

3-4-1982

## Response to the State of Washington to statements of issues filed by other parties

Charles B. Roe Jr.

*Senior Assistant Attorney General for the State of Washington*

Robert E. Mack

*Assistant Attorney General for the State of Washington*

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/walton>

---

### Recommended Citation

Roe, Charles B. Jr. and Mack, Robert E., "Response to the State of Washington to statements of issues filed by other parties" (1982). *Confederate Colville Tribes v. Walton (Colville Tribes)*. 52. <https://digitalcommons.law.uidaho.edu/walton/52>

This Brief is brought to you for free and open access by the Hedden-Nicely at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Confederate Colville Tribes v. Walton (Colville Tribes) by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

CLERK'S STAMP FILED IN THE  
U. S. DISTRICT COURT  
Eastern District of Washington

MAR 8 1982

J. R. FALLOUST, Clerk  
Deputy

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, )

Plaintiff, )

v. )

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

Defendants. )

STATE OF WASHINGTON, )

Defendant-Intervenor, )

UNITED STATES OF AMERICA, )

Plaintiff, )

v. )

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

Defendants. )

No. C-3421 ✓

RESPONSE OF STATE OF  
WASHINGTON TO STATEMENTS  
OF ISSUES FILED BY  
OTHER PARTIES

No. C-3831

This is the response of the State of Washington to State-  
ments of Issues filed by other parties to this suit. The

KENNETH O. EIKENBERRY, ATTORNEY GENERAL

Charles B. Roe, Jr.

Assistant Attorney General

Temple of Justice

Olympia, Wa. (206) 459-6162

98504 Telephone

469

1 statements of each of the parties are discussed separately  
2 below.

3 I. Response to Walton

4 A. Quantification of Walton's Rights

5 In our response to this Court's Minute Order of February 4,  
6 1982 ("Response"), the state indicated that it would defer to  
7 the views of other parties, especially Walton, as to whether  
8 additional evidence should be taken on the question of quanti-  
9 fying Walton's rights. Walton's statement contends that the  
10 Circuit Court "expects the trial court to take additional  
11 testimony" on that issue.

12 B. Fishery Right

13 The state believes that its view on this issue, previously  
14 expressed to the Court in our Response, is the correct one.

15 C. Allotment 526

16 The state stands by its analysis of the issues involving  
17 the use of No Name Creek waters by the Tribe on Allotment 526,  
18 as discussed in our Response.

19 II. United States

20 A. Dismissal of the State

21 We agree with the United States that no supplementation of  
22 the record is needed on this issue.

1 B. Replacement Fishery Right

2 The United States is incorrect in telling the Court that  
3 the present record is satisfactory for quantifying the replace-  
4 ment fishery right declared by the Circuit Court.

5 C. Allotment 526

6 In upholding Judge Neill on the Allotment 526 issue, the  
7 Circuit Court held that:

8 "The Indians have not demonstrated that water  
9 is unavailable from Omak Creek, or that its  
use involves significant disadvantages."

10 647 F.2d at 49.

11 In his February 9, 1979 order, Judge Neill indicated that  
12 the Tribe might later be allowed to produce evidence on the  
13 use of Omak Creek waters on Allotment 526, after the "rights  
14 to Omak Creek waters are . . . adjudicated, . . ." Such an  
15 adjudication is pending with this Court.

16 D. Walton's Rights

17 Although the United States submits that the record should  
18 be reopened on this issue, it offers no guidance to the Court  
19 on the extent to which the record should be reopened.

20 III. Tribe

21 A. Dismissal of the State

22 With apparent indifference to the directions contained in  
23 the Court's order of February 4, 1982, the Tribe has dedicated  
24 much of its statement of the issues to prolonged, but legally  
25 unsupportable, reargument that the state should be dismissed  
26

1 from this case. For reasons already stated to the Court orally  
2 and in writing, which we will not repeat here once again, the  
3 state should not now be dismissed from this case.

4 B. Tribe's Reserved Water Rights

5 The Tribe now asks this Court to rewrite the Circuit Court's  
6 decision by declaring that all water rights held by the Tribe,  
7 antedate the creation of the reservation, which was created by  
8 the United States in 1872, and rather are from "time immemorial."  
9 See Statement of Issues by Colville Confederated Tribes ("State-  
10 ment"), p. 10. None of the various district court and appellate  
11 court decisions in this matter supports that interpretation.  
12 None of the other parties, including the United States, supports  
13 it.

14 C. Walton's Rights

15 Rather than addressing the Court's February 4, 1982 order,  
16 the Tribe uses its statement on the issues to argue that "there  
17 is still no basis for Defendants Waltons receiving a right to  
18 the use of water." Statement, p. 10. We fail to understand  
19 how that is supposed to help this Court decide to what extent  
20 the record needs to be reopened to determine Walton's rights.

21 D. Allotment 526

22 With regard to the issues involving Allotment 526, the  
23 Tribe's position apparently is this: the use of Omak Creek  
24 waters on the allotment is an "academic" issue on which no  
25 more evidence need be taken, although the Tribe may yet want  
26

1 to offer additional evidence on it, but such evidence would  
2 not result in reopening the record. This position is logically  
3 unsupportable. For the state's position, we refer the Court  
4 to our earlier filed response.

5 Dated: March 4, 1982.

6 Respectfully submitted,

7 KENNETH O. EIKENBERRY  
8 Attorney General

9 *Charles B. Roe, Jr.*

10 CHARLES B. ROE, JR.  
11 Senior Assistant Attorney General

12 *Robert E. Mack*  
13 ROBERT E. MACK  
14 Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, )  
)  
Plaintiff, )

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

UNITED STATES OF AMERICA, )  
Plaintiff, )

v. )

WILLIAM BOYD WALTON and KENNA )  
JEANNE WALTON, his wife; and )  
the STATE OF WASHINGTON, )  
Defendants. )

AFFIDAVIT OF MAILING

CIVIL NO. 3831

STATE OF WASHINGTON )  
) ss.  
COUNTY OF THURSTON )

SUSAN CLINTON, being first duly sworn on oath, deposes  
and says:

KENNETH O. EIKENBERRY, ATTORNEY GENERAL  
Charles B. Roe, Jr.  
Sr. Assistant Attorney General

Temple of Justice  
Olympia, Wa. 459-6162  
98504 Telephone

1 That she is a secretary in the legal division of the Department  
2 of Ecology; that on the 4<sup>m</sup> day of March, 1982, she  
3 duly forwarded by United States mail, postage prepaid, a true and  
4 correct copy of the RESPONSE OF STATE OF WASHINGTON TO STATEMENTS OF  
5 ISSUES FILED BY OTHER PARTIES to the following parties at the following  
6 addresses:

7 Mr. William H. Veeder  
8 Attorney at Law  
9 818 - 18th Street, N.W.  
10 Suite 920  
11 Washington, D.C. 20006

12 Mr. Richard Price  
13 Attorney at Law  
14 P. O. Box 1687  
15 Omak, Washington 98841

16 Mr. Robert M. Sweeney  
17 United States Attorney  
18 P. O. Box 1494  
19 Spokane, Washington 99210

20 Mr. Michael Taylor  
21 Colville Confederated Tribes  
22 Legal Office  
23 P. O. Box 150  
24 Nespelem, Washington 99155

25 Susan Clinton  
26 SUSAN CLINTON

27 SUBSCRIBED AND SWORN TO before me this 4<sup>th</sup> day of  
March, 1982.

28 Beverly S. Solley  
29 Notary Public, in and for the  
30 State of Washington, residing  
31 at Yelm.

32 AFFIDAVIT OF  
33 MAILING