6-6-1978

Motion of the Colville Confederated Tribes presenting to this court a summation of documentation supporting proposed findings of fact AND petitioning this court to enter judgements in favor of the Colville Confederated Tribes in these consolidated cases

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiff, vs. BOYD WALTON, JR., et ux, et al., Defendants, STATE OF WASHINGTON, Defendant Intervenor.	Civil No. 3421 ✓ CONSOLIDATED CASES
UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM BOYD WALTON, et ux, et al., and THE STATE OF WASHINGTON, Defendants.	Civil No. 3831

MOTION OF THE COLVILLE CONFEDERATED TRIBES
PRESENTING TO THIS COURT A SUMMATION OF
DOCUMENTATION SUPPORTING PROPOSED FINDINGS OF FACT

AND

PETITIONING THIS COURT TO ENTER JUDGMENTS
IN FAVOR OF THE COLVILLE CONFEDERATED TRIBES
IN THESE CONSOLIDATED CASES

Come now the Colville Confederated Tribes, Plaintiff in Civil No. 3421 of these consolidated cases, and respectfully submit to this Court, all as directed by it, 1/ the attached "Memorandum of Points and Authorities in Summation of Colville Confederated Tribes' Case-In-Chief," hereinafter referred to as Memorandum in Summation. There is likewise incorporated into that memorandum in summation the Tribes' "Proposed Findings of Fact and Conclusions of Law and Brief,"

1/ Order of May 24, 1978, Final Argument, set for Friday, June 16, 1978, and also for hearing on Colville Confederated Tribes for Preliminary Injunction and submitting Memorandum on the Merits. See Transcript, April 27, 1978, Vol. XIV, p. 2909, l. 21-25.

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dated January 9, 1978, and the Tribes' "Memorandum of Points and Authorities," entitled "Reiteration of Plaintiff Colville Confederated Tribes' Motion for Partial Summary Judgment and Response to Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment," dated March 12, 1987.

The Colville Confederated Tribes further refer to this Court the motions made by the Colville Confederated Tribes for partial summary judgments 2/ and to the motions made February 10, 1978, 3/ by the Department of Justice for partial summary judgments to which the Colville Confederated Tribes responded by a memorandum dated March 12, 1978, and respectfully move this Court as follows.

Predicated upon the facts in the record on the merits in these consolidated cases, the Congressional enactment, pursuant to which the State of Washington was admitted into the Union, the provisions of that State's Constitution, and the repeated decisions that the State of Washington was admitted into the Union pursuant to the same conditions as other states, all as set forth in the accompanying memorandum in summation: 4/

1. The Colville Confederated Tribes petition this Court to adjudge, declare and determine that:

   a. The State of Washington has no jurisdiction over the rights to the use of water in No Name Creek or in the groundwater basin of No Name Creek; and

   b. The Certificate of Water Right issued by the State of Washington to Defendants Waltons is null and void and of no force and effect.

2. The Colville Confederated Tribes, all as set forth in the attached memorandum in summation, 5/ likewise move this Court and respectfully petition it to adjudge, declare and determine that:

   a. The Defendants Waltons did not acquire a vested appropriative right to the use of water in No Name Creek when the State of Washington issued to those Defendants the Certificate of Water Right pursuant to which the Defendants Waltons claim an appropriative right from the

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2/ Motion of Partial Summary Judgment of the Colville Confederated Tribes' Motion for Summary Judgment, dated June 14, 1976, full argued July 14, 1976.
3/ Transcript, Vol. IV, pp. 849 et seq.
4/ Attached Memorandum in Summation, p. 17.
5/ Ibid., p. 30.

State of Washington and that the Certificate of Water Right is null and void and of no force and effect;

b. The Defendants Waltons did not acquire any rights to the use of water in No Name Creek or the No Name Creek groundwater basin when they acquired the lands that they presently occupy, which were former Indian Allotments 525, 2371 and 892; and

c. The Defendants Waltons have no right, title or interest in and to the waters of No Name Creek or the No Name Creek groundwater basin by reason of the acquisition of the aforesaid former Allotments 525, 2371 and 892;

d. The Colville Confederated Tribes and the United States of America are entitled to have quieted in the Colville Confederated Tribes all of the rights, title and interest in and to the waters of No Name Creek and the No Name Creek groundwater basin against the Defendants Waltons and the State of Washington.

3. The Colville Confederated Tribes move this Honorable Court to grant to them the partial summary judgment, dated June 14, 1976, which was fully argued on July 14, 1976, all as reviewed in the attached memornandum in summation, 6/ declaring, adjudging and determining that:

a. The Secretary of the Interior vis-a-vis the Colville Confederated Tribes does not have "exclusive jurisdiction" to administer, control or allocate the waters of No Name Creek and the No Name Creek groundwater basin; 7/

b. The Secretary of the Interior does not have power or authority under 25 U.S.C. 381 or otherwise to allocate to Defendants Waltons any of the waters of No Name Creek or the No Name Creek groundwater basin. 8/

4. The Colville Confederated Tribes further respectfully petition this Court to declare, adjudge and determine that:

Full equitable title to the rights to the use of water in No Name Creek and the No Name Creek groundwater basin vested in the Colville Confederated Tribes by the Executive Order of July 2, 1872:

That the full equitable title to those rights to the use of water continues to reside in the Colville Confederated Tribes; that the naked legal title to those rights to the use of water in No Name Creek and the No Name Creek groundwater basin is held in trust for the Colville Confederated Tribes by the United States of America, trustee. 9/

6/ Memorandum in Summation, p. 33.
7/ Ibid., p. 33, para. "A", l. 21 et seq,; see authority in support, Memorandum in Summation, p. 18, l. 14 et seq.; p. 19, l. 5 et seq. - p. 33 et seq.
8/ Ibid., p. 34, para. "B" and documentation, fn. 7, supra.
9/ Ibid., p. 35, and documentation, fn. 7 supra.

5. The Colville Confederated Tribes respectfully petition this Honorable Court to deny the motion of the Department of Justice for partial summary judgment that: 10/

"At the time of transfer of Indian allotted lands to non-Indian ownership, the non-Indian, as a matter of law, is entitled to the right to the use of whatever quantity of water was being utilized by the previous Indian allottee when the land was removed from trust status and this water right would have a priority date as of July 2, 1972, when the Colville Indian Reservation was created."

6. The Colville Confederated Tribes petition this Honorable Court to deny the motion for partial summary judgment of the Department of Justice that: 11/

"Following the transfer of land from Indian to non-Indian ownership, the successor's right to the use of water is, as a matter of law, predicated upon the application of water to a beneficial use upon the lands with a priority date of such use."

7. The Colville Confederated Tribes petition this Honorable Court to deny the motion of the Department of Justice that: 12/

"The allotment of lands on the Colville Indian Reservation purusant to the General Allotment Act of 1887 (24 Stat. 388; 25 U.S.C. 331 et seq.) vests each allottee of land with the right to the use of waters necessary for the allottee's needs with a priority date as of the creation of the reservation... [Colville Indian Reservation, July 2, 1872)...."

8. The Colville Confederated Tribes petition this Court to adjudge, declare and determine that:

The Colville Confederated Tribes are entitled to a decree authorizing them to exercise their Winters Doctrine rights to the use of water in No Name Creek and in the No Name Creek groundwater basin for any purpose, including but not limited to their Lahontan Cutthroat Trout Fishery. 13/

9. The Colville Confederated Tribes respectfully petition this Court to explicity find that there is insufficient water in No Name Creek and in the No Name Creek groundwater basin to meet the reasonable water requirements:

a. For the 228.4 acres of irrigable lands within the service area of the Colville Irrigation Project, whether the lands are irrigated either by the rill method or by menas of the sprinkler system that has been installed;

10/ Ibid., p. 36, para. "D", l. 18 et seq.
11/ Ibid., p. 38, para. "E", l. 15, et seq.
12/ Ibid., p. 38, para. "F", l. 11 et seq.
13/ Ibid., p. 42 et seq.

b. For the 157.9 acres of irrigated lands within the service area of the Colville Irrigation Project, either by means of the rill method or through the operation of the presently installed sprinkler system.

This Honorable Court is further respectfully petitioned to declare, adjudge and determine that, due to the severe shortage of water in No Name Creek and in the No Name Creek groundwater basin, the diversion of the surface water from No Name Creek and the pumping of water from the No Name Creek groundwater basin by the Defendants Waltons has caused and will continue to cause the Colville Confederated Tribes irreparable damage. By reason of this irreparable damage, the Colville Confederated Tribes petition this Honorable Court to declare, adjudge and determine that the Defendants Waltons are forthwith enjoined from further diversion of No Name Creek water and from pumping water from the No Name Creek groundwater basin.

Respectfully submitted,

William H. Veeder

William H. Veeder, Attorney for
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6 June 79
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiff, vs. BOYD WALTON, JR., et ux, et al., Defendants, STATE OF WASHINGTON, Defendant Intervenor.	Civil No. 3421 CONSOLIDATED CASES
UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM BOYD WALTON, et ux, et al., and THE STATE OF WASHINGTON, Defendants.	Civil No. 3831

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUMMATION OF

COLVILLE CONFEDERATED TRIBES' CASE-IN-CHIEF

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SUBJECT INDEX

UNITED STATES DISTRICT COURT
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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUMMATION OF
COLVILLE CONFEDERATED TRIBES' CASE-IN-CHIEF

I. INTRODUCTION

This is an action initiated September 15, 1970, by the Colville Confederated Tribes, Plaintiff in Civil No. 3421, on their own behalf against the Defendants Waltons to:

1. Enjoin the Defendants Waltons from seizing, diverting or monopolizing and polluting the waters of

No Name Creek

a nonnavigable, perennial stream in the state of nature, which arises wholly within the Colville Indian Reservation, flows its full length in that reservation and terminates in Omak Lake, a closed body of water likewise entirely within the Colville Reservation; and

2. Have adjudged, declared and determined that full equitable title to

the Winters Doctrine rights to the use of water in No Name Creek resides in the Colville Confederated Tribes.

On October 19, 1972, the State of Washington intervened in Civil No. 3421 as a defendant in intervention. By that intervention, the State of Washington became an adversary of the Colville Confederated Tribes asserting, among other things, contrary to the claimed rights of the Colville Confederated Tribes, that the State of Washington had jurisdiction, power, and authority to issue to the Defendants Waltons a "Certificate of Water Right" and otherwise to exercise jurisdiction within the watershed of No Name Creek.

Independent of the Colville Confederated Tribes and of Civil No. 3421, initiated by the Colville Confederated Tribes, the Department of Justice, on March 15, 1973, initiated on its own behalf -- and purportedly on behalf of the Colville Confederated Tribes -- the case of United States v. Walton, Civil No. 3831, seeking to enjoin the Defendants Waltons from diverting waters from No Name Creek in excess of the quantity of water authorized by the Secretary of the Interior, and to have declared null and void the "Certificate of Water Right" issued by the State of Washington to the Defendants Waltons.

By an order dated December 19, 1973, the Court, sua sponte, consolidated the Colville Case, Civil No. 3421, with the Department of Justice Case, Civil No. 3831, declaring that the two cases had numerous, inextricably interrelated, common questions of fact and law.

On February 10, 1978, in the course of the trial of these consolidated cases on the merits, the Department of Justice, by an oral motion, petitioned this Court for a summary judgment and interjected into these proceedings complex and controversial issues. There are several aspects of the motion by the Department of Justice for summary judgment which are adverse to the rights and interests of the Colville Confederated Tribes and which cloud the full equitable title of the Colville Confederated Tribes in and to their Winters Doctrine rights to the use of water, the subject matter of these consolidated cases.

II. QUESTIONS OF LAW PRESENTED IN THESE CONSOLIDATED CASES

A. Are the Colyille Confederated Tribes, Plaintiff in Civil No. 3421, predicated upon the record in these consolidated cases, entitled to:

1. have the Defendants Waltons enjoined from causing irreparable damage to the Tribes through the diversion and use of the water in No Name Creek by the Defendants Waltons and by the pollution of the waters of that stream by the Defendants?

2. have their claimed rights to the use of water in No Name Creek quieted against the adverse claims of the Defendants Waltons, whose claims are predicated upon the following:

   a. a "Certificate of Water Right" issued to the Defendants Waltons by the State of Washington, purportedly granting to the Defendants Waltons under the laws of the State of Washington a right to divert one cubic foot of the surface waters of No Name Creek to irrigate 65 acres of land;

   b. acquisition from non-Indians of three (3) allotments originally owned by members of the Colville Confederated Tribes?

   Assuming, arguendo, that the Defendants Waltons did, in fact, acquire some right to the use of water when they acquired the three (3) allotments from non-Indians, what is the measure, extent and character of those rights to the use of water that passed to the Defendants Waltons upon the acquisition of the former Indian allotments?

B. Predicated on the record in these consolidated cases, are the Colville Confederated Tribes entitled to have judgment entered on their behalf against the State of Washington, Defendant in Intervention, for the following reasons:

1. that the State of Washington has no jurisdiction, authority or control over the surface and groundwaters of No Name Creek;

2. that the "Certificate of Water Right," issued by the State of Washington to the Defendants Waltons, is null and void and of no force and effect;

3. that the State of Washington has no jurisdiction, control or authority to administer the rights to the use of water of No Name Creek; hence, the title of the Colville Confederated Tribes in and to the surface and groundwaters of No Name Creek should be quieted against the adverse claims of the State of Washington.

C. Are the Colville Confederated Tribes entitled to have judgment entered on their behalf against the United States of America in regard to the following issues presented to this Court:

1. The Colville Confederated Tribes are the owners of the full equitable title to all of the rights to the use of the surface and

groundwaters of No Name Creek for the benefit of the members of the Colville Confederated Tribes and the interest of the United States is limited to the naked legal title to those rights held in trust for the benefit of the Colville Confederated Tribes. 1/

2. The Colville Confederated Tribes, contrary to the Motion for Summary Judgment of February 10, 1978, of the Justice Department, are entitled to use the waters of No Name Creek and the No Name Creek groundwater basin for any beneficial use in furtherance of the interests of the Colville Confederated Tribes, including but not limited to the maintenance of the Lahontan Cutthroat Trout Fishery in No Name Creek, which was established in No Name Creek and Omak Lake. 2/

3. The Colville Confederated Tribes have the power, authority and responsibility, under circumstances that prevail, to control, administer and allocate the waters of No Name Creek and the No Name Creek groundwater basin, and the Secretary of the Interior does not have the "exclusive jurisdiction" over the waters of No Name Creek, as the Department of Justice, in error, contends. 3/

4. The Colville Confederated Tribes, pursuant to 25 U.S.C. 381, are entitled to have declared, adjudged and determined that members of the Colville Confederated Tribes "residing" on the Colville Indian Reservation are entitled to participate in the short supply of the surface and groundwaters of No Name Creek on the basis of a "just and equal distribution" of those waters predicated upon the aforesaid 25 U.S.C. 381 and upon the Colville Water Code. 4/

5. The Colville Confederated Tribes are entitled to have their claimed, full equitable title to the Winters Doctrine rights to the use of water in No Name Creek quieted against the claims of the Department of Justice, which has moved for a summary judgment, petitioning this Court, among other things, that:

". . . the allotments of the lands of the Colville Indian Reservation, pursuant to the General Allotment Act of 1887 that each allottee of the land [sic] with the right to the use of water necessary for the allottee's needs with a priority date as the date of the reservation." 5/

1/ Pre-Trial Order, June 14, 1976, p. 16, para. IX, l. 16-23; Motion of the Colville Confederated Tribes for Partial Summary Judgment, June 14, 1976, fully argued July 12, 1976, p. 6, l. 3-26.

2/ Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 16, l. 12-14.

3/ Colville Confederated Tribes' Motion for Summary Judgment, June 14, 1976, fully argued July 12, 1976, p. 4, para. IV et seq.

4/ Col. Ex. 2(13); Transcript Vol. II, p. 223, l. 25; p. 229, l. 10.

5/ See statement by William H. Burchette, Transcript of February 10, 1978, Vol. IV, p. 849, l. 18-25; p. 850, l. 1. See Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 1, para. II, l. 28-32.

6. The Colville Confederated Tribes are entitled to judgment quieting their title against the claims of the Department of Justice, which cloud the full equitable title of the Colville Confederated Tribes by reason of the request in the Department of Justice motion for summary judgment:

> ". . . that at the time of the transfer of Indian allotted lands to the non-Indian ownership, the non-Indian would be entitled to the right to the use of whatever quantity of water was being utilized by the previous Indian allottee when the land was removed from trust status, and that this water right would have a priority date also as of the creation of the Reservation." 6/

7. The Colville Confederated Tribes are entitled to judgment quieting their title against the claims of the Department of Justice, which cloud the full equitable title of the Colville Confederated Tribes, by reason of the request in the Department of Justice Motion for Summary Judgment:

> ". . . that following the transfer of land from Indian to non-Indian ownership, the successor's right to the use of water would be predicated on the application of the water to a beneficial use upon the land with a priority date as of the date of the use." 7/

III. PRIMACY OF FEDERAL LAW

Every phase and facet of these consolidated cases involves the Primacy of Federal Law - the Supreme Law of the Land. 8/ The Supremacy Clause reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

As will be emphasized, the Supremacy Law is a predicate for the primacy of the Federal law which, it is respectfully submitted, controls the ultimate disposition of these consolidated cases.

As part of the Supreme Law of the Land is the Commerce Clause which declares, among other things, that:

> "The Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." 9/

6/ Ibid., p. 850, l. 4-11; note 5, Memorandum, p. 2, para. III, l. 1

7/ Ibid., p. 850, l. 12-17; note 5, Memorandum, p. 2, para. IV, l. 8-12.

8/ U. S. Const., Art. VI, Cl. 2.

9/ U. S. Const., Art. I, Sec. 8, Cl. 3.

Repeatedly, the Commerce Clause, above quoted, has been referred to as a source of the plenary power of Congress over Indian affairs. 10/ Equally important is the fact that it is the Commerce Clause of the Constitution which gave rise to the concept - all important here - that the United States of America is the trustee and the Colville Confederated Tribes are the beneficiaries of that Constitutional trust. 11/ Another provision of the Constitution pertains to the plenary power of the Congress of the United States over the admission of states into this Union. 12/ That provision reads as follows: "New States may be admitted by the Congress into this Union...."

Pursuant to that clause of the Constitution, the admission of the State of Washington was subject to these conditions, among others:

> "The people inhabiting [the proposed State of Washington would] forever disclaim all right and title... to all lands lying within said limits owned or held by Indians or Indian tribes...." 13/

It was likewise specifically provided in that Enabling Act, conditioning the admission of the State of Washington into the Union, that until title to the Indian lands had been extinguished by the United States

> "... said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. 14/

Any doubt as to the conditions pursuant to which the State of Washington entered the Union are removed by the language of the "Compact With The United States" the State of Washington entered into when it adopted its constitution. Contained in that "Compact" is identically the same language as the conditions upon which the State of Washington was permitted to join the Union. Those conditions emphasized with great clarity the primacy and the supremacy of the laws of the United States and the powers of the United States vis-a-vis the State of Washington.

10/ Worcester v. Georgia, 31 U.S. 515 (1832).

11/ Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

12/ U.S. Const., Art. IV, Cl. 3, Sec. 3.

13/ Act of Feb. 22, 1889, Ch. 180, Sec. 4(2), 25 Stat. 676 [emphasis added].

14/ Id., [emphasis added].

It is Article IV, Section 3, Clause 2 of the United States Constitution that provides that:

> "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States...."

Although that power of the Congress over the properties of the United States has been recognized as being plenary, it has likewise been historically recognized that the power resides with the President of the United States to carve from the public domain Indian reservations. However, by reason of the Property Clause, it is important that there be Congressional recognition of any Indian reservation thus created by the Executive Branch of the National Government. 15/

Seventeen years before the State of Washington was admitted, in the year 1889, into the Union, President Grant created the Colville Indian Reservation on July 2, 1872. 16/ Relative to the Congressional recognition of the Colville Indian Reservation thus created, this all-important quotation from the Seymour decision is set forth:

> "Time and time again in statutes enacted since 1906, Congress has explicitly recognized the continued existence as a federal Indian reservation of this South Half or diminished Colville Indian Reservation." 17/

A. Indian Law - Federal Pre-Imminence Exemplified

From the brief review of the Constitutional provisions here involved in these consolidated cases, the Primacy of Federal Law has been exemplified. There is no area in the No Name Creek watershed in which the State of Washington may function. The National Government, since the formative days of this Union, has pre-empted the field of Indian affairs. 18/ Recently, the Supreme Court in its Oneida decision had this to say respecting the pre-emption by the United States relative to Indian lands: 19/

15/ See Arizona v. California, 373 U.S. 546, 559-601 (1963).
16/ Col. Ex. 2(3).
17/ Col. Ex. 2(10), Seymour v. Superintendent, 368 U.S. 351, 356 (1962).
18/ See Worcester v. Georgia, 31 U.S. 515, 556-557 (1832).
19/ See Oneida Indian Tribe v. County of Oneida, 414 U.S. 661, 667 (1974).

> "In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession."

Under the factual situation in these consolidated cases, this additional, most germane statement from Oneida is quoted:

> "There being no federal statute making the statutory or decision of law of the State of New York applicable to the reservation, the controlling law remained federal law; and, absent statutory guidance, the governing rule of decision would be fashioned by the federal law in the mode of the common law." 20/

The next phase of this consideration is directed to the subject matter of these consolidated cases - namely, the Winters Doctrine rights to the use of water of the Colville Confederated Tribes in the No Name Creek watershed.

B. Winters Rights To The Use Of Water In No Name Creek, Full Equitable Title To Which Resides In The Colville Confederated Tribes, Involves Federal Jurisdiction To The Exclusion Of The State Of Washington

Winters Rights To The Use Of Water In No Name Creek Are Not Subject To The Jurisdiction Or Control By The State Of Washington

It will be recalled that a primary issue in the Winters decision, both in the Ninth Circuit 21/ and the Supreme Court, 22/ reviewed extensively this question: Could Winters, whose claimed rights to the use of water were predicated upon the laws of the State of Montana, impinge upon the rights to the use of water reserved by the Fort Belknap Tribe by their treaty and agreement? Both the Court of Appeals for the Ninth Circuit and the Supreme Court rejected the contentions of Winters. They did so with great specificity and established the precedent that is controlling here.

20/ Id. at 674.

21/ Winters v. United States, 143 Fed. 740, 749 (1906).

22/ Winters v. United States, 207 U.S. 564, 576-7 (1908).

