1-9-1978

Proposed Findings of Fact, Conclusions of Law, and Brief

William H. Veeder
Attorney for the Colville Confederated Tribes

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiff, vs. BOYD WALTON, JR., et ux, et al., Defendants, STATE OF WASHINGTON, Defendant Intervenor.	Civil No. 3421 CONSOLIDATED CASES
UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM BOYD WALTON, et ux, et al., and THE STATE OF WASHINGTON, Defendants.	Civil No. 3831

PROPOSED FINDINGS OF FACT
CONCLUSIONS OF LAW
AND
BRIEF

Comes now the Colville Confederated Tribes, Plaintiff in Civil No. 3421 of these Consolidated Cases, pursuant to this Court's Order entered December 12, 1977, which provides that:

> "... at least 5 days before commencement of trial counsel shall submit to the court and serve on other counsel proposed Findings of Fact and Conclusions of Law," and

HEREBY respectfully files with this Court the Findings of Fact, Conclusions of Law, and Brief of the Colville Confederated Tribes.

It is, moreover, respectfully brought to this Court's attention that the "Brief" is set forth concurrently with each Conclusion of Law of which the Brief is in support and is in the form of footnotes to those Conclusions of Law.

DATE Jan. 9, 1978

Respectfully submitted,

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SUBMITTED BY

THE COLVILLE CONFEDERATED TRIBES

SUBJECT INDEX

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CHRONOLOGY OF PERTINENT EVENTS
IN CONSOLIDATED CASES

1. On September 15, 1970, the Colville Confederated Tribes, hereafter referred to as the Tribes, Plaintiff in Civil No. 3421, initiated an action against the above-named Waltons, referred to as Defendants herein, for the purpose of enjoining the diversion and use by them of the waters of No Name Creek. The Tribes asserted their title in and to the rights to the use of water in No Name Creek and asked this Court to quiet title in them, averring, moreover, that Defendants were diverting and using the waters of No Name Creek to the irreparable damage of the Tribes and without authorization from them.

2. In the exercise of this Court's jurisdiction over the res or subject

matter of these cases, it entered a temporary injunction on September 27, 1972, enjoining the Defendants from using more than one-half of the surface flow of No Name Creek, from pumping any ground water except for the use of one domestic well near Defendants' residence and granting other relief. That injunction expired predicated upon the time limit therein contained, which was May 1, 1973.

3. The State of Washington filed its petition to intervene in Civil No. 3421 on October 19, 1972, as a Defendant. This Court granted that petition constituting the State a Defendant upon the grounds and for the reason that the State was, in effect, asserting its sovereign rights over the "surplus" waters in No Name Creek, if any. The intervening Defendant State of Washington recognized the prior and paramount character of the Tribes' Winters Doctrine rights to the use of water. Its claimed jurisdiction pertained only to those surplus waters over and above the requirements of the Tribes.

4. Rejecting the Tribes' request that the United States intervene in its suit against the Waltons, the United States, on March 15, 1973, initiated an action, Civil No. 3831, against the Waltons and the State of Washington. Among other things, the United States asserted "exclusive jurisdiction" over the rights to the use of water in No Name Creek, claiming that the Waltons were making unauthorized diversions of water from that stream without authorization from the United States.

5. This Court, having determined by an order entered December 19, 1973, that the case of Colville v. Walton, Civil No. 3421, and the United States v. Walton and the State of Washington, Civil No. 3831, had common issues of law and fact, consolidated those cases for trial.

6. This Court entered its Pre-Trial Order on June 14, 1976.

7. On July 14, 1976, this Court entered its "Order for Monitoring, Managing, Measuring and for Hydrologic Testing." Pursuant to that order, the Tribes, at great cost and expenditures of time and effort, completed and placed in operation the hereinafter referred to Colville Irrigation Project which is described in detail in the July 14, 1976 Order.

8. On October 4, 1976, this Court amended the aforesaid order dated July 14, 1976, to permit the United States Geological Survey "to drill six

test holes north of Omak Creek...." at locations set forth on the sketch made a part of that motion. The United States Geological Survey drilled some of the proposed test holes but not all of them.

9. By this Court's order entered December 22, 1976, its "Order for Monitoring, Managing, Measuring and for Hydrological Testing" was extended through October 1, 1977.

10. Throughout the 1977 water-use season, the Colville Irrigation Project pumped from three wells located on Indian property above the Waltons' property and delivered that developed water down No Name Creek across the Walton property to irrigate lands in Allotments 901, 903, and for the maintenance of the Lahonton Cutthroat Fishery. During that time, the Tribes likewise irrigated lands in the Peter's Allotment 892 and in former Allotment 525, title to which resides in it, producing substantial cuttings of alfalfa and providing forage for livestock.

11. Pursuant to the aforesaid order of July 14, 1976, as extended, both the Tribes and Defendants continued to pump or divert water supplies which were drawn virtually entirely from the No Name Creek Ground Water Basin, the source of the surface and ground water supply for No Name Creek.

12. Mr. F. O. Jones, geohydrologist, appointed by this Court in its July 14, 1976 order, as extended, projected early in August 1977 that the water supply available in the No Name Creek Basin would be insufficient to provide water for both Defendants and the Tribes to continue pumping at their current rate from the No Name Creek Ground Water Basin.

13. Predicated upon that projection, the Waltons filed with this Court a motion, dated August 10, 1977, to restrain the Tribes from pumping from the No Name Creek Basin, declaring that, if the Tribes continued pumping at their current rate, there would be insufficient water at the end of August 1977 to permit Defendants to obtain water from the No Name Creek Basin which, as stated, is the common source of supply for the Tribes and the Waltons.

14. Irrespective of the drastically short supply of water, the Tribes, desiring to do equity in regard to the greatly diminished water supply in the No Name Creek Basin, sharply reduced their pumping and water uses to their

irreparable damage, and completed a pipeline for emergency uses if the Walton well should be dried up irrespective of the greatly reduced pumping by the Tribes. That offer to do equity in regard to the Defendants Waltons was filed by the Tribes on August 25, 1977.

15. At a hearing before this Court, held August 30, 1977, on the motion of Defendants relative to the water shortage, an agreement was reached pursuant to which the Tribes continued operation under the July 14, 1976 Order, as extended through its expiration date of October 1, 1977.

16. On September 15, 1977, this Court entered its order setting these consolidated cases for trial on Tuesday, January 17, 1978.

17. On September 16, 1977, this Court ordered the stay on all pending motions until final completion of discovery and testing.

18. On November 4, 1977, the Tribes filed with this Court a "Motion Relative to this Court's Order Entered September 16, 1977" suggesting that two of the Tribes' pending motions had become moot due to action taken earlier by the Court and recommending that the motions be dropped from the docket.

19. The Tribes, by their motion dated November 4, 1977, in response to the aforesaid order of September 16, 1977, further alluded to the fact that there had been filed with the Court a motion for partial summary judgment, that the motion had been fully briefed and orally argued on July 12, 1976, and submitted to this Court for resolution.

20. As stated in the aforesaid motion of November 4, 1977, there are two issues set forth in the motion for partial summary judgment which are not ripe for summary disposition. The Tribes respectfully asserted, nevertheless: There is ready for disposition by that summary judgment process the issue of the availability to the Defendants of these affirmative defenses -- adverse possession; latches; equitable estoppel; acquiescence; and related defenses of that nature. 1/

1/ "Motion Relative to this Court's Order" entered September 16, 1977, November 4, 1977, pp. 4-5-6, para. 10. NOTE: Defendants Waltons filed resistance to the Tribes' motion of November 4, 1977, declaring that the matter should be held over to the trial on January 17, 1978.

21. On December 12, 1977, this Court reaffirmed the trial date as being January 17, 1978, ordering, moreover, that:

> "... at least five days before the commencement of trial, counsels shall submit to the Court and serve on other counsels proposed Findings of Fact and Conclusions of Law."

22. Pursuant to a conference call on December 15, 1977, in which the Court, the Department of Justice, the State of Washington and the Tribes participated (counsel for Defendants Waltons was not available), the Court established the "ground rules" for the trial commencing January 17, 1978. It was agreed that the Tribes' principal expert witnesses will be available in the Office of the United States Attorney on January 5th and 6th, 1978, for depositions. The Court stated that it would be available to meet with counsel for all of the parties during those mentioned days and that the order of December 12, 1977, would continue in force and effect requiring filing of proposed Findings of Fact and Conclusions of Law five days antecedent to the commencement of the trial.

On the background of the history of events involving these proceedings, the Tribes respectfully present their proposed "Findings of Fact and Conclusions of Law and Brief."

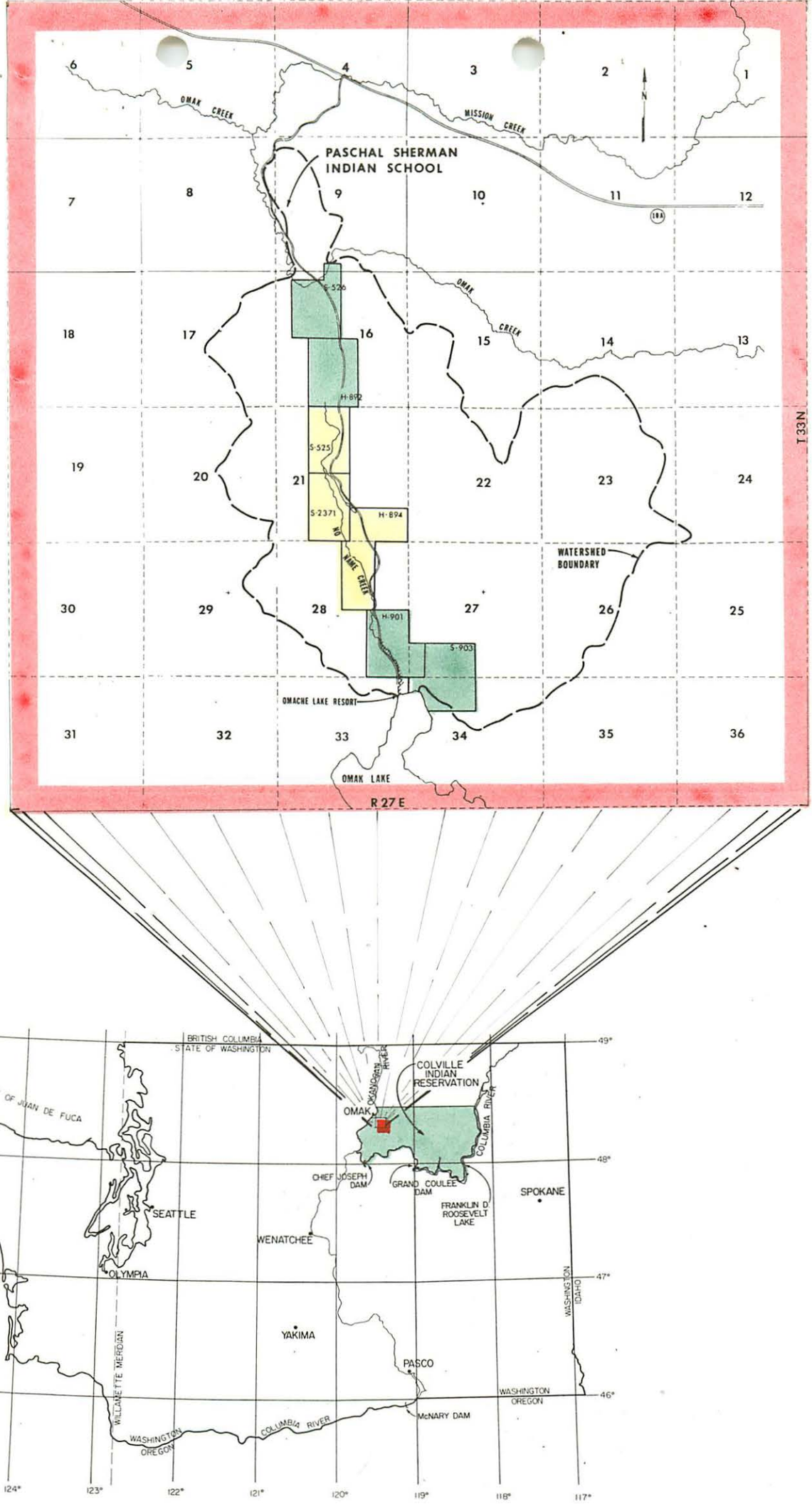
PROPOSED FINDINGS OF FACT

I.

