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Written closing argument - State of Washington

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiffs, v. BOYD WALTON, JR., and KENNA JEANNE WALTON, his wife, and WILSON WALTON and MARGARET WALTON, his wife, Defendants. STATE OF WASHINGTON, Defendant Intervenor.	Civil No. 3421 WRITTEN CLOSING ARGUMENT - STATE OF WASHINGTON
UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM BOYD WALTON and KENNA JEANNE WALTON, his wife; and the STATE OF WASHINGTON. Defendants.	Civil No. 3831

In previous briefs filed in this case by the State of Washington, the law applicable to the Court's determination whether state law applies to waters located on non-Indian lands within the exterior boundaries of an Indian reservation has been thoroughly analyzed. The purpose of this brief is to provide a short synopsis

of the state's legal position, followed by a discussion of the facts developed during the recent trial.

Based on the framework of law and on the facts developed in the course of this trial, the State believes its position has been fully sustained. That is, the State has the jurisdictional authority to issue water rights to non-Indians such as Mr. Walton, located within the exterior boundaries of a reservation, such as the Colville Reservation, where there are waters in "excess" of those subject to reserved Indian rights. Furthermore, the State's authority was properly excercised in this case, and the 1949 issuance of the water right permit to Mr. Walton for use of No Name (or in Indian - "Su-wa-ka") Creek waters should be upheld by this Court. Whether there is sufficient water now to permit Mr. Walton to use "state" water to the full extent authorized by his permit is a separate factual matter, apart from the question of the State's authority in general, and its exercise of such authority in this case. However, the State does believe that Mr. Walton holds a portion of a reserved right also, being a successor to an Indian allottee. With this brief introduction, we turn to a discussion of the framework of the law as we see it in this matter.

Legal Framework

Since the passage of the State's Surface Water Code 1/, Chapter 90.03 RCW, in 1917, 2/ the State of Washington has had a permit-based prior appropriation system of authorizing rights for the

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1/ The permit system of the water code was extended to public ground waters in 1945, by the adoption of what is now Ch. 90.44 RCW.

2/ Prior to 1917, there was no central repository for water rights filings. Although riparian rights were recognized under certain circumstances, Washington also followed other western states in accepting the "first in time, first in right rule." Early Washington Territorial legislation (18 Laws of Washington Territory 520, 1873) adopted the appropriation rule. After statehood, the legislature passed legislation providing for appropriation for irrigation purposes, and for the beneficial use of public

beneficial use of the public waters. 3/ Pursuant to that statute, persons have since been applying for and receiving "water rights" (permits) both within and without the boundaries of the several Indian reservations located in this state. 4/ However, since the early 1970s, the respective Indian tribes, and the United States as trustee, have asserted the position that the State of Washington cannot, as a matter of law, issue water rights to non-Indians even where there are "excess" waters available. 5/

In a nutshell, the State's position is that state law is applicable with respect to non-Indian water uses within the boundaries of a reservation unless

1. A federal statute or treaty preempts state water rights law; or

2. The exercise of a state's water right laws impairs a tribe's limited powers of self-government over Indians and Indian interests.

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waters. Wash. Sess. Laws, Sec. 2 and 4, 1891, provided a "notice-posting" system of establishing a use right and priority therefor. Pursuant to these enactments, persons were required to file their claimed right with local county auditors.

In 1969, the legislature passed the Water Rights Claims Registration Act, Ch. 90.14 RCW, to attempt to develop a record of pre-1917 water rights (known as "vested rights"). Exhibit NNNN-SW is such a documentation of a claimed "vested right," in the No Name Creek area.

3/ See RCW 90.03.250 et seq. for a description of the application - permit system. Basically, a person desiring to use water makes application therefor, with a priority date as of the date of application. The state water rights agency - now the Department of Ecology - makes a field examination of the proposed use, and, if there is water available for a beneficial use, which use will not be detrimental to existing rights or to the public interest, a permit to develop and use the water may be issued. During the application process, notice of the proposed use is provided to the public, and any "aggrieved person" may appeal the issuance of a permit to the Pollution Control Hearings Board. A certificate is issued after a permit, confirming and recording the right established.

4/ Some of the earliest water permits and certificates issued under the 1917 Code were issued to water users within the Colville Indian Reservation. See Exhibit SSS-SW, where, for example, right number S3-956-C has a priority date of January 20, 1919, and several

The analysis starts with a recognition that in our federal system, certain powers rest with the federal government, pursuant to various constitutional provisions - for example, the war and navigation powers. The states, however, retained plenary powers, as recognized by the Tenth Amendment, U.S. Constitution. These state powers are limited by the Constitution's "Supremacy" Clause, Art. VI, Cl. 2, and to some degree, by the character of ownership of property over which the jurisdiction is asserted, or by a need to protect Indian tribes' exercise of limited tribal powers of self-government, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1964). See also Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011 (1978); Cohen, Federal Indian Law 513 (1958).

Thus, unless one of the jurisdictional "ouster" requirements stated above is met, state water rights laws are applicable to waters located on non-Indian or federal land within a reservation.

With respect to the possibility, above, that Washington's exercise of its water rights laws will "impair" Indian rights of self-government, the State submits that this case does not present the Court with an impairment problem. Assuming, arguendo, that a tribe has powers over any waters within a reservation reserved by the United States for its benefit, 6/ the implementation of Washington's water rights laws cannot impair tribal self government

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other rights with priority dates in the early 1920s are shown. Indeed, the in-reservation permits carry priority dates from 1919 on, until the early 1970s, when litigation concerning reserved rights arose.

5/ The State recognizes the reserved rights doctrine, and the "paramount" priority date of most such reserved rights. The state's jurisdictional claim extends only to the "excess waters" on non-Indian lands.

6/ A position which requires acceptance of some notion of Indian "sovereignty," over non-Indians and non-Indian interests, with which we are unable to agree. See Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011 (1978).

powers because the State's law only authorizes establishment of rights subject to existing rights, including any prior reserved rights of the Indians.

As a practical matter, the Indian reserved rights - carrying a priority date as of the establishment of the reservation - are encompassed within the "existing rights" limitation which all state rights are subject. Thus, state law, as a matter of law, applies only to excess waters - waters not required to satisfy Indian reserved rights. Stated another way, any use of water authorized by the State of Washington respecting "excess waters" is within the context of a system of priorities and would yield to any prior or subsequently initiated water usage from No Name Creek which is within the scope of prior reserved rights of the United States, established for No Name Creek, held for the benefit of Indians.

Furthermore, it should be noted that the State's jurisdictional claim does not extend to Indians, Indian lands, water on such lands, or to the reserved rights themselves. State law does not interfere with "self-government;" it simply does not apply.

With respect to the possibility that state water rights law is ousted or rendered inapplicable within a reservation because of the operation of federal law, treaty, or executive order, it is the State's position that no federal statute or treaty has built such a "wall" around the various Indian reservations. 7/

Careful examination of the various statutes and enactments does not support the plaintiff's theory of an impregnable legal "wall" around reservation boundaries:

7/ This position comports with the well-recognized doctrine that state law may, under proper circumstances, apply to non-Indians and non-Indian (also nonfederal) interests within the original boundaries of the reservation. Langford v. Monteith, 102 U.S. 145 (1880); Draper v. United States, 164 U.S. 240 (1896); United States v. Bratney, 104 U.S. 621 (1881); New York v. Martin, 326 U.S. 496 (1946).

1. The Enabling Act, 25 Stat. 676, Sec. 4, which authorized Washington State's submission to the federal union does not.

COMMENT: The act would apply to claimed state jurisdiction over Indians and Indian land; it does not reach the State's authority over non-Indians and non-Indian land.

2. Likewise, Washington State's Constitution, Art. 26, Sec. 2, with language identical to the Enabling Act, does not.

3. 28 U.S.C. §1360(B) (Public Law 83-280) does not, and

4. Washington's counterpart statute to PL 83-280, chapter 37.12 RCW, does not.

COMMENT: Again, the statutes relate to Indian interests, not non-Indian interests. Nothing in either statute bars the application of state law to excess waters on non-Indian lands. In fact, PL 83-280 would support state jurisdiction over non-Indians. (See footnote 10 below.)

5. Likewise, 25 U.S.C. §381 does not contain state law - preempting language.

A court should not conclude Congress legislated an ouster of state authority ". . . in the absence of an unambiguous congressional mandate to that effect. . . ." Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963). The Allotment Act and the other noted federal statutes contain no such preemptive language.