There is no challenge and there is no basis for challenging the principle of law that, when the United States of America, acting through the President, created the Colville Indian Reservation there were reserved for that reservation Winters rights to the use of water. That title to Winters rights to the use of water passed to the Colville Confederated Tribes at the time of the issuance of the July 2, 1872 Executive Order is free from doubt. In the Solicitor's Opinion of June 3, 1974, this important statement is made:

> "Congress has recognized the Colville Confederated Tribes' full equitable title to tribal lands within the Colville Reservation.... Such title, having vested in the tribes, cannot be taken except as clearly and specifically authorized by Congress." 23/

It is vital to this consideration and status of the title of the Colville Winters Doctrine rights to the use of water in the No Name Creek drainage area that the creation of the reservation, all as reviewed above, reserved not only the lands of the Colville Indian Reservation but also reserved water rights for that reservation, including but not limited to the No Name Creek drainage. 24/ In a controversy - not unlike this - involving conflicts with states of the Union admitted into the Union pursuant to similar conditions, as reviewed above, the Supreme Court of the United States had this to say:

> "In our view, these reservations, like those created directly by Congress, were not limited to land, but included water as well.... We can give but short shrift at this late date to the argument [of Arizona] that the reservations either of land or water are invalid because they were originally set apart by the Executive." 25/

That conclusion was predicated upon the primacy of the Constitution of the United States. On the subject in Arizona v. California, this controlling declaration is made:

> "They [decisions erroneously cited] do not determine the problem before us and cannot be accepted as limiting

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23/ Col. Ex. 2(12), Solicitor's Opinion, Opinion on the boundaries of and status of title to certain lands within the Colville and Spokane Indian Reservation, p. 9 and cited cases.

24/ Arizona v. California, 373 U.S. 546, 598-601 (1963).

25/ Ibid., at 546, 598.

> the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property." 26/

Continuing to underscore the primacy of Federal law in regard to Indian affairs, the Supreme Court in Arizona v. California further analyzed the federal-state-Indian relations relative to the Winters rights to the use of water of the character here involved. On the subject, the Supreme Court added these succinct statements:

> "Arizona also challenges the Master's holding as to the Indian Reservations on two other grounds: first, that there is a lack of evidence showing that the United States in establishing the reservations intended to reserve water for them; second, that even if water was meant to be reserved the Master has awarded too much water. We reject both these contentions." 27/

Reason for the "short shrift," the "rejection" of the state's contentions was summarized in these terms:

> "It is impossible to believe that... when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind--hot, scorching sands--and that water from the river would be essential to the life of the Indian people ... and the crops they raised." 28/

On the subject of the imperative need for water on reservations, similar to the Colville Reservation, in the arid and semi-arid regions of the west, the Supreme Court in Arizona v. California quoted the congressional recognition that water is life itself in the arid and semi-arid regions where most of the Indian reservations are situated:

> "'Irrigating canals are essential to the prosperity of these Indians. Without water there can be no production, no life....'" 29/

In anticipation of the comments subsequently to be made relative to the General Allotment Act of 1887 and particularly Section 7 of that Act - 25 U.S.C. 381 - reference is made to the fact that the quoted excerpt relative to the congres-

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26/ Ibid., 597-8. See Art. I, Sec. 8, Cl. 3, supra; Art. IV, Sec. 3, Cl. 2.
27/ Ibid. [Emphasis supplied]
28/ Ibid. at 598-9.
29/ Ibid. at 599.

sional knowledge of the need for water was made in 1865, twenty-two (22) years before the General Allotment Act. That congressional cognizance of the imperative need for water on the semi-arid reservations of the character of the Colvill Indian Reservation was pronounced twelve (12) years antecedent to the creation of the reservation in question. Judicial cognizance of the need for water to make habitable the Indian reservations and the states bordering on Canada, such as Montana and Washington, is likewise contained in the Winters decision that relates to the Fort Belknap Reservation of Montana. There the Supreme Court said this:

> "The lands were arid and without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the government." 30/

It is manifest that the three great branches of the Government of the United States of America - Executive, Legislative and Judiciary - have in the past and are now fully aware that the Colville Indian Reservation has

> an imperative need for water if the lands of that reservation including those within the No Name Creek drainage are to be made habitable.

C. In These Consolidated Cases, This Court Has Adopted And Applied The Concept Of The Primacy Of Federal Law - Pursuant To 25 U.S.C. 177, This Court Has Denied The Affirmative Defenses Under The Laws Of The State Of Washington In Regard To The Contentions Of Defendants Waltons

Repeatedly, reference has been made above to the plenary and exclusive authority of the National Government under the Supremacy Clause of the Constitution in regard to Indian affairs. That plenary and exclusive authority is applicable to the state laws in regard to the affirmative defenses of adverse possession, estoppel and laches. The Court of Appeals for the Ninth Circuit in the Ahtanum decision explicitly applied those concepts. On the subject, the Ninth Circuit said this:

30/ Winters v. United States, 207 U.S. 564, 576 (1908).

> "No defense of laches or estoppel is available to the defendants here for the Government as trustee for the Indian Tribe, is not subject to those defenses. Utah Power and Light Co. v. United States, 243 U.S. 389, 408-9; Cramer v. United States, 261 U.S. 219, 234; United States v. Walker River Irr. Dist., supra, p. 339." 31/

Continuing, the Court of Appeals in the Ahtanum decision said this in regard to the specific issues of the inapplicability of adverse possession, estoppel and laches in relation to Indian rights:

> "And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This, as pointed out, in United States v. 7,405.3 Acres of Land, 4 cir., 97 F.2d 417, 422, arises out of the provisions of Title 25, U.S.C.A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention." 32/

On March 21, 1978, this Court applied the well- and long-established precepts of the law that the "... defense of laches and estoppel is not available to the property owners in this case." 33/

It is significant that by thus rejecting the applicability of the affirmative defenses created by the laws of the State of Washington, this Court has accepted and applied the basic concept of the primacy of Federal law. It has effectively denied that the State of Washington or the laws passed by that State have any applicability to the rights to the use of water in No Name Creek. That ruling is of paramount importance by reason of the other issues pertaining to the State of Washington and likewise to the other issues pertaining to the plenary and exclusive control and authority of the Congress of the United States of America over all features and aspects of Indian affairs that arise in connection with these consolidated cases.

31/ United States v. Ahtanum Irr. Dist., 236 F.2d 321, 334 (CA 9, 1956), cert. den., 352 U.S. 988 (1956); 330 F.2d 897 (1965); 338 F.2d 307, cert. den. 381 U.S. 924 (1965).

32/ Ibid.

33/ Transcript, March 21, 1978, Vol. V, p. 893, l. 23 & 24.

D. Primacy Of Federal Law Precludes The Acquisition By Defendants Waltons Under The Laws Of The State Of Washington To Rights To The Use Of Water In No Name Creek

In the proposed Findings of Fact and Conclusions of Law filed by the Colville Confederated Tribes and the Pre-Trial Order of June 14, 1976, of this Court, there is set forth in detail these facts in regard to the attempts by the Defendants Waltons to acquire rights to the use of water in No Name Creek and No Name Creek groundwater basin by applying or attempting to apply the laws of the State of Washington. In that regard, reference is made to these facts:

1. The Defendants Waltons, by a deed dated August 24, 1948, acquired title from non-Indians to former Allotments 525, 2371 and 892. 34/

2. On August 24, 1948, the Defendants Waltons applied to the State of Washington for a permit for a surface diversion of No Name Creek water. 35/

3. On August 25, 1950, the State of Washington issued to Defendants Waltons a Certificate of Water Right purportedly authorizing Defendants Waltons to divert one cubic foot of water to irrigate 65 acres of land. 36/

4. In July 1975, the Defendants Waltons drilled an irrigation well in clear violation of the laws of the State of Washington, which they seek to have applied. 37/ The Waltons attempted to obtain a permit from the State of Washington for that irrigation well. The State of Washington denied that application. 38/

5. Irrespective of the refusal of the State of Washington to grant Defendants Waltons a permit to pump water from the No Name Creek groundwater basin, the Defendants Waltons continue to pump from that groundwater basin causing irreparable damage to the Colville Allotments 892 and 526, which overlie the predominant area of the No Name Creek groundwater basin. 39/

34/ See Pre-Trial Order, June 14, 1976, p. 7, para. 28(a)(b)(c), E--"The State Water Certificate," para. 31, l. 25 - p. 8, l. 17. See Proposed Findings of Fact and Conclusions of Law filed by the Colville Confederated Tribes, p. 15, l. 24 et seq.

35/ See Pre-Trial Order, June 14, 1976, p. 7, l. 25 et seq.

36/ See Defendants Waltons Ex. R-W; Pre-Trial Order, June 14, 1976, p. 8, para. 32 et seq.

37/ Revised Codes of Wash., Ann., Permit to Withdraw, 90.44:050; 90.03.260.

38/ See testimony, State of Washington's witness, Eugene Wallace, Supervisor of Water Resources and Management Development in the Office of Water Programs, State of Washington, Vol. XIII, p. 2742, l. 15-17; William Boyd Walton, Vol. XI, p. 2246-7.

39/ See Col. Ex. 6; Col. Ex. 8.

There is thus presented the anomaly of the Defendants Waltons, joined in these consolidated cases by the State of Washington, relying upon the laws of Washington, but acting in clear violation of those laws while officials of that State do not in anyway seek to enforce their laws which they know have been and are being violated. 40/

There is no need to reiterate and reaffirm the proposition that the State of Washington's admission into the Union was conditioned upon the waiver of any claim to Indian properties within the State of Washington. 41/ It cannot be emphasized too heavily, however, that the State of Washington, by the last-cited Enabling Act, specifically declared that:

> "[the properties of the Indian people of the character involved within the State of Washington]... shall remain under the absolute jurisdiction and control of the Congress of the United States." [Emphasis supplied]

On repeated occasions, the Court of Appeals for the Ninth Circuit has specifically declared and unequivocally ruled that the State of Washington has no jurisdiction over Indian properties within the State of Washington by reason of the conditions of the State's admission into the Union. 42/

In the Ahtanum decision, the Court of Appeals, in regard to a decision which originated in this Court, declared that the rights to the use of water on the Indian reservations "... are not subject to appropriation under state law, nor has the state power to dispose of them." 43/

Relative to the Flathead Indian Reservation in the State of Montana, the Court of Appeals for the Ninth Circuit again applied the Enabling Act pursuant to which the State of Montana was admitted into the Union. As previously noted, the States of Washington, North Dakota, South Dakota and Montana were all admitted

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40/ See testimony, State of Washington's witness, Eugene Wallace, Supervisor of Water Resources and Management Development in the Office of Water Programs, State of Washington, Vol. XIII, p. 2660; p. 2742, l. 5-17.

41/ See Act of February 26, 1889, Ch. 180, §§ 1 and 4(2).

42/ See United States v. Romaine, 255 Fed. 253, 260 (CA 9, 1919).

43/ United States v. Ahtanum Irr. Dist., 236 F.2d 321, 328 (CA 9, 1956), cert. den., 325 U.S. 988 (1956).

into the Union under the same explicit condition: They have no jurisdiction over Indian properties. On the subject, the Ninth Circuit said this:

> "Montana statutes regarding water rights are not applicable, because Congress at no time made such statutes controlling in the reservation." 44/

Recently in the decision of the Supreme Court in Antoine v. State of Washington, 45/ the full impact of the plenary power and control of the National Government vis-a-vis the State of Washington was reiterated and reaffirmed. Involved was the Agreement of May 9, 1891, pursuant to which the Colville Confederated Tribes were required by the United States to cede the northern portion of their reservation. Among other things that Agreement, ratified by Congress, provided that: 46/

> "ARTICLE 6. It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians... shall not be subject... to taxation for any purpose... that said Indians shall enjoy without let or hinderance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in commen [sic] with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."

The State of Washington arrested Alexander J. Antoine and his wife for hunting deer in violation of the laws of the State of Washington. Defense of the Antoines was that the above-quoted Article 6 rendered them immune from the laws of the State of Washington pursuant to which they were arrested.

In explicit terms, the Highest Court applied the principles of law in regard to the immunity of the Colville Indian property rights from the jurisdiction of the State of Washington. These are the terms which, when applied to the Defendants Waltons' Certificate of Water Right, render null and void and of no force and effect that certificate:

> "The decisions... settle that Congress, by its legislation ratifying the 1891 Agreement, constituted those

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44/ United States v. McIntire, 101 F.2d 650, 654 (CA 9, 1939).

45/ 420 U.S. 194, 197 (1975), included as Col. Ex. 2(11).

46/ Col. Ex. 2(4), Agreement of May 9, 1891. [Emphasis supplied]

> provisions, including Art. 6 'laws of the United States... in Pursuance' of the Constitution, and the supreme law of the land, 'superior and paramount to the authority of any State within whose limits are Indian tribes.'" 47/

The Supreme Court likewise declared in Antoine v. Washington:

> "State qualification of the rights is therefore precluded by force of the Supremacy Clause and neither an express provision precluding state qualification nor the consent of the State was required to achieve that result." 48/

Earlier, in the case of Seymour v. Superintendent, 49/ the State of Washington again challenged the powers of the National Government to create and maintain the Colville Indian Reservation free and clear and immune from the jurisdiction of the State of Washington. In clear and convincing and unequivocal terms, the Supreme Court again rejected any effort on the part of the State of Washington to intrude upon that reservation. It is worthy of note that the State of Washington seized upon the Act of 1906, subsequently reviewed, contending that the act of Congress obliterated and did away with the Colville Indian Reservation. That position was declared by the Court to be without merit. Again rejecting the claims of jurisdiction over the issues there involved, the Court said this:

> "Since the burglary with which petitioner was charged occurred on property plainly located within the limits of that reservation, the court of Washington had no jurisdiction to try him for that offense."

It is respectfully submitted that the repeated efforts of the State of Washington, as in the Walton case, to intrude upon the Colville Indian Reservation and to seize jurisdiction over the properties within the Colville Indian Reservation have been consistently rejected. The efforts of the State of Washington to intrude into the Walton cases should likewise be rejected, all as will now be reviewed.

47/ Antoine v. Washington, 420 U.S. 194, 197 et seq. (1975), included as Col. Ex. 2(11), Part II, pp. 6-11.

48/ Ibid.

49/ 368 U.S. 351, 359 (1962), included as Col. Ex. 2(10).

RENEWAL OF MOTION OF
THE COLVILLE CONFEDERATED TRIBES
FOR SUMMARY JUDGMENT
AGAINST THE STATE OF WASHINGTON

A Motion for Partial Summary Judgment, filed by the Colville Confederated Tribes, was noticed for a hearing on June 14, 1976. That Motion came on and was fully argued to this Court on July 12, 1976. When these consolidated cases were set for trial, all aspects of the Motion, save one, were stayed until the trial on the merits, which has now been completed. 50/

This Court has already granted a very important phase of the Motion for Partial Judgment, filed by the Colville Confederated Tribes. As reviewed above, this Court has declared that 25 U.S.C. 177 precludes the Defendants Waltons from successfully interposing against the Colville Confederated Tribes the affirmative defenses of adverse possession, estoppel and laches. 51/

At this junction in these proceedings, the Colville Confederated Tribes renew another aspect of their Motion for Partial Summary Judgment argued, all as stated above, on July 12, 1976. That aspect of the aforesaid Motion for Partial Summary Judgment is paraphrased as follows:

> The State of Washington has no jurisdiction over rights to the use of water in No Name Creek and the permit and Certificate of Water Right, issued by the State of Washington to the Defendants Waltons, are null and void and of no force and effect.

Reference at this juncture is made to the "Proposed Findings of Fact and Conclusions of Law" (Pre-trial submission of State of Washington). It is worthy of note that the State of Washington makes no reference to the partial summary judgment of the Colville Confederated Tribes. It is likewise worthy of note that the State of Washington offers no cases, authorities, indeed, arguments that would support the permit and Certificate of Water Right issued to the Defendants Waltons. It is understandable that no authorities or citations are offered by the State of Washington in support of its untenable position in these cases for there is no authority which supports its claimed jurisdiction. Indeed,

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50/ See Court's Order, September 16, 1977.

51/ See p. 12, supra., fn. 33, supra.

as reviewed above in explicit detail, the State of Washington was permitted to join the Union as a quasi-sovereign predicated upon the conditions that it would assert no claims over the Indians or over their properties. 52/

It is respectfully submitted that granting at this time to the Colville Confederated Tribes their motion for judgment against the State of Washington would have two salutory effects: One, it would eliminate further contesting with the State of Washington, which has totally failed to offer evidence or law in support of its alleged jurisdiction to issue the aforesaid permit and Certificate of Water Right. Two, it would eliminate from both of these cases, now consolidated for trial, the presence of the State of Washington, which has not contributed in anyway to a resolution of the issues so vastly important, to which reference will now be made, in regard to the Colville Confederated Tribes, the National Government and the Defendants Waltons.

PRIMACY OF FEDERAL LAW AS TO DEFENDANTS WALTONS CLAIM IN NO NAME CREEK INDEPENDENT OF THE CLAIMS PREDICATED ON THE LAWS OF THE STATE OF WASHINGTON

Throughout the trial on the merits of these consolidated cases, there has been continuously emphasized by the Colville Confederated Tribes the special status they occupy under the Federal law. Throughout, the Defendants Waltons have vigorously contested the claims of the Colville Confederated Tribes that the full equitable title to the rights to the use of water in No Name Creek and in No Name Creek groundwater basin has always resided, and at all time pertinent to this litigation now resides, in the Tribes. In no sense being captious with the Defendants Waltons, it is respectfully submitted, as will be emphasized, that they had a burden of proving that in some manner the Congress of the United States had divested the Colville Confederated Tribes of their Winters Doctrine rights to the use of water. The Defendants Waltons have failed to offer factual evidence or legal authorities that would in anyway support the claim that in some manner title to the rights to the use of water moved out of the Colville Confederated Tribes and presently resides in the Defendants Waltons.

52/ See p. 6, note 13, supra.

Having failed to sustain that burden, the Colville Confederated Tribes are entitled to have judgment declared and determined to reside in them to those rights to the use of water as against the Defendants Waltons.

Unique Status Of Colville Confederated Tribes Under Federal Law, The Primacy Of Which Is Controlling In These Consoldiated Cases

1. Presumption That Title Resides In Colville Confederated Tribes To Its Winters Rights In No Name Creek

In detail and with explicit specificity, the Colville Confederated Tribes have proved that on July 2, 1872, full equitable title to the Winters rights to the use of water in No Name Creek became vested in them. Neither the Defendants Waltons nor the Department of Justice or the State of Washington have presented substantial facts of law -- or, indeed, any facts or law -- which would support the assertions by the Defendants Waltons that title had moved out of the Colville Confederated Tribes and into the Defendants Waltons. It is an established precept of Indian law that cannot be successfully challenged that the title, once having been proved to reside in the Colville Confederated Tribes, is presumed to continue in the Tribes. Absent specific divestiture of that title by the United States of America, acting through the Congress, that full equitable title resides in the Colville Confederated Tribes, and cannot be successfully disputed. 53/ Predicated upon the well-established concept of law that the Colville Confederated Tribes had title vested in them and that that title continues to reside in them in regard to Winters rights to the use of water in No Name Creek, the acts of Congress, which are pertinent in that regard, and the concepts of law which are controlling will now be reviewed.

2. Special Act Of Congress Protects The Winters Rights To The Use Of Water Of The Colville Confederated Tribes -- 25 U.S.C. 381

Enactment of special legislation to protect the Colville Confederated Tribes and other Indian tribes against depredations by white claimants has

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53/ Mattz v. Arnett, 412 U.S. 481, 504 (1973); United States v. Celestine, 215 U.S. 278 (1908); Seymour v. Superintendent, 368 U.S. 351 (1962); Antoine v. State of Washington, 420 U.S. 194 (1975). The cases of Seymour v. Superintendent and Antoine v. State of Washington are included as Col. Ex. 2(10) and Col. Ex. 2(11).

long been upheld as a constitutional exercise of legislative authority. In the recent case of Morton v. Mancari, the Supreme Court said this in regard to special legislation favoring Indian Tribes:

> "On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique legal status is of long standing and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgment will not be disturbed. (Citations omitted)." 54/

Congress, by a special act - Section 7 of the General Allotment Act of 1887 - 25 U.S.C. 381, recognized the imperative need to provide water for Indians residing upon arid and semi-arid Indian reservations, similar to the Colville Indian Reservation. That act contains the special and protective features of the character reviewed above in Morton v. Mancari. This is the language of that frequently cited but never previously applied act of Congress:

> "... where... water... is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary
>
> > to secure a just and equal distribution [of the available water supply] among the Indians residing upon any such reservations...." 55/

Four things are abundantly manifest in regard to the specific language above quoted:

1. 25 U.S.C. 381 is the only language in the General Allotment Act of 1887 and the specific acts applying to the allotment of lands within the Colville Indian Reservation. 56/

2. 25 U.S.C. 381 is special legislation favoring "Indians" residing upon the Colville Indian Reservation. 57/

54/ See also Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 479-80 (1976); Fisher v. District Court, 424 U.S. 382, 390-1 (1976); Cf. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Williams v. Lew, 358 U.S. 217 (1959).

55/ 25 U.S.C. 381. [Emphasis supplied]

56/ Act of March 22, 1906 (34 Stat. 80), "... that the Secretary of the Interior be, and he is hereby authorized and directed... [to allot lands within the Colville Indian Reservation]."

57/ See Morton v. Mancari, supra.

3. 25 U.S.C. does not provide for a just and equal distribution of water among allottees but, rather, with great specificity, it declares that the available supply of water will be distributed on a just and equal basis "among the Indians residing upon" any reservation requiring water for the successful prosecution of agriculture.

4. 25 U.S.C. 381 excludes non-Indians.

Tenets of the law have been reviewed in detail as to:

1. The obligation of the Judiciary to apply the language of the statutes as written;

2. The Congress alone has the authority to legislate in regard to Indian affairs;

3. Judiciary, irrespective of whatever concepts it may have as to the desirability or the lack of desirability of applying the law as written, is nevertheless, under the separations of power in the National Government, obligated to search out and determine the will of Congress;

4. Where, as here, the language is explicit and clear, there is no room for interpretation;

5. A 1924 Attorney General's Opinion states this in regard to the established practices of upholding legislation favoring Indian people:

> "From the beginning of its negotiations with the Indians, the government has adopted the policy of giving them the benefit of the doubt as to the questions of fact or the construction of treaties and statutes relating to their welfare."
>
> Continuing, that Attorney General's opinion alludes to the fact that it has long been the policy of the United States of America, trustee, "...of safeguarding the Indians" and that policy "has been continuously adhered to. Treaties have been considered not according to their technical meaning but in the sense in which they would be naturally understood by the Indians." 58/

Reference is again made to the Solicitor's opinion of 4 June 1974 in regard to the Colville Indian Reservation boundary. There the concepts of statutory interpretation relative to statutes expressed in succinct and concise terms:

> "Similar support for this view of the Act stems from the well established principle that statutes affecting Indian interests are, where ambiguous, to be construed most favorably to the Indians." 59/

58/ 34 Op., Atty. Gen., 439, 444 (1924).

59/ E.g., Squire v. Capoeman, 351 U.S. 1, 6-9 (1956); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); United States v. Santa Fe Pac. R. Co., supra, 314 U.S. at 353-54; Choate v. Trapp, 224 U.S. 665, 675 (1912); Cherokee Inter-marriage cases, 203 U.S. 76, 94 (1906) -- Col. Ex. 2(12), p. 20.