The Colville Indian Reservation:

From time immemorial, the Methow Indians, the Okanogan Indians, the San Poil Indians, the Lake Indians, the Colville Indians, the Calispel Indians, the Spokane Indians, the Coeur d'Alene Indians and scattering bands of Indians occupied the lands constituting the present Colville Indian Reservation. 2/ Those Tribes Comprised the Colville Confederated Tribes, Plaintiff, in Civil No. 3421.

2/ See following page, Col. Ex. 1, Index Map No Name Creek Basin; Col. Ex. 2(1).



INDEX MAP OF THE NO NAME CREEK BASIN

II.

On April 8, 1872, the then Commissioner of Indian Affairs informed the Secretary of the Interior as follows:

> "I have the honor to invite your attention to the necessity for the setting apart by Executive order of a tract of country hereinafter described, as a reservation for the following bands of Indians in Washington Territory, not parties to any treaty...." 3/ Naming the aforesaid Tribes.

On April 9, 1872, President U.S. Grant ordered the establishment of the Colville Indian Reservation encompassing the lands described in the communication of April 8, 1872, from the Commissioner of Indian Affairs to the Secretary of Interior. 4/

III.

On July 2, 1872, President U.S. Grant revoked the April 9, 1872 Executive Order and created the Colville Indian Reservation in its present location. The language of that Execuitve Order is as follows:

> "It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public doman [sic], and that in lieu thereof
>
> > the country bounded on the east and south by the Columbia River on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon." 5/

IV.

For a period of approximately twenty years after the July 2, 1872 Executive Order, the Colville Confederated Tribes occupied the vast area encompassed within that Order. There was, however, entered into by the Tribes an "Agree-

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3/ Col. Ex. 2(1).

4/ Col. Ex. 2(2).

5/ Col. Ex. 2(3).

ment of May 9, 1891" which provided in Article 1:

> "The said Colville Indians residing and having their homes on the said Colville Indian Reservation, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following described tract of country on the Colville Indian Reservation in the State of Washington, viz:
>
> Beginning at a point on the eastern boundary line of the Colville Indian Reservation where the township line between townships 34 and 35 north of range 37 east of the Williamette meridian if extended west would intersect the same, said point being in the middle of the channel of the Columbia River, and running thence west parallel with the forty-ninth (49) parallel of latitude, to the western boundary line of the said Colville Indian Reservation in the Okanogan River, thence north following the said western boundary line to the said forty-ninth (49) parallel of latitude, thence east along the said forty-ninth (49) parallel of latitude to the northeast corner of the said Colville Indian Reservation, thence south following the eastern boundary of said reservation to the place of beginning, containing by estimation one million five hundred thousand acres, the same being a portion of the Colville Indian Reservation created by executive order dated April 9, 1872." 6/

V.

Among other things, the May 9, 1891 Agreement likewise provided:

> "ARTICLE 2. Each and every Indian now residing upon the portion of the Colville Indian Reservation hereby ceded and relinquished, and who is so entitled to reside thereon, shall be entitled to select from said ceded portion eighty acres of land which shall be allotted to such Indian in severalty. ***
>
> "ARTICLE 5. That in consideration of the cession... the United States will pay to the said Indians, the beneficiaries of this agreement, to be distributed per capita, the sum of one million five hundred thousand dollars, payable in five annual installments of three hundred thousand dollars each, with interest thereon at five per centum after this agreement shall take effect. ***
>
> "ARTICLE 6. It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians, and the improvements thereon, shall not be subject within the limitations prescribed by law to taxation for any purpose, national state or municipal; that said Indians shall enjoy without let or hinderance the right at all times freely to use all water power and water courses belonging to or connected with the lands to

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6/ Col. Ex. 2(4).

be so allotted, and that the right to hunt and fish in commen [sic] with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged. 7/ [Emphasis Supplied]

VI.

By the Act of July 1, 1892, 8/ Congress passed "An act to provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes." That Act, similar to the Agreement of May 9, 1891, established the eastern boundary of the Colville Indian Reservation, as it now exists, to a "point in the middle of the channel of the Columbia River." Also to be noted is that the statute in question did not refer to the Agreement of May 9, 1891.

VII.

On December 1, 1905, an agreement was entered into between James McLaughlin, the United States Indian Inspector, on the part of the United States, and the Confederated Tribes of Indians belonging to and having rights on the Colville Indian Reservation in the State of Washington. That agreement provided for the allotment of the Colville Indian Reservation which remained after the Act of July 1, 1892, which vacated the northern half of the Colville Indian Reservation and restored it to the public domain, all as provided for by the aforesaid Agreement of May 9, 1891. 9/

7/ Col. Ex. 2(4), Agreement of May 9, 1891. See Antoine v. Washington, 420 U.S. 194, 193 (1975), included as Col. Ex. 2(11).

8/ 27 Stat. 62.

9/ During the December 1, 1905 Agreement, the following, among other things, was provided for:

ARTICLE I. The said Indians belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the so-called diminished Colville Indian Reservation: Provided, That allotments of land of eighty (80) acres each, within said diminished Reservation shall first be made, under the direction of the Secretary of the Interior, to every man, woman, and child belonging to or having tribal rights on the Colville Indian Reservation, who have not heretofore received such allotments: Provided further, That the cession of the surplus lands of the said diminished Reservation, after the

VIII.

The Congress enacted on June 21, 1906, 10/ an act which provided for the carrying "... into effect the agreement bearing date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States." Among other things, that June 21, 1906 Act provided for paying to the Colville Confederated Tribes the million five hundred thousand dollars for the northern half of their reservation, all as set forth in the Agreement of May 9, 1891 and for which Congress provided payment in the last cited act.

9/ (cont'd) allotments herein provided for have been made, is conditioned upon the Indians, parties hereto, being compensated by the United States for the Northern portion of the said Reservation, containing approximately one million five hundred thousand acres, which was vacated and restored to the public domain by the Act of July first, eighteen hundred and ninety-two, and that the said Indians are to receive one million five hundred thousand dollars, in the manner hereinafter provided, in full payment for the lands vacated and opened to settlement by the said Act of July first, eighteen hundred and ninety-two.

" ***

"ARTICLE IV. It is further agreed that the one million five hundred thousand dollars in full payment to said Indians for the lands opened to settlement by the Act of July first, eighteen hundred and ninety-two, together with the proceeds derived from the sales of the surplus lands of the said diminished Reservation, in conformity with the provisions of this agreement, shall be paid into the Treasury of the United States and paid to the Indians belonging to and having tribal rights on the Colville Indian Reservation, or expended on their account, only as provided in this agreement." [Emphasis Supplied]

See Col. Ex. 2(5).

10/ Col. Ex. 2(6), 34 Stat. 377:

"To carry into effect the agreement bearing date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States *** there shall be set aside and held in the Treasury of the United States for the use and benefit of said Indians, which shall at all times be subject to the appropriation of Congress and payment to said Indians, in full payment for one million five hundred thousand acres of land opened to settlement by the Act of Congress 'To provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes,' approved July first, eighteen hundred and ninety-two, the sum of one million five hundred thousand dollars...."

IX.

By the Act of March 22, 1906, 11/ the Congress also declared:

> "Sec. 2. That as soon as the lands embraced within the diminished Colville Indian Reservation shall have been surveyed, the Secretary of the Interior shall cause allotments of the same to be made to all persons belonging to or having tribal relations on said Colville Indian Reservation, to each man, woman, and child eighty acres, and, upon the approval of such allotments by the Secretary of the Interior, he shall cause patents to issue therefor under the provisions of the general allotment law of the United States."

X.

Provision is likewise made in the aforesaid Act of March 22, 1906, as follows:

> "Sec. 3. That upon the completion of said allotments to said Indians the residue or surplus lands - that is, lands not allotted or reserved for Indian school, agency, or other purposes - of the said diminished Colville Indian Reservation shall be classified under the direction of the Secretary of the Interior *** and shall be appraised under their appropriate classes by legal subdivisions *** and, upon completion of the classification and appraisement, such surplus lands shall be open to settlement and entry under the provisions of the homestead laws at not less than their appraised value in addition to the fees and commissions now prescribed by law for the disposition of lands of the value of one dollar and twenty-five cents per acre by proclamation of the President, which proclamation shall prescribe the manner in which these lands shall be settled upon, occupied, and entered by persons entitled to make entry thereof: Provided, That the price of said lands when entered shall be fixed by the appraisement, as herein provided for, which shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms.... ***
>
> "Sec. 6. That the proceeds not including fees and commissions arising from the sale and disposition of the lands aforesaid *** shall be, after deducting the expenses incurred from time to time in connection with the allotment, appraisement, and sales, and surveys, herein provided, deposited in the Treasury of the United States to the credit of the Colville and confederated tribes of Indians belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington, and shall be expended for their benefit, under the direction of the Secretary of the Interior...." 12/ [Emphasis Supplied]

11/ Col. Ex. 2(7), 34 Stat. 80.

12/ Act of March 22, 1906, 34 Stat. 80, Col. Ex. 2(7).

XI.

Pursuant to the Act of March 22, 1906, set forth above in part, President Wilson, by a proclamation dated May 3, 1916, declared that all nonmineral, unallotted, and unreserved lands "within the diminished (south half) Colville Indian Reservation, classified as irrigable, grazing, or arid lands, shall be disposed of under the Homestead Act, and shall be opened to settlement and entry." 13/

XII.

On June 18, 1934, Congress passed the Indian Reorganization Act. Pursuant to that law, the Secretary of Interior withdrew all the undisposed of, surplus lands on the Colville Indian Reservation. That Act also provided that "No land ... shall be allotted in severalty." 14/

XIII.

By the Act of July 24, 1956, Congress, among other things, provided that:

> "'... The undisposed-of lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80), are hereby restored to tribal ownership to be held in trust by the United States to the same extent as all other tribal lands on the existing reservation, subject to any existing valid rights.'" 15/
> [Emphasis Supplied]

XIV.

Recently, the eastern and southern boundaries of the Colville Indian Reservation have been declared to be "... located at the middle of the channel of the Columbia River where it bordered the reservation." 16/

13/ Col. Ex. 2(8), Proclamation of May 3, 1916.

