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Instream Flows and Tribal Management Goals: The Flathead Indian Reservation Litigation

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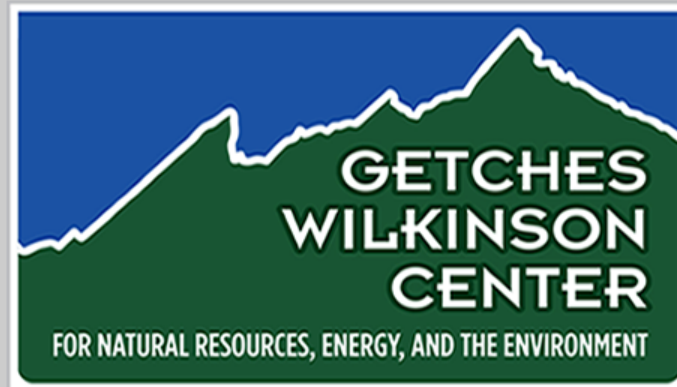
Citation Information

Decker, Daniel F., "Instream Flows and Tribal Management Goals: The Flathead Indian Reservation Litigation" (1988). *Natural Resource Development in Indian Country (Summer Conference, June 8-10)*. <https://scholar.law.colorado.edu/natural-resource-development-in-indian-country/21>

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Daniel F. Decker, *Instream Flows and Tribal Management Goals: The Flathead Indian Reservation Litigation*, in *NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1988).

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INSTREAM FLOWS AND TRIBAL MANAGEMENT GOALS:
THE FLATHEAD INDIAN RESERVATION LITIGATION

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NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY

Natural Resource Law Center
University of Colorado
School of Law

June 8-10, 1988

INSTREAMS FLOWS AND TRIBAL MANAGEMENT GOALS:
THE FLATHEAD RESERVATION LITIGATION

I. Summary

1. Flathead Reservation:
The Flathead Reservation located in beautiful western Montana is an area of fertile plains surrounded by rugged, tree-covered mountains with snow-capped peaks. Four distinct valleys make up the Reservation: The Mission, Little Bitterroot, Camas Prairie, and Jocko. Flathead Lake, a large natural fresh water lake, forms the northern boundary of the Mission Valley. The Mission Mountains that form the eastern boundary are spectacular rocky mountain peaks that are up to 10,000 feet in length towering above the valley floors.

The Reservation's borders encompass some 1,248,000 acres. However, Acts of Congress allowed for the opening of the reservation to non-Indian homesteaders beginning in 1910. Today non-Indian ownership, accounts for approximately 550,000 acres.

2. The Flathead Indian Irrigation Project:
The Flathead Indian Irrigation Projects, a project originally conceived to benefit Indian water users, has over the years come to serve predominantly non-Indian irrigators. Approximately 127,000 acres of irrigable land are located within the projects service area on the Reservation. The Tribes and Tribal members in 1986 owned approximately 27,450 acres within the irrigation project's boundaries. This project operates and maintains some 1,200 miles of canals and ditches and sixteen (16) reservoirs for irrigation purposes. The operation of this Bureau of Indian Affairs project directly impacts the ability of reservation fisheries to survive.

II. Background Information

1. The Flathead Indian Reservation, comprising approximately 1,245,000 acres in northwestern

Montana, was reserved by the Tribes in the Treaty of Hellgate, July 16, 1855. 12 STAT 975. In return for rights reserved in the Treaty, the Tribes agreed to convey large portions of their original homelands to the United States.

2. Since time immemorial the Confederated Salish and Kootenai Tribes have held aboriginal title to a vast area of land located in what now comprises the State of Montana and Idaho.
3. The Tribes "had always exercised their right to hunt and fish thereon from time immemorial" as it was their ancestral home. State v. McClure, 127 Mont. 534, 268 P.2d 624 (1954)
Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982).
4. Article III of the Tribes Treaty expressly reserved and the United States guaranteed that:
"The exclusive right of taking fish in all streams running through or bordering said reservation is further secured to said Indians..."
5. Congress passed the 1904 Flathead Allotment Act which provided for the allotting of parcels of land to Indians, and that certain surplus lands were to be opened to non-Indian settlement.
6. The 1904 Act also authorized the construction of an irrigation project for the benefit of Indians

- from the proceeds of sales of surplus lands.
7. The Flathead Indian Irrigation Project (FIIP) is administered by the Bureau of Indian Affairs (BIA) and presently serves both Indian and non-Indian irrigators.
 8. FIIP operates and maintains approximately 1,200 miles of canals and ditches and 16 reservoirs for irrigation purposes. These facilities mostly built on Tribal and individual Indian lands have been constructed in such a manner as to be inextricable intertwined with dozens of previously existing natural streams and lakes on the reservation.
 9. Operation of FIIP directly impacts reservation fisheries and has the ability to completely dewater many crucial reaches of reservation streams.
 10. During the summer of 1985 the reservation faced a serious drought. The Project Manager ignored Tribal requests to maintain emergency instream flows and minimum pools to protect fisheries. The Tribes sought injunctive relief from the federal district court and were successful in getting a temporary restraining order. CS&KT v. Flathead Irrigation and Power Project, 616 F. Supp. 1292 (D. Mont. 1985).
 11. The Tribes and the BIA entered into a stipulated agreement shortly after the Tribes declined the

- temporary restraining order. The stipulation protected a core fishery by maintaining certain instream flows in recognition of the Tribes' aboriginal rights and the lawsuit was dismissed.
12. The BIA in 1986, as a result of the 1985 lawsuit and stipulation, issued and attempted to implement a short-term interim instream flow and reservoir pool level plan. The non-Indian irrigation project water-users represented by the Joint Board of Control (JBC) filed lawsuit to stop implementation of the plan.
 13. The JBC was successful in obtaining injunctive relief from the BIA plan; Joint Board of Control v. United States, 646 F. Supp 410 (D. Mont. 1986).
 14. The Tribes appealed the District Court ruling and were successful in having the federal circuit court reverse the lower court. 832 F.2d 1127 (9th Cir. 1987)
 15. During the summer of 1987 before the Ninth Circuit ruling the JBC again filed lawsuit to stop implementation of a BIA interim management plan providing for instream flows on reservoir pools to protect fisheries. The district court dismissed the action. Joint Board of Control v. United States, No. CV-87-107-M (D. Mont. 1987), appeal filed. CA No. 87-4106 (9th Cir.)

16. The United States Supreme Court has recently denied Cert on the JBC lawsuit of 1986. 832 F. 2d 1127 (9th Cir 1987) Cert denied May __, 1988.