Of overriding importance here is this fact: 25 U.S.C. 381 - the controlling provision of the General Allotment Act of 1887 - is clear; its provisions are not in any sense ambiguous; its objective is clear -- "just and equal distribution of" a short water supply among "Indians residing," in this case, on the Colville Indian Reservation. Non-Indians are excluded from participating in that short water supply -- Defendants are non-Indians, ergo, they are not legally entitled to participate in any of the waters of No Name Creek.

Defendants Waltons have cited no facts -- there are none; Defendants Waltons have cited no law -- there is none -- to support their claims that in some manner, the Colville Confederated Tribes were:

1. Deprived of their Winters Doctrine rights to the use of water, which passed to them on July 2, 1872, upon the creation of their reservation; 60/

2. Nowhere have the Defendants Waltons even remotely indicated that, in some manner, the rights to the use of water residing in the Colville Confederated Tribes were stripped from the Tribes and water sufficient to irrigate the Defendants Waltons' lands was conveyed to the Defendants Waltons.

There are controlling precepts of the law respecting the application of the express language of a statute when that language is clear and explicit, as set forth in 25 U.S.C. 381. 61/

Perhaps the most elemental principle of the law, relative to statutory construction, has been stated by the Supreme Court in these terms:

> "Where the language [of a statute, as in 25 U.S.C. 381] is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion." 62/

Another precept of statutory construction is contained in this Latin maxim: Expressio unius est exclusio alterius, 63/ as declared in the last-cited

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60/ See Review of Winters Doctrine, pp. 8-11, supra.

61/ See Colville Memorandum of March 12, 1978, filed with this Court, entitled "Reiteration Of Plaintiff Colville Tribes' Motion For Partial Summary Judgment And Response To Memorandum Of Points And Authorities In Support Of Plaintiff, United States' Motion For Partial Summary Judgment, p. 16, l. 3 - p. 18, l. 13.

62/ Caminette v. U.S., 242 U.S. 470, 485 (1916). See abundance of authority on principle quoted, 2A Sutherland Statutory Construction, 4th Edition Text and Commentary, sec. 45.02, pp. 4 et seq.

63/ 2A Sutherland Statutory Construction, 4th Ed., sec. 47.23.

authority:

> "... the maxim is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions." 64/

Most recently, the courts have reiterated and reaffirmed their adamant refusal to depart from the express language of the law, as enunciated by the Congress. A leading case, reviewing the necessity of the courts to abide with the express letter of the law as passed by Congress, contained these controlling statements:

> "The meaning and spirit of the Act are clear on its face. We need not refer to legislative history to rationalize our independent assessment of its impact."

Continuing, that court re-emphasized the limits of the judicial power with these terms:

> "As a court we cannot countenance such patent usurpation of legislative authority. Nor will we expurgate an important federal policy statute...."

The decision in question then alluded to another recent case from which this statement is quoted:

> "We are fully in accord with the 4th Circuit's view, in West Virginia Division of Izaak Walton League of America, Inc. v. Butz, that:
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> "Economic exigencies... do not grant courts a license to rewrite a statute no matter how desirable the purpose or result might be.... [T]he appropriate forum to resolve this complex and controversial issue is not the courts but the Congress. 522 F.2d 945, 955 (4th Cir. 1975)." 65/

In another recent decision, these additional, very pertinent principles of statutory construction are taken:

> "'If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history."

The Court then continued with this statement:

> "We are not insensitive to the fact that our reading of the Organic Act will have serious and far-reaching

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64/ Id.
65/ Hill v. TVA, 549 F.2d 1064, 1072, 1073-4 (CA 6, 1977).

> consequences, and it may well be that this legislation enacted over seventy-five years ago is an anachronism which no longer serves the public interest. However, the appropriate forum to resolve this complex and controversial issue is not the court but the Congress."

The decision then proceeded to add this concept:

> "The controlling principle was stated in United States v. City and County of San Francisco...:
>
> "Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress.'" 66/

It is respectfully submitted that the Supreme Court in the San Francisco decision enunciated what it is believed the law in these consolidated cases should be relative to the meaning of 25 U.S.C. 381. Congress has plenary and exclusive control of Indian affairs within the National Government. 67/ It is not for the courts to usurp the powers of the Congress of the United States in regard to the plenary power of the legislative body. Congress has declared, in 25 U.S.C. 381, that the Secretary of the Interior is authorized to provide a "just and equal distribution" of No Name Creek water among the Indians upon the Colville Indian Reservation.

Predicated upon the precepts of statutory construction, it is manifest that 25 U.S.C. 381 - the only act here involved - continues to maintain title in the Colville Confederated Tribes of their invaluable Winters Doctrine rights to the use of water and to provide that those invaluable Winters Doctrine rights to the use of water of the Colville Confederated Tribes may be distributed on a just and equal basis "among Indian residing" on the Colville Indian Reservation. The fact that the Secretary of the Interior has not envoked that power is academic. It is manifest beyond doubt that there can be no vested rights in any

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66/ West Virginia Division of Izaak Walton League of America, Inc., et al., Appellees v. Earl L. Butz, Secretary of Agriculture of the United States, et al., Appellants, 522 F.2d 945, 955 (CA 4, 1975).

67/ See note 61 , supra, p. 2 et seq.

Indian allottee if the Secretary of Interior has the power to distribute water "among Indians" residing on the reservation. A vested right could not be taken from an allottee and utilized on the basis of a "just and equal distribution." Hence, it is manifest that it was intended that the allottee would receive land without rights to the use of water but that he would be entitled, as an Indian residing on the reservation, to participate in a just and equal distribution of the water. Applying those concepts to the No Name Creek watershed is extremely interesting. Due to the shortage of water, it is clear beyond question that the upper allotments, 526 and 892, could deplete entirely the flow of water that is imperatively needed for Allotments 901 and 903 that are located below the Defendants Waltons. Hence, the Congress, in its wisdom, has declared that no single allottee would have a vested right to monopolize and utilize the waters, thus drying up his neighbor's allotment. Any other interpretation of 25 U.S.C. 381 would devastate the developments of the kind that were made by the Colville Confederated Tribes when they established the Colville Irrigation Project. 68/

Reference is made to the contention in the Pre-Trial Order of Defendants Waltons that the Colville Confederated Tribes have a priority in No Name Creek as of 1956. No mention has been made by the Defendants Waltons throughout the trial on the merits or, indeed, is there any reference in briefs that have been filed by the Defendants Waltons relative to their contention in the Pre-Trial Order that:

> "24. Waltons' vested water right is of equal priority with that of other allottees in the basin and superior or paramount to that of the Colville Tribe whose claim is tied to water appurtenant to the undisposed (surplus) lands restored in 1956 'subject to all existing valid rights."

Again Defendants Waltons have cited congressional acts having no bearing on these consolidated cases. There were no surplus lands in the No Name Creek watershed, to which Section 3 of the Act of March 22, 1906 69/ would have

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68/ For location of Allotments 526, 892, 901 and 903, which are within the service area of the Colville Indian Reservation, please refer to Col. Ex. 8. From that exhibit, it is manifest that the upstream allottees would be deprived of all water if there was not a provision for just and equal distribution of water to them in their downstream location.

69/ Col. Ex. 2(7).

application. That section related only to lands which had not been allotted and were "surplus." The Defendants Waltons have pointed to no such lands in the No Name Creek Valley and, indeed, there are none. Hence, neither the Presidential Proclamation of May 3, 1916, 70/ nor the Congressional Act of 1956, 71/ restoring surplus lands to the Colville Confederated Tribes, have application in any way to the rights to the use of water, which are the subject matter of this case and are here for adjudication by this Court.

The authorities cited by the Defendants Waltons have no bearing on the issues in these consolidated cases.

Throughout these proceedings, the Defendants Waltons have continuously cited, in error, numerous decisions, which, once again, will be reviewed and the lack of merit in them exposed by the Colville Confederated Tribes. 72/

United States v. Powers 73/

Repeatedly, the Defendants Waltons have relied upon the Supreme Court decision in the case of United States v. Powers. Brief reference will be made to the Powers case. The Powers decision is totally irrelevant here. Ignored by the Defendants Waltons and the Department of Justice, both of whom rely upon Powers, is the fact succinctly stated by the Highest Court:

> "The decree of the Circuit Court of Appeals [Ninth Circuit] dismissing the bill must be affirmed." 74/

Simply stated, there was nothing determined in Powers; there was nothing decided in Powers other than that the Federal District Court did not have jurisdiction, all as declared and determined by the United States Court of Appeals for the Ninth Circuit, the decision of which was affirmed by the Supreme Court. 75/ It is important, however, in distinguishing Powers from Colville v. Walton that repeatedly, the Supreme Court, in its dictum in Powers, alluded to the Crow Indian

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70/ Col. Ex. 2(8).
71/ 70 Stat. 626, 627.
72/ See Defendants Waltons' Proposed Findings of Fact & Conclusions of Law, p. 15 et seq.
73/ 305 U.S. 527 (1939).
74/ Ibid. at 528.
75/ See United States v. Powers, 94 F.2d 783 (CA 9, 1939).

Treaty of May 7, 1868. 76/ For easy reference, a copy of the Crow Treaty is attached to the Colvilles' Memorandum dated March 12, 1978. 77/ Provision, as Powers points out in its dictum, is made in the Crow Treaty by Article 6, which, among other things, provides that a head of a family may request land under the Treaty for the purpose of farming. Predicated on that Treaty provision, the Supreme Court, as part of its obiter dictum, says this:

> "We do not consider the extent or precise nature of respondent's [Powers] rights in water."

Let it be respectfully emphasized that: Powers did not rely upon 25 U.S.C. 381 other than to observe, by way of dictum, that 25 U.S.C. 381 provides for the distribution of water among Indian residing on the reservation; that the Secretary of the Interior had not exercised the authority conferred upon him by 25 U.S.C. 381. 78/

Nowhere have the Defendants Waltons purported to state the extent or nature of their claims. Basically, nevertheless, it is reiterated and reaffirmed that the Powers case cannot be successfully relied upon by either the Defendants Waltons or the Department of Justice in these consolidated cases.

United States v. Hibner 79/

Reference throughout these consolidated cases has been made by both the Defendants Waltons and the Department of Justice to the Hibner decision. There is not the remotest relationship between Hibner and these consolidated cases. In the Colville Confederated Tribes' Proposed Findings of Fact and Conclusions of Law, that matter is emphasized. 80/ There the fact that the allotments

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76/ 305 U.S. 528 (1939).

77/ Reiteration of Plaintiff Colville Confederated Tribes' Motion for Partial Summary Judgment and Response to Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment. See Exhibit A, Treaty with the Crows, 1868, in particular, Art. VI, which is attached to this Memorandum. (Memorandum, dated March 12, 1978.)

78/ 305 U.S. 528 (1939).

79/ 27 F.2d 909 (D.C. Ida. E.D. 1928).

80/ See p. 51, l. 28 et seq., Proposed Findings of Fact & Conclusions of Law. There the reference is made to the unique facts involved in Hibner.

involved in Hibner were outside of any Indian reservation is underscored. Lands surrounding the allotments outside of the reservations had previously been ceded and state law controlled those lands. It is worthy of note, moreover, that the uses of water on those allotments outside of the Indian reservation were subject to an agreement similar to that in Antoine. 81/

It is also important to allude to the fact that the lands in question in Hibner were originally embraced within the 1868 Treaty between the Shoshone-Bannock Tribes and the United States. Terms of the Shoshone-Bannock Treaty and Article 6 of it, which provides for the allotment of lands to heads of families desiring to go into farming, is virtually identical with the language of the Crow Treaty discussed above.

Once again it is pointed out that the Colville Confederated Tribes did not have a treaty of that nature and, most assuredly, have nothing of the character of Article 6 of the Shoshone-Bannock Treaty, that would apply to the Colville Indian Reservation. Additionally, the Hibner case turned upon the specific language of an agreement entered into between the Shoshone-Bannocks and the United States ceding the lands to the United States which surrounded the allotments involved in Hibner. Again, for easy reference, that agreement and the Shoshone-Bannock Treaty were attached to and made a part of the Memorandum of March 12, 1978, of the Colville Confederated Tribes responding to the Motion for Partial Summary Judgment filed by the United States. 82/

United States v. Alexander 83/

United States v. Alexander is another case relied upon by the Defendants Waltons which has no application to these consolidated cases. In Alexander, the United States initiated an injunction suit against Alexander and others

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81/ See p. 15 supra. See Antoine v. Washington, Col. Ex. 2(11); see also Col. Ex. 2(4), Agreement of May 9, 1891, Art. 6, where the rights of hunting and fishing which, together with the rights to the use of water, were reserved beyond the purview of the jurisdiction of the State of Washington, all as declared by the Supreme Court in Antoine.

82/ See note 77, supra.

83/ 131 F.2d 359 (CA 9, 1942).

situated within the Flathead Indian Reservation in Montana. The United States failed to prove irreparable damage and thus the trial court denied the petition for an injunction. The Court of Appeals affirmed. The Court of Appeals for the Ninth Circuit alluded to a statute which was unique to the federal reclamation project constructed on the Flathead Indian Reservation. That statute provided that the Indian allotments would be "... deemed to have a right to so much water as might be required to irrigate their lands...." 84/ Manifestly, Alexander has not the remotest relationship to the facts in these consolidated cases. It cannot in anyway support the claims of the Defendants Waltons.

Anderson v. Spear-Morgan Livestock Co., et al. 85/

In the Anderson v. Spear-Morgan Livestock Co. case, the Supreme Court of the State of Montana dismissed all the claims to rights to the use of water on the Crow Indian Reservation. That dismissal was predicated upon the immunity of the National Government from suit. Once again, reliance upon Spear-Morgan is wholly erroneous. There is no basis whatever for attempting to apply a case that has been dismissed to these consolidated cases. Quite obviously, the obiter dictum in Anderson v. Spear-Morgan Livestock Co. is not helpful to this Court nor is it helpful to do other than to blur the specific issues here involved: What rights, if any, do the Defendants Waltons have in the flow of No Name Creek?

"Handbook of Federal Indian Law" 86/

Reference has been made by Defendants Waltons to the Handbook of Federal Indian Law. Like Defendants Waltons, the Handbook has relied upon the obiter dictum of Powers, Alexander and Spear-Morgan and others. There is no justification for that reliance by the Handbook of Federal Indian Law. That Handbook is obviously in error in regard to its reliance upon those cases. Quite obviously, the quotations set forth there are obiter dictum, to which reference has been made. Accordingly, it is reiterated and reaffirmed that the Defendants Waltons have failed factually and legally to support their claims and thus to sustain the burden of proof which resides upon them.

84/ Ibid. at 360.
85/ 107 Mont. 18, 79 P.2d 667 (1938).
86/ 1945 Printing.

DECREE SHOULD BE ENTERED QUIETING THE TITLE OF THE COLVILLE CONFEDERATED TRIBES AGAINST THE ADVERSE CLAIMS OF THE DEFENDANTS WALTONS

A. Defendants Waltons Knew, When They Acquired Their Lands, They Did Not Acquire With Those Lands Rights To The Use Of Water In No Name Creek

Defendants Waltons knew that they had not acquired rights to the use of water when they purchased the undeveloped, former Indian allotments from non-Indians; they knew the price they paid was not for lands with rights to the use of water. These sequences are important and support this contention:

> The Defendants Waltons acquired title to their undeveloped lands on August 16, 1948; and
>
> Eight days later on August 24, 1948, the Defendants Waltons undertook to acquire a right to the use of water from No Name Creek by filing their application for a permit from the State of Washington.

Hence, they demonstrated they knew they did not acquire a right to the use of water as part and parcel to their lands when they acquired title to the lands. They tacitly acknowledge that the lands that they acquired, similar to homestead lands, did not carry rights to the use of water. 87/

B. The Colville Confederated Tribes Proved Their Prima Facie Case

The Colville Confederated Tribes have proved their prima facie case in support of their claimed Winters rights to the use of water in No Name Creek. That proof included, but is not necessarily limited to, the Executive Order creating the Colville Indian Reservation. 88/ As previously emphasized above, the Executive Order of July 2, 1872, vested in the Colville Confederated Tribes full equitable title to those Winters rights to the use of water. 89/

There has been reviewed in depth the want of authority in the State of Washington to grant to the Defendants Waltons a valid Certificate of Water Right. 90/ Previously, the Colville Confederated Tribes have moved for a

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87/ See Pre-Trial Order, p. 7, paras. 28 (a)(b)(c) and 30, l. 1-23.
88/ See Col. Ex. 2(3).
89/ See Review of Winters Doctrine, p. 8, supra.
90/ See p. 6, supra.

partial summary judgment declaring that the aforesaid "Certificate of Water Right" issued from the State of Washington to the Waltons is null and void and of no force and effect. 91/

Additionally, it is to be noted the prior, superior and paramount Winters Doctrine rights to the use of water of the Colville Confederated Tribes have a priority of July 2, 1872. Accordingly, it is manifest that, if the "Certificate of Water Right" awarded to the Defendants Waltons by the State of Washington had any validity - which is denied - the Defendants Waltons' priority is a minimum of three-quarters of a century junior to the prior, superior and paramount rights of the Colville Confederated Tribes. Hence it is in times of shortage, the Colville Confederated Tribes are entitled to exercise all of the rights to the use of water and to leave the Defendants Waltons without any rights to the use of water, other than that to which the Colville Confederated Tribes have agreed to, all as set forth in the Preliminary Injunction, which is set down for hearing on June 16, 1978.

C. Defendants Waltons Had The Burden Of Proof - They Failed To Sustain That Burden

There has been reviewed in detail the special obligation of the Congress of the United States of America to the American Indians, including the Colville Confederated Tribes. Predicated upon the Constitutional authority, the Congress of the United States acts with a primacy under the Supremacy Clause of the Constitution, which pre-empts all right and authority from the State of Washington. Moreover, this Honorable Court, in its granting of a partial summary judgment to the Colville Confederated Tribes, pursuant to 25 U.S.C. 177, has recognized that the laws of the State of Washington have no application to the Colville Confederated Tribes. As reviewed above, this Court has denied that the affirmative defenses of adverse possession, estoppel, laches and similar defenses are not available to the Defendants Waltons against the Colville Confederated Tribes by reason of the fact that the Constitution has authorized the pre-emption

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91/ See p. 17, et seq., supra.

by the Congress of the United States, as it has done in 25 U.S.C. 177, to preclude the operation of state law when the Congress so desires.

Enacted in 1834, the Act of Congress, 25 U.S.C. 177, has been operative down through the years. A companion section, enacted at the same time as 25 U.S.C. 177, is 25 U.S.C. 194. That section of that Act of Congress is as follows:

> "§ 194. Trial of right of property; burden of proof
>
> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." 92/

Relative to the above-quoted 25 U.S.C. 194, the 1924 Attorney General's Opinion uses that section as an example of a long-established practice of safeguarding Indian rights:

> "From the beginning of its negotiations with the Indians, the Government has adopted the policy of giving them the benefit of the doubt as to the questions of fact or the construction of treaties and statutes relating to their welfare. An illustration of this is found in section 2126 of the Revised Statutes (Act of June 30, 1834, 4 Stat. 733) [25 U.S.C. § 194]...."

It is unquestionable that these consolidated cases do pertain to "the right of property in which an Indian may be a party on one side." Not only are the Colville Confederated Tribes involved in these proceedings, but the allottees for Allotments 892, 901 and 903 have joined in these proceedings and have requested the Colville Confederated Tribes to represent them in these proceedings. It is respectfully submitted that the Colville Confederated Tribes themselves are entitled to invoke 25 U.S.C. 194, placing the burden of proof upon the Defendants Waltons. Moreover, by reason of the arrangement between the allottees and the Colville Confederated Tribes, there is no question that it is totally appropriate to invoke the provisions of 25 U.S.C. 194, placing upon the Defendants

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92/ See 22 of the 1834 Indian Non-Intercourse Act, Act of June 30, 1834, 4 Stat. 733, upon which 25 U.S.C. 194 is based, is derived from a similar provision in an 1822 Non-Intercourse Act. See Act of May 6, 1822, sec. 5, 3 Stat. 683.

Waltons the burden of proving that they have title. It is respectfully submitted that the Colville Confederated Tribes, having proved their prima facie case, and the Defendants Waltons, having failed to offer a single authority in support of their claimed rights to the use of water as being part and parcel to their land, the Colville Confederated Tribes are entitled to have a decree quieting their title to the rights to the use of water against the Defendants Waltons, all as prayed for.

THE COLVILLE CONFEDERATED TRIBES ARE ENTITTLED TO HAVE ENTERED AGAINST THE DEPARTMENT OF JUSTICE PARTIAL SUMMARY JUDGMENTS

When the Department of Justice, acting on its own volition, initiated the case of United States v. Walton, Civil No. 3831, it undertook to deprecate the title of the Colville Confederated Tribes to the Winters Doctrine rights to the use of water in No Name Creek. There are several aspects of the approach taken to the issues in these consolidated cases which entitle the Colville Confederated Tribes to summary judgments against the position taken by the Department of Justice in these cases. Those partial summary judgments, to which the Colvilles are entitled, pertain to the authority of the Secretary of the Interior, all as will be reviewed.

A. Vis-A-Vis The Colville Confederated Tribes, The Secretary Of The Interior Does Not Have Exclusive Jurisdiction Over The Waters Of No Name Creek

There was fully argued on July 12, 1976, a motion for partial summary judgment against the position taken by the Department of Justice that the Secretary of the Interior had "exclusive jurisdiction" under 25 U.S.C. 381 to (a) control, (b) administer, and (c) allocate the waters of No Name Creek. The Department of Justice denied that the Colville Confederated Tribes had any authority to administer, control or allocate water on allotted lands, formerly allotted lands or tribal lands. 93/

93/ See Motion dated June 6, 1976, p. 4, l. 26 et seq., for Partial Summary Judgment filed by the Colville Confederated Tribes.

This Court is respectfully requested to grant that motion for partial summary judgment. Indeed, the Department of Justice apparently now agrees with the Colville Confederted Tribes that the Secretary of the Interior does not have exclusive jurisdiction -- as against the Colville Confederated Tribes -- in the control, administration and allocation of the waters of No Name Creek, as originally contended when the Department of Justice initiated the case of United States v. Walton on March 15, 1973. 94/

Pragmatically, the position taken by the Department of Justice in regard to the "exclusive jurisdiction" of the Secretary of the Interior under 25 U.S.C. 381 is patently in error. The Secretary of the Interior has never exercised the authority provided for in that Act of Congress. Rather, as Chairman Melford C. Tonasket and Councilmember Lucy F. Covington have testified, there is a void, a vacuum on the Colville Indian Reservation due to the inability of the Secretary of the Interior to act. Accordingly, the Colville Confederated Tribes adopted the Colville Water Code, which is filling that vacuum, and the Colville Business Council is exercising full power and authority to administer, allocate and control the water resource on the Colville Indian Reservation including, but not limited to No Name Creek. 95/

B. The Colville Confederated Tribes Are Entitled To Have A Partial Summary Judgment Against The Department Of Justice, Which In Error Asserts That The Secretary Of The Interior May Allocate Water Under 25 U.S.C. 381 To The Defendants Waltons

Additionally, and very much a part of the request for a partial summary judgment against the Department of Justice, all as set forth above, is the erroneous assertion of the Department of Justice that the Secretary of the Interior is empowered under 25 U.S.C. 381 to allocate water to Defendants Waltons. There has been reviewed with great specificity not only the language of 25 U.S.C. 381, but the controlling precepts of statutory interpretation, which

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94/ See Department of Justice "Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment," filed March 1, 1978, p. 32, l. 10 et seq.