An examination of the Executive Order establishing the Colville Reservation in 1872 (Ex. Col. 2 (3)) does not furnish support for an "ouster" of state jurisdiction over non-Indian excess waters. First, the executive order does not expressly preempt the State from applying its water laws to waters within the reservation. 8/

8/ Indeed, the executive order is devoid of detail other than a description of the lands reserved. The reservation first extended over most of north central Washington to Idaho, but was reduced three months later to an area between the Okanogan and Columbia rivers, apparently on the outcry of local settlers and miners who feared the Indians were getting the best land. Land area was

Second, while recognizing that the establishment of the Colville Reservation impliedly reserved certain rights to waters within the Reservation for the Colvilles, United States v. Winters, 207 U.S. 564 (1908), the Winters doctrine does not, as a matter of law, apply to all waters within the Reservation.

The impliedly reserved right ("Winters Right") is related to the purposes and intention of the reservation's creation: waters within the reservation are reserved in those amounts necessary to carry out the purposes for which the reserve was created. The right's priority dates from the establishment of the reservation - here, 1872 - and the scope of the right and the purposes for which it may be used are measured by the intention of the reserve's creator at the time the reserve was created. 9/ Most importantly, as the U.S. Supreme Court recently emphasized, the right established is for that amount necessary to carry out the purposes for which the reservation was created "and no more," Cappaert v. United States, 426 U.S. 128, 141 (1976).

Further, and closely associated with this latter point, the Winters doctrine does not stand for the proposition that all waters within a reservation are reserved. The Winters case itself, and subsequent cases such as Conrad Investment Co. v. United States, 161 Fed. 829 (9th Cir., 1908) recognize that waters in excess, or "surplus" of those amounts required to satisfy a reserved right are subject to appropriation under state law. See also United States v. Ahtanum Irrigation Dist., 330 F.2d 897 (9th Cir. 1964). 10/

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clearly the prime concern in the reservation process; jurisdiction over land was secondary.

9/ The intended purposes of the Colville Reservation are discussed in greater detail at pp. 23-27.

10/ Even if it is necessary, before Washington State's water code may be applied, to find a federal statute authorizing state water law applicability within the Colville Reservation, there are at

The creation of the Colville Reservation, then, does not bar the exercise of State jurisdiction with respect to excess waters on non-Indian lands within the Reservation. The issue of "excess" or "surplus" waters to which state law attaches in No Name Creek is a matter of fact for the court to decide. Whether such waters exist involves a consideration of various facts; e.g., (1) availability of water, (2) scope of reserved right, (3) intent to exercise a reserved water right, and (4) the timeframes in which that intent was (or will be) carried out.

It is in this context that the Court must determine factually whether all waters within No Name Creek were reserved in such fashion that it can be stated that all waters within the creek were required to satisfy reserved rights from the first day of creation

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least three federal statutes which so provide as to waters located on non-Indian lands within the reservation. They are:

1. Public Law 83-280, as enacted in 1953, invited the State of Washington to apply its civil or criminal laws, or both, to both Indian and non-Indians and their interests. Through implementation of chapter 37.12 RCW by the State of Washington, Washington's civil laws have been applied to unrestricted fee land within the Indian reservation of the State of Washington including the Colville reservation. See RCW 37.12.010. Thus, Washington States water laws may be applied to waters located on defendant Walton's lands. See RCW 37.12.010.

2. Lands, constituting allotments, severed from federal ownership and trust pursuant to the Dawes Act "shall have the benefit and be subject to the laws, both civil and criminal, of the state or territory in which they reside . . . ." 25 U.S.C. § 349. Thus Walton, as successor in land ownership to an Indian allottee, may obtain the benefits of state laws such as Washington State's water code for such lands. See Dillon v. Antler Land Company, 507 F.2d 940 (9th Cir. 1974), cert. denied, 421 U.S. 993 (1975). See also Dickson v. Luck Land Co., 212 U.S. 371 (1917), and United States v. Hibner, 27 F.2d 909 (D. Idaho, 1928).

3. By the Act of 1906 (34 Stat. 80) the Reservation was opened to entry and settlement under the "homestead" laws. Under these federal laws, lands transferred from federal to nonfederal ownership are not accompanied by any federal water rights, water rights establishment upon and after transfer being a matter of state water rights law, California - Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). While there are apparently no "homesteaded" lands in the No Name Creek basin, there are within the rest of the Colville Reservation. Thus there is no impermeable wall around the Colville Reservation barring state water rights laws.

of the Colville Reservation in 1872. In the following analysis of the evidence before the Court, we shall point out that the weight of the evidence clearly supports a conclusion that there have been significant amounts of "excess waters" in No Name Creek in the past to which state water rights laws have been properly applied. Thus, Walton's State right issued under the water availability conditions of the later 1940s was clearly valid.

We shall also point out that if present trends continue, there will be fewer and fewer excess waters available to allow (1) for the full exercise of state-based water rights issued in the past or (2) for the establishment of new state-based rights in the future.

The essential fact derived from the evidence is that there have been and will be excess waters in No Name Creek to which state water rights laws may apply. There is, as a matter of fact and law, no wall on the original boundaries of the Colville Reservation which bars the reach of such laws to No Name Creek waters.

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FACTUAL DISCUSSION

With the legal framework in mind, we turn to a discussion of the case's factual aspects. The jurisdictional questions related to the existence of "excess" waters in No Name Creek, now or in 1949, are discussed first. Space and time limit our discussion of other topics touched on in trial, but we do comment on the following:

1. The historical background of the Colville Indian Reservation's establishment.

2. The scope of the reserved right.

3. Water availability.

4. Water duty and usage.

5. Omak Lake and the Lahontan fishery.

We turn immediately to the discussion.

* * *

State's Issuance of Walton Permit

In 1948, Mr. Wilson Walton submitted an application to the State for permission to use surface water (3 cfs) from No Name Creek for irrigation of his farm. (Ex. IIII-SW, p. 16a). The application was duly published in the local paper; 11/ no protests were received during the protest period. 12/ As part of the standard application processing procedures, a field exam of the proposed use was made, and, on October 31, 1949, Mr. Herbert Pollock of the Department of Conservation signed the Report of Examination, Ex. IIII-SW, p. 13. A permit was duly issued on the basis of the Report's recommendation. 13/ (Trans. 2698-2700-Wallace).

Were there "excess" waters when the permit was issued? Because of the present unavailability of the Department of Conservation employees who handled the Walton application, there is no eyewitness testimony of what the State "saw" in 1949. However, the Report of Examination itself, (Ex. IIII-SW, p.13), based on the department's field exam, provides several important indications:

1. Under the heading "Other use made of water," the notation is "stockwater 1 ranch downstream."

2. Under "Special Remarks," the notation is "One ranch downstream utilizes this stream for stockwater and possibly for other domestic uses."

11/ See RCW 90.03.280 and Ex. IIII-SW, p. 15.

12/ See RCW 90.03.470(12); counsel for Colvilles and for the United States stipulated that there was no protest filed as to the Walton application or others (Trans., 2265-67; see also Trans. 312, Covington).

13/ Permit No. 6105, Ex. III-SW, p. 12. The Certificate subsequently issued after Walton filed his Proof of Appropriation, is No. 3743, Ex. R-W. The certificate is identical to the permit except that the authorized acreage, 65 acres, is reduced from the permit's 75 acres, Mr. Walton having made full appropriation only as to 65 acres.

3. Fish in the stream are mentioned, indicating a year-round supply of water.

4. The quantity of water authorized for appropriation was reduced from the requested 3 cfs to 1 cfs, presumably to both protect stream flows and give a more reasonable appropriation amount for the 75 acres the department then deemed "feasible" for irrigation.

5. Estimated low flow of No Name Creek was "1.5 cfs"; maximum flow was estimated at "3 cfs."

Taken together, the Report of Examination does indicate that, at that time, there was water available for the requested appropriation, 14/ and there were no other uses except as noted. Thus, on its face, the Report of Examination and permit indicate "excess" waters.

The testimony of the "oldtimers" as to the state of No Name Creek Valley development in 1948-49 corroborates the Report. Mr. Walton stated that, in 1950, there was no irrigation south of his property (Trans. 2163). Mrs. Sampson, former tenant on Allotment 901, indicated she had left the allotment by the early 1940's. (Trans. 324). Mr. Hampson stated that there was no irrigation below the Waltons in 1948 (Trans. 2084), as did Mr. Boyd Walton (Trans. 2283), for 1950.

