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## Answer, affirmative to defense and counterclaim to complaint of United States of America

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

JUN 8 1974

J. R. FALLQUIST, Clerk

*LA* Deputy

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES,

Plaintiff,

-vs-

BOYD WALTON, JR. and KENNA  
JEANNE WALTON, his wife,

Defendants.

STATE OF WASHINGTON,

Defendant Intervenor.

NO. 3 4 2 1 ✓

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

WILLIAM BOYD WALTON and KENNA  
JEANNE WALTON, his wife, and  
the STATE OF WASHINGTON,

Defendants.

NO. 3 8 3 1

ANSWER, AFFIRMATIVE DEFENSE  
AND COUNTERCLAIM TO COMPLAINT  
OF UNITED STATES OF AMERICA

BOYD WALTON, JR., and KENNA  
JEANNE WALTON, his wife, and  
WILSON WALTON and MARGARET  
WALTON, his wife,

Cross Claimants,

-vs-

STATE OF WASHINGTON,

Cross Defendant.

NO'S 3 4 2 1-3 8 3 1

CROSS-CLAIM

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1 deny the same.

2 VIII.

3 For Answer to paragraph VIII, Defendants deny the same.

4 FOR FURTHER ANSWER AND BY WAY OF AFFIRMATIVE DEFENSE, Defend-  
5 ants allege as follows:

6 FIRST AFFIRMATIVE DEFENSE (LACK OF JURISDICTION)

7 I.

8 Defendants assert the defense of (a) Lack of jurisdiction  
9 over the subject matter, and (b) Lack of jurisdiction over  
10 the parties. The basis of such defense is that no federal  
11 question is involved in this action. Reference is made to  
12 additional facts set forth in the following affirmative  
13 defenses.

14 SECOND AFFIRMATIVE DEFENSE

15 I.

16 Defendants jointly own with Wilson W. Walton and Margaret  
17 Walton, his wife, title and fee to the following described land,  
18 located in Okanogan County, Washington, to-wit:

19 The West Half of the West Half of the West Half of the  
20 Northeast Quarter; the East Half of the Southwest Quarter;  
21 the Southeast Quarter of the Southeast Quarter; the  
22 East Half of the Northwest Quarter; the Southwest Quarter  
23 of the Southeast Quarter; and the West Half of the West  
24 Half of the Northwest Quarter of the Southeast Quarter  
25 of Section 21; and the West Half of the Northeast Quarter  
26 of Section 28; ALL in Township 33 North, range 27 E.W.M.

24 II.

25 Prior to the issuance of fee patents from the United States,  
26 said land had been held as allotments by Indians of the Colville  
27 Confederated Tribes. This title has been derived from said  
28 Indians and the United States Government acting as trustee for  
29 said INDIANS. Defendants acquired all of the title to said  
30 lands and water rights, including reserved water rights, held  
31 by said Indians or to which they were entitled.

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THIRD AFFIRMATIVE DEFENSE

I.

Paragraphs I and II of the Second Affirmative Defense are reasserted and incorporated herein by this reference.

II.

Both ground and surface waters arise upon the lands of Defendants described above. Defendants and their predecessors in interest have appropriated and used beneficially said water for agricultural purposes in connection with their lands, which appropriation and use are prior to that of the Plaintiff.

III.

Defendants claim riprarian and appropriation rights to all waters flowing across or arising upon or beneath said lands.

IV.

The State of Washington, through the State Supervisor of Hydraulics, has issued a Certificate of Water Right, Permit No.6105, entered of record in Volume "8" at page 3443 on August 25, 1950, with a priority date of August 25, 1948, for 1.0 cubic feet per second for the purpose of irrigating the above described land. Water has been continuously and beneficially applied to said land pursuant thereto. Said lands are fee title lands; are not now part of the Colville Reservation nor owned by members of the Colville Tribe and are within the jurisdiction of the State of Washington and subject to local law.

FOURTH AFFIRMATIVE DEFENSE

I.

Paragraphs I and II of the Second Affirmative Defense are reasserted and incorporated herein by this reference.

II.

Defendants have, since 1948, continued to develop the property

1 and their home and have invested their lives and earnings  
2 in development of a dairy farm operation upon said lands.  
3 Defendants rely almost totally upon said dairy as an occupation  
4 and means of supporting themselves and their families. The  
5 Plaintiff has had knowledge of the continual development of the  
6 property and has acquiesced in the same over the past twenty-seven  
7 years. Plaintiff has acknowledged Defendants' use of the land  
8 and water. Defendants have relied upon Plaintiff's unreserved  
9 and unrestricted conveyance of title to the land and all appurtenances  
10 therewith and have relied upon Plaintiff's acquiescence and  
11 encouragement of their beneficial use and application of water  
12 upon the lands and as such Plaintiffs are estopped from attacking  
13 Defendants' right to said use pursuant to the doctrine of equitable  
14 estoppel and laches.

15 FIFTH AFFIRMATIVE DEFENSE

16 (FAILURE TO STATE A CLAIM FOR WHICH RELIEF  
17 CAN BE GRANTED PLAINTIFFS)

18 I.

19 Paragraphs I and II of the Second Affirmative Defense are  
20 reasserted and incorporated herein by this reference.

21 II.

22 The Act of February 8, 1887, Ch. 119, Sec. 7, 24 Stat. 390  
23 (25 U.S.C. Sec. 381) provided Plaintiff with authority to prescribe  
24 rules and regulations deemed necessary to secure just and equal  
25 distribution of waters.