95/ See Transcript, Chairman Tonasket, p. 222, l. 21 et seq., Vol. II; Lucy Covington, Vol. II, p. 304, l. 16 et seq.

belie the assertions of the Department of Justice that the Secretary of the Interior is empowered to allocate water to the Defendants Waltons. As emphasized, the language of the statute relates strictly to the allocation of water to the "Indian residing" on the Colville Indian Reservation. The Defendants Waltons are not Indians and, hence, they do not come within the purview of the statute -- indeed, they are explicitly excluded from operation of that statute. 96/ Accordingly, this Honorable Court is requested to enter partial summary judgment in favor of the Colville Confederated Tribes denying that the Secretary of the Interior has the power to allocate water to the Defendants Waltons, as asserted by the Department of Justice in the case of United States v. Walton.

C. The Colville Confederated Tribes Respectfully Request This Court To Enter Judgment That The Title To The Winters Doctrine Rights To The Use Of Water In No Name Creek Continues To Reside In The Colville Confederated Tribes

As reviewed above, the Colville Confederated Tribes have proved that title to their Winters rights to the use of water became vested in them on July 2, 1872, when the Executive Order created their reservation. Congress has not divested the Tribes of their Winters rights to the use of water. Congress alone has that power. It has not exercised that power. Indeed, the only act pertaining to the use of water and the distribution of water from No Name Creek is 25 U.S.C. 381. That Act specifically protects the Colville Confederated Tribes in their title to their Winters Doctrine rights to the use of water. Admittedly, the members of the Colville Confederated Tribes, residing on the reservation, are entitled to a just and equal distribution of the waters that are available. However, that did not and could not constitute a divestiture of title in the Colville Confederated Tribes. As reviewed above, Congress must declare specifically if it is going to seize, confiscate or take by imminent domain any title to properties residing in the Indian nations, tribes or people. 97/

Of extreme importance to this Honorable Court and to the Colville Confederated Tribes are these facts demonstrated by the trial on the merits:

96/ See cited authorities at p. 10, l. 26; p. 19, l. 25, et seq., supra.

97/ See note 53, p. 19, supra.

Neither the Department of Justice, the State of Washington nor the Defendants Waltons have offered a shred of evidence, a word of decisional precedence or a convincing analysis of the law that would support the divestiture of the Winters Doctrine rights to the use of water which originally were vested in the Colville Confederated Tribes, at least as early as July 2, 1872. The burden resided with them to demonstrate that the Colville Confederated Tribes had, in some manner, been deprived of the rights originally vested in them. Each of the parties alluded to above have failed to sustain their burden of proving that the Colville Confederated Tribes were deprived of their Winters Doctrine rights to the use of water; hence, the Colville Confederated Tribes are entitled to the judgment that the Tribes do, in fact, continue to hold title to those rights to the use of water.

Accordingly, this Honorable Court should enter a partial summary judgment declaring that the Secretary of the Interior is not empowered — the Congress has not empowered the Secretary of the Interior — to take from the Colville Confederated Tribes their invaluable Winters rights to the use of water and to allocate those rights or any part of them to the Defendants Waltons.

D. There Should Be Denied These Aspects Of The Department Of Justice Motion For Partial Summary Judgments Against The Colville Confederated Tribes

In error, the Department of Justice contends against the Colville Confederated Tribes, in violation of this Nation's trust obligation owing to the Tribes and of the vested Winters Doctrine rights of the Colville Confederated Tribes, that:

> At the time of transfer of Indian allotted land to non-Indian ownership, the non-Indian, as a matter of law, is entitled to the right to the use of whatever quantity of water was being utilized by the previous Indian allottee when the land was removed from trust status and this water right should have a priority date as of July 2, 1872, when the Colville Indian Reservation was created. 98/

98/ Transcript, Feb. 10, 1978, Vol. IV, p. 850, l. 1-11; Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 2, paragraph (3), l. 1-7.

There are no authorities which support the violation of the full equitable title of the Colville Confederated Tribes in the manner proposed by the Department of Justice. At no time has any court declared, under the circumstances that prevail in this case, that the Defendants Waltons are entitled to acquire a right to the use of water to the extent that water was being used at the time the lands were transferred out of Indian ownership. Hibner has been cited by the Department of Justice in support of their erroneous concepts. 99/

There has been reviewed with specificity and in detail the wide disparity of the facts in the Hibner decision with the facts of the case of Colville v. Walton or the case of United States v. Walton. As emphasized above, there were unique provisions of the Shoshone-Bannock Treaty providing for the acquisition of land for purposes of irrigation. Provision was made for the ceding of the lands in question in the Hibner case, which lands were outside of the reservation. And, finally, there was a specific proviso in regard to the rights to the use of water of those allotments, which were outside of the Treaty created by the Shoshone-Bannock. 100/ To distort the principles there enunciated and to inject into these consolidated cases the concept of Hibner, which has never previously been applied, is to ask this Court to commit a grave error; to violate the invaluable Winters Doctrine rights of the Colville Confederated Tribes; and to bring about a clear violation of the trust obligation owing by the United States of America to the Colville Confederated Tribes. It is respectfully submitted that the motion for partial summary judgments by the Department of Justice should not be countenanced by this Honorable Court.

Similarly, the Department of Justice has relied upon the Powers decision and, like its misapplication of the concepts of the Hibner case, the Department of Justice has likewise failed properly to consider the facts of that case. In its Memorandum of Points and Authorities supporting the violation of the Winters rights to the use of water of the Colville Confederated Tribes, the Department of Justice reviews at some length the language of Powers. What the

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99/ Ibid., p. 19, l. 12 - p. 21, l. 6.
100/ See p. 26, supra, et seq.

Department of Justice did not do -- and should have done -- was to admit to this Court that the Powers decision is strictly obiter dictum. That case, as outlined above, was dismissed, for want of jurisdiction, by the Court of Appeals for the Ninth Circuit and, in specific words, that dismissal was approved by the Supreme Court. Once again, though, it is reiterated and reaffirmed that if there is any merit to the obiter dictum of the Powers decision, that obiter dictum is predicated upon the language of Section 6 of the 1868 Treaty of the Crow Indians, whose reservation was involved in the Powers case. There is no relationship between the factual situation in Powers and the facts and the law involved in these consolidated cases.

Accordingly, as was reviewed above, the petition of the Department of Justice for a summary judgment against the Colville Confederated Tribes should be denied.

E. Once Again, In Error, The Department Of Justice Has Requested A Partial Summary Judgment Against The Colville Confederated Tribes On The Grounds That

> "Following the transfer of land from Indian to non-Indian ownership, the successor's right to the use of water is, as a matter of law, predicated upon the application of water to a beneficial use upon the lands with a priority as of the date of such use." 10/

Congress has at no time declared that the Colville Confederated Tribes must share their rights to the use of water with non-Indian claimants who have initiated the use of water without any right upon the lands within the Colville Indian Reservation. As has been stated in regard to the Hibner and Powers decision immediately above, those decisions are, in no way, support for the claim that, in some manner, the Defendants Waltons acquired a right to use water by the diversion and application of it to the formerly allotted lands that they acquired in August of 1948. To recognize that a right has become vested in the Defendants Waltons is tantamount to grave prejudice against the Colville

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10/ See Transcript, February 10, 1978, Vol. IV, p. 850, l. 12-17. See also Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, page 2, paragraph (4) at lines 8-12.

Confederated Tribes. At most, the diversion and use of water by the Defendants Waltons is at sufferance and, under no circumstances, could there be a right vested in the Defendants Waltons, as has been declared by the Department of Justice.

Accordingly, the Colville Confederated Tribes respectfully petition this Court to deny the partial summary judgment prayed for by the Department of Justice in regard to this phase of the request of the Colville Confederated Tribes for a decree quieting its title to the invaluable Winters Doctrine rights to the use of water in No Name Creek.

F. The Colville Confederated Tribes Are Entitled To Have Denied The Petition For Partial Summary Judgment Against Them As Prayed For By The Department Of Justice In Regard To This Erroneous Contention By The Department Of Justice:

> "The allotment of lands on the Colville Indian Reservation pursuant to the General Allotment Act of 1887 (24 Stat. 388; 25 U.S.C. 331 et seq.) vests each allottee of land with the right to the use of waters necessary for the allottee's needs with a priority date as of the creation of the... [Colville Indian Reservation, July 2, 1872]." 102/

In error, the Department of Justice has requested that the General Allotment Act be construed as having vested in each allottee the quantity of water "necessary for the allottee's needs...." Manifestly, that is a practical impossibility. In the arid and semi-arid west, there can be no such an allocation. The needs of the lands of each allottee, in many instances, would equal or surpass the available supply of water. Pragmatically, reference is made to the irrigable acreages on Colville Allotment 526, which is 61.8 irrigable acres. On Colville Allotment 892, the irrigable acreage is 57.9. 103/ It is abundantly manifest that if Allotments 526 and 892, referred to above, were awarded by the Congress -- something that did not happen -- a right to the use of water to the extent of their "needs," as proposed by the Department of Justice, there would be

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102/ See Transcript of February 10, 1978, Vol. IV, p. 849, l. 21 - p. 850, l. 1. See Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, page 1, paragraph (2) at lines 28-32.

103/ See Col. Ex. 8.

inadequate water for Allotments 901 and 903, which are located downstream from Allotments 526 and 892. 104/

Congress, in its wisdom, provided by 25 U.S.C. 381 that, under the circumstances prevailing in the No Name Creek watershed, the "Indians" would participate in that short supply on a just and equal basis. Otherwise stated, the Congress has prohibited the claim by an allottee of all the water that he needs, but he is required to share and share alike with the other allottees in the drainage system. A different course would permit the upstream allottees to dry up the short supply of water and forever leave the lower allotments without water, to their irreparable damage, as urged by the Department of Justice.

Because there is no law to support the contentions of the Department of Justice (as stated in A, B, and C above), 105/ that Department has turned to the Desert Land Act of 1877 for support. That approach constitutes a nonsequitur of the first magnitude. It is elemental that the Desert Land Act of 1877 applies to the "public lands" and has absolutely no reference to the Colville Indian Reservation that was created five (5) years antecedent to the passage of the Desert Land Act. One of the most important decisions on the subject of western rights to the use of water is that of the California Oregon Power Co. v. Portland Beaver Cement Co. 106/ In the California Oregon Power Co. decision, the Supreme Court first alluded to the plenary power of the Congress of the United States over the "public lands." Emphasized there is that the public lands are those lands subject to disposition without limitation. That language of the Desert Land Act of 1877 automatically excluded the application of the Desert Land Act to the Colville Indian Reservation, the lands of which are reserved in character. In the California Oregon Power Co. decision, the Supreme Court declared that, after the date of the passage of that Act, the public lands would pass out of the title of the National Government to the homesteader and the

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104/ See Col. Ex. 6.

105/ See pp. 33, 34, 35 supra.

106/ 295 U.S. 142 (1935). See 43 U.S.C. 321, the Desert Land Act of 1877, 19 Stat. 377.

homesteader would not acquire any rights to the use of water. It was emphasized in the California Oregon Power Co. case that the rights to the use of water, which would be acquired from the United States of America, could be acquired only by compliance with the state law and then could be acquired only if they were "surplus." So it is that the homesteader did not acquire any rights to the use of water, when he acquired his land.

Let this fact be emphasized: The Defendants Waltons, had they purchased lands that had been homesteaded or if they had, in fact, homesteaded lands under the Desert Land Act they would not have acquired rights to the use of water. Rather, as they attempted to -- and, in error, thought they could do -- they applied to the State of Washington for a permit to appropriate rights to the use of water from No Name Creek. That the State of Washington did not have the power to issue a permit or a Certificate of Water Right is too clear for question.

However, the efforts of the Department of Justice, by a strange construction of the Desert Land Act of 1877, to attempt to deprive the Colville Confederated Tribes of their invaluable rights of water is a clear violation of the trust obligation owing to the Colville Confederated Tribes by the National Government. It does demonstrate, however, the paucity of authority, which belies any attempt to establish that Congress deprived the Colville Confederated Tribes of their vested Winters rights to the use of water in No Name Creek.

In succinct terms, the Supreme Court in the Pelton decision[107] declared in detail and with specificity in regard to the Warm Springs Indian Reservation in the State of Oregon that the Desert Land Act of 1877 has no application and can have no application to the lands constituting the Colville Indian Reservation.

Once again, this Honorable Court is specifically petitioned to deny the several aspects of the motion for partial summary judgment made by the Department of Justice in the open court on February 10, 1978, all as reviewed above.

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[107] See Federal Power Commission v. State of Oregon, 349 U.S. 435 (1955).

THE COLVILLE CONFEDERATED TRIBES
PRAY THIS COURT FOR A DECREE
DECLARING THAT THEY MAY EXERCISE THEIR
WINTERS DOCTRINE RIGHTS TO THE USE OF WATER
FOR ANY PURPOSE INCLUDING BUT NOT LIMITED TO
THEIR LAHONTAN CUTTHROAT TROUT FISHERY

In full cooperation with the United States Fish and Wildlife Agency of the Department of the Interior and in furtherance of the objectives of the "Endangered Species Act," 108/ the Colville Confederated Tribes introduced into Omak Lake the Lahontan Cutthroat Trout. That action taken by the Colville Confederated Tribes occurred in the year 1968 at a time when the Lahontan Cutthroat Trout were listed as an endangered species. Under the federal policy, established by the Endangered Species Act, the Colville Confederated Tribes were carrying out a well-established federal policy. 109/ The Colville Confederated Tribes have found that the Lahontan Cutthroat Trout flourish in their new environment in Omak Lake. That Lake, which is highly saline, is similar to the closed lakes of Nevada -- Summit and Pyramid Lakes -- the lakes in which the Lahontan Cutthroat Trout are indigenous.

Once again the primacy of Federal law is invoked and the area having been pre-empted by the United States of America, trustee, acting in conjunction with the Colville Confederated Tribes, the jurisdiction of the State of Washington has been ousted and the entire area of the Lahontan Cutthroat Trout Fishery has been pre-empted. 110/

The Department Of Justice Is Cognizant That The Bureau Of Reclamation And The United States Corps Of Engineers Destroyed The Natural Fishery Of The Colville Confederated Tribes

Beyond contradiction is the fact that from time immemorial the Colvill Confederated Tribes relied upon the Columbia River Salmon Fishery to supply them sustenance. Beyond controversy, the Bureau of Reclamation, which built the Grand Coulee Dam and the United States Corps of Engineers, which built Chief

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108/ 16 U.S.C. 1531 et seq.

109/ Ibid., 16 U.S.C. 1540; testimony of D. Koch, Vol. VIII, p. 1685.

110/ See pp. 6, 17 supra.

Joseph Dam, both of which structures are located on properties of the Colville Confederated Tribes, destroyed the historic Colville Salmon Fishery. 111/

Incredibly, the Department of Justice and the State of Washington act in concert in seeking to have this Court deny that the Colville Confederated Tribes are entitled to use the fresh waters of No Name Creek to provide a spawning ground for the Lahontan Cutthroat Trout which, as stated, have been artificially placed in Omak Lake.

Without a citation of authority on this subject, the Department of Justice denies that the Colville Confederated Tribes may use their Winters rights to the use of water to propogate the Lahontan Cutthroat Trout, irrespective of the fact that it was the Department of the Interior and the Corps of Engineers that destroyed the natural Salmon fishery and irrespective of the fact of the Congressional policy and will as expressed in the Endangered Species Act. 112/ This statement is made by the Department of Justice denying that the Colville Confederated Tribes may use the waters of No Name Creek to propogate the threatened Lahontan Cutthroat Trout:

> "Under the present facts, a reserved water right for a non-indiginous fish in No Name Creek, an intermittent stream, is untenable." 113/

It is of interest that the Department of Justice and the State of Washington attacked the use of water by the Colville Confederated Tribes for maintenance of the Lahontan Cutthroat Trout Fishery in substantially the same language. Here is what the State has to say:

> "10. The development of the Lahonton fishery is not within the scope of any right to No Name Creek waters impliedly reserved in the creation of the Colville Indian Reservation." 114/

111/ Testimony of David L. Koch, Vol. VIII, p. 1661, l. 22 et seq.

112/ 16 U.S.C. 1531.

113/ Memorandum of Points & Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 16, l. 12-14.

114/ Proposed Findings of Fact and Conclusions of Law (Pre-trial submission of the State of Washington), p. 8, para. 10, l. 3-5.

It is unclear precisely the position that the Defendants Waltons are assuming in regard to the Lahontan Cutthroat Fishery. In the Pre-Trial Order, entered by this Court on June 14, 1976, the Defendants Waltons presumably deny that the Colville Confederated Tribes may exercise their rights for fish and wildlife purposes, adding that the "Lahonton Fishery introduced in the Omak lake in the last few years, in not a natural part of the lake." 115/

Neither the Department of Justice, the State of Washington nor the Defendants Waltons offer a scintilla of authority to support their efforts to impose a servitude upon the title of the Colville Confederated Tribes in and to their Winters Doctrine rights to the use of water in No Name Creek. Indeed, it is contrary to the entire concept of ownership of property rights thus to impose a totally unreasonable servitude upon the right, as is being attempted by the Justice Department, the State of Washington and the Defendants Waltons. It is, of course, contrary to the laws of the western states in which the rights to the use of water were recognized to be an interest in real property and could be exercised for any beneficial purpose subject to the qualification that the use could not be to the detriment of some other user. However, there is no basis for asserting that the use of No Name Creek water to maintain the spawning grounds for the Lahontan Cutthroat Trout Fishery is contrary to any right, title or interest of any of the parties. As emphasized above, the Defendants Waltons have no rights in No Name Creek and certainly are not in a position to claim that the use of water for the Lahontan Cutthroat Trout, in any manner, damages their right, title and interest, which, as stated, are nonexistent. It is of interest what the Department of Justice states on the subject of the use of water by the Colville Confederated Tribes for the purpose of the fishery. Here is what is said:

> "It cannot be over emphasized, however, that the government is not intimating that waters cannot be reserved for fishing on the Colville Reservation or that water cannot be reserved with respect to uses of water on the Reservation other than irrigation. Where the facts and circumstances

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115/ Pre-Trial Order of June 14, 1976, p. 29, para. 28, l. 1-10.

> indicate that water for uses other than irrigation were impliedly reserved at the time of the creation of the reservation, the United States is asserting and will continue to assert that a reserved water [sic] exists for such uses."

It is then that the Department of Justice comes forth with this nonsequitur:

> "Under the present facts, a reserved water right for a non-indiginous fish in No Name Creek, an intermittent stream, is untenable." 116/

On sound principle, there is no basis for imposing a servitude upon the Colville Confederated Tribes' Winters rights to the use of water. Those rights should be premitted to be utilized by the Colville Confederated Tribes for any purpose or at any place. As Wiel so correctly states:

> "By appropriating a stream, the law has always considered that a right of property was conferred, and being property, the owner may enjoy it as he will, so long as he does no injury to others, just as he may a farm or a horse or other property." 117/

It is likewise elementary that the right of fishery is an interest in real property. It has been authoritatively declared:

> "It is held that fishing rights are incorporeal hereditaments, since they issue out of... or are annexed to things corporeal." 118/

Manifestly, the fishery right and the Winters Doctrine rights owned by the Colville Confederated Tribes are inseparable and should not be separated. 119/ In the Winans decision, the Supreme Court of the United States recognized that the right of fishery and the rights to the use of water are inseparable and are part of the bundle of rights constituting the full fee simple title vested in the Indians. Additionally in the Winans decision, it has been stated that:

> "[T]he right [of fishery] was intended to be continuing against the United States and its grantees as well as against the State and its grantees." 120/

In the Ahtanum decision, the Court of Appeals for the Ninth Circuit has declared that the rights to the use of water there involved could be diverted

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116/ Memorandum of Points & Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 16, l. 3-14.
117/ See 1 Wiel, Water Rights in the Western States, Sec. 496, p. 529.
118/ 1 Thompson on Real Property, Sec. 250.
119/ United States v. Winans, 198 U.S. 371 (1905).
120/ Ibid., at 381.

and utilized by the Yakima Indian Tribe for any beneficial purpose. 121/ That language was specifically written into the decree formulated by the Court of Appeals in that case and directed by that Court to be entered.

In conclusion, respecting the error of the Department of Justice in seeking to limit the use of the Colville Confederated Tribes' right to the use of water in No Name Creek, reference is made to the fact that those rights are invaluable interests in real property. 122/ Likewise elemental is the fact that the actions of the character of these consolidated cases are proceedings to quiet title in and to real property. 123/

Under the circumstances, this Court is requested to reject out of hand the contention of the Department of Justice that the Colville Confederated Tribes may not utilize their rights to the use of water in furtherance of the Lahontan Cutthroat Trout Fishery. It is of extreme importance to emphasize at this point that: The Lahontan Cutthroat Trout, at the moment of this writing, are spawning in the No Name Creek reconstructed channel, which has been prepared by the Colville Confederated Tribes. Hence, to deny the Colville Confederated Tribes the right to exercise their water rights in connection with the Lahontan Cutthroat Trout Fishery must, of necessity, cause them irreparable and continuing damage.

* *

121/ United States v. Ahtanum Irr. Dist., 330 F.2d 897 (CA 9, 1964); cert. den. 381 U.S. 924 (1965).

122/ Wiel, Water Rights in the Western States, 3d ed., vol. 1, sec. 18, pp. 20, 21; sec. 283, pp. 298-300; sec. 285, p. 301; United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 75 (1913); Ashwander v. TVA, 297 U.S. 288, 330 (1936); United States v. Ahtanum Irr. Dist., 236 F.2d 321, 339 (CA 9, 1956); Fuller v. Swan River Placer Mining Co., 12 Colo. 12, 17; 19 Pac. 836 (1898); Wright v. Best, 19 Cal. 2d 368; 121 P.2d 702 (1942); Sowards v. Meagher, 37 Utah 212; 108 Pac. 1112 (1910); See also Lindsey v. McClure, 136 F.2d 65, 70 (CA 10, 1943); David v. Randall, 44 Colo. 488; 99 Pac. 322 (1908).

123/ United States v. Ahtanum Irr. Dist., 236 F.2d 321, 339 (CA 9, 1956); Crippen v. X Y Irr. Co., 32 Colo. 447, 76 Pac. 794 (1904); Louden v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535 (1897); Kinney on Irrigation and Water Rights, p. 2844, sec. 1569.

