

6-12-1978

## Findings of fact and conclusions of law

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### Recommended Citation

Sweeny, Robert M. and Gillespie, James J., "Findings of fact and conclusions of law" (1978). *Confederate Colville Tribes v. Walton (Colville Tribes)*. 39.  
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FILED IN THE  
U. S. DISTRICT COURT  
Eastern District of Washington

JUN 12 1978

J. R. FALLQUIST, Clerk  
*RF* Deputy

~~FILED IN THE  
RECEIVED~~

~~JUN 12 1978~~

~~CLERK, U. S. DISTRICT COURT  
SPOKANE, WASHINGTON~~

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, )  
Plaintiff, )

-vs-

BOYD WALTON, JR., et ux., )  
et al., )  
Defendants, )

Civil No. 3421 ✓

STATE OF WASHINGTON, )  
Defendant-Intervenor. )

UNITED STATES OF AMERICA, )  
Plaintiff, )

-vs-

WILLIAM BOYD WALTON, et ux., )  
et al., and THE STATE OF )  
WASHINGTON, )  
Defendants. )

Civil No. 3831

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

The United States of America, plaintiff in Civil No. 3831  
submits the following proposed Findings of Fact and Conclusions  
of Law:

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1 bands of Indians within the Washington Territory, which bands  
2 are now collectively designated as the Colville Confederated  
3 Tribes.

#### 4 V

5 By the Act of February 8, 1887, (24 Stat. 388, 25 U.S.C.  
6 331, et seq.), Congress established the General Allotment Act which  
7 was applicable to all Indian reservations, created by treaty or  
8 executive order, including the Colville Indian Reservation. This  
9 Act provided for the allotment of lands within Indian reservations  
10 to individual Indians and Section 7 of the Act 24 Stat. 390, 25  
11 U.S.C. 381) provided and does now provide as follows:

12 In cases where the use of water for irrigation is  
13 necessary to render the lands within any Indian  
14 reservation available for agricultural purposes,  
15 the Secretary of the Interior is authorized to  
16 prescribe such rules and regulations as he may  
17 deem necessary to secure a just and equal dis-  
18 tribution thereof among the Indians residing  
19 upon any such reservations; and no other  
20 appropriation or grant of water by any riparian  
21 proprietor shall be authorized or permitted to  
22 the damage of any other riparian proprietor.

#### 23 VI

24 On November 11, 1889, the State of Washington entered  
25 the union. This admission of the State of Washington was author-  
26 ized by the Enabling Act of February 22, 1889, (25 Stat. 676).  
27 Both the Enabling Act and the Washington State Constitution  
28 (Article 26) provided that the state disclaimed all right or  
29 title in lands within the state owned or held by an Indian or  
30 Indian tribe.

#### 31 VII

32 The Presidential Proclamation of July 2, 1872, had set  
aside 2.8 million acres in the Washington Territory for the use  
of the Colville Tribes. By the Act of July 1, 1892, (27 Stat. 62),  
Congress ratified an agreement of the Colville Indians to  
relinquish title to 1.5 million acres of land in the north half  
of the original Colville Reservation, which 1.5 million acres,  
3.

1 subject to allotments to individual Indians, were to be opened  
2 to entry and settlement under the general land laws. The lands  
3 in the south half, or diminished portion of the original  
4 reservation (1.3 million acres) were to remain in the ownership  
5 of the United States in trust for the Colville Indians. The lands  
6 within No Name Creek Valley which are the subject matter of this  
7 proceeding are entirely within the south half or diminished portion  
8 of the Colville Reservation.

9 VIII

10 On December 1, 1905, a majority of the Colville Indians  
11 entered into an agreement with representative of the United  
12 States whereby portions of the 1.3 million acres within the  
13 diminished Colville Reservation would be allotted to Indians and  
14 lands remaining after such allotment would be opened for entry  
15 and settlement under the general land laws. This agreement was  
16 ratified by Congress in the Act of March 22, 1906, (34 Stat. 80)  
17 which provided that the surplus lands on the diminished Colville  
18 Reservation would be opened to entry upon Presidential proclamation.  
19 President Wilson by Proclamation of May 3, 1916, opened the surplus  
20 lands of the diminished Colville Reservation to entry and settle-  
21 ment. However, no lands within the No Name Valley on the Colville  
22 Reservation were disposed of through the general land laws.

23 IX

24 The rights in the possession and use of the lands within  
25 the No Name Valley on the Colville Reservation were established  
26 beginning in 1917 under the Act of March 22, 1906, (34 Stat. 80),  
27 providing for the allotment of lands to Colville Indians under  
28 the General Allotment Act. The status of lands within the No  
29 Name Creek Valley can be categorized in the following manner:  
30 (1) lands within the upper valley to the north; (2) lands in  
31 the middle valley (owned by Walton); and, (3) lands in the lower  
32 valley.

