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Proposed findings of fact and conclusions of law by United States of America

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES

Plaintiffs,

vs.

BOYD WALTON, JR., et ux.,

Defendants,

STATE OF WASHINGTON,

Defendant/Intervenor.

Civil No. 3421

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW BY UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

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

Defendants.

Civil No. 3831

The United States of America, Plaintiff on Civil No. 3831, submits the following Proposed Findings of Fact and Conclusions of Law on the issues to be determined in this proceeding on remand from the Ninth Circuit Court of Appeals.

PROPOSED FINDINGS OF FACT

I.

Allotment No. 2371 initially passed out of Indian ownership on April 20, 1921 when it was purchased by Gilbert T. I. and Hettie Justice Wham. Exhibit L-W.

II.

Allotment No. 894 initially passed out of Indian ownership on May 5, 1923 when a fee simple patent was issued by the United States to Hettie Justice Wham. Exhibit L-W; Stipulated Fact No. 22(c) appended to 1978 district court opinion

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in Colville Confederated Tribes v. Walton and United States v. Walton, 460 F. Supp. 1320, 1334 (E.D. Wash. 1978).

III.

Allotment No. 525 initially passed out of Indian ownership on August 10, 1925, when a fee simple patent was issued by the United States to Hettie Justice Wham. Exhibit L-W; Stipulated Fact No. 22(a) appended to 1978 district court opinion in Colville Confederated Tribes v. Walton and United States v. Walton, 460 F. Supp. at 1334.

IV.

None of the respective sales of allotment Nos. 2371, 894 and 525 to Hettie Justice Wham in the early 1920's included a transfer of the allottees' reserved water rights. U.S. Exhibit Nos. 59, 60 and 61.

V.

None of the lands contained in former allotment Nos. 2371, 894 and 525 were irrigated prior to the time they passed out of trust status and were purchased by the Whams, non-Indians, in the early 1920's. Tr. 326 (1978 Trial--Sampson); Tr. 2109 (1978 Trial--Aston); Tr. 2065, 2071, 2082 (1978 Trial-Hampson); Tr. 177 (1982 Trial-Johnson); U.S. Exhibit Nos. 59 at 12, 60 at 47 and 61 at 2.

VI.

The evidence introduced at trial to establish the number of acres irrigated on former allotments S-525, S-2371 and H-894 by the first non-Indians owners, the Whams, during the period the Whams resided on the property from 1921 until 1940 is contradictory and, at best, speculative. The Court finds that a maximum of 10 acres were irrigated by the Whams from the time they purchased the allotments in the early 1920's until they moved away from the property in approximately 1940. Tr. 2089-92; 2094, 2109 (1978 Trial--Aston); Tr. 2070, 2077-81, 2083-84 (1978 Trial)

and Tr. 135-41, 164-71 (1982 Trial--Hampson); Tr. 180-84, 186, 188-91 (1982 Trial--Johnson); Tr. 206 (1982 Trial--Apple); Tr. 326, 344-45 (1978 Trial--Sampson); Tr. 483-84, 486-88 (1982 Trial--Watson); Tr. 543-45, 557 (1982 Trial--Clark); Colville Confederated Tribes' Exhibits 46 and 46A.

VII.

There is no evidence in the record to establish that any acreage in former allotments S-525, S-2371 and H-894 was irrigated during the period after the Whams moved away from the property in approximately 1939 or 1940 until 1942 when the Whams sold the former allotments to the O'Bierns. Tr. 188, 191 (1982 Trial--Johnson); Tr. 2088, 2109 (1978 Trial--Aston); Exhibit L-W.

VIII.

There is no evidence in the record to establish that any acreage in former allotments S-525, S-2371 and H-894 was irrigated during the period from 1942 after the property was purchased from the Whams by the O'Bierns until 1946 when the O'Bierns sold the former allotments to Leo Moomaw. Tr. 539-42 (1982 Trial--Clark) Colville Confederated Tribe Exhibits 47 and 47-A; Exhibit L-W.

IX.