DOCUMENTATION
IN SUPPORT OF
PROPOSED FINDINGS OF FACT

Proposed Findings of Fact, filed January 9, 1978, I through XV have been incorporated into and made a part of the preceding review of the law and requests of the Colville Confederated Tribes for judgments. Those proposed Findings of Fact have, in effect, been superceded. There follows the documented Findings of Fact which support the requests of the Colville Confederated Tribes for judgments against the State of Washington, 124/ the Defendants Waltons, 125/ The Department of Justice 126/ and the request for a decree authorizing the Colville Confederated Tribes to exercise their full equitable title to the use of No Name Creek water for any beneficial use including but not limited to the operation and maintenance of the Lahontan Cutthroat Trout Fishery. 127/

I.

Title To Lands Involved In These Consolidated Cases

All of the lands here involved 128/ were allotted pursuant to the General Allotment Act of 1887. 129/ None of those lands within the No Name Creek Basin were opened to disposition pursuant to the Homestead Act or otherwise, as provided for in the above-cited Act of March 22, 1906. 130/ Hence, the Presidential proclamation of May 3, 1916, 131/ had no application to the lands here involved. None of the lands came within the purview of the Congressional enactments or the Presidential proclamation that opened "surplus" lands to entry making applicable laws entirely distinct from the General Allotment Act as amended by the Act of 1906 and other acts.

124/ See pp. 17 et seq., supra.

125/ See pp. 30 et seq., supra.

126/ See pp. 33 et seq., supra.

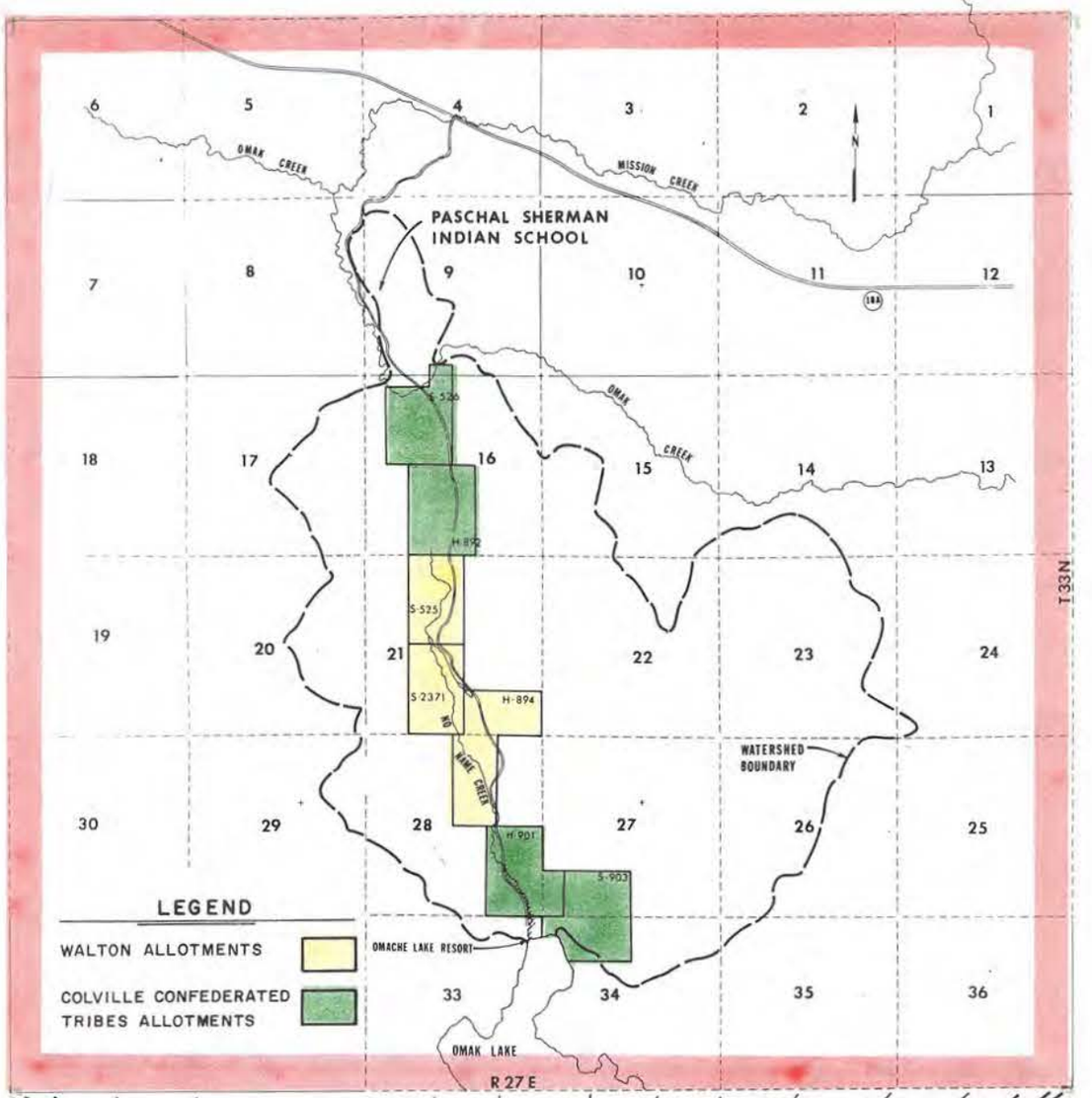
127/ See pp. 42 et seq., supra.

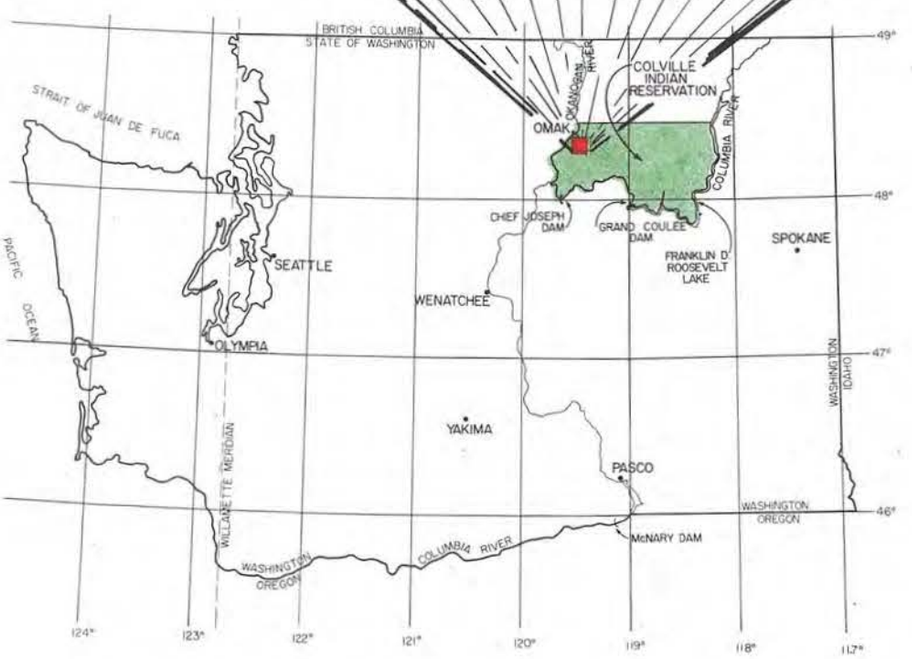
128/ See Plate following this page, Col. Ex. 1, "Index Map, No Name Creek Basin," showing tribal or Indian allotted lands and Waltons lands.

129/ Act of Feb. 28, 1887, C.119, § 1, 24 Stat. 388, 25 U.S.C. 331 et seq.

130/ Col. Ex. 2(7).

131/ Col. Ex. 2(8).





INDEX MAP OF THE NO NAME CREEK BASIN

II.

Tribal And Allotted Lands In No Name Creek Basin

Former Allotment No. 526 132/

Present Owner: Title resides in the Colville Confederated Tribes to former Allotment 526. That Allotment was recently transferred to the Tribes by "Gift" by the Pioneer Educational Society which had held title to those lands as part of the St. Mary's Mission School, which was run for the benefit of the Colville Confederated Tribes and other Indians. 133/

Description: The south half of the southeast quarter of the southeast quarter of the southwest quarter of Section nine and the east half of the northeast quarter of the northwest quarter, the south half of the northwest quarter of the northeast quarter of the northwest quarter, the southwest quarter of the northeast quarter of the northwest quarter, the south half of the northeast quarter of the northwest quarter of the northwest quarter, the southeast quarter of the northwest quarter of the northwest quarter, the east half of the southwest quarter of the northwest quarter, and the southeast quarter of the northwest quarter of Section sixteen in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred fifteen acres.

Those lands, thus described, were allotted to Elizabeth Smitakin, an Indian of the Colville Indian Reservation. They were leased at one time to St. Mary's Mission. On April 7, 1917, the Allotment was granted to Elizabeth Smitakin. Subsequent to that time on April 4, 1923, a patent in Fee passed to Joanna F. Blake. That Patent was transmitted to Joanna F. Blake in care of St. Mary's Mission. Ultimately, title passed to the Pioneer Education Society which, as stated, utilized former Allotment 526 for the benefit of the Colville Indian Tribes and then granted it by "Gift" to the Colville Confederated Tribes where title resides today.

132/ Col. Ex. 3(1).

133/ Col. Ex. 3(1), Title is held in trust for the Colville Confederated Tribes by the United States.

Indian Allotment No. 892 134/

Present Owner: Title To Allotment 892 presently resides in the heirs of Jennie or Sin-o-nalx, a Colville Indian residing on the Colville Indian Reservation. The allottee is deceased. However, a Trust Patent was issued to Jennie or Sin-o-nalx on April 7, 1917.

Description: The east half of the southwest quarter and the west half of the west half of the southeast quarter of Section sixteen in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred twenty acres.

Those lands, thus described, are presently leased for a ten-year period to the Colville Confederated Tribes by the heirs of Jennie or Sin-o-nalx, the leasing agreement being made a part of the record in this case.

Indian Allotment No. 901 135/

Present Owner: Title to Allotment 901 presently resides in the heirs of Mary Ann or Yatkanolx. To that allottee a Trust Patent was issued October 17, 1921.

Description: The Lot two of Section twenty-seven and the northeast quarter of the southeast quarter, the east half of the east half of the northwest quarter of the southeast quarter, the east half of the east half of the southwest quarter of the southeast quarter and the lot one of Section twenty-eight in Township thirty-three north of Range twenty-seven east of the Willamette Meridan, Washington, containing one hundred thirteen and ninety-five hundredths acres.

Title to these lands has always remained in Indian ownership. Those lands are presently held by the Colville Confederated Tribes pursuant to a ten-year lease entered into by the Colville Confederated Tribes with the heirs of Mary Ann or Yatkanolx, that lease being made a part of the record in this case.

134/ Col. Ex. 3(2).

135/ Col. Ex. 3(3).

Indian Allotment No. 903 136/

Present Owner: Title to the lands comprising Allotment 903 has always resided in Indian ownership. A Trust Patent to those lands was issued on October 25, 1919, to William Edwards, an Indian of the Colville Indian Reservation.

Description: The southeast quarter of the southwest quarter and the east half of the southwest quarter of the southwest quarter of Section twenty-seven and the northeast quarter of the northwest quarter and the lot one of Section thirty-four in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred twenty-six and ninety-five-hundredths acres.

Those lands, thus described in Allotment 903, were leased for a period of ten years to the Colville Confederated Tribes by the heirs of William Edwards, that lease being made a part of the record in this case.

Former Allotments Held By The Waltons

Former Allotment No. 525 137/

This land was originally allotted to Alexander Smitakin, an Indian of the Colville Indian Reservation, by a Trust Patent dated April 7, 1917.

Description: The west half of the west half of the west half of the northeast quarter and the east half of the northwest quarter of Section twenty-one in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred acres.

Title to those lands, thus described, passed out of Indian ownership by "a fee Simple Patent" dated August 10, 1925, to a non-Indian, Hettie Justice Wham.

Fee simple title to the lands, thus described, is asserted by Defendants Waltons in fee simple from non-Indian grantor or grantors other than the original allottee, Alexander Smitakin or his heirs.

136/ Col. Ex. 3(4).

137/ Col. Ex. 3(5).

Former Allotment No. 2371 138/

This land was originally allotted to George Alexander Smitakin, an Indian of the Colville Indian Reservation, to whom a Trust Patent was issued April 7, 1917. On January 28, 1921, a "fee simple Patent" was issued to Paul Smitakin, heir of George Alexander Smitakin.

Description: The east half of the southwest quarter and the west half of the west half of the west half of the southeast quarter of Section twenty-one in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred acres.

Fee simple title to the lands is asserted by Defendants Waltons from non-Indian grantor or grantors other than the original allottee, George Alexander Smitakin or his heirs.

Former Allotment No. 894 139/

This land was allotted to William George, an Indian of the Colville Indian Reservation. The Allotment was issued April 7, 1917, to William George.

Description: The east half of the west half of the southwest quarter of the southeast quarter, the east half of the southwest quarter of the southeast quarter, and the southeast quarter of the southeast quarter of Section twenty-one and the west half of the northeast quarter of Section twenty-eight in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred fifty acres.

A fee simple Patent dated May 5, 1923, was issued to those lands, thus described, to Hettie Justice Wham.

Fee simple title to these lands is asserted by the Defendants Waltons. Those lands were not conveyed to the Defendants Waltons by Indian William George or his heirs.

138/ Col. Ex. 3(6).

139/ Col. Ex. 3(7).

Tribal Lands:

Title resides in the Colville Confederated Tribes to the lands described as the northeast quarter (NE^4), Section 33 North, Range 27 East. Those lands have located on them the Omache Lake Resort and recreation lands, title to which resides in the Tribes. No Name Creek enters Omak Lake after it traverses those tribal lands.

III.

NO NAME CREEK WATERSHED 140/

No Name Creek

No Name Creek is a small, nonnavigable stream which rises within the Colville Indian Reservation and flows in a south and easterly direction its entire length, a distance of approximately three miles. No Name Creek has its terminus in Omak Lake, an entirely closed body of water likewise situated completely within the Colville Indian Reservation. It is a natural body of water having great esthetic value. Omak Lake is presently used for recreational purposes and has an immense value to the Colville Confederated Tribes for that purpose.

IV.

No Name Creek, in its above-described course, traverses the southerly portion of the above-described Indian Allotment 892; enters former Allotment (Walton property) 525 proceeding across former Allotment 2371 and former Allotment 894; it enters Indian Allotment 901 and flows across that Allotment. In a state of nature, No Name Creek traverses the western portion of Allotment 903. That stream then traverses tribal land in the northeast quarter of Section 33, North, Range 27 East, to a point where it enters Omak Lake. 141/

V.

No Name Creek has its source from what is referred to as the spring zone which rises in Indian Allotment 892, described as the southwest quarter of

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140/ For general location, see Col. Ex. 1, Index Map, No Name Creek Basin.

141/ Testimony, Thomas M. Watson, Vol. III, p. 558, ln. 9-17. See Col. Ex. 1, Index Map, No Name Creek Basin.

Section 16, Township 33 North, Range 27 East, W.M., Washington. 142/ After flowing some distance within Indian Allotment 892, No Name Creek continues its southeast course flowing across the northern boundary of the Walton properties, former Allotment 525. Throughout its course on Allotment 892 and former Allotment 525 on the Walton property, No Name Creek is in a deeply incised channel with steep banks. 143/ The spring zone, where No Name Creek rises, extends down into the Walton Allotment 525. Approximately midway in its course across that last-mentioned Allotment, the deeply incised channel widens out at or near where the spring zone of No Name Creek terminates. 144/

VI.

No Name Creek Groundwater Basin

Except for melting snow in the early Spring and occasional heavy rainfall along the precipitous mountain area encompassing most of the No Name Creek Valley, the flow of No Name Creek is wholly dependent upon the waters draining from the spring zone, which has been described above. 145/ That spring zone is the natural outlet of the No Name Creek groundwater basin, which is hereinafter

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142/ See testimony of Michael B. Kaczmarek, Vol. VI, p. 1301, ln. 16 - p. 1302, ln. 17; Charles S. Robinson, Vol. VII, pp. 1441, ln. 24 - 1443, ln. 18; Col. Ex. 6 and 22(1); Testimony of Thomas M. Watson, Vol. III, pp. 588, ln. 25 - 599, ln. 25.

143/ Testimony, Charles P. Corke, Vol. II, p. 363, ln. 3-6; Michael Kaczmarek, Vol. VII, p. 1408, ln. 11-17.

144/ Testimony, Thomas M. Watson, Vol. III, pp. 617, l. 8 - 618, l. 4; Vol. III, pp. 621, l. 17-25; Vol. VI, p. 1177, l. 9-22; Vol. IV, p. 800, l. 10-20; Chalres P. Corke, Vol. II, p. 363, l. 3-25; Michael B. Kaczmarek, Vol. VII, p. 1408, l. 11 - 1409, l. 7; p. 1385, l. 16-17; Charles S. Robinson, Vol. VII, p. 1443, l. 22 - 1444, l. 1.

145/ Col. Ex. 27(1),(2),(3),(4). Col. Ex. 17(1), 17(3). See Col. Ex. 7. Testimony, Thomas M. Watson, Vol. III, p. 601, l. 1 - 602, l. 8; pp. 606, l. 20 - 608, l. 13; (Col. Ex. 10); Vol. IV, pp. 694, l. 20 - 696, l. 25.

See USA Ex. 1, p. 12: "Flows at the granite lip (site N-9) ranged from virtually zero - when no water was pumped into No Name Creek.... From diversion at site N-5 to the granite lip (site N-9), No Name Creek nearly consistently loses water...." (Cline, 1978).

See testimony of Michael B. Kaczmarek, Vol. VII, p. 1409, ln. 18 - p. 1410, ln. 3.

described. 146/ That Basin is the vital source of water supply for the Indian properties and is of primary importance to the Paschal Sherman Indian School of the Colville Confederated Tribes. 147/

VII.

The extent, distribution and availability to wells of groundwater in the No Name Creek groundwater basin, which is also referred to as the No Name Creek aquifer, 148/ corresponds directly to the sand and gravel or glacial outwash deposits within the No Name Creek watershed, 149/ and the fluctuation of groundwater levels in the sands and gravels of the aquifer. 150/ Other geologic materials within the No Name Creek watershed do not yield usable quantities of groundwater to wells 151/ and comprise clearly delineated boundaries to the aquifer. 152/ The No Name Creek aquifer -- water-bearing area — is well

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146/ See USA Ex. 1, p. 19: "The decrease in natural flow of No Name Creek in the summer of 1976 resulted in part from pumping of the wells as indicated by the observation that when pumping was stopped and water levels started to rise, the streamflow began to increase.... Heavy pumping in 1977 decreased the groundwater discharge to No Name Creek above the diversion to nearly zero by October." (Cline, 1978).

Testimony, Thomas M. Waton, Vol. IV, pp. 773, l. 10-20; Michael Kaczmarek, Vol. VII, pp. 1409, l. 18 - 1410, l. 3.

147/ Testimony, Thomas M. Watson, Vol. III, pp. 525, l. 18 - 526, l. 21; pp. 579, l. 3 - 580, l. 21; pp. 627, l. 11 - 628, l. 10; pp. 532, l. 20 - 533, l. 23; Charles P. Corke, Vol. II, p. 363, l. 15-22.

148/ Testimony, Michael B. Kaczmarek, Vol. VI, p. 1237, l. 1. 10 - p. 1238, l. 11; Col. Ex. 7, "Watershed Map, No Name Creek Basin."

149/ Testimony of Michael B. Kaczmarek, Vol. VI, pp. 1260, l. 8 - 1262, l. 2; pp. 1238, l. 18 - 1240, l. 12; pp. 1241, l. 11 - 1252, l. 5; Col. Ex. 7, "Watershed Map of No Name Creek Basin"; Col. Ex. 6, "General Geologic Map, No Name Creek Basin"; Col. Ex. 30(1)-(7), "Logs of Test Holes and Wells"; testimony of Michael Kaczmarek, Vol. VII, pp. 1301, l. 16 - 1302, l. 17; Col. Ex. 22(1), "Geologic Profile L-L'"; and Testimony of Fred O. Jones, Vol. IX, pp. 1868, l. 9 - 1869, l. 3.

150/ Testimony, Thomas M. Watson, Vol. IV, pp. 695, l. 7 - 697, l. 1; pp. 774, l. 22 - 775, l. 1; Michael Kaczmarek, Vol. XIV, pp. 2848, l. 7 - 2850, l. 3.

151/ Testimony, Michael Kaczmarek, Vol. VI, pp. 1262, l. 3 - 1264, l. 23; pp. 1252, l. 6 - 1257, l. 6; Col. Ex. 6, "General Geology, No Name Creek Basin"; Col. Ex. 30(8)-(13), "Logs of Holes and Wells"

152/ Testimony, Michael Kaczmarek, Vol. VI, pp. 1257, l. 7 - 1260, l. 7; pp. 1267, l. 5 - 1287, l. 24; pp. 1288, l. 24 - 1291, l. 13; Col. Ex. 6,

defined on the Plate, "General Distribution Of Aquifer And Non-Aquifer Materials," which follows. 153/

VIII.

The No Name Creek groundwater basin encompasses virtually the entire west half of Section 9 extending a short distance into the northeast quarter of Section 8, Township 33 North, Range 27 East, W.M. It continues southward into the west half of Section 16, Township 33 North, Range 27 East, W.M. It continues across the north line of the Walton property in former Allotment 525 for a distance of approximately 600 feet 154/ into the northwest quarter of Section 21, Township 33 North, Range 27 East, W.M.

IX.