26 III.

27 Plaintiff has not complied with the aforescribed  
28 Act and without so doing, Plaintiff has no right to the relief  
29 prayed for and no claim for which relief can be granted.

30 SIXTH AFFIRMATIVE DEFENSE

31 I.

Paragraphs I and II of the Second Affirmative Defense are

1 reasserted and incorporated herein by this reference.

2 II.

3 Plaintiffs' conduct seeking an injunction of Defendants' use  
4 of their water is unconstitutional and violative of Defendants'  
5 constitutional guarantees of due process of law, constitutes an  
6 impairment of contract and an unequal protection of law.

7 SEVENTH AFFIRMATIVE DEFENSE

8 I.

9 Paragraphs I and II of the Second Affirmative Defense are  
10 reasserted and incorporated herein by this reference.

11 II.

12 Plaintiffs' conduct seeking an injunction of Defendants' use  
13 of their water constitutes a violation of Defendants' civil rights.

14 COME NOW THE DEFENDANTS AND FOR FIRST COUNTERCLAIM TO PLAINTIFFS'  
15 COMPLAINT allege as follows:

16 FIRST COUNTERCLAIM

17 I.

18 Plaintiff issued fee patents to the property described in this  
19 action and said lands were held as allotments by Indians of the  
20 Colville Confederated Tribes with said lands and appurtenances  
21 thereto carrying reserved water rights with the land and appurten-  
22 ant water rights passing to Defendants. Defendants are entitled  
23 to the benefits of the water rights as the legal owner of said  
24 rights and by virtue of being a thirdparty beneficiary and by  
25 virtue of Plaintiff's tortuous conduct to the extent that Defendants  
26 are enjoined or their property right interest, including water  
27 rights, limited in any respect, Plaintiff is liable to Defendants  
28 for the loss of the value of their property in connection there-  
29 with.

30 SECOND COUNTERCLAIM

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I.

Plaintiff's conduct in seeking an injunction of Defendants' use of their water is unconstitutional and violative of Defendants' constitutional guarantees of due process of law, impairment of contract; constitutes an unequal protection of law and it is, in addition, violative of Defendants' civil rights for which Defendants are entitled to be compensated to the extent of the loss of any property rights resulting from Plaintiff's action.

CROSS-CLAIM

For a Cross-Claim against the State of Washington, Defendants-Cross-Claimants Waltons allege as follows:

I.

Paragraphs I and II of the Second Affirmative Defense are reasserted and incorporated herein by this reference.

II.

Immediately after acquiring the property described in paragraph I above, Defendants-Cross-Claimants Walton did seek to determine the possible extent of his water rights before investing his svaings and livelihood in the property in question and, in this regard, Defendant-Cross-Claimant did make application to the State of Washington, through the State Supervisor of Hydraulics for water rights in connection with the future development of his property.

III.

Pursuant to Defendant-Cross-Claimant Walton's application, the State of Washington, through the State Supervisor of Hydraulics, issued a Certificate of Water Right, Permit No. 6105, entered of record in Volume "8" at page 3443 on August 25, 1950, with a priority date of August 25, 1958 for 1.0 c.f.s for the purposes of



1 irrigating the above-described land. The State of Washington  
2 issued the permit without reservation and without restriction.

3 IV.

4 Acting in reliance upon the State of Washington's actions,  
5 and pursuant to the State of Washington's asserted authority  
6 to issue a water right permit providing Defendant Walton with  
7 a substantive right, Defendant Walton did proceed to develop  
8 and beneficially use water upon his property for agricultural  
9 purposes for the ensuing 26 years.

10 V.

11 Cross-Defendant State of Washington held itself out as  
12 having the right and authority to issue water permits and provide  
13 Defendant Walton with a substantive water right permit upon which  
14 he could rely; Defendant-Cross Complanant Walton did rely upon  
15 said water permit in developing and investing in the property  
16 in question. Defendant-Cross=Complainant Walton had a right to  
17 rely upon the State of Washington acting in its asserted capacity  
18 with all governmental authority and that any lessening of  
19 Defendant-Cross Complainant's water rights below that purportedly  
20 granted by the State of Washington to Defendant-Cross Complainant  
21 will result in severe economic loss to the Defendant-Cross Complainant

22 VI.

23 Cross Defendant State of Washington is liable for any and  
24 all economis losses to Defendants as a result of the State of  
25 Washington's exceeding their authority in granting said water  
26 permit.

27 WHEREFORE, DEFENDANT-COUNTERCLAIMANT and CROSS-CLAIMANT  
28 WALTONS PRAY AS FOLLOWS:

29 1. Plaintiffs' Complaint be dismissed and that Plaintiffs  
30 take nothing thereby;

31 2. That Defendant-Counterclaimant and Cross Claimant Waltons

1 have judgment against Cross-Defendant State of Washington to the  
2 extent of lessening of Defendant-Counterclaimants-Cross-Claimant's  
3 water rights below that purportedly granted to Defendant-Counter-  
4 claimant and Cross-Claimant Walton by Cross- Defendant State of  
5 Washington.

6 3. That Defendants-Counterclaimants and Cross-Claimants  
7 be awarded their costs incurred in this action;

8 4. For such other and further relief as to the Court may  
9 seem just and proper.

10 DATED, May 31, 1974.

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NANSEN & PRICE

Attorneys for Defendants-Counterclaim-  
ants-Cross-Claimants.

By 