14/ Col. Ex. 2(9), Letter to "The honorable, the Secretary of the Interior, (Through the Commissioner of the General Land Office)," see final page of this exhibit in which the then Secretary of Interior Harold L. Ickes approved the withdrawal of the surplus lands. 25 U.S.C. 461 et seq.

15/ Act of July 24, 1956 (70 Stat. 626); see Seymour v. Superintendent, 368 U.S. 351, 356 (1962), Col. Ex. 2(10).

16/ See Sol. Op., June 3, 1974, Col. Ex. 2(12), p. 7.

XV.

Title To Lands Involved In These Consolidated Cases

Congress implemented its trust obligations in regard to the Colville Indian Reservation when the United States, by the Act of February 22, 1889, provided for the admission of the State of Washington into the Union. 17/ In the Enabling Act, provision is made that "the people inhabiting" the proposed State of Washington would "forever disclaim all right and title *** to all lands lying within said limits owned or held by Indians or Indian tribes...." 18/ Provision was made, moreover, in the Enabling Act that until the title to Indian lands had been extinguished by the United States "... said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States..." 19/ By its "Compact With The United States," the State of Washington covenanted compliance with the conditions set forth relative to the disclaimer by the people of the State of Washington in and to Indian and tribal lands, all as provided for in the aforesaid Enabling Act.

XVI.

All of the lands here involved 20/ were allotted pursuant to the General Allotment Act of 1887. 21/ None of those lands within the No Name Creek Basin were opened to disposition pursuant to the Homestead Act or otherwise, as provided for in the above-cited Act of March 22, 1906. 22/ Hence, the Presidential

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17/ Act of February 22, 1889, Ch. 180, §§ 1 & 4, 25 Stat. 676.

18/ Id., § 4(2) [Emphasis Supplied].

19/ Id., [Emphasis Supplied].

20/ See Col. Ex. 1, Index Map Of No Name Creek Basin. Lands in green - tribal or Indian allotted lands. Lands in yellow - title resides in the Waltons.

21/ Act of February 28, 1887, C.119, § 1, 24 Stat. 388, 25 U.S.C. 331 et seq.

22/ Col. Ex. 2(7).

proclamation of May 3, 1916, 22/ had no application to the lands here involved. None of the lands came within the purview of the Congressional enactments or the Presidential proclamation that opened those lands to entry and made applicable laws entirely distinct from the General Allotment Act as amended by the Act of 1906 and other acts.

XVII.

Tribal And Allotted Lands In No Name Creek Basin

Former Allotment No. 526 23/

Present Owner: Title resides in the Colville Confederated Tribes to former Allotment No. 526. That Allotment was recently transferred to the Tribes by "Gift" to the Colville Confederated Tribes by the Pioneer Educational Society which had held title to those lands as part of the St. Mary's Mission School, which was run for the benefit of the Colville Confederated Tribes and other Indians. 24/

Description: The south half of the southeast quarter of the southeast quarter of the southwest quarter of Section nine and the east half of the northeast quarter of the northwest quarter, the south half of the northwest quarter of the northeast quarter of the northwest quarter, the southwest quarter of the northeast quarter of the northwest quarter, the south half of the northeast quarter of the northwest quarter of the northwest quarter, the southeast quarter of the northwest quarter of the northwest quarter, the east half of the southwest quarter of the northwest quarter, and the southeast quarter of the northwest quarter of Section sixteen in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred fifteen acres.

22/ Col. Ex. 2(8).

23/ Col. Ex. 3(1).

24/ Col. Ex. 3(1), Title is held in trust for the Tribes by the United States.

Those lands, thus described, were allotted to Elizabeth Smitakin, an Indian of the Colville Indian Reservation. They were leased at one time to St. Mary's Mission. On April 7, 1917, the Allotment was granted to Elizabeth Smitakin. Subsequent to that time on April 4, 1923, a Patent in Fee passed to Joanna F. Blake. That Patent was transmitted to Joanna F. Blake in care of St. Mary's Mission. Ultimately title passed to the Pioneer Educational Socitey that, as stated, utilized former Allotment 526 for the benefit of the Colville Indian Tribes and then granted it by "Gift" to the Colville Confederated Tribes where title resides today.

Indian Allotment No. 892 25/

Present Owner: Title to Allotment No. 892 presently resides in the heirs of Jennie or Sin-o-nalx, a Colville Indian residing on the Colville Indian Reservation. The allottee is deceased. However, a Trust Patent was issued to Jennie or Sin-o-nalx on April 7, 1917.

Description: The east half of the southwest quarter and the west half of the west half of the southeast quarter of Section sixteen in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred twenty acres.

Those lands, thus described, are presently leased for a five-year period to the Colville Confederated Tribes by the heirs of Jennie or Sin-o-nalx, the leasing agreement being dated September 20, 1974.

Indian Allotment No. 901 26/

Present Owner: Title to Allotment No. 901 presently resides in the heirs of Mary Ann or Yatkanolx. To that allottee a Trust Patent was issued October 17, 1921.

Description: The Lot two of Section twenty-seven and the northeast quarter of the southeast quarter, the east half of the east half of the northwest quarter of the southeast quarter, the east half of the east half of the southwest

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25/ Col. Ex. 3(2).

26/ Col. Ex. 3(3).

quarter of the southeast quarter and the Lot one of Section twenty-eight in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred thirteen and ninety-five hundredths acres.

Title to these lands has always remained in Indian ownership. Those lands are presently held by the Colville Confederated Tribes pursuant to a five-year lease dated March 23, 1973, entered into by the Colville Confederated Tribes with the heirs of Mary Ann or Yatkanolx.

Indian Allotment No. 903 27/

Present Owner: Title to the lands comprising Allotment No. 903 has always resided in Indian ownership. A Trust Patent to those lands was issued on October 25, 1919, to William Edwards, an Indian of the Colville Indian Reservation.

Description: The southeast quarter of the southwest quarter and the east half of the southwest quarter of the southwest quarter of Section twenty-seven and the northeast quarter of the northwest quarter and the Lot one of Section thirty-four in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred twenty-six and ninety-five-hundredths acres.

Those lands, thus described in Allotment No. 903, were leased on March 19, 1973, for a period of five years to the Colville Confederated Tribes by the heirs of William Edwards.

Former Allotments Held By The Waltons

Former Allotment No. 525 28/

This land was originally allotted to Alexander Smitakin, an Indian of the Colville Indian Reservation, by a Trust Patent dated April 7, 1917.

27/ Col. Ex. 3(4).

28/ Col. Ex. 3(5).

Description: The west half of the west half of the west half of the northeast quarter and the east half of the northwest quarter of Section twenty-one in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred acres.

Title to those lands, thus described, passed out of Indian ownership by "a fee simple Patent" dated August 10, 1925, to a non-Indian, Hettie Justice Wham.

Fee simple title to the lands, thus described, is asserted by Defendants Waltons in fee simple from non-Indian grantor or grantors other than the original allottee, Alexander Smitakin or his heirs.

Former Allotment No. 2371 29/

This land was originally allotted to George Alexander Smitakin, an Indian of the Colville Indian Reservation, to whom a Trust Patent was issued April 7, 1917. On January 28, 1921, a "fee simple Patent" was issued to Paul Smitakin, heir of George Alexander Smitakin.

Description: The east half of the southwest quarter and the west half of the west half of the southeast quarter of Section twenty-one in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred acres.

Fee simple title to the lands is asserted by Defendants Waltons from non-Indian grantor or grantors other than the original allottee, George Alexander Smitakin or his heirs.

Former Allotment No. 894 30/

This land was allotted to William George, an Indian of the Colville Indian Reservation. The Allotment was issued April 7, 1917, to William George.

29/ Col. Ex. 3(6)

30/ Col. Ex. 3(7).

Description: The east half of the west half of the southwest quarter of the southeast quarter, the east half of the southwest quarter of the southeast quarter, and the southeast quarter of the southeast quarter of Section twenty-one and the west half of the northeast quarter of Section twenty-eight in Township thirty-three north of Range twenty-seven east of the Willamette Meridian, Washington, containing one hundred fifty acres.

A fee simple Patent dated May 5, 1923, was issued to those lands, thus described, to Hettie Justice Wham.

Fee simple title to these lands is asserted by the Waltons. Those lands were not conveyed to the Waltons by Indian William George or his heirs.

Tribal Lands:

Title resides in the Colville Confederated Tribes to the lands described as the northeast quarter (NE^4), Section 33 North, Ranger 27 East. Those lands have located on them the Omache Lake Resort and recreation lands, title to which resides in the Tribes. No Name Creek enters Omak Lake after it traverses those tribal lands.

XVIII.

NO NAME CREEK VALLEY 31/

No Name Creek

No Name Creek is a small, nonnavigable stream which rises within the Colville Indian Reservation and flows in a south and easterly direction its entire length, a distance of approximately three miles. No Name Creek has its terminus in Omak Lake, an entirely closed body of water likewsie situated completely within the Colville Indian Reservation. It is a natural body of water having great esthetic value. Omak Lake is presently used for recreational purposes and has an immense value to the Colville Confederated Tribes for that purpose.

31/ For general location, see Col. Ex. 1, Indian Map of the No Name Creek Basin, following Chronology of Events--5.

XIXX.

No Name Creek, in its above-described course, traverses the southerly portion of the above-described Indian Allotment 892; enters former Allotment (Walton property) 525 proceeding across former Allotment 2371 and former Allotment 894; it enters Indian Allotment 901 and flows across that Allotment. In a state of nature, No Name Creek traverses the western portion of Allotment 903. That stream then traverses tribal land in the northeast quarter of Section 33 North, Range 27 East, to a point where it enters Omak Lake.

XX.

No Name Creek has its source from what is referred to as the spring zone which rises in Indian Allotment 892, described as the southwest quarter of Section 16, Township 33 North, Range 27 East, W.M., Washington. After flowing some distance within Indian Allotment 892, No Name Creek continues its southeast course flowing across the northern boundary of the Walton properties, former Allotment 525. Throughout its course on Allotment 892 and former Allotment 525 on the Walton property, No Name Creek is in a deeply incised channel with steep banks. The spring zone, where No Name Creek rises, extends down into the Walton Allotment 525. Approximately midway in its course across that last-mentioned Allotment, the deeply incised channel widens out at or near where the spring zone of No Name Creek terminates.

XXI.

No Name Creek Groundwater Basin

Except for melting snow in the early Spring and occassional heavy rainfall along the precipitous mountain area encompassing most of the No Name Creek Valley, the flow of No Name Creek is wholly dependent upon the waters draining from the spring zone, which has been described above. That spring zone is the natural outlet of the No Name Creek Groundwater Basin, which is hereinafter described. That Basin is the vital source of water supply both to the Indian properties and to the Walton properties and is a common source for both of them.

XXII.

The approximate dimensions of No Name Creek Aquifer are as follows. 32/ From its northerly extremity to its southerly extremity, the No Name Creek Aquifer is:

10,610 Feet In Length

640 Feet In Width

149 Feet Average Depth

XXIII.