The evidence introduced at trial by the Defendants to show that some of the lands purchased by the Defendants in 1948 had been irrigated immediately prior to 1948 is contradictory and speculative. Tr. 2121, 2123-26, 2164-66, 2171-73 (1978 Trial--Wilson Walton); Tr. 44-51, 74-75 (August 9, 1982 Hearing--Wilson Walton); Tr. 30-38, 66, 98-103, 120-25 (1982 Trial--Boyd Walton), Exhibits T-W, SSSS-W and XXXX-W; 1978 District Court Opinion in Colville Confederated Tribes v. Walton and United States v. Walton, 460 F. Supp. 1320 at 1324 and Judgment dated February 11, 1979 at 4. The Court finds that the evidence in the record does not reasonably establish the number of acres, if any, irrigated immediately prior to 1948, the year the Defendants purchased the former allotments.

X.

No evidence was introduced at trial to establish the amount of water actually put to use on former Indian allotments S-525, S-2371 and H-894 from the time they initially left Indian ownership in the early 1920's until they were purchased in 1948 by Wilson Walton, the fourth non-Indian 1/ successor in interest to the former allotments. Therefore, there is no evidence in the record on which to base a reasonable calculation of the amount of any reserved water rights to which the Defendants might have succeeded as remote successors in interest to the former Indian allotments.

XI.

The evidence introduced at trial to establish the number of acres placed under irrigation by the Defendants after they purchased former allotment Nos. 525, 2371 and 894 in 1948 is contradictory, indefinite and speculative. Tr. 2131-36, 2152-55 (1978 Trial--Wilson Walton); Tr. 70, 74-79 (August 9, 1982 Hearing-- Wilson Walton); Tr. 2175-78, 2180, 2182-94, 2245, 2994, 2998 (1978 Trial--Boyd Walton); Tr. 30-43, 60-64, 86-87, 98, 102-06 (1982 Trial--Boyd Walton); Exhibits T-W, SSSS-W, RRRR-W, QQQQ-W, PPPP-W, XXXX-W, VV-W, II-W, HH-W, RR-W, SS-W, LL-W, KK-W, QQ-W, MM-W, OO-W, PP-W; Tr. 454-57, 461-62 (1982 Trial--Watson); Tr. 534, 536-39 (1982 Trial--Clark); Colville Confederated Tribes Exhibit Nos. 50 and 50A. At the 1978 trial, the parties stipulated that by 1978 approximately 102 acres had been placed under irrigation by the Defendants. Colville Confederated Tribes v. Walton and United States v. Walton, 460 F. Supp. 1320 at 1324 and Stipulated Fact No. 20 appended to District Court Opinion at 1334.

1/ Although Leo Moomau was an Indian, he was not a member of the Confederated Colville Tribes and therefore has the status of a non-Indian for purposes of determining the amount of the reserved water right to which Walton could have succeeded. 1978 District Court Opinion in Colville Confederated Tribes v. Walton and United States v. Walton, 460 F. Supp. 1320 at 1324; Ninth Circuit Court of Appeals Opinion of 1981 in Colville Confederated Tribes v. Walton and United States v. Walton, 647 F.2d at 45.

XII.

The testimony introduced at trial, although speculative suggests that approximately 105 acres are currently irrigated by the Waltons. Tr. 63 (1982 Trial--Boyd Walton); Exhibit PPPP-W.

XIII.

The testimony introduced at trial reasonably establishes that approximately 155 to 170 acres contained in former allotment Nos. 525, 2371 and 894 can be irrigated to some extent. Tr. 1777 (1978 Trial--Harvey); Tr. 426-448 (1982 Trial--Watson); Tr. 60 (August 9, 1982--Wilson Walton); Colville Confederated Tribes Exhibits 49 and 49A, U.S. Exhibit No. 8.

XIV.