HISTORY OF WATER USE FROM NO NAME CREEK PRIOR TO CONSTRUCTION OF COLVILLE IRRIGATION PROJECT

Irrigation of Allotments 901 and 903 from No Name Creek was commenced in the early 1920s. No Name Creek was used as a principal source of water for the purposes of irrigation, domestic use and stock watering during that period. 155/ The area irrigated prior the the development of the Colville Irrigation Project in 1975 on Allotments 901 and 903 totaled 30 to 40 acres. 156/ The irrigation system used during the 1920s, 1930s and 1940s to irrigate Allotments 901 and 903, including the flumes and ditches on the east and west sides of No Name

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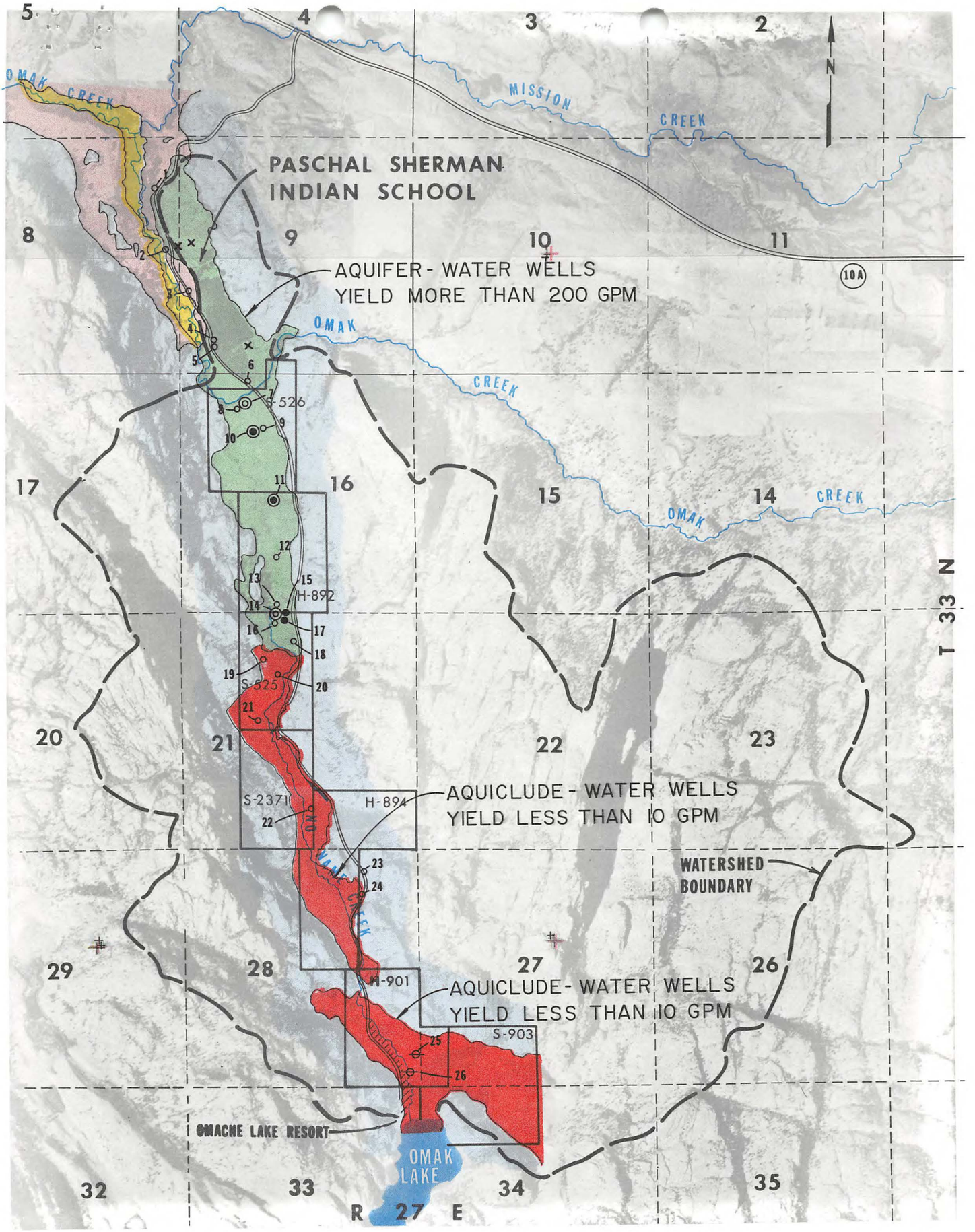
152/ (continued) "General Geology, No Name Creek Basin"; Col. Ex. 23(1)-(29), "Geologic Cross Sections"; Col. Ex. 30(1)-(13), "Logs of Test Holes and Wells"; testimony, Fred O. Jones, Vol. IX, pp. 1869, l. 4-13; p. 1871, l. 2-8.

153/ Col. Ex. 6, "General Geology, No Name Creek Basin"; Col. Ex. 7, "Watershed Map, No Name Creek Basin."

154/ Testimony, Michael B. Kaczmarek, Vol. VI, pp. 1262, l. 15 - 1263, l. 4; Dr. Charles S. Robinson, Vol. VII, pp. 1443, l. 19 - 1444, l. 1; Col. Ex. 6, "General Geology, No Name Creek Basin."

155/ Testimony, Mary Ann Timentwa Sampson, Vol. II, pp. 330, l. 20 - 331, l 20; pp. 316-325; pp. 342, l. 25 - 344, l. 2; Charles D. Hampson, Vol. X, pp. 2062, l. 4 - 2063, l. 16; see Col. Ex. 15(2).

156/ Ibid. See Col. Ex. 15(2); testimony, Thomas M. Watson, Vol. III, pp. 495, l. 17 - 498, l. 3; Vol. IV, pp. 709, l. 4 - 710, l. 25; see Col. Ex. 24(2), "Presently Irrigated Acres, Allotment 901."



EXPLANATION

AQUIFER – GEOLOGIC MATERIALS WHICH READILY STORE AND TRANSMIT GROUNDWATER.

AQUICLUDE – GEOLOGIC MATERIALS WHICH STORE GROUNDWATER BUT WHICH HAVE VERY LITTLE CAPACITY TO TRANSMIT GROUNDWATER.

AQUIFUGE – GEOLOGIC MATERIAL WHICH NEITHER STORES NOR TRANSMITS GROUNDWATER.

– NO NAME CREEK BASIN AQUIFER

– OMAK CREEK ALLUVIAL AQUIFER

– AQUICLUDE MATERIALS CONSISTING OF LAKE BEDS AND FINE GRAINED ALLUVIAL DEPOSITS.

– AQUIFUGE MATERIALS CONSISTING OF GRANITE BEDROCK.

GENERAL DISTRIBUTION OF AQUIFER AND NON-AQUIFER MATERIALS

DECEMBER, 1977

Creek can be witness today. 157/ Investigations have demonstrated that Allotments 901 and 903 were historically used to produce alfalfa for livestock and the lands have proven to be valuable for the production of natural grass and alfalfa in abundance.

X.

In the early 1920s, there was constructed an irrigation system by a lessee of the Timentwa family who owned the allotments as heirs of Mary Ann and William Edwards. 158/ By means of that system of irrigation, the Timentwa diverted No Name Creek water to irrigate lands in Allotment 901 on both the east and west sides of No Name Creek. 159/

XI.

There were irrigated from No Name Creek in the early 1920s and down through the late 1940s:

> Indian Allotment 901, approximately thirty-one and four-tenths (31.4) acres;
>
> Indian Allotment 903, a small acreage was likewise irrigated on the east side of that stream.

XII.

The irrigation works utilized from the early 1920s onward, as found above, on the west side of No Name Creek included two parallel pipes eight inches in diameter. The ditch into which the water was delivered by the flume was one and a half feet wide at the top and had a depth of one foot. On the east side of No Name Creek, the diversion works had a ditch system the width of which was two feet and the depth was one foot. 160/ The irrigated acreage in 901, on the east

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157/ Ibid. See testimony, Charles P. Corke, Vol. II, pp. 336, l. 23 - 337, l. 16.

158/ Finding II, pp. 49-50, in regard to Indian Allotments 901 and 903, supra.

159/ See note 157, supra.

160/ See Col. Ex. 15(2), "Historic Irrigation on Indian Allotments H-901 and S-903.

and west sides of No Name Creek, totaled more than 30.4 acres presently irrigated and were devoted to alfalfa and grass. The reasonable diversion of water requirements for the alfalfa during the irrigation season was 5.1 acre-feet per acre. 161/ The irrigation system that was utilized was flooding by means of ditches and laterals which can be located today. 162/

XIII.

The Timentwas normally harvested three cuttings of alfalfa each irrigation season from Allotment 901. After the final cutting in the late summer, the livestock were turned out onto the alfalfa fields for the purpose of providing them with forage. 163/

XIV.

At all time during the early 1920s and through the late 1940s, the Timentwas had sufficient water from No Name Creek to successfully conduct their farm operations on 901 and 903, all as found above. 164/

XV.

Prior to the late 1940s, No Name Creek was a live stream throughout its entire length and for the full period of the irrigation season. It was sufficient to irrigate the lands, all as described in the Findings set forth above. Moreover, No Name Creek was a habitat for fish which were indigenous to the area 165/ and likewise supported trout that had been artifically planted. 166/

XVI.

In the year 1948, the Defendants Waltons acquired title form non-Indians to Allotments 525, 2371 and 894. 167/

161/ See note 155 supra.; see Col. Ex. 24(6), "Colville Irrigation Project - Water Requirement Summary, Irrigated - Rill," for the column "Farm Unit Requirement, (Acre-Feet/Acre)," a value of 5.09 acre-feet per acre is given in regard to Allotment 901.
162/ See note 157 supra.
163/ Testimony, Mary Ann Timentwa Sampson, Vol. II, p. 320, l. 13-22.
164/ Ibid., p. 324, l. 8-23; p. 328, l. 4-7.
165/ Ibid., p. 329, l. 8-15; p. 333, l. 6-11; pp. 336, l. 7 - 337, l. 15; p. 345, l. 14 - p. 346, l. 4.
166/ Testimony, Wilson W. Walton, Vol. XI, pp. 2144, l. 5 - 2147, l. 1.
167/ See testimony of Wilson W. Walton, Vol. X, p. 2120, l. 11 - p. 2122, l. 5.

XVII.

There is no evidence that any of the lands in the aforesaid Allotments 525, 2371 and 894 were irrigated during the period of Indian ownership. There is, no evidence as to the amount of diversion and use of water, if any, until after the acquisition of those allotments by the Defendants Waltons, all as found above. 168/

XVIII.

On August 24, 1948, the Defendants Waltons filed an application with the Department of Hydraulics, State of Washington (predecessor agency of the State Department of Ecology), for a permit to divert water from No Name Creek for the purposes of irrigation. On November 28, 1949, the Supervisor of Hydraulics issued a permit to one of the Defendants, Wilson Walton, to irrigate 75 acres of land. On August 25, 1950, the Supervisor of Hydraulics issued a Certificate of Water Right to Defendant Wilson Walton for the diversion of one cubic foot of water per second of time from No Name Creek for the irrigation of 65 acres of land. 169/

INTERFERENCE BY DEFENDANTS WALTONS WITH
COLVILLE USE OF NO NAME CREEK WATER
FOR AGRICULTURE, RESORT AND FISHERY

IXX.

The Defendants Waltons monopolized all of the usable water flowing in No Name Creek, preventing any water from flowing down to Indian Allotments 901 and 903, as it had flowed there previously. There was insufficient water during the irrigation season for Indian Allotments 901 and 903, either for the irrigation of the fields there located or for livestock or for domestic use. 170/

168/ See Finding II, pp. 49-50, et seq., supra.

169/ See Defendants Waltons' Ex. R-W.

170/ Testimony, William Boyd Walton, Vo. XI, pp. 2235, l. 3 - 2236, l. 10; T.M. Watson, Vol. III, pp. 579, l. 3 - 580, l. 21; pp. 627, l. 11 - 628, l. 10; Michael Kaczmarek, Vol. VI, pp. 1265-6; David Koch, Vol. VIII, pp. 1660, l. 13 - 1661, l. 14.

See USA Ex. 1. The United States Geologic Survey refers to Defendants Waltons' surface diversion and states: "Water is diverted from No Name

XX.

In 1967, an effort was made to start a recreational resort on the lands of the Colville Tribes situated in the northeast quarter of the northeast quarter (NE^4 NE^4) of Section 33, Township 33 North, Range 27 East. However, due to the fact that the Defendants Waltons monopolized and diverted all of the waters of No Name Creek during the irrigation season, 171/ it was impossible to obtain sufficient water for successful operation of the recreational resort referred to above. That resort, situated at the north end of Omak Lake, had no water source other than No Name Creek. The waters of Omak Lake were not potable and could not be used because of the high saline content. 172/

XXI.

Lahontan Cutthroat Trout, in 1967, were determined to be an endangered species. 173/ They were found only in the high saline lakes of Pyramid Lake, Summit Lake and Walker Lake in Nevada. Because of the diversion of water away from those lakes and the steady decline of them, there was a very real threat that the Lahontan Cutthroat Trout would become extinct. 174/

170/ (cont'd) Creek just above site N-5 to a pond to which the water is pumped for irrigation (pumping site 7 and Fig. 7). Practically the entire flow of No Name Creek was diverted to this pond in July and early August 1976 before instrumentation was completely installed at the gaging stations (site N-4 and N-5 and Table 14)." (Cline, 1978, p. 9, first full paragraph)

"Flows at the granit lip (site N-9) range from virtually zero - when no water was pumped into No Name Creek and water was being diverted to the pond (August, 1976) - to 2.4 ft^3/s on September 14, 1976 - when water was being pumped to the creek and virtually no water was being diverted (Table 20 and Fig. 14)." (Cline, 1978, p. 12, first paragraph)

See Col. Ex. 14(29); testimony, T.M. Watson, Vol. III, pp. 594, l. 9 - 596, l. 24; Col. Ex. 17(2).

171/ Testimony, Chairman Melford Tonasket, Vol. II, pp. 212, l. 13 - 214, l. 1.

172/ Testimony, Mary Ann Timentwa Sampson, Vol. II, pp. 318, l. 20 - 319, l. 4.

173/ See testimony of Dr. David L. Koch, Vol. VIII, p. 1679, l. 7-17. See Col. Ex. 37(1), Federal Rules and Regulations, October 13, 1970."

174/ See testimony of Dr. David L. Koch, Vol. VII I, p. 1665, l. 6 - p. 1667, l. 4. See Col. Ex. 37(1), "Federal Rules and Regulations, October 13, 1970."

XXII.

It is a National Policy to protect and preserve all species of wildlife indigenous to the United States. 175/ In furtherance of that policy, the Lahontan Cutthroat Trout were planted in Omak Lake by the United States of America acting in close cooperation with the Colville Confederated Tribes. 176/ Because of the high salinity in Omak Lake, it provides an excellent environment for those fish. 177/ Although the Trout live in saline water, they spawn in fresh water. The pollution of water of No Name Creek by Defendants Waltons' livestock required action to prevent the pollution of Omake Lake and No Name Creek. 178/

XXIII.

As a consequence of the diversion of the entire streamflow by the Defendants Waltons during the irrigation season and the pollution of water from that stream, the Colville Confederated Tribes, Plaintiff in Civil No. 3421, have historically suffered and are now suffering irreparable and continuing damage. 179/

XXIV.

The Paschal Sherman Indian School

In 1892, St. Mary's Mission School was founded by the Society of Jesus. That school was primarily administered for the benefit of the Colville Confederated Tribes, although others did attend that Mission School. 180/

175/ Testimony, Charles P. Corke, Vol. II, pp. 354, l. 4 - 356, l. 17; Col. Ex. 4, "Water Resources Council Principles of Standards for Water and Land - Related Planning"; testimony, M. Tonasket, Vol. II, p. 214, l. 7-24.

176/ Testimony, M. Tonasket, Vol. II, p. 214, l. 7-24; p. 257, l. 24 - p. 258, l. 4; David Koch, Vol. VIII, pp. 1673, l. 16 - 1674, l. 20; Col. Ex. 37(25), "Resolution No. 1954-42"; Col. Ex. 37(26), "Resolution No. 1965-43.

177/ Testimony, David Koch, Vol. VIII, p. 1664, l. 13-25.

178/ Testimony, M. Tonasket, Vol. II, pp. 214, l. 25 - 215, l. 25.

179/ Testimony, David Koch, Vol. VIII, pp. 1660, l. 14 - 1661, l. 14; p. 1688, l. 10, et seq.; p. 1741, l. 24 - p. 1742, l. 17; Denzel R. Cline, Vol. I, p. 63, l. 25 - p. 64, l. 16; Thomas M. Watson, Vol. III, p. 628, l. 20 - p. 631, l. 19; p. 525, l. 18 - p. 527, l. 21; See note 170, supra.

180/ See above Finding II, Title of Former Allotment No. 526.

XXV.

In 1972, the administrator of St. Mary's Mission School formally advised the Colville Confederated Tribes that, due to the shortage of the funds, the school could no longer be administered. Thereafter, the Colville Confederated Tribes assumed full responsibility for the funding, management and control of the St. Mary's Mission School, changing the name to the Paschal Sherman Indian School. 181/

XXVI.

As presently operated, the Paschal Sherman Indian School is fully accredited and operated for the benefit of the members of the Colville Confederated Tribes living both on and off of the reservation. It is predominantly a boarding school. There are presently enrolled 160 students, 130 of whom are boarding students and 30 of whom are bussed to school from the City of Omak or the vicinity. 182/

XXVII.

To administer the Paschal Sherman Indian School, the Colville Confederated Tribes, acting through their governing body, the Colville Business Council, created the Colville Education Development Board. That Board sets the policy for the administration of the Paschal Sherman Indian School. To ensure it being an autonomous and independent governing agency, the Colville Education Development Board was chartered, making it independent from the Colville Confederated Tribes. 183/ Members of the Colville Education Development Board are elected annually by members of the Colville Confederated Tribes, 18 years of age or over. The full control and responsibility for the operation of the Paschal Sherman Indian School resides in the last-mentioned Education Development Board.

181/ Testimony, Chairman Melford Tonasket, Vol. II, p. 219, l. 22 - p. 220, l. 20; Virgil L. Gunn, Vol. II, p. 288, l. 2 - p. 289, l. 29; See Col. Ex. 2(15), "Resolution Colville Educational Development Board."

182/ Ibid.

183/ Ibid.

XXVIII.

The Paschal Sherman Agricultural Program - Colville Irrigation Project

In an effort to constitute the School as self-sufficient as possible, the Colville Confederated Tribes have assisted the School in acquiring a herd of 100 head of beef cattle which provides both income and sustenance for the School. 184/ The Tribes have leased all Indian Allotment lands to provide feed and revenue for the School. 185/

XXIX.

In July 1975, the Paschal Sherman Indian School undertook to irrigate all Indian lands in the No Name Creek Basin. 186/ At that time the Colville Irrigation Project was initiated, all as shown on the Plate which follows.

XXX.

In connection with the Colville Irrigation Project, there was entered by this Court, on January 27, 1976, an Order directing a hydrological testing program to be conducted throughout the No Name Creek Basin. On July 14, 1976, that Order was superceded by an "Order for Monitoring, Managing, Measuring, and for Hydrological Testing." That Order was extended on December 22, 1976, to remain operative throughout the irrigation season of 1977, terminating on or about October 1, 1977. Throughout these findings, that Order is referred to as the Order of July 14, 1976, as extended. It is incorporated into these findings by reference and made a part of them.

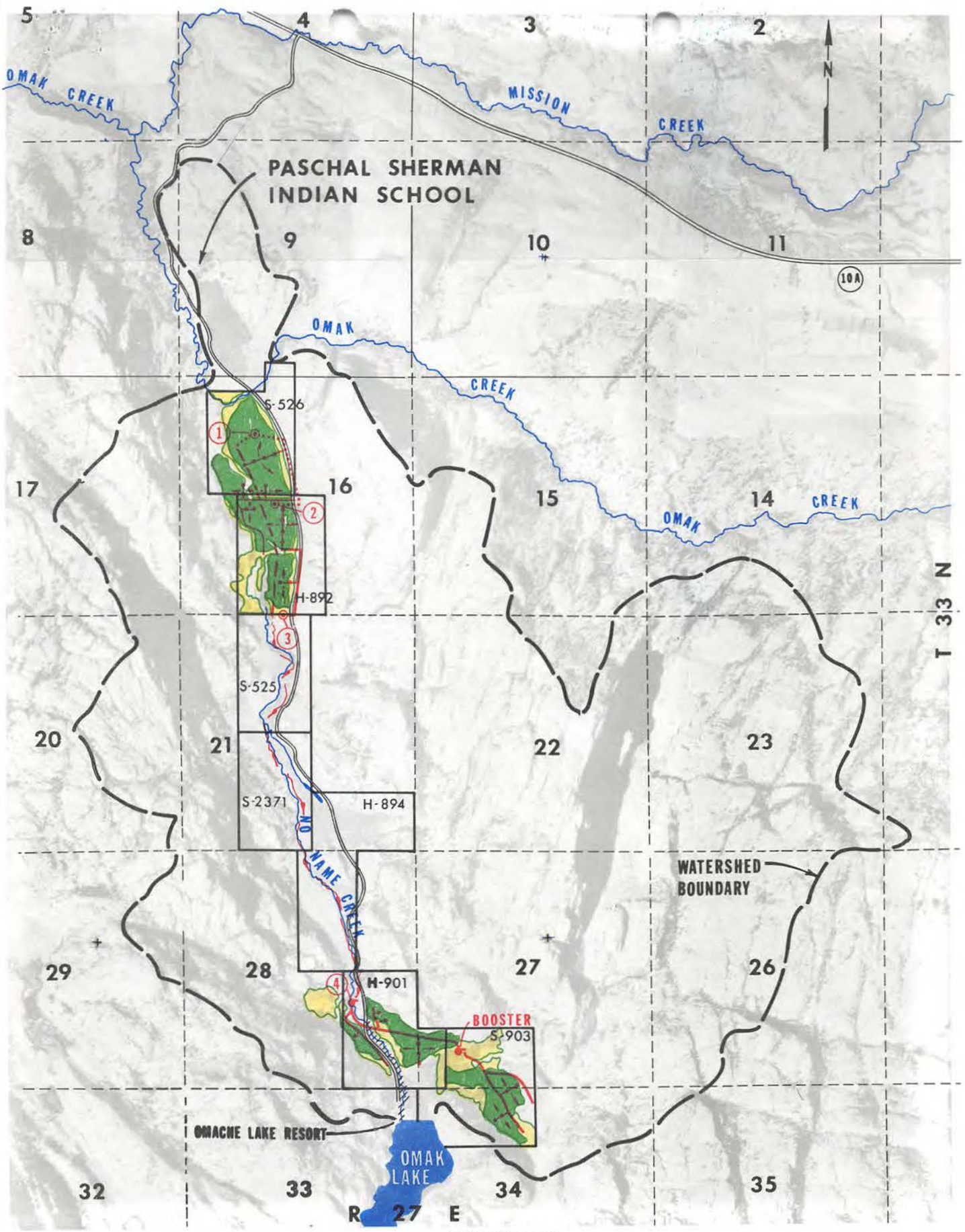
XXXI.

The Order of July 14, 1976, as extended, was stipulated and agreed to by all parties in these consolidated cases and was entered by this Court after a full hearing held in regard to it on July 12, 1976.

184/ Testimony, Virgil L. Gunn, Vol. II, p. 295, l. 7-14.

185/ Testimony, Chairman Melford Tonasket, Vol. II, p. 220, l. 21 - p. 221, l. 14; See Col. Ex. 3(1), 3(2), 3(3) and 3(4).

186/ Testimony, Charles P. Corke, Vol. II, p. 362, et seq.; See Col. Ex. 8, "Colville Irrigation Project"; Col. Ex. 33(1), "Elevation to Groundwater, Peter's Observation Well," which shows record keeping beginning in July 1975.