The situation in 1949, then, was this: The State had received a surface water application for No Name Creek waters. The surface flow of No Name Creek 15/ starts at the spring area just north of the Walton property (Trans. 589-Watson). Reasonably, then, the

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14/ RCW 90.03.290 requires a determination of a) water availability, b) beneficial use, and c) no detriment to prior users or the public interest before a permit may issue. The Walton application was subject to these tests, of course.

15/ There were occasional floods on flows down from Omak Creek to No Name Creek (Trans. 2209-B. Walton, see also Aston), but the ordinary flow starts near the North property line of the Waltons.

extent of the stream at which the State was looking in 1949 was from the spring zone flowing down to Omak Lake through allotments 901 and 903. 16/ It was those properties against which the excess waters "determination" is to be considered, 17/ not as against the northern allotments in the valley, Nos. 526 and 892, for which the logical surface water source would have been Omak Creek, not No Name Creek. 18/

Furthermore, there were no wells between the Walton property and Omak Creek except domestic wells. (Trans. 314-Covington; 2092-Aston; see also USGS report, USA Ex. (1) and Ex. 30-14). There would thus have been no suggestion that the proposed Walton diversion could in any way adversely affect ground water resources. 19/ Also, because of the unique formation known as the granite lip, south of Walton, the lower No Name Creek area is a separate ground water basin. (Trans. 1263, 1264-Kaczmarek). Thus, the only use which could have been affected by the Walton surface diversion would

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16/ The stream originally flowed into the lake through Lot 903, but after channel renovation now flows through Lot 901 (Trans. 334-Sampson; see also testimony of Koch).

17/ This was not a formal finding, of course, for as Mr. Wallace stated, the issue simply never came up (Trans. 2739). That is, there was simply no question at that time that the Walton's use was non-detrimental to others' uses.

18/ Indeed, there was considerable testimony that at least Allotment 526 (an upper lot) had been irrigated from Omak Creek, and that there were ditches running off Omak Creek. (Trans. 1813-Bennett; 340-Sampson)

19/ As a matter of fact, it is far more likely that a upstream groundwater withdrawal will affect a downstream surface use, rather than vice versa. The surface flow can only affect downstream - not "uphill" in the aquifer. It has taken the sophisticated research resources of the Colvilles and the USGS to document No Name Creek's source as being primarily surfacing ground water from Omak Creek. The complex surface - ground connection was simply not apparent or provable until the advent of this litigation. The point still remains, however, that Walton's use of No Name Creek itself can only affect downstream users of the stream, for if he does not use the stream the water would still flow south, not north.

have been a use on the creek downstream from his diversion. As already demonstrated, there was practically no downstream use in 1948-50; there was no irrigation use from the stream at that time in Allotments 901 and 903. To the extent there was some stock and grazing use, the State's Report of Examination noted it and took it in to account in the amounts authorized for diversion.

It should also be noted that the Waltons were the only residents and irrigators in No Name Creek Valley until the advent of the Colville Irrigation Project in the mid-1970's. 20/ From 1948 to 1975, then, the only irrigation water user was Mr. Walton. The record is bare of any suggestion of contemplated or imminent water-requiring development by the allottees, the Tribe or anyone else, until the late 1960's. There is simply no factual basis, then, to conclude that the Walton permit no. 6105 was infringing on or issued in the face of an impending exercise of reserved rights. From 1949 to the mid-1970's, the waters used by Walton pursuant to his State permit were, quite literally, excess. They would have run, unused and unproductive, into an ever-rising "dead" Omak Lake, had the Waltons not made beneficial use of the water for their lands and cattle.

To summarize: when the State issued Permit 6105, there were excess waters, and the permit was properly within the State's jurisdiction to issue. The validity of the permit should be confirmed by this Court.

20/ According to Mr. Tonasket's testimony, the first impetus for the project was Edgar Disautel's complaint in 1970 that he couldn't get enough ground water from Lot 901 (which we now know as a poor aquifer) for the Lake resort, (Trans. 212-Tonasket.) There was no earlier evidence of complaint, concern or otherwise about Walton's diversion.

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Current Status of Walton's State Right

We have seen that, at the time of permit issuance, there were excess waters available for appropriation from No Name Creek. The record is also clear that, with the advent of the Colville Irrigation Project, stream flows of No Name Creek have diminished, if not disappeared altogether. (See, e.g., Trans. 669-Watson).

One of the unique features of the Winters right is that, unlike state-based rights which are lost for non-use, see, e.g. Ch. 90.14 RCW, the Winters right may be exercised at any time. Assuming, then, that the Colville Irrigation Project is a proper exercise of a long-dormant Winters right, 21/ that exercise carries with it a priority date as of the date of the Reservation's establishment, 1872.

Mr. Walton's state right carries a priority date of 1948.

The state right issued to Mr. Walton, like that issued to any other permittee, is issued "subject to existing rights," RCW 90.03-.010. One of the "existing rights" to which the Walton permit is subject, therefore, is an exercise of a reserved right to use the water supply, here, No Name Creek. 22/

Under the terms of the permit itself (Ex. IIII-SW, p. 12), Washington water law (RCW 90.03.010), and standard Western law of

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21/ Elsewhere in our discussion we point out some of the limitations on the scope and quantity of the right, pp. 22-25.

22/ The exercise of a reserved right by the Colville Indians on, for example, the Columbia River, could not affect the No Name Creek water resource. This illustrates the point that the determination of "excess" waters is a factual question, directly related to the particular water resource, not to the Reservation as a whole. It is for this reason that the state contends the relief requested in Issue 12, Pretrial Order, is premature and cannot be made on the basis of this record.

appropriations, "subject to existing rights" is enforceable in terms of priority:

"First in time shall be the first in right."

Simply stated, the Colville Indian reserved right has priority over the Walton State right. In case of water shortage of No Name Creek, the Walton right 23/ must yield to the exercise of the Indian right, as it would to the exercise of any right, state-based or Winters-based, with a greater priority to that particular water resource or water body.

By the same token, if at some point the Colville Irrigation Project did not use all waters, the Walton right could be exercised to the extent of excess, cutting back as the excess was picked up again by the Project.

The ability of the state right to expand (up to the authorized amount) and contract (to nothing) is not a mere trick, it is the very basis upon which the law of water use in the West is founded. That is, the water right is a use right, not a right of ownership of the stream, per se. See RCW 90.03.010 and Weil, Running Water, 22 Harv. L. Rev. 109 (1909). That right to use necessarily depends both on the physical state of the stream itself, and on the other use rights held by other stream users, whether Indian or non-Indian, within the reservation or not, and may therefore expand or contract as stream conditions and priority warrant.

23/ The Walton right here discussed is the state-based right. The State also supports Mr. Walton's claim to a portion of the Winters right, as successor to an Indian allottee, United States v. Hibner, 27 F.2d 909 (D. Idaho, 1928); United States v. Powers, 305 U.S. 527 (1939). Purchasers of Indian allotments stand, in effect, in the shoes of the Indians. A purchaser obtains a reserved water right. The State's discussion is concerned solely with Mr. Walton's water use pursuant to State permit, not with the water to which he is entitled as a successor to an allottee. We recognize that Mr. Walton's exercise of his portion of the Winters right may "diminish" his own state right.

In summary: Because of recent water resource development in the No Name Creek vicinity, it is possible the "excess" water available in 1949 no longer exists to satisfy part or all of the right authorized to Mr. Walton. Basically, No Name Creek may be "fully appropriated," 24/ at any one time by holders of rights with greater priority - the Colvilles and their successors. To that extent, the Walton right is (and must be by law) diminished.

It is also most likely that, given the demands currently related to the No Name Creek water resource, a new State attempt to issue further state rights there would be impossible. There would simply be no 'excess' waters available to satisfy the state law requirement of water availability 25/ prior to permit issuance. This determination, of course, would be based on the factual circumstances related to No Name Creek. This points out again that the state system and the Winters right do "mesh" remarkably well to allow water resource development, based on the practical circumstances of the particular water body or resource.

It is also clear that future issuance of state permits elsewhere on the reservation rests on a factual determination of 'excess' waters for each such stream or water resource. If there are 'excess' resources, they can be put to use; if not, a state right-based use will yield to the higher priority use of the reservation's beneficiaries, the Colville Indians. Clearly, it would be premature to now give injunctive relief as requested in the Pretrial Order, Issue 12, and the Court should deny the request.