The No Name Creek Groundwater Basin encompasses virtually the entire west half of Section 9 extending a short distance into the northeast quarter of Sec-8, Township 33 North, Range 27 East, W.M. It continues southward into the west half of Section 16, Township 33 North, Range 27 East, W.M. It continues across the north line of the Walton property in former Allotment 525 for a distance of approximately 600 feet. 33/

XXIV.

HISTORY OF WATER USE FROM NO NAME CREEK
PRIOR TO CONSTRUCTION OF COLVILLE IRRIGATION PROJECT

When the No Name Creek Basin was surveyed by the General Land Office, which survey was completed October 31, 1907, and the Plat of Survey approved March 8, 1909, the lands constituting Indian Allotments 901 and 903 were being used for agricultural purposes. On Indian Allotment 901, there was an established farm house and barn. A portion of those lands are designated as being in fields and meadows on the east side of No Name Creek. Investigations have demonstrated

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32/ See the following exhibits: Col. Ex. 6, Map of No Name Creek Basin showing Distribution of Geologic Units; Col. Ex. 7, showing Watershed Areas Contributing to Aquifer and Aquiclude Materials in No Name Creek Valley; Col. Ex. 9, Map of No Name Creek Basin showing Distribution of Aquifer and Aquiclude Materials; Col. Ex. 18, Graphical Illustration of Water Level in No Name Creek Aquifer and Spring Discharge; Col. Ex. 20, Graphical Illustrations of Natural Storage in No Name Creek Aquifer in Relation to Water Level Elevations; Col. Ex. 22, Scaled Illustration showing Longitudinal Profile of Geology of No Name Creek Basin and Aquifer and Aquiclude Materials; Col. Ex. 23, Scaled Illustration showing Geologic Cross-Section of No Name Creek Basin.

33/ See Col. Ex. 1, Index Map of No Name Creek Basin, following p. 5.

that the areas were historically used for livestock and the lands have proved to be valuable for the production of natural grass and alfalfa in abudance.

XXV.

Prior to 1920, there was constructed an irrigation system by a lessee of the Timentwa family who owned the allotments as heirs of Mary Ann and William Edwards. 34/ By means of that system of irrigation, the Timentwa family diverted No Name Creek water to irrigate lands in Allotment 901 on both the ease and west sides of No Name Creek.

XXVI.

There were irrigated from No Name Creek prior to 1920 and down through the middle 1940's:

> Indian Allotment 901, approximately thirty-one and four-tenths (31.4) acres
>
> Indian Allotment 903, a small acreage was likewise irrigated on the east side of that stream.

XXVII.

The irrigation works utilized, as found above, on the west side of No Name Creek included two parallel pipes eight inches in diameter. The ditch into which the water was delivered by the flume was one and a half feet wide at the top and had a depth of one foot. On the east side of No Name Creek, the diversion works had a ditch system the width of which was two feet and the depth was one foot. 35/ The irrigated acreage in 901, on the east and west sides of No Name Creek, totaled 27.8 acres devoted to alfalfa and 3.6 acres devoted to grass. The reasonable diversion of water requirements for the alfalfa during the irrigation season was 5.1 acre-feet per acre. The diversion of water requirements for grass was 4.2 acre-feet. The irrigation system that was utilized was flooding by means of ditches and laterals which can be located today.

34/ See above Finding XVII, pp. 14-15, in regard to Indian Allotments 901 and 903.

35/ Col. Ex. 34.

XXVIII.

The Timentwas normally harvested three cuttings of alfalfa each irrigation season from Allotment 901. After the final cutting in the late summer, the livestock were turned out onto the alfalfa fields for the purpose of providing them with forage.

XXIX.

At all times prior to 1920 through the middle 1940's, the Timentwas had sufficient water from No Name Creek to successfully conduct their farm operations on 901 and 903, all as found above.

XXX.

The Timentwa family continued to farm Allotments 901 and 903 diverting the waters from No Name Creek as described above. In the early 1940's, the diversion works to the lands east of No Name Creek in Indian Allotment 901 were destroyed. However, the system of diverting water from No Name Creek on the west side continued in operation.

XXXI.

To supply water to Indian Allotment 901, a sump or well was dug near No Name Creek where it traverses Allotment 901. In the latter part of the 1940's during the irrigation season, there was no longer water from No Name Creek. The then lessee from the Timentwa family who occupied the Indian Allotments 901 and 903 had no water from No Name Creek with which to irrigate the lands. Moreover, there was no water available for the livestock or for domestic purposes.

XXXII.

Prior to the late 1940's, No Name Creek was a live stream throughout its entire length and for the full period of the irrigation season. It was sufficient to irrigate the lands, all as described in the Findings set forth above. Moreover, No Name Creek was a habitat for fish which were indigenous to the area and likewise supported trout that had been artificially planted.

XXXIII.

In the year 1948, the Defendants Waltons acquired title from non-Indians to Allotments 525, 2371 and 894.

XXXIV.

There is no evidence that any of the lands in the aforesaid Allotments of 525, 2371 and 894 were irrigated during the period of Indian ownership. There is, indeed, no evidence as to the amount of diversion and use of water, if any, until after the acquisition of those allotments by the Defendants Waltons, all as found above. 36/

XXXV.

On August 24, 1948, the Defendants Waltons filed an application with the Department of Hydraulics, State of Washington (predecessor agency of the State Department of Ecology), for a permit to divert water from No Name Creek for the purposes of irrigation. On November 28, 1949, the Supervisor of Hydraulics issued a permit to one of the Defendants, Wilson Walton, to irrigate 75 acres of land. On August 25, 1950, the Supervisor of Hydraulics issued a Certificate of Water Right to Defendant Wilson Walton for the diversion of one cubic foot of water per second of time from No Name Creek for the irrigation of 65 acres of land.

XXXCI.

The Defendants Waltons monopolized all of the water flowing in No Name Creek, preventing any water from flowing down to Indian Allotments 901 and 903, as it had flowed there previously. There was insufficient water during the irrigation season to provide any water for Indian Allotments 901 and 903, either for the irrigation of the fields there located or for livestock or for domestic uses.

XXXVII.

In 1967, an effort was made to start a recreational resort on the lands of the Colville Tribes situated in the northeast quarter of the northeast quarter

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36/ See Finding No. XVII.

(NE^4 NE^4) of Section 33, Township 33 North, Range 27 East. However, due to the fact that the Defendants Waltons monopolized and diverted all of the waters of No Name Creek during the irrigation season, it was impossible to continue the operation of the recreational resort referred to above. That resort, situated at the north end of Omak Lake, had no water source other than No Name Creek. The waters of Omak Lake could not be used because of the high saline content.

XXXVIII.

Lahonton Cutthroat Trout, in 1968, were determined to be an endangered species. They were found only in the high saline lakes of Pyramid Lake and Walker Lake in Nevada. Because of the diversion of water away from those lakes and the steady decline of them, there was a very real threat that the Lahonton Cutthroat Trout would become extinct.

XXXIX.

It is a National Policy to protect and preserve all species of wildlife indigenous to the United States. 37/ In furtherance of that policy, the Lahonton Cutthroat Trout were planted in Omak Lake by the United States of America acting in close cooperation with the Colville Confederated Tribes. Because of the high salinity in Omak Lake, it provides an excellent environment for those fish. Although the Trout live in saline water, they spawn in fresh water. The pollution of water of No Name Creek by Defendants Waltons' livestock required action to prevent the pollution of Omak Lake and No Name Creek.

XL.

As a consequence of the diversion of the entire streamflow by the Defendants Waltons during the irrigation season and the pollution of water from that stream, the Colville Confederated Tribes, Plaintiff in Civil No. 3421, have historically suffered and are now suffering irreparable and continuing damage.

37/ See Col. Ex. 4 at p. 6, Article II, and also pp. 33 & 34 of the Principles and Standards of Water Resource Planning in the United States.

XL.

The Paschal Sherman Indian School

In 1892, St. Mary's Mission School was founded by the Society of Jesus. That School was primarily administered for the benefit of the Colville Confederated Tribes although others did attend that Mission School. 38/

XLII.

In 1972, the administrator of St. Mary's Mission School formally advised the Colville Confederated Tribes that, due to the shortage of the funds, the School could no longer be administered. Thereafter, the Colville Confederated Tribes assumed full responsibility for the funding, management and control of the St. Mary's Mission School, changing the name to the Paschal Sherman Indian School.

XLIII.

As presently operated, the Paschal Sherman Indian School is fully accredited and operated for the benefit of the members of the Colville Confederated Tribes living both on and off of the reservation. It is predominantly a boarding school. There are presently enrolled 160 students, 130 of whom are boarding students and 30 of whom are bussed to school from the City of Omak or the vicinity.

XLIV.

To administer the Paschal Sherman Indian School, the Colville Confederated Tribes, acting through their governing body, the Colville Business Council, created the Colville Education Development Board. That Board sets the policy for the administration of the Paschal Sherman Indian School. To insure it being an autonomous and independent governing agency, the Colville Education Development Board was chartered, making it independent from the Colville Confederated Tribes. Members of the Colville Education Development Board are elected annually by members of the Colville Confederated Tribes,

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38/ See above Finding XVII, Title of Former Allotment No. 526.

18 years of age or over. The full control and responsibility for the operation of the Paschal Sherman Indian School resides in the last-mentioned Education Development Board.

XLV.

The Paschal Sherman Agricultural Program

In an effort to constitute the School as self-sufficient as possible, the Colville Confederated Tribes have assisted the School in acquiring a herd of 100 head of beef cattle which provides both income and sustenance for the School. The Tribes have leased all Indian Allotment lands to provide feed and revenue for the School.

XLVI.

In July 1975, the Paschal Sherman Indian School undertook to irrigate all Indian lands in the No Name Creek Basin.

XLVII.

In connection with the Colville Irrigation Project, there was entered by this Court, on January 27, 1976, an Order directing a hydrological testing program to be conducted throughout the No Name Creek Basin. On July 14, 1976, that Order was superceded by an "Order for Monitoring, Managing, Measuring, and for Hydrological Testing." That Order was extended on December 22, 1976, to remain operative throughout the irrigation season of 1977, terminating on or about October 1, 1977. Throughout these findings, that Order is referred to as the Order of July 14, 1976, as extended. It is incorporated into these findings by reference and made a part of them.

XLVIII.

The Order of July 14, 1976, as extended, was stipulated and agreed to by all parties in these consolidated cases and was entered by this Court after a full hearing held in regard to it on July 12, 1976.

XLIX.

The United States Geological Survey was designated as the Federal agency in charge of the direction and supervision of the program conducted pursuant to the Order of July 14, 1976, as extended. 39/

L.

An expert geohydrologist, F.O. Jones, employed by the United States Department of Justice, pursuant to the Order of July 14, 1976, as extended, was directed to be the consultant for all parties in connection with the development and administration of the monitoring, managing and operation of the program set forth in the aforesaid Order. 40/

LI.