SCALE: 2 INCHES = 1 MILE

EXPLANATION

IRRIGATION WATER DEVELOPMENT. DELIVERY. AND APPLICATION SYSTEM

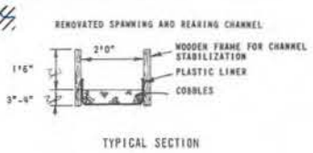
WELLS
- (1) PASCHAL SHERMAN IRRIGATION WELL
- (2) COLVILLE NUMBER 1 IRRIGATION WELL
- (3) COLVILLE NUMBER 2 IRRIGATION WELL

SURFACE DIVERSION
- (4) DIVERSION POINT FOR "SOUTH UNIT" COLVILLE IRRIGATION PROJECT

DELIVERY SYSTEM
- PORTABLE ALUMINUM SPRINKLER PIPE
- BURIED STEEL PIPE
- BURIED PLASTIC PIPE
- NATURAL CHANNEL FOR CONVEYANCE

APPLICATION SYSTEM
- PORTABLE ALUMINUM HAND-MOVE SPRINKLER LINE
- AUTOMATED CENTER PIVOT SPRINKLER LINE

LAHONTON CUTTHROAT FISHERY
- RENOVATED SPAWNING AND REARING CHANNEL



TYPICAL SECTION

IRRIGATION LAND DEVELOPMENT
- IRRIGATED ACRES (1977)
- UNDEVELOPED IRRIGABLE ACRES

IRRIGATION SUMMARY

ALLOTMENT	IRRIGATED ACRES (1977)	UNDEVELOPED IRRIGABLE ACRES	TOTALS
S-526	50.7	11.1	61.8
H-892	43.6	14.3	57.9
TRIBAL TRUST	.8	.7	1.5
H-901	30.4	10.7	41.1
TRIBAL TRUST	-----	8.8	8.8
S-903	32.4	24.9	57.3
TOTALS	157.9	70.5	228.4

COLVILLE IRRIGATION PROJECT

DECEMBER, 1977

XXXII.

The United States Geological Survey was designated as the Federal agency in charge of the direction and supervision of the program conducted pursuant to the Order of July 14, 1976, as extended. 187/

XXXIII.

An expert geohydrologist, F. O. Jones, employed by the United States Department of Justice, pursuant to the Order of July 14, 1976, as extended, was directed to be the consultant for all parties in connection with the development and administration of the monitoring, managing and operation of the program set forth in the aforesaid Order. 188/

XXXIV.

All in accordance with the Order of July 14, 1976, as extended, and under the supervision and direction of the United States Geological Survey in consultation with the aforesaid F. O. Jones, there was installed complex equipment and devices for the measuring, monitoring and managing of No Name Creek. The "Surface Water, Monitoring, and Management System" is in the record. 189/ On that exhibit is set forth the system that has been utilized in the study of the available supply of surface water in No Name Creek. Under the following headings there is set forth all of the equipment which was installed pursuant to the Order of July 14, 1976, as extended.

"EQUIPMENT AND MONITORING SITES OPERATED UNDER JULY 14, 1976, COURT ORDER"

The United States Geological Survey and the Colville Confederated Tribes, acting in consultation with the aforesaid F. O. Jones, have gathered, processed, analyzed and utilized the data provided for by the "Surface Water, Monitoring and Management System," all as set forth on the aforesaid Colville Exhibit 10.

187/ Order of July 14, 1976, as extended, paragraph 8.

188/ Order of July 14, 1976, as extended, paragraphs 20 & 22.

189/ Col. Ex. 10, "Surface Water, Monitoring, and Management System."

XXXV.

Likewise in conformity with the Order of July 14, 1976, as extended, there has been undertaken by the United States Geological Survey and the Colville Confederated Tribes, acting in consultation with the aforesaid F. O. Jones, an intense study of the No Name Creek Groundwater Basin. There appears on the Colville Exhibit 10, entitled "Groundwater Development, Monitoring, and Management System," 190/ the following"

(1) "WELLS AND PIEZOMETERS PRIOR TO JULY 14, 1976, COURT ORDER

(2) "PIEZOMETERS AND TEST HOLES UNDER JULY 14, 1976, COURT ORDER

(3) "WELLS AND PIEZOMETERS UNDER JULY 14, 1976, COURT ORDER, AS EXTENDED"

The United States Geological Survey and the Colville Confederated Tribes, acting in consultation with the aforesaid F. O. Jones, have observed the groundwater fluctuations of the No Name Creek Groundwater Basin and have gathered, processed, analyzed and utilized the data disclosed by that system.

XXXVI.

Construction, Operation And Maintenance Of The Colville Irrigation Project Pursuant To The Order Of July 14, 1976, As Extended

Provision is made in the July 14, 1976 Order, as extended, that:

> "4. The Colville Confederated Tribes may pump a quantity of water (approximately 2 cubic feet per second) into No Name Creek sufficient to deliver at a point immediately downstream from the Waltons' southern boundary 1-1/2 cubic feet per second of water, there to be measured at a gaging station which has been installed and will be operated by the Colville Confederated Tribes in cooperation with the United States Geological Survey, and the pumping, testing, and recording of the passage of such water shall be a part of the hydrological testing and monitoring program herein authorized...." 191/

XXXVII

In regard to the water pumped into No Name Creek, hereinafter sometimes referred to as "developed water," all as found immediately above, provision

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190/ See Col. Ex. 11, "Groundwater Development, Monitoring and Management System."

191/ Order of July 14, 1976, as extended, p. 2, paragraph 4, lines 4-11.

is made in the Order of July 14, 1976, as extended:

> "Such water shall be used for irrigation of Allotments 901 and 903 for the Lahontan cutthroat trout fishery and for use on tribal lands in conjunction with the Omache Resort." 192/

XXXVIII.

It is provided for in the Order of July 14, 1976, as extended, that the following wells and installations "are hereby authorized to be operated and maintained" by the Colville Confederated Tribes in furtherance of the Paschal Sherman Indian School, Colville Irrigation Project: (See Order, paras. 9a,b,c)

> 1. The Paschal Sherman Well, situated on Former Allotment No. 526, together with a pump and motor for the purpose of irrigating the irrigable lands within the Paschal Sherman Tract and for delivery of water down to Allotments 901 and 903, for the Lahontan Cutthroat Fishery and for the Omache Lake Resort.
>
> 2. Colville Irrigation Well No. 1, located at the northern end of Allotment No. 892, for the purpose of irrigating lands within that Allotment.
>
> 3. Colville Irrigation Well No. 2, on Allotment No. 902, immediately north of the Walton property, to irrigate land within that Allotment.
>
> 4. There has been installed and operated an irrigation system together with pump and necessary sprinklers for the purpose of irrigating the lands on both sides of No Name Creek in Allotment No. 901.
>
> 5. There has also been installed an irrigation system to irrigate lands in Allotment No. 903, comprised of a booster pump and the necessary sprinkler system.
>
> 6. The channel of No Name Creek has been renovated for the purpose of providing an adequate spawning grounds for the Lahontan Cutthroat Trout which inhabit Omak Lake.

XXXIX.

On the Plate which appears above there is located the irrigation system including the wells and other installations constructed, operated and maintained in connection with the Paschal Sherman Indian School, Colville Irrigation Project. 193/ Set forth on that Plate is the following irrigable and irrigated

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192/ Order of July 14, 1976, as extended, p. 2, paragraph 4, lines 18-20.

193/ See Colville Ex. 8, "Colville Irrigation Project," supra, following p. 62.

acreage served by the aforesaid colville Irrigation Project: 194/

IRRIGATION SUMMARY

Allotment	Irrigated Acres (1977)	Undeveloped Irrigable Acres	Totals
S-526	50.7	11.1	61.8
H-892	42.6	14.3	57.9
TRIBAL TRUST	.8	.7	1.5
H-901	30.4	10.7	41.1
TRIBAL TRUST	----	8.8	8.8
S-903	32.4	24.9	57.3
TOTALS	157.9	70.5	228.4

XL.

Quantities Of Water Actually Diverted To Indian Lands Within The Colville Irrigation Project - 1977

Predicated upon the data obtained from the monitoring and managing program provided for by the Order of July 14, 1976, as extended, the following quantities of water were pumped and diverted for use on the Indian Allotment and Tribal lands within the service area of the Colville Irrigation Project above the Walton property:

SUMMARY OF 1977 WATER USE ABOVE THE WALTON PROPERTY 195/

Allotment	1977 Acres	Water Use in Acre-Feet	Water Use in Acre-Feet Per Acre	Average Annual Sprinkler Water Requirements in Acre-Feet Per Acre
Tribal Allotment No. 526	50.7	254.8 Total	2.68 Average	4.24
Indian Allotment No. 892	43.6	All Lands	All Lands	4.44
Tribal Lands	.8			4.44

194/ Ibid.

195/ See Col. Ex. 24(10), "Summary of 1977 Water Use, No Name Creek Basin," for Allotments Colville S-526 and Colville H-892; testimony, Thomas M. Watson, Vol. IV, p. 728, l. 15 - p. 732, l. 1.

The reasonable average annual sprinkler water requirements for the service area of the Colville Irrigation Project above the Walton property are 4.33 acre-feet per acre. 196/ The Colville Irrigation Project diverted 2.68 acre-feet per acre to the lands above the Walton property in 1977 which is substantially less than the reasonable water requirements with the attendant reduction in crop production and damage. 197/

XLI.

Predicated upon the data obtained from the monitoring and managing program provided for by the July 14, 1976 Order, as extended, the following quantities of water were pumped into No Name Creek, diverted across the Walton property and delivered by the Colville Irrigation Project below the Walton property:

SUMMARY OF 1977 WATER USE BELOW THE WALTON PROPERTY 198/

Allotment	1977 Acres	Water Use in Acre-Feet	Water Use in Acre-Feet Per Acre	Average Annual Sprinkler Water Requirements Acre-Feet Per Acre
Indian Allotment No. 901	30.4	161.6	5.32	4.9
Indian Allotment No. 903	32.4	12.5	.39	5.71

The reasonable average sprinkler water requirements, due to conveyance losses in the delivery of water in the No Name Creek channel to Allotments 901

196/ "Average Annual Sprinkler Water Requirement, (Acre-Feet Per Acre)" of 4.24 and 4.44 for Allotments 526, and 892, respectively; See Col. Ex. 24(2), "Colville Irrigation Project, Irrigation Water Requirements, Irrigated Lands" under sprinkler irrigation for Allotments 901 and 903; See Col. Ex. 24(4), "Colville Irrigation Project, Water Requirements Summary, Irrigated-Sprinkler" under column entitled "Farm Unit Requirement, (Acre-Feet Per Acre)" For Allotments S-526 and H-892 and tribal lands west of 892; testimony, Thomas M. Watson, Vol. IV, p. 711-728.

197/ Testimony, Thomas M. Watson, Vol. III, p. 525, l. 18 - p. 527, l. 21; p. 531, l. 20 - p. 534, l. 16; p. 543, l. 9-19; p. 567, l. 15-22; Vol. IV, p. 779, l. 6-12; Denzel R. Cline, Vol. I, p. 74, l. 7-23.

198/ See Col. Ex. 24(10), "Summary of 1977 Water Use, No Name Creek Basin," for Allotments H-901 and S-903; testimony, Thomas M. Watson, Vol. IV, p. 728, l. 15 - p. 732, l. 1.

and 903, increased the diversion requirements for those two allotments by 50.0 acre-feet above the farm requirements. 199/ The production of alfalfa on Indian Allotment 901 was materially reduced due to the need to limit the quantity of water delivered. Alfalfa was planted on Indian Allotment 903 so late in the season that there was no production. However, the crop for the 1978 irrigation season was planted and will be in production during that season. 200/

XLII.

There were produced within the Colville Irrigation Project service area 364 tons of alfalfa in the irrigation season of 1977. Twenty-five hundred bales of alfalfa have been delivered to the Paschal Sherman Indian School to feed the School's livestock. The value of the alfalfa produced within the Colville Irrigation Project area is calculated to be $21,000 for use by the Paschal Sherman Indian School. 201/

XLIII.

Listed below are the water uses for the 1977 water season: 202/

Allotment	1977 Acres	Water Use In Acre-Feet	Water Use In Acre-Feet Per Acre	Average Annual Diversion Sprinkler Water Requirements Acre Foot Per Acre
TOTAL COLVILLE:				
Irrigation	157.9	428.9	2.72	4.72

199/ See Col. Ex. 24(4), "Colville Irrigation Project, Water Requirement Summary, Irrigated - Sprinkler," under column heading "Conveyance Loss," for Allotments S-901 and S-903. The sum of the conveyance losses for both allotments is given as 50.0 as the number of acre-feet. Note that "conveyance losses" do not include diversion of developed water of the Colville Confederated Tribes by Walton.

200/ Testimony, Thomas M. Watson, Vol. XIV, p. 2816, l. 5-22.

201/ Testimony, Melford Tonasket, Vol. II, p. 221, l. 19 - p. 222, l. 13; p 243, l. 2-13; Charles P. Corke Vol. II, p. 383, l. 17 - p. 384, l. 3.

202/ See Col. Ex. 24(10), "Summary of 1977 Water Use No Name Creek Basin" for "Total Colville Irrigation."

XLIV.

Had the Colville Irrigation Project utilized its full reasonable diversion requirements for sprinklers on the 157.9 irrigated acres north and south of the Walton properties, it would have reasonably used 746.2 acre-feet 203/

The Colville Irrigation Project did not utilize its full reasonable entitlement for the 157.9 acres but, rather, used 428.9 acre-feet 204/

XLV.

By reducing the quantities of water used during the irrigation season of 1977, both above and below the Walton property, the Colville Irrigation Project salvaged for other uses 317.3 acre-feet 205/

XLVI.

The total reasonable water requirements using sprinkler irrigation for the 228.4 acres of irrigable land within the service area of the Colville Irrigation Project are 4.65 acre-feet per acre for a total water requirement of 1062.2 acre-feet for each irrigation season. 206/

XLVII.

The total reasonable water requirements for rill or flood irrigation for the 228.4 irrigable acres within the service area of the Colville Irrigation Project are 5.86 acre-feet per acre for a total of 1339.1 acre-feet for each irrigation season. 207/

203/ See Col. Ex. 24(2), "Colville Irrigation Project, Irrigation Water Requirements, Presently Irrigated Lands, Sprinkler Irrigation," and Col. Ex. 24(4), "Colville Irrigation Project, Water Requirement Summary, Irrigated - Sprinkler" for total.

204/ See note 202 supra.

205/ The 317.3 acre-feet is the difference between the sprinkler water requirements of 746.2 acre-feet (see note 203 supra) and the actual water use in 1977 of 428.9 acre-feet (see notes 202 and 203, supra) for 157.9 acres.

206/ See Col. Ex. 24(1), "Colville Irrigation Project, Irrigation Water Requirements, Total Irrigable Lands, Sprinkler Irrigation" for total.

207/ See Col. Ex. 24(1), "Colville Irrigation Project, Irrigation Water Requirements, Total Irrigable Lands, Rill Irrigation" for total.

XLIV.

Had the Colville Irrigation Project utilized its full reasonable diversion requirements for sprinklers on the 157.9 irrigated acres north and south of the Walton properties, it would have reasonably used 746.2 acre-feet 203/

The Colville Irrigation Project did not utilize its full reasonable entitlement for the 157.9 acres but, rather, used 428.9 acre-feet 204/

XLV.

By reducing the quantities of water used during the irrigation season of 1977, both above and below the Walton property, the Colville Irrigation Project salvaged for other uses 317.3 acre-feet 205/

XLVI.

The total reasonable water requirements using sprinkler irrigation for the 228.4 acres of irrigable land within the service area of the Colville Irrigation Project are 4.65 acre-feet per acre for a total water requirement of 1062.2 acre-feet for each irrigation season. 206/

XLVII.

The total reasonable water requirements for rill or flood irrigation for the 228.4 irrigable acres within the service area of the Colville Irrigation Project are 5.86 acre-feet per acre for a total of 1339.1 acre-feet for each irrigation season. 207/

203/ See Col. Ex. 24(2), "Colville Irrigation Project, Irrigation Water Requirements, Presently Irrigated Lands, Sprinkler Irrigation," and Col. Ex. 24(4), "Colville Irrigation Project, Water Requirement Summary, Irrigated - Sprinkler" for total.

204/ See note 202 supra.

205/ The 317.3 acre-feet is the difference between the sprinkler water requirements of 746.2 acre-feet (see note 203 supra) and the actual water use in 1977 of 428.9 acre-feet (see notes 202 and 203, supra) for 157.9 acres.

206/ See Col. Ex. 24(1), "Colville Irrigation Project, Irrigation Water Requirements, Total Irrigable Lands, Sprinkler Irrigation" for total.

207/ See Col. Ex. 24(1), "Colville Irrigation Project, Irrigation Water Requirements, Total Irrigable Lands, Rill Irrigation" for total.

XLVIII.

SUMMARY OF 1977 WATER USE BY WALTONS FROM NO NAME CREEK BOTH SURFACE AND GROUNDWATER 208/

Allotment	1977 Acres	Water Use In Acre-Feet	Water Use in Acre-Feet Per Acre	Average Annual Sprinkler Water Requirements Acre-Feet Per Acre
Walton Allotment No. 525	29.0	152.5	5.26	4.44
Walton Allotments Nos. 2371 & 894	21.9	115.4	5.27	3.66

XLIX.

The Waltons exceeded the reasonable average annual diversion sprinkler water requirements on former Allotment 525 by eight-tenth acre-feet per acre for an excessive water use on the 29.0 acres of 23.2 acre-feet during the 1977 irrigation season. 209/

L.

The Waltons exceeded the reasonable average annual diversion sprinkler water requirements for Allotments 2371 and 894 by 1.6 acre-feet per acre for an excessive water use on the 21.9 acres of 35.0 acre-feet during the 1977 irrigation season. 210/

LI.

During the 1977 irrigation season, the Waltons intercepted and utilized 86.3 acre-feet of the developed water pumped into No Name Creek by the Colville

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208/ See Col. Ex. 24(10), "Summary of 1977 Water Use, No Name Creek Basin" for Allotments "Walton S-525, Walton S-2371, and Walton H-894."

209/ See Col. Ex. 24(10), "Summary of 1977 Water Use, No Name Creek Basin" for Walton Allotment S-525. Difference between "Water Use" (5.25 acre-feet per acre) and "Average Annual Sprinkler Water Requirement" (4.44 acre-feet per acre) is .8 acre-feet per acre, which is the equivalent of 23.2 acre-feet over the irrigated area of 29.0 acres.

210/ See Col. Ex. 24(10), "Summary of 1977 Water Use, No Name Creek Basin" for Walton Allotments S-2371 (9.9 acres) and H-894 (12.0 acres), which total 21.9 acres. Difference between "Water Use" (5.26 acre-feet per acre) and "Average Annual Sprinkler Requirement" (3.66 acre-feet per acre for grass) is 1.6 acre-feet per acre, which is the equivalent of 35.0 acre-feet over 21.9 acres.

Irrigation Project for delivery and use on Allotments 901 and 903, to the irreparable damage to the Colville Confederated Tribes and the Paschal Sherman Indian School. 211/

LII.

At all times since the Waltons commenced irrigating in the late 1940s above the Indian Allotments 901 and 903 and the Tribal lands below the Waltons' property, the Colville Confederated Tribes have suffered irreparable and continuing damage due to the diversion and use by the Waltons of the entire stream flow of No Name Creek. 212/

LIII.

Reduction Of Irrigated Acreage, Water Use And Salvaged Water Used For Fishery:

A decision was made by the Colville Confederated Tribes and the United States during the 1977 irrigation season to:

1. Refrain from irrigating the full 228.4 acres and to irrigate only 157.9 acres, with a reduction in water use of 316.0 acre-feet 213/

2. Reduce the quantity of water actually applied to the lands irrigated below the reasonable dirversion requirements for irrigating the 157.9 acres referred to above, with the resultant saving of 317.3 acre-feet 214/

3. Use sprinkler irrigation on the 157.9 acres, rather than to use the flood or rill method of irrigation,

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211/ See Col. Ex. 17(2), "Separation of Walton Surface Diversion into Components of Natural Streamflow and Developed Water of Colville Confederated Tribes"; Testimony, Thomas M. Watson, Vol. III, p. 627, l. 11 - p. 631, l. 19.

212/ See notes 170, 171, & 172, supra.

213/ Difference between Sprinkler Irrigation Requirements of 746.2 acre-feet for 157.9 acres (see note 203, supra) and Sprinkler Irrigation Requirement of 1062.2 acre-feet for 228.4 acres (see note 206, supra) is 316.0 acre-feet.

214/ See note 205, supra.

resulting in greater efficiency of water use and a resultant saving of 192.6 acre-feet 215/

By those methods, the Colville Confederated Tribes reduced the quantities of water used from the No Name Creek surface and groundwater supply by a total of 825.9 acre-feet 216/

LIV.

A portion of that total reduction of water use and salvage of water through greater efficiency was used by the Colville Irrigation Project for delivery to the Lahontan Cutthroat Fishery in the amount of 322.7 acre-feet 217/

LV.

By using that salvaged water down the renovated channel, the Lahontan Cutthroat Trout were induced to enter No Name Creek and proceed up that stream to a point immediately below the "Diversion Point for 'South Unit' Colville Irrigation Project," marked "4" on the Plate which follows. 218/

LVI.

The Lahontan Cutthroat Trout spawned in the renovated channel and, in the opinion of the fishing experts, approximately 67,000 Lahontan Trout were produced as a result of natural spawning in No Name Creek. 219/

215/ See Col. Ex. 24(2), "Col. Irrigation Project, Irrigation Water Requirements, Total Irrigable Lands," which shows water requirements of 938.8 acre-feet for 157.9 acres of "Rill" irrigation and 746.2 acre-feet for 157.9 acres of "Sprinkler" irrigation. The difference in water requirements using rill and sprinkler irrigation is 192.6 acre-feet.

216/ Reduced water use of 825.9 acre-feet is the sum of 316.0 acre-feet (see note 213, supra), 317.3 acre-feet (see note 214, supra), and 192.6 acre-feet (see note 215, supra).

217/ See Col. Ex. 24(10), "Summary of 1977 Water Use, No Name Creek Basin" for total Colville Fishery in column titled "Water Use, (Acre-Feet)."

218/ See Col. Ex. 8, "Colville Irrigation Project" and Col. Ex. 37(14); Testimony, David L. Koch, Vol. VIII, p. 1697, l. 17 - p. 1707, l. 22.

219/ Testimony, David L. Koch, Vol. VIII, p. 1707, l. 23 - p. 1708, l. 11.

LVII.

The Lahontan Cutthroat Trout which were spawned under the conditions prevailing in the No Name Creek Fishery resulted in a hardier and healthier fish than those raised in the completely artificial circumstances which prevail in the fish hatcheries. Hence, the quality of fish and the probability of survival of the threatened species has been enhanced through the use of the No Name Creek water. 220/

LVIII.

The decision of the Colville Confederated Tribes and the United States to use water for the Lahontan Cutthroat Trout Fishery rather than to use it to irrigate land was in furtherance of the Federal policy of protecting any threatened species. 221/ Since the planting of the Lahontan Cutthroat Trout in Omak Lake, that species has been removed from the endangered species to a threatened species--a marked improvement in the possible survival of the Lahontan Cutthroat Trout. 222/

DRASTICALLY SHORT WATER SUPPLY OF NO NAME CREEK AND NO NAME CREEK GROUNDWATER BASIN

LIX.

The dependable or firm water supply of the No Name Creek Basin for purposes of irrigation, the Lahontan Cutthroat Fishery and the Omache Lake Resort is derived from the No Name Creek aquifer. 223/ The firm water supply is made

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220/ Ibid., at p. 1708, l. 12 - p. 1715, l. 11; p. 1724, l. 21 - p. 1725, l. 16; p. 1727, l. 8 - 14.