1           A. LANDS IN NORTH NO NAME VALLEY

2           1. Trust Allotment 526. Trust patent issued April 7,  
3 1917, to Elizabeth Smitakin, a Colville Indian. Fee patent  
4 issued to Joanne Blake on April 9, 1923. Thereafter conveyed  
5 in fee to the Pioneer Educational Society for use in connection with  
6 St. Mary's Mission School. Title then conveyed to the United  
7 States in trust for the Colville Tribe. It contains 115 acres.

8           2. Trust Allotment 892. Trust patent issued April 7,  
9 1917, to Jennie or Sin-o-nalx, a Colville Indian. Title now held  
10 by the United States in trust for the heirs of Jennie or  
11 Sin-o-nalx. Presently subject to a lease to the Colville Tribe  
12 for 5 years commencing September 20, 1974. It contains 120 acres.

13           B. LANDS IN MIDDLE NO NAME VALLEY

14           1. Former Allotment 525. Trust patent issued April 7,  
15 1917, to Alexander Smitakin, a Colville Indian. Fee patent  
16 issued to Hettie Justice Wham on August 10, 1925. Title now  
17 held in fee by the Waltons. It contains 100 acres.

18           2. Former Allotment 2371. Trust patent issued April 7,  
19 1917, to George Alexander Smitakin, a Colville Indian. Fee  
20 patent issued to Paul Smitakin on January 23, 1921. Title now  
21 held by the Waltons in fee. It contains 100 acres.

22           3. Former Allotment 894. Trust patent issued April 7,  
23 1917, to William George, a Colville Indian. Fee title issued to  
24 Hettie Justice Wham on May 5, 1923. Title now held by the Waltons  
25 in fee. It contains 150 acres.

26           C. LANDS IN LOWER NO NAME VALLEY

27           1. Trust Allotment 901. Trust patent issued October 17,  
28 1921, to Mary Ann or Yatkanolx, a Colville Indian. Title now held  
29 by the United States in trust for heirs of Mary Ann or Yatkanolx.  
30 Presently subject to a lease to the Colville Tribe commencing  
31 March 23, 1973. It contains 103.95 acres.

32           5.



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XIV

On July 1, 1948, the defendants Walton acquired the fee title to the former Indian Allotments 525, 2371, and 894. Allotment 525 had left trust status in 1925, allotment 2371 had left trust status in 1921, allotment 894 had left trust status in 1923. These allotments total 350 acres. When acquired by the Waltons in 1948, these lands were improved with a house and were used for the pasturage of horses according to the testimony of Mr. Walton (R. 2173), and there was approximately 32 acres of land under irrigation at that time.

XV

Shortly after the acquisition of the property in 1948, the Waltons applied to the State of Washington for a permit to divert water from No Name Creek to irrigate their land. On August 25, 1950, the State Supervisor of Hydraulics issued a Certificate of Water Right to the Waltons for the diversion of 1.0 cubic feet per second of water from No Name Creek for the irrigation of 65 acres of land. (Exhibit -)

XVI

Meanwhile, the order of Secretary Ickes prohibiting disposition of the surplus lands of the Colville Reservation dated September 19, 1934, remained unrevoked. By the Act of July 24, 1956, (70 Stat. 626), Congress overrode the vote of the Colville Tribe against application of the Indian Reorganization Act and, among other things, directed that the surplus lands on the diminished Colville Reservation be restored to tribal ownership.

XVII

In 1975, the Colville Tribe commenced a program for the irrigation of trust and tribal lands north and south of the Walton's lands for irrigation in connection with the Paschal Sherman Indian School (formerly the St. Mary's Mission School).

7.



1 (R. 238,389). The Colville Tribe program included the installation  
2 of three high-yield wells on trust allotments 526 and 892. In  
3 addition to providing water for the irrigation of lands on trust  
4 allotments 526 and 892, these wells, pursuant to an order of  
5 court entered July 14, 1976, provided water which was conveyed  
6 in the No Name Creek channel across the Walton lands and delivered  
7 to trust allotments 901 and 903 for irrigation and to establish  
8 a spawning ground for Lohanton trout in the lower reach of No  
9 Name Creek.

10 XVIII

11 There are approximately 228 irrigable acres of land  
12 held in trust by the United States for the benefit of the Colville  
13 Confederated Tribes in the No Name Creek Valley. (R.485). Of  
14 these acres, approximately 150 acres are presently being irrigated.  
15 (R.284). (See Colville Exhibit 8 - United States Exhibit 11,  
16 R. 1895).