All in accordance with the Order of July 14, 1976, as extended, and under the supervision and direction of the United States Geological Survey in consultation with the aforesaid F.O. Jones, there was installed complex equipment and devices for the measuring, monitoring and managing of No Name Creek. On the Plate, which immediately follows, designated "Surface Water, Monitoring, and Management System," there is set forth the system that has been utilized in the study of the available supply of surface water in No Name Creek. Under these headings, there appears on that Plate all of the equipment which was installed in:

"RELATION TO JULY 14, 1976, COURT ORDER

"EQUIPMENT AND MONITORING SITES OPERATED PRIOR TO JULY 14, 1976, COURT ORDER

* * * * * * * * * * *

"EQUIPMENT AND MONITORING SITES OPERATED UNDER JULY 14, 1976, COURT ORDER"

The United States Geological Survey and the Colville Confederated Tribes, acting in consultation with the aforesaid F.O. Jones, have gathered, processed, analyzed and utilized the data provided for by the "Surface Water, Monitoring,

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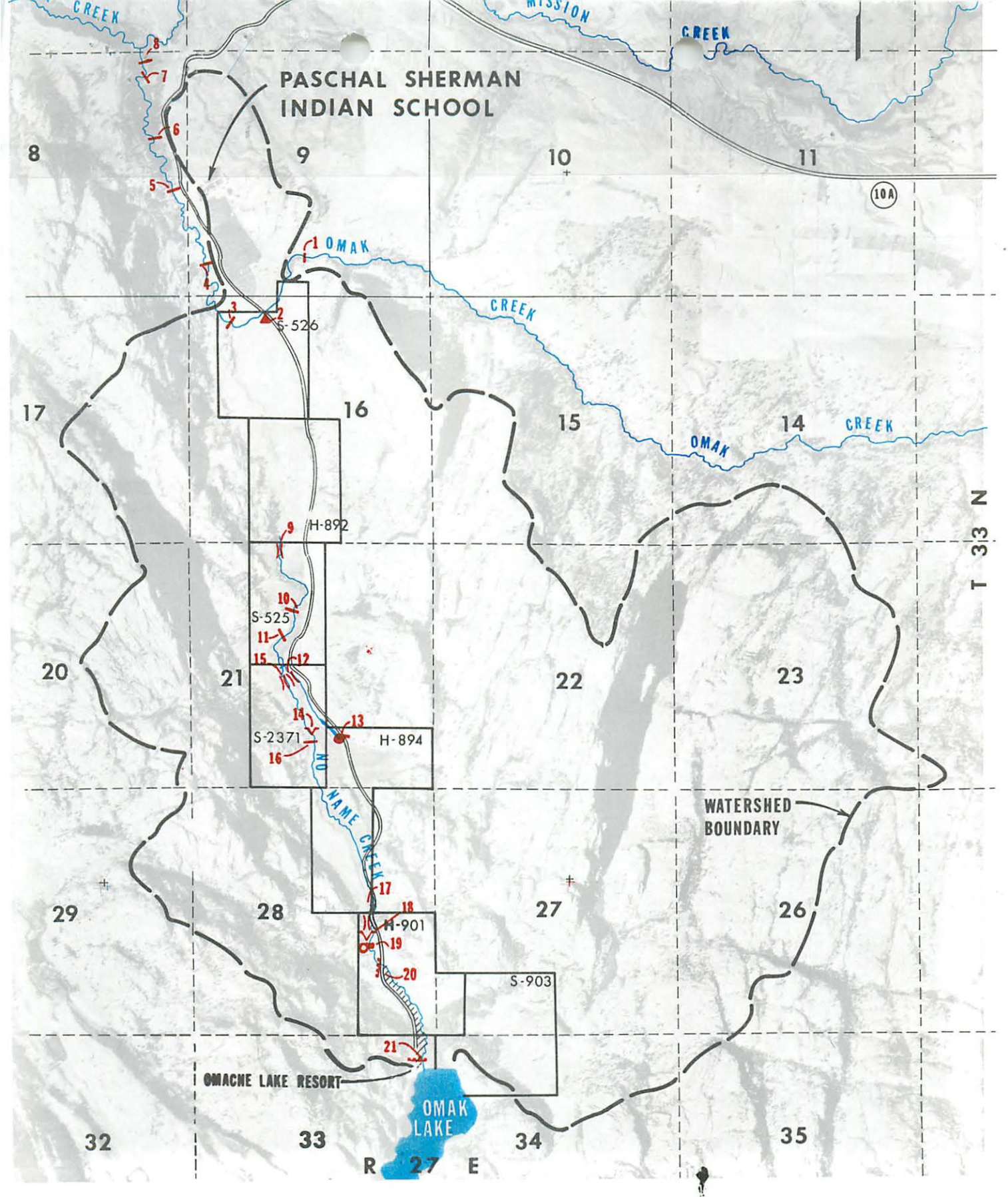
39/ Order of July 14, 1976, as extended, paragraph 8.

40/ Order of July 14, 1976, as extended, paragraphs 20 and 22.



SCALE: 2 INCHES = 1 MILE

EXPLANATION

EXPLANATION OF DATA COLLECTION FROM SURFACE WATER SITES

- PERIODIC CURRENT METER MEASUREMENT SITE
- ABANDONED PERIODIC CURRENT METER MEASUREMENT SITE
- MONITORING STATION PROVIDING CONTINUOUS RECORD OF STAGE; STREAM CONTROL
- MONITORING STATION PROVIDING CONTINUOUS RECORD OF STAGE; PARSHALL FLUME CONTROL
- MONITORING STATION PROVIDING CONTINUOUS RECORD OF STAGE; V-NOTCH WEIR CONTROL
- PUMP DIVERSION SITE EQUIPPED WITH FLOW METER AND RECORDER
- PUMP DIVERSION SITE

NOTE: ALL CONTINUOUS RECORD MONITORING STATIONS WERE EQUIPPED WITH DIGITAL AND CHART RECORDERS

RELATION TO JULY 14, 1976, COURT ORDER

EQUIPMENT AND MONITORING SITES OPERATED PRIOR TO JULY 14, 1976, COURT ORDER

- 2 OMAK CREEK AT COUNTY ROAD BRIDGE, U.S.G.S. GAGING STATION 12-4459
- 8 NO NAME CREEK ABOVE WALTON NORTH BOUNDARY
- 13 PUMP FROM WALTON IRRIGATION DITCH
- 17 NO NAME CREEK AT CROSSING OF GRANITE LIP
- 20 NO NAME CREEK AT COUNTY ROAD CULVERT, U.S.G.S. PERIODIC MEASUREMENT SITE 12-4459.45
- 21 NO NAME CREEK ABOVE OMAK LAKE, U.S.G.S. PERIODIC MEASUREMENT SITE 12-4459.48

EQUIPMENT AND MONITORING SITES OPERATED UNDER JULY 14, 1976, COURT ORDER

- 1 OMAK CREEK AT FOOTBRIDGE BELOW FALLS
- 3 OMAK CREEK AT GRANITE OUTCROPPING
- 4 OMAK CREEK NEAR PASCHAL SHERMAN SCHOOL DOMESTIC WELL
- 5 OMAK CREEK NEAR PASCHAL SHERMAN SCHOOL ABANDONED DOMESTIC WELL
- 6 OMAK CREEK NEAR THE INTERSECTION OF COUNTY ROAD AND PASCHAL SHERMAN SCHOOL MAIN ACCESS ROAD
- 7 OMAK CREEK ABOVE PETERSON PUMP
- 9 OMAK CREEK ABOVE MISSION CREEK
- 10 NO NAME CREEK AT WALTON DRIVEWAY CROSSING
- 11 NO NAME CREEK ABOVE WALTON SURFACE DIVERSION
- 12 WALTON IRRIGATION DITCH BELOW DIVERSION
- 14 OVERFLOW DRAIN FROM WALTON IRRIGATION DITCH
- 15 NO NAME CREEK BELOW WALTON SURFACE DIVERSION
- 16 NO NAME CREEK BELOW OVERFLOW DRAIN FROM WALTON IRRIGATION DITCH
- 18 NO NAME CREEK AT CROSSING OF GRANITE LIP
- 19 COLVILLE IRRIGATION PUMP DIVERSION FROM NO NAME CREEK

SURFACE WATER, MONITORING, and MANAGEMENT SYSTEM

DECEMBER, 1977

PLATE I

and Management System," all as set forth on the Plate which immediately precedes this page.

LII.

Likewise in conformity with the Order of July 14, 1976, as extended, there has been undertaken by the United States Geological Survey and the Colville Confederated Tribes, acting in consultation with the aforesaid F.O. Jones, an intense study of the No Name Creek Groundwater Basin. There appears on the Plate entitled "Groundwater Development, Monitoring, and Management System," the following:

(1) "WELLS AND PIEZOMETERS PRIOR TO JULY 14, 1976, COURT ORDER

(2) "PIEZOMETERS AND TEST HOLES UNDER JULY 14, 1976, COURT ORDER

(3) "WELLS AND PIEZOMETERS UNDER JULY 14, 1976, COURT ORDER, AS EXTENDED"

The United States Geological Survey and the Colville Confederated Tribes, acting in consultation with the aforesaid F.O. Jones, have observed the groundwater fluctuations of the No Name Creek Groundwater Basin and have gathered, processed, analyzed and utilized the data disclosed by that system.

LIII.

Construction, Operation And Maintenance Of The Colville Irrigation Project Pursuant To The Order Of July 14, 1976, As Extended

Provision is made in the July 14, 1976 Order, as extended, that:

> "4. The Colville Confederated Tribes may pump a quantity of water (approximately 2 cubic feet per second) into No Name Creek sufficient to deliver at a point immediately downstream from the Waltons' southern boundary 1-1/2 cubic feet per second of water, there to be measured at a gaging station which has been installed and will be operated by the Colville Confederated Tribes in cooperation with the United States Geological Survey, and the pumping, testing, and recording of the passage of such water shall be a part of the hydrological testing and monitoring program herein authorized...." 41/

LIV.

In regard to the water pumped into No Name Creek, hereinafter sometimes referred to as "developed water," all as found immediately above, provision

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41/ Order of July 14, 1976, as extended, p. 2, paragraph 4, Lines 4-11.

is made in the Order of July 14, 1976, as extended:

> "Such water shall be used for irrigation of Allotments 901 and 903 for the Lahontan cutthroat trout fishery and for use on tribal lands in conjunction with the Omache Resort." 42/

LV.

It is provided for in the Order of July 14, 1976, as extended, that the following wells and installations "are hereby authorized to be operated and maintained" by the Colville Confederated Tribes in furtherance of the Paschal Sherman Indian School, Colville Irrigation Project: (See Order, paras. 9a,b,c)

1. The Paschal Sherman Well, situated on Former Allotment No. 526, together with a pump and motor for the purpose of irrigating the irrigable lands within the Paschal Sherman Tract and for delivery of water down to Allotments 901 and 903, for the Lahonton Cutthroat Fishery and for the Omache Lake Resort.

2. Colville Irrigation Well No. 1, located at the northern end of Allotment No. 892, for the purpose of irrigating lands within that Allotment.

3. Colville Irrigation well No. 2, on Allotment No. 892, immediately north of the Walton property, to irrigate land within that Allotment.

4. There has been installed and operated an irrigation system together with pump and necessary sprinklers for the purpose of irrigating the lands on both sides of No Name Creek in Allotment No. 901.

5. There has also been installed an irrigation system to irrigate lands in Allotment No. 903, comprised of a booster pump and the necessary sprinkler system.

6. The channel of No Name Creek has been renovated for the purpose of providing an adequate spawning grounds for the Lahonton Cutthroat Trout which inhabit Omak Lake.

LVI.