24/ See Trans. 2703-Wallace, concerning state practice in appropriating streams.

25/ RCW 90.03.290.

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Historical Background - Water and the Colville Reservation

The Colville Reservation was created by executive order. (Ex. 2(3)-Col). That order is silent as to the extent and nature of reserved water rights on the reservation. It is also silent on the extent that the federal government contemplated restriction of state jurisdiction within the boundaries of the reservation.

Treaties and executive orders are similar to statutes in their effect. Where they are ambiguous or silent, long-accepted and mandated methods of judicial interpretation are required. The courts will look to the practice and understanding of the particular executive agency specially authorized to act in the area, to determine the full effect of the congressional or executive action. This rule of construction is likewise applicable to cases involving treaties and orders dealing with Indian tribes. Such documents must be "read in light of the common notions of the day and the assumptions of those who drafted them." Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011, 1019 (1978). In this area, shared presumptions of the Congress and the Executive Branch carry "considerable weight." Oliphant, Id.

What are those presumptions with regard to the Colville Reservation?

First, we begin with the main reasons for the creation of this particular reservation. One such reason was

> . . . to provide a definite location for certain Indian bands which then were roaming around over the Northwest country without any fixed abode, . . .

House Report No. 1070, 58th Cong., 2d Sess., (1904), p.1. The reservation creation followed a request by the Farmer-in-Charge at Fort Colville; he believed that such a reservation was necessary to avoid

the outbreak of hostilities between Indians and non-Indian settlers. Report of William P. Winans to Gen. T. J. McKenney, Sept. 1, 1871, as reported in Report of the Commissioner of Indian Affairs for the Year 1871 (1872), p. 295.

In establishing the reservation it was clear that the federal government did not consider the Tribes involved to possess any of the sovereign powers which they assert now before this court. In 1869 the Commissioner of Indian Affairs informed the Superintendent of Indians for Washington:

> Arrangements now, as heretofore, will doubtless be required with tribes desiring to be settled upon reservations for the relinquishment of the rights to the lands claimed by them . . . but I am of the opinion that they should not be of a treaty nature. . . . . A treaty involves the idea of a compact between two or more sovereign powers . . . . The Indian tribes of the United States are not sovereign nations.

Report of the Commissioner of Indian Affairs, 1869 (1870), p. 6.

In 1887, the Commissioner's report to the Secretary of the Interior commented on Indian "sovereignty":

> ". . . to maintain any such view is to acknowledge a foreign sovereignty, with the right of eminent domain, upon American soil - a theory utterly repugnant to the spirit and genius of our laws, and wholly unwarranted by the Constitution of the United States."

Report of the Comissioner of Indian Affairs, 1887, p. 87.

The nature of the Colville Tribes' right to the reservation created for them was different - and always recognized as such by the federal government - than that of other tribes. The Commissioner of Indian Affairs stated:

> The Indian title to lands within the limits of the States and Territories of the United States is well settled to be the right of occupancy alone, except in special instances where, perhaps, a title of a higher nature

> has been vested by statute or treaty provision.

Annual Report of the Comm. of Ind. Aff., 1872, p. 82.

The order establishing the Colville Reservation was not such a special instance.

The Congress understood that the Colville Tribes:

> . . . have no right, except the right of occupancy, and they have no title, except a mere license based upon an Executive order establishing the reservation.

Senate Report No. 468, 58th Cong., 2d sess. (1904), p.3.

It was clear to the Congress that the Colvilles were set apart from other tribes. Their legal relationship was different:

> It has been the policy and the practice of the Government to consult the Indians having title in the land of the reservation to be opened, and their consent should be obtained, yet such consent ought not to be required when the Indians do not have title to the land to be opened, and that is the case provided for in this bill (S. 345). The Indians occupying these lands are there only by sufferance of the United States. They have no title to the land whatever. Id., p. 4.

Before creation of the reservation whatever right or title they had must have been "a very shadowy one, if any at all, . . ."

House Report No. 1070, 58th Cong., 2d sess. (1904), p.3.

> This Executive Order defines the Colville Reservation as it now exists, and is the sole basis upon which the right of occupancy of these Indians rests. Under this order the Indians were given a license to occupy the lands described in it so long only as it was the pleasure of the Government they should do so, and no right, title, or claim to such lands has rested in the Indians by virtue of this occupancy. Id., p. 2.

The government clearly contemplated, moreover, that by allotting land on the Reservation, it would help to determine which lands were irrigable for general agriculture and which lands were not. We look to the government's behavior to see that this was in fact the intention of the government in reserving the lands in the No Name Creek

Valley. On the Colville Reservation, the government intended that allotments of 40 acres were suitable for use as irrigated agricultural land, and allotments of 160 acres were suitable only for use as non-irrigated grazing land. See Report of the Commissioner of Indian Affairs, 1910-1911; see also Annual Report of the Department of Interior, Indian Affairs, 1906, p. 81, and Senate Report N. 468, 58th Cong., 2d sess. (1904), p. 3; see also Deposition of Eri Parker, one of the original surveyors of allotments, Ex. JJJJ-W, pp. 11-12; 15; 20-23; 31.

The reserved right for the Colville Reservation was also peculiarly limited in two other ways.

First, it was always recognized that local water rights custom and the local laws of the State were applicable to the exercise of water rights on the Reservation. Local custom was applied to Indian rights. For example, the Commissioner of Indian Affairs instructed the Secretary of the Interior in 1906:

> . . . in alloting land to an Indian a tract of land larger than he can hope to till - especially when his tenure of the water necessary to make it productive depends upon his <u>beneficial</u> and <u>continued use</u> thereof - we place upon him not only a physical but a moral handicap. (Emphasis added.)

Annual Report of the Department of Interior, Indian Affairs, 1906, p. 80.

It was also recognized that non-Indians could establish water rights pursuant to the laws of the State of Washington, and Indians would have to protect their prior <u>Winters</u> rights by taking appropriate action. Captain John Webster, Agent at the Colville Agency, reported to the Commissioner of Indian Affairs that:

> The question of water rights for the irrigation of Indian allotments from small streams flowing through them is assuming prominence, causing a great deal of hardship and ill feeling between Indians and their white neighbors in the opened north half of the Colville Reservation. It is

> very unfortunate that the laws on the subject are so meager, for the problem is a serious one, affecting nearly every farmer in this region, and in this new age of general irrigation will lead to untold trouble and frequent litigation before it is solved. White homesteaders have diverted most, and in some cases all, of the water from sources used by the Indians for many years, even their drinking-water supply in some instances being entirely cut off. From consultation with the United States attorney I learn that there is no adequate remedy at this late day in the case of Indians of the north half, and to prevent as far as possible the recurrence of like conditions on the Colville and Spokane reservations, about to be opened, I propose to see that every Indian allottee posts notice of claim and makes a regular filing and record of water rights where a supply is available, prior to the opening of the lands for homestead entry. Id., pp. 371-372.

Even more startling is certain proposed legislation offered by Secretary Garfield in 1908. The clear implication of the Secretary's message is that the federal government did not make a complete reservation of all waters on the Colville Reservation. Indeed, if such had been the case, there would have been no need for special legislation to reserve additional water for power purposes.

> During the past summer the Commissioner of Indian Affairs visited this reservation, and the allotting agent invited his attention to certain large creeks flowing down from the mountains on the diminished Colville Reservation, affording valuable water power which will be of great value in the future to the public and to the Indian allottees, and which, if not protected by the Government, will be acquired by settlers and developed for private gain.
>
> Allotment work on the Colville Indian Reservation will be taken up shortly, and upon its completion the classification and opening of the surplus lands to settlement will follow. If these sites are to be protected with a view to their conservation and development along broad lines of governmental policy, legislation is necessary.

Other evidence bears out the lack of intent by the Government

to exclude the States' water laws. For example, superintendants were instructed in November, 1915, to describe Indians' water rights as being derived from "adjudication and decree" or "Approved permit no." (see Pro. Ex. YYY-SW), before land sales, indicating recognition of these means of obtaining water rights.

Indians have filed claims with the State, pursuant to its Water Right Claims Registration Statute. (Trans. 2712-Wallace). There was a history of silence on the part of the federal government and the Tribe as to State issuance of permits on the reservation. (Stipulated; see also Trans. 312-Covington).

Patented allotments were placed on the local county's tax rolls. (Tr. 2495-Thorp). Neither the United States nor the Tribe objected to County assessments that took into account water rights. (Trans. 2497-2498-Thorp).