Evidence introduced at trial reasonably establishes that almost all of the acreage contained in allotment Nos. 894 and 2341 and a substantial portion of the acreage contained in No. 525 are characterized by high ground water table conditions, which affect the amount of water properly required to irrigate the irrigable acres located within the high groundwater table areas. Tr. 259-74, 277-306, 315-20, 630-32. (1982 Trial--Kaczmareck); Tr. 426-449 (1982 Trial--Watson); Tr. 612, 620-22 (1982 Trial-Boyd Walton); Colville Confederated Tribes Exhibit Nos. 3, 6, 7, 8, 9, 10, 12-3, 44, 45, 48, 50 and 50-A; Tr. 2135, 2139-40, 2502, 2505, 2508-11, 2528 (1978 Trial--Wilson Walton); Tr. 70, 72-73 (August 9, 1982 Hearing--Wilson Walton). Tr. 217-220, 224-26, 228-230 (1982 Trial--Blomdahl); Tr. 1816-19, 1823-31, 1843, 2027, 2037 (1978 Trial--Bennett).

XV.

Although the record does contain testimony regarding the general water duty for alfalfa in the Omak area, the record contains virtually no evidence about the different crops grown by the Defendants on former allotment Nos. 525, 2371 and 894, the field sizes of specific crops, the moisture holding capacity of the particular soils in which specific crops are grown or the amounts of water applied by the Defendants to irrigate the former allotments.

Tr. 1807-11, 1814-40, 1843, 1856-58, Tr. 2018-20, 2022-23, 2027-29, 2031, 2037, 2045-50, 2056-57. (1978 Trial--Bennett); Tr. 63, 65, 106-07, 115, 614, 622-25 (1982 Trial--Boyd Walton); Tr. 427-28, 435-36, 439, 441-46, 475-76, 499-500 (1982--Watson); Tr. 273, 326, 359-60, 362-64, 630-32 (1982 Kaczmarek); Tr. 217-18 (1982 Trial--Blomdahl); Colville Confederated Tribes Exhibit Nos. 7 and 10; Walton Exhibits QQQQ-W. Court finds that the record does not contain evidence sufficient to establish the amount of any water right the Defendants might have perfected after 1948 though the actual beneficial application of water to irrigate their irrigable lands.

PROPOSED CONCLUSIONS OF LAW

I.

Under the law of this case, Plaintiff Colville Confederated Tribes are entitled to a reserved water right in an amount sufficient to enable the natural spawning of Lahontan cutthroat trout in No Name Creek. Colville Confederated Tribes v. Walton and United States v. Walton, 647 F.2d 42, 48 (9th Cir. 1981). Plaintiffs have reasonably established a reserved right to 346.5 acre feet of water out of No Name Creek for replacement fishery purposes. The Plaintiffs are entitled to a priority date of time immemorial for water reserved to the Tribes for fishery purposes.

II.

Under the law of this case, an allottee may transfer his or her reserved right incident to the sale of his or her allotment. Colville Confederated Tribes v. Walton and United States v. Walton, 647 F.2d at 50 and 51. However, transfer of the reserved right should be recognized only if an intent to transfer the right to manifested in the documents of conveyance or can be implied from the circumstances surrounding the sale of the allotment. See United States Hearing Memorandum of May 5, 1982 at 1-13. The defendants have failed to establish that the initial conveyances of Allotment Nos. 525, 894, and 2371 out of Indian ownership included transfers of the allotees' reserved water rights.

III.

Assuming the initial conveyances of former allotments 525, 894 and 2371 included the allottees' reserved water rights, the Defendants carried the burden of proving (1) the amount of water applied with reasonable diligence to irrigate the former allotments by the original non-Indian purchaser and (2) the amount of such water maintained in continuous use up to 1948, the year the Defendants acquired the former allotments. The Defendants have failed to establish either the amount of water put to use by the original non-Indian purchaser or the amount of water continuously used on the former allotments up to 1948. Therefore, as a matter of law, the Defendants are not entitled to a reserved water right based on their status as remote successors in interest to former allotment Nos. 525, 894 and 2371.

IV.

In order to establish a right to water based on their beneficial appropriation of water on former allotments 525, 894 and 2371 after 1948, the Defendants carried the burden of proving the amount of water they put to beneficial use on these lands. The Defendants have failed to establish the amount of water they beneficially applied to the former allotments after 1948 for irrigation and other purposes and are not entitled to a water right based on a date of first appropriation.

Respectfully submitted,

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