There immediately follows this page a Plate which locates the irrigation system including the wells and other installations constructed, operated and maintained in connection with the Paschal Sherman Indian School, Colville Irrigation Project. Set forth on that Plate is the following irrigable and

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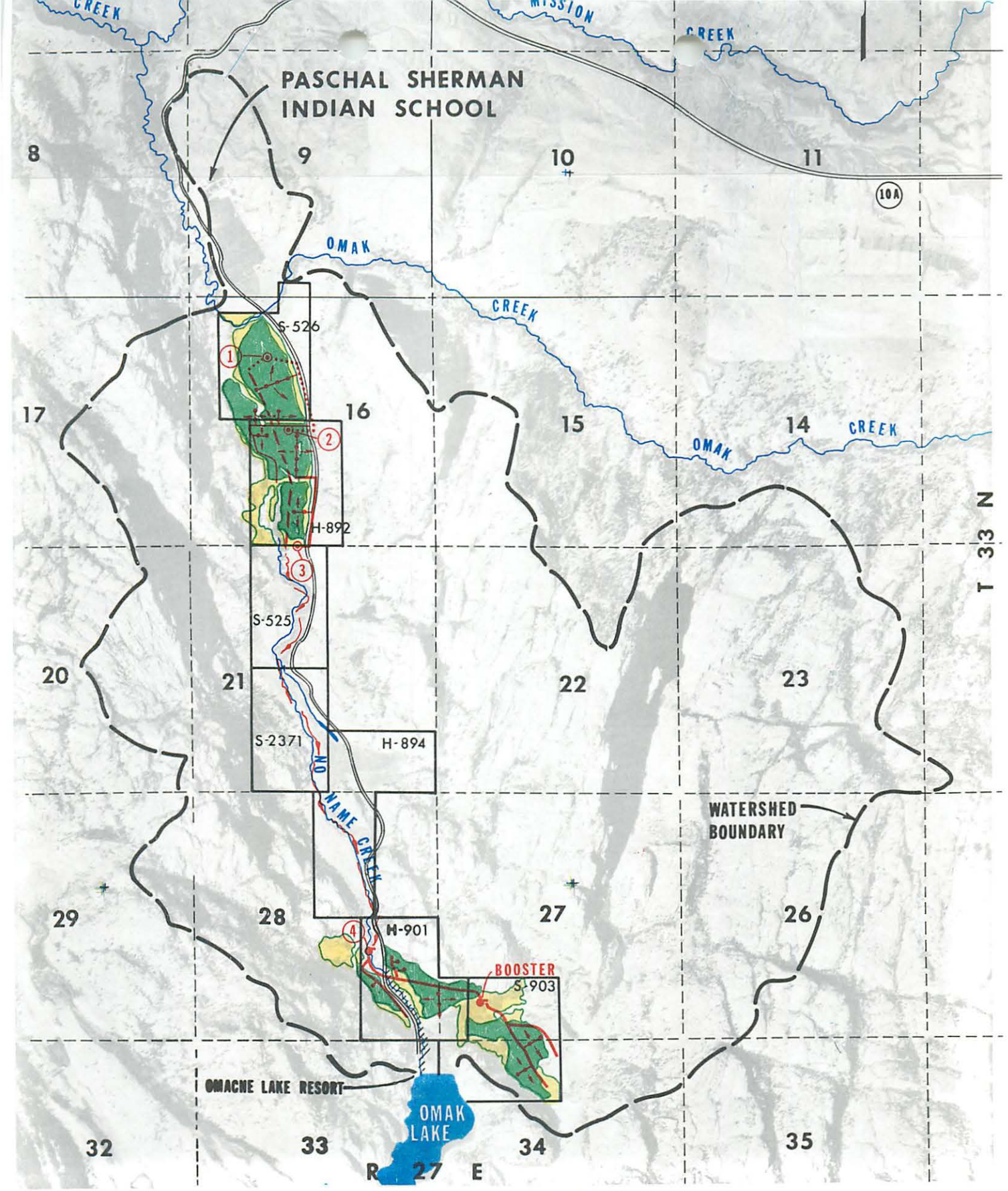
42/ Order of July 14, 1976, as extended, p. 2, paragraph 4, Lines 18-20.



SCALE: 2 INCHES = 1 MILE

EXPLANATION

IRRIGATION WATER DEVELOPMENT, DELIVERY, AND APPLICATION SYSTEM

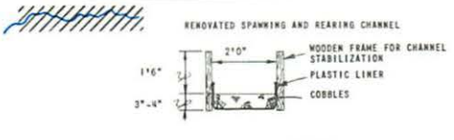
WELLS
- (1) PASCHAL SHERMAN IRRIGATION WELL
- (2) COLVILLE NUMBER 1 IRRIGATION WELL
- (3) COLVILLE NUMBER 2 IRRIGATION WELL

SURFACE DIVERSION
- (4) DIVERSION POINT FOR "SOUTH UNIT" COLVILLE IRRIGATION PROJECT

DELIVERY SYSTEM
- PORTABLE ALUMINUM SPRINKLER PIPE
- BURIED STEEL PIPE
- BURIED PLASTIC PIPE
- NATURAL CHANNEL FOR CONVEYANCE

APPLICATION SYSTEM
- PORTABLE ALUMINUM HAND-MOVE SPRINKLER LINE
- AUTOMATED CENTER PIVOT SPRINKLER LINE

LAHONTON CUTTHROAT FISHERY
- RENOVATED SPAWNING AND REARING CHANNEL



TYPICAL SECTION

IRRIGATION LAND DEVELOPMENT
- IRRIGATED ACRES (1977)
- UNDEVELOPED IRRIGABLE ACRES

IRRIGATION SUMMARY

ALLOTMENT	IRRIGATED ACRES (1977)	UNDEVELOPED IRRIGABLE ACRES	TOTALS
S-526	50.7	11.1	61.8
H-892	43.6	14.3	57.9
TRIBAL TRUST	.8	.7	1.5
H-901	30.4	10.7	41.1
TRIBAL TRUST	-----	8.8	8.8
S-903	32.4	24.9	57.3
TOTALS	157.9	70.5	228.4

COLVILLE IRRIGATION PROJECT

DECEMBER, 1977

PLATE III

irrigated acreage served by the aforesaid Colville Irrigation Project:

IRRIGATION SUMMARY

Allotment	Irrigated Acres (1977)	Undeveloped Irrigable Acres	Totals
S-526	50.7	11.1	61.8
H-892	42.6	14.3	57.9
TRIBAL TRUST	.8	.7	1.5
H-901	30.4	10.7	41.1
TRIBAL TRUST	----	8.8	8.8
S-903	32.4	24.9	57.3
TOTALS	157.9	70.5	228.4

LVII.

Quantities of Water Actually Diverted to Indian Lands Within the Colville Irrigation Project - 1977

Predicated upon the data obtained from the monitoring and managing program provided for by the Order of July 14, 1976, as extended, the following quantities of water were pumped and diverted for use on the Indian Allotment and Tribal lands within the service area of the Colville Irrigation Project above the Walton property:

SUMMARY OF 1977 WATER USE ABOVE THE WALTON PROPERTY

Allotment	1977 Acres	Water Use In Acre-Feet	Water Use In Acre-Feet Per Acre	Average Annual Sprinkler Water Requirements
Tribal Allotment No. 526	50.7	254.8 Total All Lands	2.68 Average All Lands	4.24
Indian Allotment No. 892	43.6			4.44
Tribal Lands	.8			4.44

The reasonable average annual sprinkler water requirements for the service area of the Colville Irrigation Project is 4.33 acre-feet. The Colville Irrigation Project diverted to the lands irrigated above the Walton property is 2.68 acre-feet per acre which is substantially less than the reasonable water requirements with the attendant reduction in crop production and damage.

LVIII.

Predicated upon the data obtained from the monitoring and managing program provided for by the July 14, 1976 Order, as extended, the following quantities of water were pumped into No Name Creek, diverted across the Walton property and delivered by the Colville Irrigation Project below the Walton property:

SUMMARY OF 1977 WATER USE BELOW THE WALTON PROPERTY

Allotment	1977 Acres	Water Use In Acre-Feet	Water Use in Acre-Feet Per Acre	Average Annual Sprinkler Water Requirements
Indian Allotment No. 901	30.4	161.6	5.32	4.9
Indian Allotment No. 903	32.4	12.5	.39	5.71

The reasonable average sprinkler water requirements, due to the water losses emanating from the need to deliver the water in the No Name Creek channel to Allotments 901 and 903, increased the diversion requirements for those two Allotments considerably. However, the quantities of water delivered to Indian Allotments 901 and 903 in the future will be greatly reduced from 1977 water use per acre because of the completion of the irrigation system on Allotments 901 and 903 to serve 62.8 acres. The production of alfalfa on Indian Allotment 901 was materially reduced due to the need to limit the quantity of water delivered. Alfalfa was planted on Indian Allotment 903 so late in the season that there was no production. However, the crop for the 1978 irrigation season was planted and will be in production during that season.

LIX.

There were produced within the Colville Irrigation Project service area 364 tons of alfalfa in the irrigation season of 1977. Twenty-five hundred bales of alfalfa have been delivered to the Paschal Sherman Indian School to feed the School's livestock. The value of the alfalfa produced within the Colville Irrigation Project area is calculated to be $21,860, for use by the Paschal Sherman Indian School.

LX.

Listed below are the water uses for the 1977 water season:

Allotment	1977 Acres	Water Use In Acre-Feet	Water Use In Acre-Feet Per Acre	Average Annual Diversion Sprinkler Water Requirements
TOTAL COLVILLE:				
Irrigation	157.9	428.9	2.72	4.72

LXI.

Had the Colville Irrigation Project utilized its full reasonable diversion requirements for sprinklers on the 95.1 irrigated acres above the Walton properties, it would have reasonably used 412.2 acre-feet

The Colville Irrigation Project did not utilize its full reasonable entitlement for the 95.1 acres but, rather, used 254.8 acre-feet

Thus, by reducing its actual water use, the Colville Irrigation Project had available to it for other uses 157.4 acre-feet

LXII.

Had the Colville Irrigation Project utilized its full reasonable water requirements for sprinklers for 30.4 acres on Allotment 901, it would have reasonably used 149.0 acre-feet

The Colville Irrigation Project did not utilize its full reasonable entitlement for sprinklers for 30.4 acres on Allotment 901 and 32.4 acres in 903, rather used only on allotment 901 161.6 acre-feet

Had the Colville Irrigation Project utilized its full reasonable water requirements for sprinklers for 32.4 acres on Allotment 903, it would have reasonably used 185.0 acre-feet

The Colville Irrigation Project did not utilize its full

reasonable entitlement for sprinklers for 32.4 acres on Allotment 903 but, rather, used only 12.5 acre-feet

Thus, by reducing its actual water for sprinklers on Allotment 901, the Colville Irrigation Project had available to it for other uses 12.6 acre-feet

And, by reducing its actual water for sprinklers on Allotment 903, the Colville Irrigation Project had available to it for other uses 172.5 acre-feet

LXIII.

By reducing the quantities of water used during the irrigation season of 1977, both above and below the Walton property, the Colville Irrigation Project salvaged for other uses 317.5 acre-feet

LXIV.