17 XIX

18 There are approximately 110 acres of land presently being  
19 irrigated by the defendants Walton.

20 XX

21 WATER AVAILABILITY

22 A. Pursuant to the order of this court, the United States  
23 Geological Survey investigated the water capabilities of No  
24 Name Creek Valley commencing in late July, 1976, and continuing  
25 through October, 1977. On or about January 9, 1978, the United  
26 States Geological Survey published a report entitled "Water  
27 Resources of No Name Creek Valley." As a result of this study, the  
28 United States Geological Survey made the following conclusions:

- 29 - -
- 30 - -
- 31 - -
- 32 - -

8.

1           1. The average annual yield from the No Name Creek  
2 ground water reservoir under a heavy stress would total about 1,100  
3 acre-feet per year. It is possible to obtain approximately 700  
4 acre-feet from leakage from Omak Creek and approximately 400  
5 acre-feet of recharge from precipitation in a year of normal  
6 precipitation. (R.60).

7           2. In the event there is no heavy stress placed on the  
8 No Name Creek ground water aquifer as a result of pumping, there  
9 would be somewhat less than 1,000 acre-feet of water available to  
10 the No Name Creek aquifer. (R.71).

11           3. Approximately 950 acre-feet is available naturally in  
12 the No Name Creek Valley. (R.79).

13           B. Mr. Michael Watson, expert witness for the Colville  
14 Confederated Tribes, made the following determination as to  
15 water availability in the No Name Creek Valley.

16           1. The firm water supply of the No Name Creek Basin, from  
17 all sources, is 550 acre-feet per year. (R. 708, 1115).

18           2. The firm annual water supply is the amount of water that  
19 can be used from a year to year basis without significant  
20 shortage in water supply for beneficial purpose and would present  
21 a reduction in profits significantly. (R. 752).

22           3. The average available water supply in the No Name  
23 Creek Valley would be approximately 800 acre-feet. The average  
24 available water supply is distinguishable from the firm water  
25 supply.

26           4. You cannot rely on the average amount of water that  
27 was available during the years 1975, 1976, and 1977, on a firm  
28 basis because the firm precipitation during this period of time  
29 does not take into consideration the fact that during the 1920's  
30 and 1930's there was below average precipitation. In other words,  
31 the average amount of water that was available during the year  
32

9.

1 1975 through 1977 is water that would not be available in those  
2 dryer years.

3 C. Mr. F. O. Jones, expert witness testifying on behalf  
4 of the United States, calculated the available water supply in the  
5 No Name Creek Valley as follows:

6 1. The safe annual yield of the No Name Creek aquifer is  
7 between 700 and 850 acre-feet per year. (R. 1891).

8 D. An average of the United States Geological Survey  
9 figures for the estimated water availability in the No Name Creek  
10 aquifer and those of Mr. Watson's and Mr. Jones' will indicate  
11 that approximately 800 acre-feet of water is available from the  
12 No Name Creek aquifer annually.

13 XXI

14 WATER REQUIREMENTS

15 A. The consumptive use figure relied upon by the United  
16 States Geological Survey in its report was 26 inches for alfalfa.  
17 (R.102).

18 B. The consumptive use requirement relied upon by Mr.  
19 Watson, the expert witness for the Colville Confederated Tribes,  
20 in his analysis of water requirements for the Colville  
21 Irrigation Project is approximately 39 inches. The water  
22 requirements for 157.9 acres of land under sprinkler irrigation  
23 during the 1977 irrigation season was 756.8 acre-feet (R.1223).

24 C. The consumptive use requirement relied upon by Mr. F.  
25 O. Jones, expert witness for the United States, was 23 inches,  
26 (R.1889). Mr. Jones calculated that the minimum requirement for  
27 water to irrigate the land in the No Name Creek Valley is  
28 approximately 1,797 acre-feet per year. The maximum requirement  
29 is approximately 1,979 acre-feet per year. (R.1972).

30 D. Mr. Bennett, Soil Conservation Service, estimated a  
31 water requirement of 3.1 acre-feet or 37 inches. (R.2018, 2046).

32 10.

1 E. Mr. Maddox, expert witness testifying on behalf of  
2 the defendants Walton, previously testified that alfalfa in this  
3 area has a requirement for 4.04 acre-feet per year. (R.2406).

4 F. On the basis of the above estimates of the expert  
5 witnesses testifying in this action, the average annual consumptive  
6 use for alfalfa grown in the No Name Creek Valley would be  
7 approximately 39-40 inches.

8 XXII

9 CONCLUSIONS

10 A. The United States Geological Survey.

11 1. If the four irrigation wells were pumped to create a  
12 heavy stress on the ground water aquifer beneath the No Name  
13 Creek Valley, the pumping of approximately 1,100 acre-feet would mean  
14 that the No Name Creek would cease to flow. (R.62).

