was asking for law which could be applied to the logic of the situation, but since it was shown none it felt unable to tie groundwater and surface water together. This seems to me to be a serious problem that needs to be remedied.

C. Exportation of Water Off the Reservation

The district court held that the Tribes can "sell or lease any part of the water" within the Reservation but not off the Reservation. The Supreme Court did not address the issue, because:

"The Tribes did not seek permission to export (the water and) the U.S. conceded that there is no federal law which permits the sale of reserved water to non-Indians off the reservation."
(p. 29)

But, I do not know of any law which prohibits the off-Reservation sale of reserved water either. And, it was interesting that one of the court's two dissenters asserted that the Tribes should be able to sell their water off the Reservation. After all, why should the Indians be allowed to use water to grow crops which are sold off the reservation and not sell the water itself off the reservation?

D. Use of Water for Any Purpose

The court did not specifically address the issue of whether the Tribes would be restricted to using the water for only those purposes for which a right was awarded or whether they could use the water awarded for any purposes. However, the court did allow the tribes to use their water for livestock, domestic, municipal and commercial purposes. And, it did let stand the district court's opinion that the Tribes can sell their water for use on the reservation. Therefore, I infer that the Tribes can use their water for any purpose.

E. Sensitivity Doctrine

The "sensitivity doctrine" comes from a dissenting opinion of Justice Powell, of the U.S. Supreme Court, in which he said,

"... the implied reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law." (p. 47)

The court recognized that doctrine. However, the decision was clear in stating that the Tribes did not have to provide upstream storage to replace any water lost to downstream, and presumably junior, users due to the Tribes' diversion of their water. It said,

"Deletion of the upstream storage requirement which was intended to protect appropriators from sudden depletion by the diversion of water for the five future projects does not manifest insensitivity to other water users. The doctrine of reserved water rights entitles the Indians to a certain quantity of water. The requirement that they must first construct storage facilities to supply their entitlement flies in the face of the object of the reserved water right -- a prior entitlement to the waters." (p. 48)

The court concluded by saying,

"The sensitivity doctrine does not preclude the award of a fair water right." (p. 48)

Therefore, the analysis which quantifies Indian water rights does not have to consider impacts on other users. This issue is settled entirely by the way appropriative water rights law works. If appropriators outside the reservation have a senior right, they are entitled to water before the reservation. Those senior appropriators cannot lose any water as a result of the reservation's withdrawal, and therefore, they cannot be damaged by the reservation's withdrawal. If appropriators outside the reservation have a right that is junior to the reservation, the reservation is served first. Therefore, the junior appropriators have no claim to damages which may result from less water remaining after the reservation's withdrawal.