The total reasonable water requirements using sprinkler irrigation for the 228.4 acres of irrigable land within the service area of the Colville Irrigation Project are 4.65 acre-feet per acre for a total water requirement of 1062.2 acre-feet for each irrigation season.

LXV.

The total reasonable water requirements for rill or flood irrigation for the 228.4 irrigable acres within the service area of the Colville Irrigation Project are 5.86 acre-feet per acre for a total of 1339.1 acre-feet for each irrigation season.

LXVI.

SUMMARY OF 1977 WATER USE BY WALTONS FROM NO NAME CREEK
BOTH SURFACE AND GROUNDWATER

Allotment	1977 Acres	Water Use In Acre-Feet	Water Use In Acre-Feet Per Acre	Average Annual Sprinkler Water Requirements
Walton Allotment No. 525	29.0	152.5	5.26	4.44
Walton Allotments Nos. 2371 & 894	21.9	115.4	5.27	3.66

LXVII.

The Waltons exceeded the reasonable average annual diversion sprinkler water requirements on former Allotment 525 by eight-tenths acre-feet per acre for an excessive water use on the 29.0 acres or 23.2 acre-feet during the 1977 irrigation season.

LXVIII.

The Waltons exceeded the reasonable average annual diversion sprinkler water requirements for Allotments 2371 and 894 by 1.61 acre-feet per acre for an excessive water use on the 21.9 acres of 35.26 acre-feet during the 1977 irrigation season.

LVIX.

During the 1977 irrigation season, the Waltons intercepted and utilized 86.3 acre-feet of the developed water pumped into No Name Creek by the Colville Irrigation Project for delivery and use on Allotments 901 and 903, to the irreparable damage to the Colville Confederated Tribes and the Paschal Sherman Indian School.

LXX.

At all times since the Waltons commenced irrigating in the late 1940's above the Indian Allotments 901 and 903 and the Tribal lands below the Waltons' property, the Colville Confederated Tribes have suffered irreparable and continuing damage due to the diversion and use by the Waltons of the entire stream flow of No Name Creek.

LXXI.

Reduction Of Irrigated Acreage, Water Use And Salvaged Water Used For Fishery:

A decision was made by the Colville Confederated Tribes and the United States during the 1977 irrigation season to:

1. Refrain from irrigating the full 228.4 acres referred to in Finding No. LXVI and to irrigate only 157.9 acres, with a reduction in water use of 316. acre-feet

2. Reduce the quantity of water actually applied to the lands irrigated below the reasonable diversion requirements for irrigating the 157.9 acres referred to in Finding No. LXVI., with the resultant saving of 317.5 acre-feet

3. Use sprinkler irrigation on the 157.9 acres, rather than to use the flood or rill method of irrigation, resulting in greater efficiency of water use and a resultant saving of 192.6 acre-feet

By those methods, the Colville Confederated Tribes reduced the quantities of water used from the No Name Creek surface and groundwater supply by a total of 826.1 acre-feet

LXII.

A portion of that total reduction of water use and salvage of water through greater efficiency was used by the Colville Irrigation Project for delivery to the Lahonton Cutthroat Fishery in the amount of 322.7 acre-feet

LXIII.

By using that salvaged water down the renovated channel, the Lahonton Cutthroat Trout were induced to enter No Name Creek and proceed up that stream to a point immediately below the "Diversion Point for 'South Unit' Colville Irrigation Project," marked "4" on the Plate which follows page 26.

LXIV.

The Lahonton Cutthroat Trout spawned in the renovated channel and, in the opinion of the fishing experts, approximately 17,000 "fry" Lahonton Trout entered Omak Lake.

LXV.

The Lahonton Cutthroat Trout which were spawned under the conditions prevailing in the No Name Creek Fishery resulted in a hardier and healthier fish than those raised in the completely artificial circumstances which prevail in the fish hatcheries.

LXVI.

The decision of the Colville Confederated Tribes and the United States to use water for the Lahonton Cutthroat Trout Fishery rather than to use it to irrigate land was in furtherance of the Federal policy of protecting any threatened species. Since the planting of the Lahonton Cutthroat Trout in Omak Lake, that species has been removed from the endangered species to a threatened species--a marked improvement in the possible survival of the Lahonton Cutthroat Trout.

LXVII.

Available Water Supply in No Name Creek Basin, Including Both Surface and Groundwater, Falls Far Short of Water Use and Reasonable Water Requirements

The annual firm water supply in the No Name Creek Bason for both surface and groundwater is found to be 550 acre-feet. The combined water use for the 1977 irrigation season for both the Colville Confederated Tribes and the Waltons was 1019.5 acre-feet. That use is roughly twice the firm safe annual supply. Had there been full irrigation on all of the irrigable lands by the Colville Irrigation Project, the deficit in the water supply would have been even far greater, with the attendant irreparable damage to the Colville Confederated Tribes.

LXVIII.

So sharp was the decline in the No Name Creek Groundwater Basin that, during the early days of August, 1977, the aforesaid expert F. O. Jones made a projection in water use which disclosed that the Waltons' well would be dry by the end of August. The determination proved conclusively that the Colville Irrigation Project and the Waltons were pumping from the same aquifer, the No Name Creek Groundwater Basin.

LXIX.

Predicated on that projection of F. O. Jones, Mr. Walton, by a motion dated August 10, 1977, stated, among other things, that, unless the Colville Confederated Tribes were enjoined from "certain use and waste of water, that Walton will have insufficient water the latter part of this month [August] to carry on his operations."

LXX.

The Colville Irrigation Project, after consultation with the Waltons, promptly (1) reduced its pumping from the No Name Creek Basin and greatly reduced its irrigation on Allotments 526 and 892; and (2) provided the Waltons an emergency pipe line in the event their well did go dry.

LXXI.

Based on those commitments, the Colville Confederated Tribes and the Waltons agreed to continue operations pursuant to the Order of July 14, 1976, as extended, through October 1, 1977.

CONCLUSIONS OF LAW WITH BRIEF IN SUPPORT

I.

History And Background

Subject to rights of the Colville Confederated Tribes, which occupied the lands on which they now reside, there passed to the United States of America title to and jurisdiction over those lands on June 5, 1846, by its Treaty with Great Britain "In Regard To Limits Westward Of The Rocky Mountains." 43/

By the Act of August 14, 1848, the Congress passed an "Act to Establish the Territorial Government of Oregon." 44/ Embraced within that Oregon Territory is the present State of Washington. Among other things, the Act last cited provided that:

> "[N]othing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory. . . or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights . . . . "

Provision was also made in the Act creating the Oregon Territory that it would be subject to the Ordinance of 1787 which governed the then Northwest

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43/ Treaty with Great Britain, June 15, 1846, 9 Stat. 869.

44/ Ch. 177, 9 Stat. 323.

Territory. In that 1787 Ordinance, Congress provided that:

> "The utmost good faith shall always be observed towards the the Indians; their land and property shall never be taken from them without their consent;. . . ." 45/

II.

When, on March 2, 1853, the Congress passed "An Act to establish the Territorial Government of Washington" 46/ it used identical provisions as those quoted from the Oregon Territorial provision. Congress thus retained its Constitutional power over Indian affairs and Indian property within the Territory of Washington.

III.

The then President, U. S. Grant, on July 2, 1872, issued an Executive Order which provides as follows:

> "It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public doman [sic], and that in lieu thereof the country bounded on the east and south by the Columbia River on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon." 47/

IV.

By that Executive Order of July 2, 1872, there was created the Colville Indian Reservation, pursuant to which there was reserved for the Colville Indian Tribes both the lands and rights to the use of water essential to make those lands habitable. 48/

V.

Congress passed the Act of February 22, 1889, pursuant to which the

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45/ Act of August 7, 1789, ch. 8, 1 Stat. 50, n.(a), art. III.

46/ Act of March 2, 1853, ch. 90, 10 Stat. 172.

47/ See above Finding of Fact No. III; Col. Ex. 2(3).

48/ Arizona v. California, 373 U.S. 546, 598 (1963); See 376 U.S. 340 (1964) Final Decree.

inhabitants of the Territories of Dakota, Montana and Washington "may become the States of North Dakota, South Dakota, Montana, and Washington, respectively ...." 49/ Congress then in the exercise of its power to admit States to the Union in fullfillment of its obligation as Trustee for Indian Tribes and people, and to establish needful rules and regulations of the Indian lands, prescribed these conditions in the Enabling Act respecting the last-mentioned States:

> "That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title ... to all lands lying within said limits owned or held by any Indian or Indian tribes...." 50/

Moreover, Congress provided additional conditions to the admittance of these states to the Union by declaring:

> "[until] the title thereto shall have been extinquished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States...." 51/

VI.

The proviso contained in the Enabling Act, all as set forth above, is likewise made a part of the Constitution of the State of Washington in its "Compact With The United States." 52/

VII.

The No Name Creek Basin Always Part Of The Colville Indian Reservation:

The No Name Creek Basin and the rights to the use of both surface and groundwater of that stream are now and have always been part of the Colville Indian Reservation. 53/

49/ Act of February 22, 1889, ch. 180 § 1, 25 Stat. 676.

50/ Id. § 4(2). [Emphasis Supplied]

51/ Act of February 22, 1889, ch. 180 § 4(2), 25 Stat. 676 (reproduced in vol. 13 of the N.D. Cent. Code at 87; vol. 1 of the S.D. Compiled Laws Ann. at 183 and vol. 1 of the Mont. Rev. Codes Ann. at 67). [Emphasis Supplied]

52/ Wash. Const., art. 26.

53/ See Findings No. III.

VIII.

It is elemental that the rights to the use of water in No Name Creek are invaluable interests in real property. 54/ Likewise elemental is the fact that an action of the character of these consolidated cases is a proceeding to quiet title in and to real property. 55/

IX.

Full equitable title to those rights to the use of water of No Name Creek resides in the Colville Confederated Tribes. 56/ There the Solicitor of the Department of the Interior states:

> "Congress has recognized the Colville Confederated Tribes' full equitable title to tribal lands within the Colville Reservation, both in the 1940 Act and in prior legislation, see United States v. Pelican, 232 U.S. 442, 445 (1914).... Such title, having vested in the tribes, cannot be taken except as clearly and specifically authorized by Congress ...." 57/

X.

On repeated occasions, the Courts have held that, where Congress has recognized title to lands to reside in an Indian Tribe, predicated on an Executive Order, that title cannot be "taken" from the Indians except by the

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54/ Wiel, "Water Rights in the Western States," 3d ed., vol. 1, sec. 18, pp. 20, 21; sec. 283, pp. 298-300; sec. 285, p. 301; United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 75 (1913); Ashwander v. TVA, 297 U.S. 288, 330 (1936); United States v. Ahtanum Irrigation District, 236 F.2d 321, 339 (CA 9, 1956); Fuller v. Swan River Placer Mining Co., 12 Colo. 12, 17; 19 Pac. 836 (1898); Wright v. Best, 19 Cal. 2d 368; 121 P.2d 702 (1942); Sowards v. Meagher, 37 Utah 212; 108 Pac. 1112 (1910); See also Lindsey v. McClure, 136 F.2d 65, 70 (CA 10, 1943); David v. Randall, 44 Colo. 488; 99 Pac. 322 (1908).