221/ Testimony, Charles P. Corke, Vol. II, p. 354, l. 4 - p. 356, l. 17; David L. Koch, Vol. VIII, p. 1667, l. 18 - p. 1668, l. 9; p. 1669, l. 8 - p. 1670, l. 6; p. 1673, l. 13 - p. 1676, l. 15 et seq.; p. 1678, l. 19 - p. 1682, l. 15.

222/ Testimony, David L. Koch, Vol. VIII, p. 1676, l. 16 - p. 1677, l. 2; p. 1680, l. 16-23.

223/ Testimony, Thomas Michael Watson, Vol. III, p. 601, l. 1 - p. 602, l. 8; Vol. III, p. 566, l. 3-10; Vol. VI., p. 1152, l. 10; Vol. IV., p. 694, l. 20 - p. 697, l. 3; Vol. V., p. 1009, l. 3, et seq.; See Col. Ex. 18, "Natural Spring Zone Discharge Related to No Name Creek Aquifer Elevation as Measured in Peters Observation Well."

available from the aquifer either by pumping from wells or by natural discharge from the aquifer to the spring zone of No Name Creek. 224/

LX.

Below the spring zone of No Name Creek and above the "granite lip," which is located near the north boundary of Allotment 901, there are sporadic and intermittent contributions to the streamflow of No Name Creek that do not enter the No Name Creek aquifer and do not increase the firm water supply because of the erratic nature of them. 225/ Below the "granit lip" and within the No Name Creek Basin, there are no additional sources of groundwater or surface water that increase the firm water supply. 226/

LXI.

Sources of water contributing to the No Name Creek aquifer include natural infiltration or percolation from Omak Creek as Omak Creek crosses the No Name Creek aquifer from east to west and natural run-off from precipitation derived from within the watershed area draining to the valley floor overlying the aquifer. 227/

224/ See USA Ex. 1, "Water Resources of No Name Valley, Colville Indian Reservation, Washington," "Groundwater in No Name Valley is discharged from reservoir artificially by pumping, and naturally by seepage to streams and by evapotranspiration." (Cline, p. 13)

225/ See note 223, supra. Testimony, T.M. Watson, Vol. IV, p. 685, l. 21 - p. 689, l. 5; Vol. V., p. 1058, l. 11, et seq.; Vol. VI, p. 1177, l. 17, et seq.; see Col. Ex. 17(1), 17(3); Vol. VI, p. 1205, l. 19 et seq.; Vol. IV, p. 693, l. 23 - p. 694, l. 14; Fred O. Jones, Vol. IX, p. 1874, l. 12-22; Col. Ex. 7, "No Name Creek Watershed." Testimony, M.B. Kaczmarek, Vol. VII, p. 1302, l. 25 - p. 1305, l. 3; Vol. VII, p. 1405, l. 6 - p. 1408, l. 5; Vol. XIV, p. 2853.

226/ Testimony, M.B. Kaczmarek, Vol. VI, p. 1255 et seq.; Vol. VII, p. 1388, l. 4 - p. 755, l. 13-22; Vol. IV, p. 789, l. 10-22.

227/ See testimony of Denzel Cline, p. 58, lines 4 - 9. Testimony of Thomas Michael Watson, Vol. IV, p. 755, lines 13-22, Vol. IV, p. 789 at lines 10-22.

LXII.

Omake Creek is a perched stream. 228/ There is no hydraulic connection between Omak Creek and the No Name Creek aquifer. 229/ There is no groundwater divide, and testimony regarding the groundwater divide is based on water level measurements and wells outside the No Name Creek aquifer 230/ and on water level measurements in a well with proven erroneous measurements. 231/ The contribution of water from Omak Creek to the No Name Creek aquifer is a natural process and is unaffected by changing water levels in the No Name Creek aquifer. 232/ Omak Creek is a relatively constant, natural contribution to the No Name Creek aquifer. 233/ Natural run-off from precipitation varies from year to year. 234/

LXIII.

During the three years of recordkeeping in the No Name Creek Basin (1975, 1976 & 1977), precipitation totaled 33.56 inches at the Omak weather stations. 235/ Long-term three year precipitation averaged 34.62 inches, only slightly more than during the three years of recordkeeping. 236/ There were 31 three-year

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228/ Testimony, M.B. Kaczmarek, Vol. VI, p. 1281, l. 19 et seq.; Vol. VII, p. 1358, l. 25 - p. 1361, l. 16; Vol. XIV, p. 2839, l. 14 et seq.; Charles S. Robinson, Vol. VII, p. 1490, l. 19 - p. 1491, l. 23; Fred O. Jones, Vol. IX, p. 1870, l. 18-23; p. 1879, l. 21 - p. 1880, l. 23; p. 1933, l. 4 - p. 1934, l. 10; George E. Maddox, Vo. XII, p. 2400, l. 12-22.

229/ Ibid.

230/ Testimony, M.B. Kaczmarek, Vo. VII, p. 1347, l. 10 - p. 1348, l. 10; Vol. VI, p. 1240, l. 16 et seq.; Vol. XIV, p. 2870, l. 25 et seq.; Charles S. Robinson, Vol. VIII, p. 1623, l. 19 - 1624, l. 25; p. 1626, l. 8 - p. 1627, l. 7. See Col. Ex. 23(1), 23(2), "Geologic Cross Sections."

231/ Testimony, C.S. Robinson, Vol. VIII, p. 1625, l. 1 - p. 1626, l. 7; M.B. Kaczmarek, Vol. XIV, p. 2843, l. 4 et seq.

232/ See note 228 supra.

233/ Testimony, T.M. Watson, Vol. V, p. 1015, l. 12 et seq., Vol. VI, p. 1213, l. 23 et seq.; Fred O. Jones, Vol. IX, p. 1892, l. 1-9; p. 1918, l. 25 - p. 1919, l. 25.

234/ Testimony, Fred O. Jones, Vol. IX, p. 1891, l. 23 - p. 1892, l. 9; T.M. Watson, Vol. VI, p. 1213, l. 17 et seq.. See USA Ex. 1, "Water Resources of No Name Valley, Colville Indian Reservation, Washington," p. 22.

235/ Testimony, T.M. Watson, Vol. V, p. 1032, et seq.; See Col. Ex. 25(2), "Precipitation Trends."

236/ Ibid.

periods during the 67 years from 1909 to 1977 in which precipitation totaled less than in the three years of recordkeeping. 237/

LXIV.

During the three years of recordkeeping, the pumping and natural discharge from the No Name Creek Basin totaled 2700 acre-feet. 238/ The water level in the No Name Creek aquifer fell 14 feet as measured in the Peter's observation well, resulting in a loss from aquifer storage of 360 acre-feet. 239/ The inflow to the No Name Creek aquifer during the three years of recordkeeping was approxmiately 2340 acre-feet, an average annual inflow of 780 acre-feet. 240/ During the three years of recordkeeping, natural discharge from the No Name Creek aquifer to the spring zone of No Name Creek, in the non-irrigation season, reduced the average annual water supply available for irrigation, the Lahontan Fishery and the Omache Lake Resort to 600 acre-feet per year. 241/

LXV.

Heavy pumping withdrawals were made from the No Name Creek aquifer during 1976 and 1977, resulting in the lowering of the water level in the No Name Creek aquifer 242/ and a corresponding decrease in the natural spring zone discharge. 243/ The water supply during the recordkeeping years was adjusted to reflect continuation of heavy pumping, resulting in an average annual water supply of 648 acre-feet per year available during periods of beneficial use for the 1975-1976-1977 period. 244/

237/ Ibid.

238/ Testimony, T.M. Watson, Vol. V, p. 1050, et seq.; See Col. Ex. 25(3), "Accounting of Water in No Name Creek Aquifer 1975-76-77."

239/ Ibid.

240/ Ibid.; testimony, T.M. Watson, Vol. VI, p. 1117.

241/ See note 238, supra; testimony, T.M. Watson, Vol. VI, p. 1165, l. 13 et seq.

242/ Ibid.

243/ Col. Ex. 18, "Natural Spring Discharge Related to No Name Creekf Aquifer Elevation Zone As Measured in Peter's Observation Well"; Testimony of T.M. Watson, Vol. IV, p. 694, l. 20 - p. 697, l. 3.

244/ See note 238, supra.

LXVI.

From October 1975 through March 1976, there was a continuous decline in the water levels of the No Name Creek aquifer. 245/ Water was being discharged naturally from the No Name Creek aquifer through the spring zone of No Name Creek and there was no pumping from the aquifer. 246/ A measurement of the spring zone discharge was made in March 1976, showing the natural discharge from the No Name Creek aquifer to be .66 cfs., which is equivalent to an annual rate of discharge of 475 acre-feet. 247/ The measurement was representative of the No Name Creek spring zone discharge from October 1975 through March 1976. 248/

LXVII.

The water levels in the No Name Creek aquifer from October 1975 through March 1976 were declining because more water was being discharged through the spring zone of No Name Creek than was being supplied by recharge from all sources. 249/ Recharge from all sources was less than .66 cfs., which is the equivalent of 475 acre-feet per year. 250/

LXVIII.

In March 1977, prior to the beginning of the irrigation season, water levels in the No Name Creek aquifer were rising at an extremely slow rate. 251/

245/ Testimony, T.M. Watson, Vol. IV, p. 705, l. 3 - p. 706, l. 19; p. 771, l. 3 - p. 772, l. 15; p. 818, l. 4 - p. 819, l. 10; Vol. 5, p. 1040, l. 2 et seq. See Col. Ex. 25(3), "Accountin of Water in No Name Creek Aquifer 1975-76-77."

246/ Ibid. See notes 33, 34, 35, 36 and 37, supra.

247/ Testimon, T.M. Watson, Vol. IV, p. 706, l. 14-19; p. 769, l. 1 - p. 772, l. 15; p. 818, l. 4 - p. 819, l. 10; Vol. V., p. 1040, l. 2 et seq.

248/ See note 245 supra.

249/ Ibid.

250/ Testimony, T.M. Watson, Vol. IV, p. 706, l. 14-19; p. 769, l. 12 - p. 770, l. 3; p. 770, l. 22 - p. 777, l. 1.

251/ See Col. Ex. 25(3), "Accounting of Water in No Name Creek Aquifer 1975-76-77."; testimony of T.M. Watson, Vol. V, p. 1040, l. 12 et seq.; George E. Maddox, Vol. VII, p. 2299, l. 6-17.

Water was being discharged naturally from the No Name Creek aquifer through the spring zone of No Name Creek and there was no pumping from the aquifer. 252/ A measurement of the discharge from No Name Creek was made in March 1977 below the spring zone of No Name Creek. The measurement included natural spring zone discharge and run-off from precipitation that did not enter the aquifer but entered No Name Creek between the spring zone and the measurement points. 253/ The natural discharge from No Name Creek in March 1977 was .5 cfs., which is equivalent to an annual rate of discharge of 365 acre-feet. 254/

LXIX.

The water level in the No Name Creek acquifer in March 1977 was rising at a slow rate because less water was being discharged from the aquifer through the spring zone into No Name Creek than was being recharged to the aquifer from all sources. 255/ The recharge from all sources was slightly more than .5 cfs., which is the equivalent of 365 acre-feet per year. 256/

LXX.

In August 1972, prior to heavy pumping from the No Name Creek aquifer, the measurement of the discharge of No Name Creek below the spring zone was made and determined to be .50 cfs., which is equivalent to an annual rate of discharge of 365 acre-feet. 257/

252/ Ibid.

253/ See Col. Ex. 17(1). See testimony of Thomas Michael Watson, Vol. III, p. 603, l. 17 - p. 608, l. 13.

254/ See testimony of Thomas Michael Watson, Vol. V, p. 1040, l. 12 et seq.

255/ See testimony of Thomas Michael Watson, Vol. IV, p. 706, l. 12 & 13; p. 769, l. 19-24.

256/ See notes 250, 251 and 254, supra.

257/ See note 254, supra. See also testimony of Thomas Michael Watson, Vol. III, p. 579, l. 15 - p. 582, l. 1.

LXXI.

During the three years of recordkeeping (1975-1976-1977), the average water supply from the No Name Creek Basin available for beneficial purposes of irrigation, the Lahontan Fishery and the Omache Lake Resort was 640 acre-feet per year. 258/ Measurements prior to and during the three-year period of recordkeeping show periods when water entering the aquifer from all sources was being contributed at rates between .5 and .66 cfs., which is equivalent to annual rates of recharge of between 365 and 475 acre-feet. 259/ During the period from 1909 through 1977, there were 31 three-year periods in which precipitation was less than the three-year total for 1975-1976-1977. 260/ The firm annual water supply of the No Name Creek Basin for all purposes is less than 640 acre-feet per year 261/ and was determined to be 550 acre-feet per year on the basis of all available information. 262/

LXXII.

Predicated upon the short water supply in 1977, which resulted in the motion by the attorney for the Defendants Waltons in August 1977, 263/ and the subsequent agreement and implementation of that agreement by the Colville Confederated Tribes to supply Walton with water, 264/ the annual pumpage of 1100 acre-feet, as determined by the USGS, has been proven totally in error.

258/ See note 244 supra.

259/ See notes 250, 256, 257, supra.

260/ See note 237 supra.

261/ See notes 237-241 & 244, supra.

262/ See testimony, T.M. Watson, Vol. IV, p. 707, l. 12 - p. 708, l. 7; p. 752, l. 2-10; p. 1114, l. 6 et seq.

263/ See Richard B. Price, "Motion for Specific Enforcement of Testing Order to Protect Defendants Waltons' Right to Use Pending Adjudication on the Merits and Affidavits in Support Thereof." August 10, 1977.

264/ See testimony of Thomas Michael Watson, Vol. III, p. 525, l. 18 - p. 534, l. 61; p. 543, l. 10 - p. 551, l. 17; Vol. VI, p. 1219, l. 23 - p. 1233; Vol. XIV, p. 2816; Testimony of Fred O. Jones, Vol. IX, p. 1922, l. 2-6; Vol. X, p. 1973, l. 18 - p. 1942, l. 5.

There were 645 acre-feet pumped from the No Name Creek aquifer by July 31, 1977, and thereafter there was insufficient water to provide the full water requirements of the irrigated lands of the Colville Irrigation Project. 265/

LXXIII.

The 1100 acre-feet annual pumpage determined by the United States Geologic Survey requires a complete reconstruction of the existing Colville Irrigation Project, which reconstruction is based on pure speculation as to the merits of the proposal by the United States Geologic Survey. 266/ Moreover, the 1100 acre-feet annual pumpage is predicated on the artificial induction of water from Omak Creek. There is substantial evidence in support of the finding that water is not induced from Omak Creek. Evidence offered in the record which supports the finding that water is induced from Omak Creek is founded entirely upon assumptions and hypotheses predicated upon speculation and conjecture. 267/ All estimates of the parameters included by the United States Geologic Survey in the 1100 acre-feet, with the exception of the pumpage, were founded entirely upon assumptions and hypotheses predicated upon speculation and conjecture. 268/ Additionally, this Court has ruled that the subject matter of these consolidated cases is limited exclusively to the rights to the use of water of No Name Creek aquifer and stream, without the induction of water from Omak Creek. 269/

265/ See testimony of Thomas Michael Watson, Vol. XIV, p. 2802, at lines 10-20.

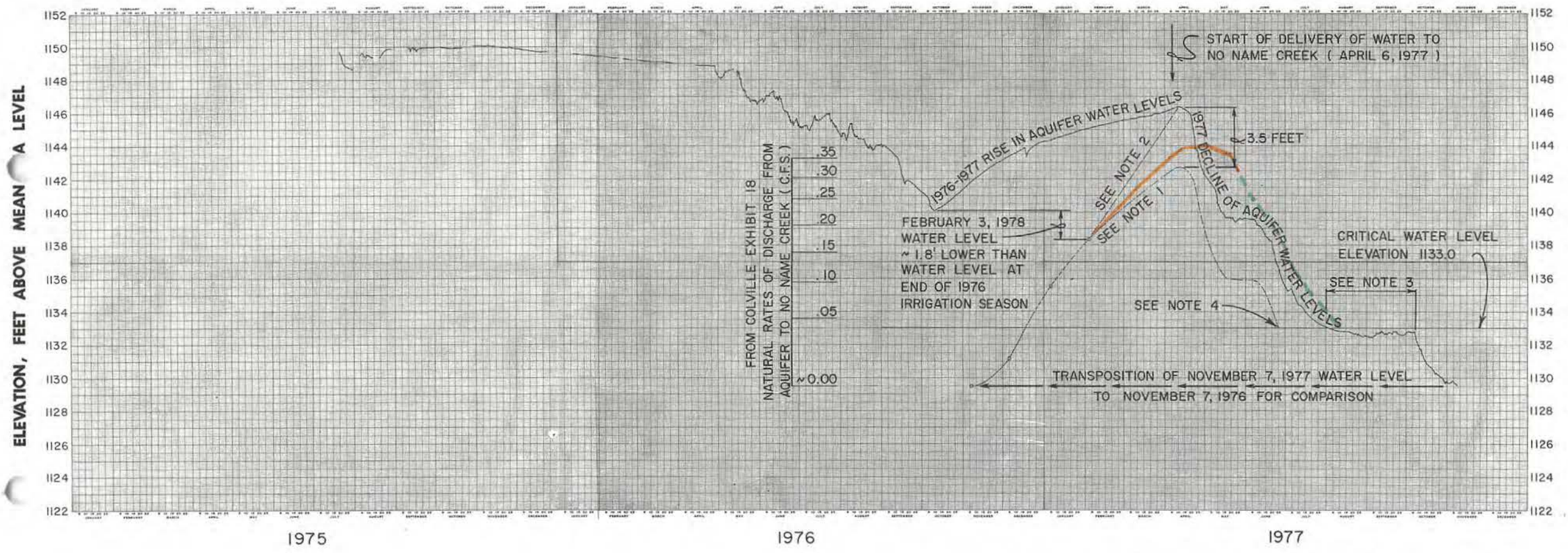
266/ See testimony of Denzel Cline, Vol. I, p. 72, l. 15 through p. 77, l. 9.

267/ See notes 228, 229, 230, 231 and 232, supra.

268/ See the testimony of Denzel Cline, Vol. I, p. 80, l. 1 - p. 82, l. 5; p. 86, l. 14 - p. 90, l. 14; p. 145, l. 20 - p. 149, l. 19; testimony of Thomas Michael Watson, Vol. III, p. 600, l. 7 - p. 602, l. 8; p. 685, l. 7 - p. 687, l. 11; p. 690, l. 2 - p. 695, l. 14. See Col. Ex. 25(4). See testimony of Michael B. Kaczmarek, Vol. VI, p. 1267 - p. 1280; Vol. XIV, p. 2830 - p. 2838. Testimony of Charles S. Robinson, Vol. VII, p. 1464, l. 7 - p. 1465, l. 24; See Col. Ex. 13(1), 13(2) and 21(2).

269/ See Transcript, Volume XII, p. 2374, l. 8-18.

1978 PROJECTION
ELEVATION OF GROUNDWATER
PETERS OBSERVATION WELL



NOTES:

1. PROJECTED 1978 RISE AND DECLINE OF AQUIFER WATER LEVELS.
2. RECOVERY RATE REQUIRED TO REACH HIGH WATER LEVEL OF 1977.
3. COLVILLE WELLS OPERATING AT REDUCED OR ZERO CAPACITY IN 1977.
4. THREAT OF REACHING CRITICAL WATER LEVEL ELEVATION BY JUNE 30, 1978.

EXPLANATION:

——— WATER LEVEL IN PETERS OBSERVATION WELL BASED ON ACTUAL MEASUREMENTS THROUGH FEB. 3, 1978.

- - - - - PROJECTED WATER LEVEL IN PETERS OBSERVATION WELL FROM FEBRUARY 3, 1978 BASED ON 1976-1977 RECOVERY, AND 1977 WITHDRAWALS FROM WELLS IN AQUIFER.

LXXIV.

Predicated upon the experience of short water supply in 1977, a projection for 1978 was prepared and offered. 270/ That projection has subsequently been updated to May 29, 1978, to reflect the most current conditions in the No Name Creek aquifer. It is projected as shown on the Plate preceding this page. It proves a severe water shortage will be experienced in late July or early August 1978 if Defendants Waltons are permitted to continue pumping from the No Name Creek aquifer and diverting from the No Name Creek stream. 271/

LXXV.

INSUFFICIENCY OF WATER FOR BOTH THE COLVILLE CONFEDERATED TRIBES AND THE DEFENDANTS WALTONS

The Colville Confederated Tribes have proved and the United States agrees that there is insufficient water in No Name Creek and the No Name Creek groundwater basin to meet the reasonable water requirements of the Colville Confederated Tribes for either their irrigable or irrigated lands within the Colville Irrigation Project. The use of any water from No Name Creek and the No Name Creek groundwater basin by the Defendants Waltons has caused and will continue to cause irreparable damage to the Colville Confederated Tribes. 272/

Respectfully submitted,

William A. Veeder

William H. Veeder, Attorney for
Colville Confederated Tribes

6 June 78
Date

Suite 920
818 18th Street, NW
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[202] 466-3890

270/ See Col. Ex. 25(1) and 25(1a) - "1978 Projections."

271/ Testimony of T.M. Watson, Vol. V, p. 1024, l. 14 - p. 1032, l. 21; Fred O. Jones, Vol. X, p. 1942, l. 17 et seq.

272/ See Finding XLV, supra. See Justice Department's Proposed Findings of Fact, XXIII and XIV.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiff, vs. BOYD WALTON, JR., et ux, et al., Defendants, STATE OF WASHINGTON, Defendant Intervenor.	Civil No. 3421 CONSOLIDATED CASES
UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM BOYD WALTON, et ux, et al., and THE STATE OF WASHINGTON, Defendants.	Civil No. 3831

CERTIFICATE OF SERVICE

District of Columbia
Washington

I, Carole Ann Roop, being first duly sworn, on oath, depose and say that I am a person of such age and discretion as to be competent to serve papers and that I served the following:

MOTION OF THE COLVILLE CONFEDERATED TRIBES PRESENTING TO THIS COURT A SUMMATION OF DOCUMENTATION SUPPORTING PROPOSED FINDINGS OF FACT AND PETITIONING THE COURT TO ENTER JUDGMENTS IN FAVOR OF THE COLVILLE CONFEDERATED TRIBES IN THESE CONSOLIDATED CASES AND ATTACHED MEMORANDUM OF POINTS AND AUTHORITIES IN SUMMATION OF COLVILLE CONFEDERATED TRIBES' CASE-IN-CHIEF

on the attorneys of record listed on the second sheet of this certificate of service by depositing copies thereof in the United States mail, postage prepaid, addressed to each of the attorneys of record on the 6th day of June, 1978.

Carole Ann Roop

Subscribed and sworn before me this 6 day of June 1978.

Mario S. Romero
Notary Public

My Commission Expires on June 30, 1978

197

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United States District Court
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