Non-Indian settlers filed to "protect" their water rights under the law of Washington as it existed prior to 1917; in the 1960's, after the enactment of Water Rights Claims Registration Act, Ch. 90.14 RCW, those same water users filed "claims" forms to protect what they thought they had established as rights. (Ex. NNNN-SW; HHHH-SW). 26/

To summarize: There was historically no clear intent or policy with respect to the waters of the Colville Reservation which would preclude the State's position on 'excess' waters.

* * *

Historical Background - Scope of the Reserved Right:

Uses and Quantities

As stated, the touchstone in determining the scope of the

26/ St. Mary's Mission filed such claims, for waters from Omak Creek. The St. Mary's Mission lands were owned in fee by the Jesuit Fathers when these "rights" were established. Presumably the Tribe, as purchasers of the fee title, own those "rights" now.

Winters right, both as to uses and as to quantities, is the intention of those who established the reservation. What was intended for the Colvilles? In summary form, we suggest the following purposes for uses:

1. Agriculture: The Indians were to be settled and become as homesteaders. Because of the recognized mountainous nature of much of the Reservation, 27/ the contemplated agricultural uses would probably not be extensive.

2. Timber Production: A use which follows logically from the creation of the Colvile Reservation, which was recognized to be, and is, heavily forested. 28/

3. Fishing: A use historically related to the large salmon runs on the Columbia. 29/ For the smaller streams and lakes, the "fishery right" would be only for the preservation of subsistence native fisheries in those streams, as relied on by the Indians.

4. Mineral Production: The Colville Reservation does have mineral resources, and waters for the exploitation of those resources were probably 'intended' to be reserved, where appropriate. (No mineral production uses would be appropriate in the context of No Name Creek).

27/ See letter of James McLaughlin, 20 Dec. 1905, quoted in HR 1681, 59 Cong. 1st Sess. (Feb. 23, 1906):

> It must be borne in mind that the southern half of the Colville Reservation is a very mountainous country, containing much land which is not of any particular value for agricultural purposes; but to offset this it contains a vast area of very fine timber..."

28/ Ibid.

29/ See letter, 15 Aug. 1872, McKenney to Walker, quoted at Annual Report of the Commissioner of Indian Affairs, 1872, p. 347, stating that Kettle Falls on the Columbia was "where they all get their winter's supply of salmon."

5. Domestic uses

6. Stockwatering uses

7. Firefighting uses

As to the quantities reserved for such uses, we are again guided by intention principles. Amounts are only to the extent necessary to achieve those purposes, Cappaert v. U.S., 426 U.S. 128 (1976).

For agriculture the current rule of quantification, adopted by the Supreme Court, in Arizona v. California, 373 U.S. 546, 600-01 (1963), set as the outside limit in that case the "practicably irrigable acreage."

Agriculture as practiced at the time of the reservation's establishment was mainly grazing, dry cropping, and irrigation from surface-water fed gravity and flume systems. These systems required more water than modern sprinklers, but probably covered less land than sprinklers are now capable of irrigating. There is therefore some question as to whether the extent of agricultural water reservation should be measured by the irrigation technology existing at the time of the reservation. For rill irrigation from the flow of No Name Creek, the irrigable acres would be approximately 115 acres. 30/ If this Court should adopt a sprinkler-based "irrigability test," the testimony indicated that approximately 400 acres in the No Name Creek Valley are irrigable. 31/ (Ex. 11- U.S.).

30/ The figure is derived from the 75 Walton acres feasible for creek water irrigation, and the approximately 40 creek-water irrigated acres for the two lower allottments, (Ex. IIII-SW, p. 13; Trans. 2062-Hampson.)

31/ Whether the manner in which the irrigation water is presently used (pumped in the north, shipped wastefully to the south) was within the intention of the reservation's creation presents a related issue. That is, was it intended that the Lots 901 and 903, whose own ground water resources are limited, (Trans. 1264-Kaczmarek), were to receive the benefit of ground water pumped from Lots 526 and 892? Or were the lower lots "intended" simply to receive the naturally occurring flows of No Name Creek as it came over the granite lip? Is

For timber purposes, the right need not be quantified in this litigation, there being no timber production element herein.

Water quantities for fisheries purposes are limited to those amounts necessary to ensure the continuance of the native fishery, but only if that fishery was "intended" to be protected.

Domestic and stockwatering uses are, for all practical purposes, de minimis.

Firefighting uses again are not directly related to this case, but quantification would be futile, as the need is instantaneous, on an emergency basis.

Regarding ground waters, no reservation of such waters could be made by the federal government unless it clearly contemplated that such waters underlay the lands in question. Indeed, it would be most difficult to find an intention to reserve such waters unless they were known at the time the reservation took place. Moreover, to the extent that any reservation of ground waters was made, that reservation was for the use of such ground waters in quantities sufficient to fulfill domestic purposes. There was no intention to reserve ground waters for modern, high-capacity irrigation wells. The State does not argue here that such ground waters must now be used for all time solely for domestic use, but the extent of the right (the limit of the volume under that right) is determined by the original intended use.

For practical purposes, then, in this litigation it is the agricultural use which constitutes the major element of the reserved right.

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the reserved right the Tribes' to move, in gross, or ascribable on a pro rata basis to each allottee? In considering this quantification of the agricultural use, the Court will have to keep in mind the "intention" touchstone when threading through the somewhat difficult ground-surface water relationships in No Name Creek, before and after development.

* * *

Water Availability

In analyzing the estimates of various experts as to the amount of water available in the No Name Creek Valley for irrigation purposes, the Court should keep in mind that inherent in all of the estimates are certain and varying resource management assumptions and preferences. As testified to by Dr. Maddox and Mr. Jones, the concepts of "firm annual supply" and other similar expressions are based on certain assumptions of how water is to be managed. Every year that irrigation has taken place in the No Name Creek Valley is a year in which some scheme of water management was in effect. Why should the scheme of management imposed by the Tribe in 1977 (with one eye on the pumps and the other eye on U.S. v. Walton) be the scheme of management by which all others are to be judged, and eventually rejected? This Court is being seriously misled when it is told that it must not seem to be imposing a water management scheme on all of the parties here when it makes its decisions.

All of the "firm annual" estimates, for example, contained built-in assumptions of how water should be managed. (Trans. 2625-Maddox). None of these assumptions should be blindly accepted by the Court. However, it would be appropriate for the Court to look to the customary experience in many areas of the western states: planned declines in water table over a set period of time so as to more efficiently make use of a scarce resource. (See Trans. 2336-37-Maddox; 2707-Wallace; see also RCW 90.44.130, on "safe sustaining yield" and "controlled decline.") As the determination of water availability in this case will necessarily involve an implicit management scheme, the Court should be well aware of the values embodied in such choice.

The first estimate of water availability presented at the trial was that of Mr. Cline of the USGS. His figure - an annual supply of

1100 AF - assumed the deepening of certain wells that tap the northern aquifer so as to place a strong, but safe, stress on the ground water system. (Trans. 62-Cline). On the other hand, assuming the use of water resources in the area without any significant change in the methods of withdrawal, Mr. Cline estimated an annual available supply of 950-1000 AF. (Trans. 71-72-Cline). The amount of water available in the aquifer system would be increased, of course, by increased pumping; take more out and you put more in, as more water is induced to enter the system. (Trans. 169-Cline). This phenomenon of shifting ground water boundaries is observable, shown by the additional water induced recently by tribal pumping. (Trans. 2630a-Maddox). In fact, more water could be produced from the aquifer if it were not for the present poorly planned spacing of wells in the Valley. (Trans. 2633a-Maddox).

Mr. Cline's figure is solid. It is "accurate, though conservative," as one expert testified. (Trans. 2325-Maddox.) It is far from the wild-eyed guess that the Tribe's experts attempted to make it. The figure, which is explained at U.S. Ex. 1, p. 31, was the product of an extremely thorough report, was based on accurate data (Trans. 2338-Maddox) and was produced by individuals with excellent professional reputations. (Trans. 2337-Maddox). The analysis used to derive the figure was based on a "water budget" method, one of the acceptable methods for such a problem as presented here. (Trans. 2543, 2544-Grimstad).