15 2. The pumping of 1,100 acre-feet would mean that the  
16 Colville irrigation well No. 1 (well 16L1) would run dry. The same  
17 is true for Mr. Walton's well and for Colville well No. 2 as  
18 well as the Paschal Sherman well. (R.63).

19 3. When water is diverted from the No Name Creek at  
20 point N5, there is a decrease in the flow of water in the No Name  
21 Creek at the granitelip. (R.64).

22 4. In order to arrive at the 1,100 acre-feet safe annual  
23 yield in the aquifer, it would require a change in the present  
24 irrigation method and system that presently exist in the No Name  
25 Creek Valley. (R.73 ).

26 5. It is not possible to remove 1,100 acre-feet of water  
27 under the present irrigation system existing within the No Name  
28 Creek Valley. The 1,100 acre-feet supply of water within the  
29 No Name Creek Valley, according to the United States Geological  
30 Survey report, was computed primarily on the basis of the  
31 information obtained during the course of this study (i. e. 1976,  
32 1977), R. 203,204).

11.

1 B. Mr. F. O. Jones, expert witness testifying on behalf  
2 of the United States, concluded as follows:

3 There is no sufficient waters to irrigate the presently  
4 irrigated lands of Mr. Walton and the Colville Confederates Tribes  
5 of the No Name Creek Valley. (R. 1941).

6 C. Mr. Watson, expert witness testifying on behalf of  
7 plaintiff Colville Confederated Tribes. His final conclusion is  
8 as follows:

9 1. There is no sufficient water within the No Name Creek  
10 aquifer to irrigate the presently irrigated land of the Colville  
11 Confederated Tribes. (R. 1222, 1223).

12 2. It is the opinion of Mr. Watson, expert witness for the  
13 Colville Confederated Tribes, that by the end of July 1978, there  
14 will be insufficient available water supply to satisfy the pump-  
15 ing needs of the Colville Confederated Tribes. (R. 1233, 1234).

16 3. Presentle there is not adequate natural water supply  
17 available in the No Name Creek Basin to fully irrigate the presently  
18 irrigated land or to fully irrigate the total acreage of 228.4  
19 acres in No Name Creek Basin. This does not include any of  
20 defendants Walton land presently being irrigated. (R. 494).

21 D. Mr. Kaczmarek.

22 Based on a rather intensive investigation of the geology  
23 in the No Name Creek Valley and the effect that the geology had on  
24 the availability of ground water in this area, and based on the  
25 two test wells, at location 25 and location 26, which were drilled  
26 expressly to examine the potential for developing ground water  
27 from those materials, it is Mr. Kaczmarek's opinion that there is  
28 no source of water available to allotment 901 and 903, except  
29 for that water flowing down the No Name Creek. (R. 1264).

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12.



1 VI

2 The rights of the Colville Confederated Tribes and its  
3 members to the use of waters on lands within No Name Creek  
4 Valley has a priority date of 1872 and is prior and paramount to the  
5 rights of the Waltons to the use of water upon their lands in No  
6 Name Creek Valley.

7 VII

8 Since the water available for use on lands within No  
9 Name Creek Valley is insufficient to satisfy the needs of the  
10 Colville Confederated Tribes and its members, the judgment to be  
11 entered in these proceedings should enjoin and restrain the  
12 Waltons from using water in No Name Creek Valley which interferes  
13 with the and diminishes the amount of water available in the  
14 Valley to satisfy the needs of the Colville Confederated Tribes  
15 and its members.

16 VIII

17 The State of Washington has no jurisdiction or authority  
18 to control or regulate the use of water on lands within the  
19 exterior boundaries of the Colville Indian Reservation, whether  
20 such lands are trust lands owned by the United States or fee  
21 lands owned by non-Indians.

22 IX

23 The judgment to be entered in these proceedings should  
24 declare that the Certificate of Water Right issued by the State  
25 of Washington to the Waltons on August 25, 1950, to be void and of  
26 no effect.

27 X

28 The judgment to be entered in these proceedings should  
29 enjoin and restrain the State of Washington from issuing any  
30

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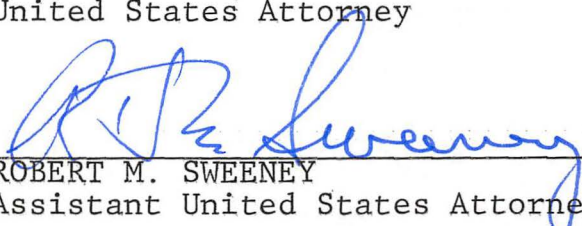
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14.

1 permits or certificates of water right for the use of water on  
2 lands within the exterior boundaries of the Colville Indian  
3 Reservation.

4 Respectfully Submitted,

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6 United States Attorney

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