The estimate that was derived from the other major and regular method testified to at trial (Trans. 2545-Grimstad) was the modified "flow net" analysis used by Dr. Maddox. Like all complex techniques of geohydrologic analysis, this type of analysis relies on certain assumptions. (Trans. 2340-Maddox). After explaining his careful analysis and its attendant computations, Dr. Maddox stated that the availability for annual withdrawal from the No Name Creek aquifer is

a total of 1200-1300 AF (Trans. 2309-2319, 2323-24-Maddox). This figure is far closer to that derived by the USGS experts (who, it should be noted, become active in investigation in the No Name Creek Valley under the authority of the Court and who were not hired by any party to prepare their work for the purpose of presenting a particular case at litigation) than are the figures of the expert for the Tribe. The figure derived by Mr. Jones was closer to the USGS figure than it was to the Tribal consultant's estimation. 32/

In stark contrast to the figures derived from two of the experts from this state -- Dr. Maddox and Mr. Cline -- is the figure selected upon by Mr. Watson: 550 Acre Feet. In analyzing this figure -- exactly half the amount believed available by the USGS -- we begin first with the knowledge that, as he testified, Mr. Watson was operating within certain analytical constraints apparently imposed by this litigation (Trans. 793 - "Those are my orders, Mr. Mack."- Watson).

And when did he come to decide that 550 Acre Feet, and no more, was the "capacity" of the No Name Creek aquifer? His analysis was based on data from the spring, 1976, and from the fall, 1976 to the spring, 1977. After digesting and interpreting the data, he determined that 550 Acre Feet was the "safe annual yield." This number was conveniently the same number proposed by counsel for the Tribes in the Pre-Trial Order herein - submitted to the Court in the summer of 1976. (Pretrial Order, p. 14).

The Watson approach includes many flaws pointed out below. One of the more serious flaws of the 550 AF number is that, based on Mr. Watson's own logic, the number is actually either 480 AF or 962 AF! That is, Mr. Watson derived his 550 figure from the .66 cfs

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32/ Trans. 1891-Jones. See the discussion, below, p. 30, as to why the Tribal figure is actually 480 AF, not 550.

measurement in March 1976 and January-April 1977, at Walton's driveway. 1 cfs converts to approximately 2 AF/day. 33/ Thus, as he testified, .66 cfs equals approximately 480 AF/yr (.66 x 2 x 365 = 483).

He then divided the .66 cfs into two portions, one for "precipitation" and one for "Omak Creek leakage" contributions, as follows:

.12 cfs - precipitation
.54 cfs - leakage
.66 cfs Total

(Trans. 759-Watson). However, rather than using the standard conversion factor, some unknown factor was used, for he then suggests that: (Trans. 758-9; see also 1171 and 1155-1194-Watson)

	Watson	(Standard Conversion)
.12 cfs =	175 AF	(87 AF
.54 cfs =	375 from Omak Cr.	(393 AF)
	550	(480 AF)

Further, even if the Watson "conversion figure" is accepted, the proportions between the .12 cfs and the .54 cfs figures are such that .54 cfs should be 787 AF, not 375 AF. (.54 = 4.5 x .12; 4.5 x 175 = 787). Adding, 787 + 175 equals 962 AF. The 550 figure, in and of itself, is simply not scientifically correct, nor is it even consistent with its own internal logic, whatever that may be. This Court should be cautious in using such figures. 34/

Mr. Watson's figures, of course, assumed that one plans for water use and allots rights to the use of water on the most pessimistic projections. Under such an assumption, there is no better

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33/ See Attachment A.

34/ We also note that, on cross-examination, Mr. Watson was unable to come to a reasoned explanation of the 550 figure, see, i.e., Trans. 1167-93.

year than a drought year to calculate the amount of water available for use in a particular area. Such an analysis, of course, runs counter to all custom and practice in Washington and the western states. (See Trans. 2703-Wallace).

The tribal expert's analysis had other failures, which the Court should note.

First, Mr. Watson's analysis heavily relies on data from the Peters Observation Well, a well that is particularly ill-suited to serve as a major foundation for a hydrologic analysis. The well is a bad one to use for such puposes. (Trans. 2298, 2304, 2317, -Maddox; 2593-Cline).

Second, Mr. Watson relied on weather data from two weather stations without making the necessary correlation of data from the stations. (Trans. 2602,-Cline; Trans. 2624-Maddox).

Third, the one surface flow measurement which is the linchpin of Mr. Watson's analysis is also an unreliable datum on which to rely. (Trans. 2604-Cline).

Fourth, Mr. Watson's use of a water budget shows why he is not particularly comfortable with this accepted technique. His water budget figures do not confrom with reality; his budget is hopelessly out of balance. (Trans. 2583-Cline).

Fifth, whereas the Tribe underestimated recharge to the aquifer (Tr. 2632A-Maddox), and overestimated discharge - thereby coming up with a low net inflow figure - (Trans. 2605-Cline), the predicted recharge of Mr. Cline was remarkably accurate. (Trans. 2762-MacNish).

Sixth, Mr. Watson's attack on the methods and data used by USGS tends to show no one's unreliability but his own. Mr. Watson doubts the accuracy of all USGS measurements, but he relies on them. Indeed, Mr. Kazcmarek stated that the Tribe's experts relied on unreliable data (Trans. 2873-Kaczmarek); Dr. Robinson testified that calculations based on unreliable data are unreliable themselves. (Trans.

2888-Robinson).

Seventh, the reliance on the .66 cfs figure to show, indirectly, inflow into the aquifer, assumes that all the outflow was counted in the .66 cfs figure. However, all the outflows were not counted. (Trans. 2604-Cline; see also the testimony of the Waltons concerning the other springs on and below the Walton property, e.g., Trans. 2207.)

The study of the USGS is the best study of its type that has been performed anywhere in the nation. (Trans. 2748-2756-MacNish). The measurements obtained were extremely accurate and were obtained by use of the finest techniques. (Trans. 2557-58, 2573-74-Carpenter; 2630-Maddox).

Contrast this with the work of the tribal consultants. These witnesses attack the USGS surface flow measurements as unreliable on account of daily fluctuations, which, in fact, are indications of nothing of the sort. (Trans. 2572-Carpenter). On the other hand, the tribal experts made the following errors in their surface flow measurements:

1. They relyed on unreliable flume readings (Trans. 2559, 2562-Carpenter).

2. They use and rely on a manufacturer's rating curve for their weirs and flumes, when reliance on such is misplaced. (Trans. 2562-Carpenter).

3. They made poor velocity measurements (Trans. 2564-67-Carpenter).

4. Their measuring points are at too shallow depths. (Trans. 2570-71, Carpenter).

5. They are apparently ignorant of the pump-setting in one of their wells (Trans. 2589-Cline).

6. They prepared exhibits on their surface flow measurements that are either incomplete, sloppy, or deceptive (Trans. 2568-Carpenter).

It is based on this type of work that they assail the USGS-supplied data on which all parties have justifiably relied. In the face of this, is their other work reliable? Is the 550 Acre Feet figure one in which this court can have confidence?

We think not.

Finally, we note that all of the water availability figures ignore the water available from the surface flow of Omak Creek. That Creek runs through the lands in question. Its waters historically have been used for irrigation of lands in the No Name Creek Valley. For efficient use of water today, those waters should be used. (Trans. 2642-Maddox). There is sufficient water there to satisfy all present uses in the No Name Creek Valley. (Trans. 2368, 2362-Jones). Its use should not be ignored by the court. The surface waters of Omak Creek are as much part of the waters available for use in the No Name Creek Valley as are the waters of No Name Creek, particularly as the pre-trial order does not limit this court's scope of analysis to the waters of No Name Creek.

* * *

Omak Creek and No Name Creek

Omak Creek is connected to the ground water system of No Name Creek. Indeed, No Name Creek is nothing more than a distributary stream of Omak Creek. The principal source of recharge to the No Name Creek aquifer is vertical percolation from Omak Creek. (Trans. 58-Cline). There is an obvious hydrologic connection between Omak Creek and the No Name Creek aquifer (Trans. 2628A-Maddox), even though the connection is not perfectly direct (Trans. 2266-Jones).

The discussion at trial by the tribal experts about an allegedly massive Omak Creek subflow was much ado about nothing (or, rather, very little). There is simply no significant subflow. (Trans. 2618-Cline). If there were, of course, it would simply mean that a greater area would tend to contribute to the vertical percolation

that all parties admit is occurring. Indeed, although the tribal experts believe that this subflow is large, they are hard-pressed to explain - indeed, cannot explain - why its water is not apparent where it should be. (Trans. 2859, 2867-Kaczmarek).

The ground water divide of the No Name Creek aquifer can be shifted to the north, based on pumping in the valley, and therefore can take in a larger area from which the aquifer is supplied. (Trans. 54-Cline). Indeed, such a shift occurred last year, due to increased stress on the aquifer. (Trans. 53, 2595-Cline; 2635-Maddox).

It is obvious to all but the most myopic that Omak Creek flows through allotments in question in this suit, and flows across the lands that are the subject of the suit. Omak Creek is certainly a part of the No Name Creek basin. (Trans. 2261-Jones).

We note that historically Omak Creek waters have flowed into the No Name Creek. Mr. Cline thought that it was likely (Trans. 172; Boyd Watson observed this in modern times (Trans. 2209-2210). This is contrary to the testimony of Dr. Robinson, who testified that such a flow could not have occurred since prehistoric times.

We also know that water from Omak Creek has been artificially induced southward into the valley. The Tribe itself has done so recently. (Trans. 2212-B. Walton). Historically, all irrigation of the upper allotments was done from Omak Creek, by gravity-based ditch and flume systems.

Look at the setting. Clearly the government intended that it was reserving surface waters, if any, not from No Name Creek but from Omak Creek for the upper allotments of No Name Valley. In the days of rill irrigation - the time when the reservation was created - only the Omak Creek waters would have been considered as a source for irrigation of these allotments. And, of course, the history of use bears this out. Indian witnesses stated that irrigation from

Omak Creek had been made by Indians at least near the turn of the century. (Trans. 310-Covington; see also Ex. NNNN-SW), and the testimony of Bennett (Trans. 1841-43) and Hampson (2067) also indicate water use from Omak Creek. It was within the contemplation of the federal government that Omak Creek waters would be the ones used for irrigating the upper allotments.

No comparable reservation was made of ground waters (1) because no one could have contemplated that large volumes would exist or would be extracted and (2) because to the extent they were reserved they were done so only in small amounts for stock and domestic use. (Trans. 314-Covington). The agency records show no ground water use for irrigation. They do show in 1922, 20 acres of Allotment 526 were being irrigated - from Omak Creek. (Ex. AAAA-SW).

When President Grant created the Reservation and reserved water for it, he did not only reserve water from No Name Creek for use in the No Name Creek Valley. Omak Creek also runs there. Counsel for the Tribe and the United States can pretend that it does not occur there, but, it is there. The State did not put it there. Winters rights have been exercised from it for years. Winters rights for Lots 526 and 892 have attached to it. Those rights are just as appurtenant to the lands they serve as any other water right. Those allotments have their rights from Omak Creek, and should not properly be "charged" against No Name Creek water resources.

* * *

Water Duty and Irrigation Practices

In general terms, "water duty" is the amount of water which must be applied to lands to grow crops. Water duty multiplied by the number of acres to be irrigated gives a figure for the total water requirements of a farm area. Soil moisture, crop, and system efficiency are factors taken into account in assigning a water duty (see generally, Trans. 1807-08-Bennett).

In the Pretrial Order, the Tribe originally contended for a water duty of approximately 4.8 AF/ac (Pretrial Order, p. 11), and, at trial, its witnesses testified that during 1977 the Tribe used approximately 4.8 to over 5 AF/acre of water (Ex. 24-10 Col.). The State has always contended that, at maximum, a water duty of 4 AF/acre would be sufficient for irrigation in the area. 35/ However, experience with similar irrigation projects and crops indicates that the actual water use would be somewhat less. Dr. Maddox testified that a figure two-thirds of the amount shown for "Omak Alfalfa" on Table Two, WSU Circular 512, (Ex. Col.-36.2) (2/3 x 39" = 26"), was, in practice, a sufficient amount of water for crop production.
(Trans. 2331-2-Maddox).

The most telling testimony with regard to water duty was that of Mr. Bennett, of the Okanogan office, U.S. Soil Conservation Service. Virtually Mr. Bennett's entire professional career has dealt with irrigation systems and water requirements in the Omak area. Based on his testimony, an appropriate duty in the area is about 3.6 AF/acre (Trans. 1810-Bennett). Even in years where serious drought conditions exist, Mr. Bennett's testimony was that a duty of 4.3 AF/acre would be sufficient. 36/ The Bennett figures do take into account the efficiency of the irrigation system used, but are

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35/ We note other adjudication proceedings awarded water duties in the 3-4 AF range. In re Chiliwist Creek, 77 Wn.2d 658 (1970) a case involving both Indian and federal interests, in Okanogan County, an average water duty of about 4 AF was granted; in the Chamokane Creek case, pending before this court, a water duty of 3 AF/acre in a similar situation was requested by the United States.

36/ Any greater use of water, would, of course, indicate a waste of water, a possibility abhored in western water law.

conservative in the sense that soil moisture content is not included. 37/ There was absolutely no showing by the Colville witnesses or any others that lands in No Name Creek Valley are in any fundamental manner different from other Okanogan County lands for which Mr. Bennett and the local SCS have provided advice. The claims to any water duty over 3.6 AF/acre, must therefore be based on a system which does not use water efficiently - certainly not something this Court should be encouraging in a water-short basin. If the "reasonable standard" to which other farmers in the Okanogan area adhere is a water duty of 3.1 to 3.6 AF/acre, that standard should also apply to lands in the No Name Creek Valley.

With respect to water duties for rill irrigation, the State submits that the issue is misleading. At the beginning of the allotment period in the 1920's, before the advent of more efficient sprinkler systems (Trans. 1815-16-Bennett), gravity or pump-assisted flume systems were used for irrigation in the area. (Trans. 2087-Aston; 2060-Hampson). However, gravity systems were limited by the source of surface water supply and the slope of the land, see, e.g., Trans. 331-Sampson, regarding "dry-cropping" on Lot 903. The now-Walton lands and the 901 and 903 lots are therefore the only lands which could reasonably have been "reserved" for irrigation under a gravity or flume system from No Name Creek itself. Furthermore, some of the lands in Lots 901 and 903 would not have been irrigable under rill irrigation as practiced. (Higher percentage of Class 3 and 4 lands, Trans. 1794-Harvey; "dry-cropped," Trans. 331-Sampson).

37/ If Mr. Bennett's estimate 4 inches of soil moisture is taken into account, the 3.6 AF figure is thereby reduced, leading to an actual duty of 3.1 AF in average years, (Trans. 1834-Bennett). We also note that all of the Tribe's water duty figures, except the 1977 figures, were based on calculations, not on actual experience in the area, as with Mr. Bennett. The Tribes' 1977 water use was about 5 AF and therefore either inherently excessive, or inefficient.

Thus even if the Court finds that the intended Winters reservation was made with rill irrigation in mind, leading to a higher water duty to compensate for the method's inefficiency (Trans. 1815-Bennett), the "irrigable" area would be considerably less than that now considered "irrigable" (Trans. 2062-Hampson).

It is probably for that reason that the Plaintiff Colvilles have not argued that the amount of water reserved was reserved in terms of rill irrigation. However, the Colvilles are now attempting to suggest to the Court that they should get the "benefit" of the higher water duty, ignoring the source-of-supply-location and slope limitations the rill theory originally embodied. The newer test of irrigability, based on sprinkler irrigation which permits greater development of marginal lands (Trans. Mar. 23 - p. 83-84-Kaczmarek), is apparently being combined with the "old" water duty. The argument for rill irrigation water duties is obviously a latter-day contention, of dubious validity in the face of the considerable sums expended to put in large modern and permanent sprinkler systems (Trans. 380-81, Corke) and the lack of any evidence to suggest that the Colvilles are going to redo the irrigation project for rill irrigation. (Trans. 2817-Watson).

* * *

Lahontan Trout, Omak Lake, and Water Quality

Omak Lake is the largest saline lake in Washington (Ex. TTT-SW). As a consequence of its salinity, native biota were somewhat limited. The native fish in the lake (and which still live in the lake) appear to consist primarily of suckers and red-side shiners (Trans. 1758-Koch), some of which could grow to catchable and edible size (Trans. 333-Sampson). No evidence was produced to show that Omak Lake ever supported a trout or salmonid population. (In fact, the Tribes' fishery expert estimated that a healthy adult rainbow trout could only survive one-half hour in the lake, presumably because of

the salinity. (Trans. 1755-Koch.)

There were also some trout, of small size and number, residing in the lower reaches of No Name Creek, apparently as a result of earlier unsuccessful attempts at stocking the lake. (Trans. 1756-Koch). Trout in upper No Name Creek were planted by the Walton's predecessors, the Whams. (Trans. 2144-Walton). No evidence suggested that the "native" fishery resource of No Name Creek or Omak Lake has been a fundamental subsistence element for the Colville Indians since the establishment of the Reservation. Also, it should be noted that the Lake was often avoided or ignored by the Indians, belying a suggestion that it was a major fishery resource. (Trans. 312-Covington; 256-Tonasket).

The Lahontan trout species, which is adapted for saline waters, was introduced to the Reservation in the late 1960's and is not a native of the Colville Reservation or Omak Lake (Trans. 1754, 1764-Koch). This exotic fishery uses water in the renovated channel of No Name Creek during certain seasons for spawning (Trans. 1744-Koch), but the adult Lahontan live in the lake itself. Cultivation of Lahontans at the nearby Winthrop, Washington, fish hatchery has also been extensively used (Trans. 1724-Koch), indicating that No Name Creek waters are not absolutely necessary for the Lahontans' propagation.

There was no evidence, in terms of fish kill, loss of production, or otherwise, to prove that Walton's activities have detrimentally affected the Lahontan fishery. In fact, each year since 1975, the fishery has been successful, and an increasing fishing season has been allowed. (Trans. 1763-64-Koch.)

The Tribe produced evidence of two coliform samples, both taken in September 1976 by the U.S. Bureau of Reclamation above the granite lip, to "prove" pollution. These were apparently the only two samples taken for this water quality parameter, for the Tribe's expert did no

such sampling, during the entire time of his association with the project from 1975 to the present, (Trans. 1754-Koch). No coliform samples were taken in the lake, nor was there any evidence of "pollution" in the lake. In fact, because of agricultural and resort activities of the Tribe, as well as Walton, as well as agricultural practices on Kartar Creek, at the lake's south end, it would be impossible to ascertain the specific cause of "pollution," if any, in the Lake.

The fact that the lake is relatively unpolluted is borne out by the Tribe's own successful establishment of the Lahontan fishery. Presumably, the fish would not thrive in a dirty lake (Trans. 1677-78-Koch). To further demonstrate Walton's lack of effect on the lake, the testimony showed that his withdrawal of No Name Creek water was de minimus, especially in comparison with evaporation from the lake (Trans. 2551-Grimstad; 2628-Maddox). The fact that the lake level has risen significantly since 1948 (Trans. 2095, 2104-Aston) also belies the tribe's contention that the use of waters pursuant to State permit is in any way damaging the Lake.

Water uses have indeed had an effect on the native fishery in the area, but not by Mr. Walton's acts. The resident "native" trout in lower No Name Creek apparently still exist (Trans. 1731-Koch). It was the total 1977 pumping which dried out trout habitat in upper No Name Creek (Trans. 2175-Walton.)

In brief, there is simply no evidence (sufficient to meet the preponderance-of-the-evidence-test) suggesting Mr. Walton's (or the State's) contribution to "pollution," lake size or quality reduction, fish loss, etc., was and is anything other than de minimis. To hold only Mr. Walton or the State accountable for the purported "ill-effects" is simply not justified by the facts.

The Lahontan program has also been used as the basis for a

claim for "reserved rights" for their propagation. The Lahontan fishery may be a commendable program. Water uses for that program are not, however, properly within the scope of the Winters right reserved for the Colville Indians. The United States has also reached this conclusion, see Memo, March 1, 1978, on Motion for Partial Summary Judgment, p. 13-16, and authorities cited therein.

As discussed in greater detail, above, p. 22, the purposes for which the Reservation was established include providing permanent homes, agriculture, timber, limited fishing and mineral extraction. Nothing in the history of the Reservation's creation, or in this record, remotely suggests that one of its purposes was to serve as a breeding and swimming ground for an exotic and imported trout species. If waters were historically reserved for fisheries purposes, it was for the salmon runs since wiped out by the large river dams. Those large salmon runs (or other valuable subsistence fish) never existed in No Name Creek or Omak Lake, so it is questionable whether any fishery water reservation was intended for No Name Creek or the lake. In short, no No Name Creek waters were reserved for the propagation of the Lahontans, and this Court should recognize no right for fisheries.

* * *

CONCLUSION

We believe a fair reading of the evidence shows, among other things, water duty to be 3.1-3.6 AF/acre, a water supply of approximately 1100 AF/year, no intention to reserve waters for the Lahontan trout program, and clear historic patterns of water use from No Name and Omak creeks. Most importantly, the record demonstrates the propriety of the State's issuance of Permit No. 6105 to Mr. Walton in 1949. There were sufficient waters (excess waters) in No Name Creek, and the State's jurisdiction was properly exercised. We respectfully urge the Court to affirm the validity of the Walton

State water right, and to deny any requested injunctive relief as to both No Name Creek and any other water source on the Colville Indian reservation.

Dated June 9, 1978.

Respectfully submitted,

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ATTACHMENT 'A'

Conversion Table for Volume

Unit	Equivalents							
	Cu in.	Gal	Imperial gal	Cu ft	Cu yd	Cu m	Acre-ft	Sfd
Cubic inch	1	0.00433	0.00361	5.79×10^{-4}	2.14×10^{-5}	1.64×10^{-5}	1.33×10^{-8}	6.70×10^{-9}
U.S. gallon	231	1	0.833	0.134	0.00495	0.00379	3.07×10^{-6}	1.55×10^{-6}
Imperial gallon	277	1.20	1	0.161	0.00595	0.00455	3.68×10^{-6}	1.86×10^{-6}
Cubic foot	1,728	7.48	6.23	1	0.0370	0.0283	2.30×10^{-5}	1.16×10^{-5}
Cubic yard	46,656	202	168	27	1	0.765	6.20×10^{-4}	3.12×10^{-4}
Cubic meter	61,000	264	220	35.3	1.31	1	8.11×10^{-4}	4.09×10^{-4}
Acre-foot	7.53×10^{7}	3.26×10^{5}	2.71×10^{5}	43,560	1610	1230	1	0.504
Second-foot-day	1.49×10^{8}	6.46×10^{5}	5.38×10^{5}	86,400	3200	2450	1.98	1

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Conversion Table for Discharge

Unit	Equivalents						
	Gpd	Cu ft/day	Gpm	Imperial gpm	Acre-ft/day	Cfs	Cu m/sec
U.S. gallon per day	1	0.134	6.94×10^{-4}	5.78×10^{-4}	3.07×10^{-6}	1.55×10^{-6}	4.38×10^{-8}
Cubic foot per day	7.48	1	5.19×10^{-3}	4.33×10^{-3}	2.30×10^{-5}	1.16×10^{-5}	3.28×10^{-7}
U.S. gallon per minute	1,440	193	1	0.833	4.42×10^{-3}	2.23×10^{-3}	6.31×10^{-5}
Imperial gallon per minute	1,728	231	1.20	1	5.31×10^{-2}	2.67×10^{-3}	7.57×10^{-5}
Acre-foot per day	3.26×10^{5}	43,560	226	188	1	0.504	0.0143
Cubic foot per second	6.46×10^{5}	86,400	449	374	1.98	1	0.0283
Cubic meter per second	2.28×10^{7}	3.05×10^{6}	15,800	13,200	70.0	35.3	1

From Linsley & Franzini, Water Resources Engineering (McGraw-Hill: 1964)

Attachment 'A'
WRITTEN
CLOSING ARGUMENT,
WASHINGTON

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiffs, v. BOYD WALTON, JR., and KENNA JEANNE WALTON, his wife; and WILSON WALTON and MARGARET WALTON, his wife, Defendants. STATE OF WASHINGTON, Defendant Intervenor.	Civil No. 3421 AFFIDAVIT OF MAILING
UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM BOYD WALTON and KENNA JEANNE WALTON, his wife; and the STATE OF WASHINGTON, Defendants.	Civil No. 3831

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

SUSAN CLINTON, being first duly sworn on oath, deposes and says: that she is a secretary in the legal division of the Department of Ecology, State of Washington; that on the 12th day of June, 1978, she duly forwarded by United States mail, postage prepaid, true and correct copies of the Written Closing Arguments--State of Washington in the above matter to the following persons at the

addresses listed below:

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Susan Clinton
SUSAN CLINTON

SUBSCRIBED AND SWORN TO before me this 12th day of June, 1978.

Virginia M. Bath
NOTARY PUBLIC, in and for the
State of Washington, residing
at Olympia.