55/ United States v. Ahtanun Irrigation District, 236 F.2d 321, 339 (CA 9, 1956); Crippen v. X Y Irr. Co., 32 Colo. 447, 76 Pac. 794 (1904); Louden v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535 (1897); Kinney on Irrigation and Water Rights, p. 2844, sec. 1569.

56/ See Col. Ex. 2(12), "Solicitor's Opinion on the boundaries of and status of title to certain lands within the Colville and Spokane Reservations" Memorandum to Assistant Secretary, Energy & Resources; Assistant Secretary, Fish, Wildlife & Parks; Commissioner, Bureau of Indian Affairs, from Secretary of the Interior Rogers C.B. Morton, June 3, 1974.

57/ Id., p. 9.

exercise by the Congress of its power of Eminent Domain. 58/

XI.

The Court of Appeals for the Ninth Circuit, in regard to the Spokane Indian Reservation in the State of Washington, specifically ruled that:

> "There can be no doubt that such reservation by proclamation of the executive stands upon the same plane as a reservation made by a treaty or by Act of Congress." 59/

XII.

The Winters Doctrine Applicable To No Name Creek

As concluded above, as a matter of law, the Executive Order of July 2, 1872, reserved land and with that land rights to the use of water without which those semi-arid lands comprising the Colville Indian Reservation could not be constituted a permanent home and abiding place for the Colville Confederated Tribes. In thus declaring the reservation of rights to the use of water for the Colville Confederated Tribes, there was being applied by this Court the concepts of the Winters Doctrine, as first enunciated by the Court of Appeals for the Ninth Circuit in Winters v. United States, 60/ which decision was affirmed by the Supreme Court 61/ and quite recently reiterated and reaffirmed on appeal from the Southern Division of this Court in the case of United States v. Ahtanum Irrigation District, et al. 62/

XIII.

In conformity with the rationale of the Winters Doctrine, as enunciated by

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58/ See Col. Ex. 2(10), Opinion, Supreme Court, Seymour v. Superintendent, 368 U.S. 351, 356 (1962). See also Hynes v. Grimes Packing Co., 337 U.S. 86, 106-107 et seq. (1949); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-281 (1953); Northern Pacific R.R. Co. v. Wismer, 230 Fed. 391, 393 (CA 9, 1916); 246 U.S. 283 (1918); Gibson v. Anderson, 131 Fed. 39, 40 (CA 9, 1904); Antoine v. Washington, 420 U.S. 194 (1975); see also 25 U.S.C. 476; 34 A.G. Op. 171, 181 (1924).

59/ Gibson v. Anderson, 131 Fed. 39, 42 (1904).

60/ 143 Fed. 740 (CA 9, 1906).

61/ Winters v. United States, 207 U.S. 564 (1908).

62/ United States v. Ahtanum Irrigation District et al., 236 F.2d 321 (CA 9, 1956); Cert. den. 352 U.S. 988 (1956); 330 F.2d 897 (CA 9, 1964); 338 F.2d 307 (CA 9, 1964); Cert. den. 381 U.S. 924 (1965).

the Court of Appeals for the Ninth Circuit, it is concluded as a matter of law that the reservation of rights to the use of water in No Name Creek for the Colville Confederated Tribes is sufficient to meet not only the water requirements to make the semi-arid lands of the Colville Indian Reservation habitable on July 2, 1872, but also in the future, including the full development of the No Name Creek Indian lands, pursuant to the Order of July 14, 1976, as extended. 63/

63/ The Winters Doctrine As Enunciated And Applied: In the opinion of the Court of Appeals for the Ninth Circuit, there is a most exhaustive review of the background and rationale of the Winters Doctrine and the reasons for its application, both at the time when the reservation there involved was created and in the future. Emphasized by the Court of Appeals--reaffirmed by the Supreme Court in explicit terms--is the fact that without water the semi-arid lands cannot constitute a permanent home and abiding place for the Indians occupying those lands. Likewise emphasized is the fact that it was the announced purpose of the United States Government to have the Indians renounce their nomadic ways, to settle down upon greatly restricted areas, to become farmers, and, thus, to adopt the non-Indian civilized manner of living. Hence, the Court of Appeals concluded that, although neither the Treaty nor the agreement there involved referred to rights to the use of water, those rights were reserved by the Indians for themselves by implication [Winters v. United States, 143 Fed. 740 (CA 9, 1906)]. In affirming the Court of Appeals for the Ninth Circuit, the Supreme Court adhered to identically the same rationale as enunciated by the Court of Appeals using this language:

> "The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant. The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that their cession there was the cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon.' And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters,--command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived

XIV.

It is likewise concluded, as a matter of law, that the principles of the Winters Decision, Conrad Decision, and the Ahtanum Decision, relative to the Indian rights to the use of water reserved at the time of the creation of the reservations there involved being sufficient to meet the Indian water requirements at the time of the creation of the reservations and in the future, are equally applicable to the Colville Indian Reservation. 64/ (For ftn.64,see pp.43,44).

63/ (Continued) by its negotiators. Neither view is possible. The government is asserting the rights of the Indians. But extremes need not be taken into account. By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." [Winters v. United States, 207 U.S. 564, 576-577 (1908)][Emphasis Supplied]

In the same year (1908) as the Supreme Court rendered the Winters Decision, the Court of Appeals for the Ninth Circuit rendered its decision in Conrad v. United States, 161 Fed. 829, 832 (CA 9, 1908). In explicit terms, the Court of Appeals declared that it was the policy of the United States to make habitable the semi-arid lands upon which the Indians have been restricted. Moreover, said the Court of Appeals, the need for water both at the time when the lands were set aside for the reservation and also for the indeterminate future is a fact fully recognized by the Court. From the Conrad Decision, the Court of Appeals in the Ahtanum Decision quoted this most relevant statement: [236 F.2d 321, 326 et seq.]

> "'What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters case.' The trial court's decree in that case, which this court affirmed, enjoined the interference with a specified quantity of water presently diverted and used for the benefit of the Indians on the reservation. . . . This portion of the trial court's decree was expressly approved by this court in the following language, (p. 835): 'It is further objected that the decree of the Circuit Court provides that, whenever the needs and requirements of the complainant for the use of the waters of Birch creek for irrigating and other useful purposes upon the reservation exceed the amount of water reserved by the decree for that purpose, the complainant may apply to the court for a modification of the decree. This is entirely in accord with complainant's rights as adjudged by the decree. Having determined that the Indians on the reservation have a paramount right to the waters of Birch creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification, should the conditions on the reservation at any time require such modification.'"

The language from the Winters, Conrad and Ahtanum Decisions, reviewed immediately above, are especially pertinent to the No Name Creek Valley. Without water to irrigate those lands, the Indians cannot continue to occupy and successfully farm them. That is precisely the situation

XV

Allotting And Opening For Entry The Colville Indian Reservation Did Not Abrogate Or Denigrate The Winters Doctrine Rights Of The Tribes

It was neither the intent of the Act of March 22, 1906, nor the Presidential Proclamation of May 3, 1916, providing for the allotting of the Colville Indian Reservation and opening surplus lands to entry on the Colville Indian Reservation, to abrogate or denigrate the Winters Doctrine rights to the use of water reserved for the Colville Indian Reservation nor to deprive the Colville Confederated Tribes of water essential to make habitable the No Name

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63/ (Continued) in regard to Indian Allotments 901 and 903 when the Waltons entered upon former Allotments 525, 894, and 2371, commenced irrigating those lands, and monopolized the entire flow of No Name Creek, as a result of which the Timentwas and their lessees were forced to abandon those lands because, without water, Allotments 901 and 903 were no longer habitable. (See Findings XXIV, XXV, XXVI, XXVIII, XXIX, XXX, and XXXI.)

64/ (In support of Conclusion of Law No. 14, p. 42) The Supreme Court, in the relatively recent case of Arizona v. California, 373 U.S. 546, 598-599 (1963), applied the concepts of the Winters Decision, originally enunciated in regard to Treaty reservations, to five Executive Order reservations on the Lower Colorado River. (373 U.S. 546, 595-596, Footnotes 97, 98, 99, and 100) As to the authority of the Chief Executive to create those reservations and reserve water for them, the Highest Court said this:

> "We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive."

As to the imperative need for water to make these Executive Order reservations habitable as the predicate for establishment of those reservations, the Supreme Court emphasized:

> "Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great . . . Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind--hot, scorching sands--and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised. In the debate leading to approval of the first congressional appropriation for irrigation of the Colorado River Indian Reservation, the delegate from the Territory of Arizona made this statement: 'Irrigating canals are essential to the prosperity of these Indians. Without water there can be no production, no life; and all they ask of you is to give them a few agricultural implements to enable them to dig an irrigating canal by which their lands may be watered and their fields irrigated, so that they may enjoy the means of existence. . . . '"

Creek Basin. 65/ Rather, in the words of the Seymour Decision, that Act was for the benefit of the Colville Indian Tribes and their membership. This is the language used in regard to the objectives of the United States in opening the Reservation for entry.

> "Consequently, it seems clear that the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation. The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." 66/

XVI.

There is no provision in the Act of March 22, 1906, relative to the allocation of rights to the use of water among allottees. As a consequence, the provisions of the General Allotment Act of 1887 67/ became controlling. That last cited Act contravenes any concept that rights to the use of water are to attach to allotted lands. Rather it provides that where, as in the No Name Creek Basin

> ". . . water for irrigation is necessary to render the lands within any Indian reservation available for agricultural

(quote continued on next page)

64/ (Continued) In explicitly ruling that the rights to the use of water must meet future developments, the Supreme Court declared:

> "We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs,' which, in fact, means by the number of Indians. How many Indians there will be and what their future uses will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable."

65/ Seymour v. Superintendent, 368 U.S. 351 (1962).

66/ Id., at p. 356. [Emphasis Supplied]

67/ Feb. 8, 1887, c. 119, § 7, 24 Stat. 390.

> purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; . . . ." 68/

XVII.

There is no room for statutory construction of the aforesaid 25 U.S.C. 381. The Secretary of the Interior has power under that act only to distribute "water . . . among the Indians." It does not provide for the allocation of water among allottees but, rather, among Indians residing on the Colville Indian Reservation.

> "Where the language [of a statute, as in 25 U.S.C. 381] is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion." 69/

XVIII.

It is, therefore, concluded, as a matter of law, that 25 U.S.C. 381 precludes the vesting of any right to the use of water in any allottee under the General Allotment Act. 70/ Pursuant to that Act, each Indian residing on the Colville Indian Reservation, having property within the No Name Creek Basin, is entitled to a just and equal share of the short supply of water in that stream system. If each allottee was legally entitled (a) to any specific quantity of water or (b) to irrigate all of his irrigable lands, or (c) to irrigate all of the lands he has under irrigation, without regard to other allottees or other Indians residing on the reservation, it would be impossible for the Secretary of the Interior to make a "just and equal" distribution of water "among the Indians" residing on the Colville Indian Reservation. It would be legally impossible for the Secretary of the Interior to reduce any vested right to the use of water of any allottee, had a right become vested in him. Hence,

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68/ 25 U.S.C. 381, Sec. 7 of the General Allotment Act. [Emphasis Supplied]

69/ Caminette v. United States, 242 U.S. 470, 485 (1916). See also abundance of authority supporting that quoted principle in 2A Southerland Statutory Constructions, 4th Edition, Text and Commentary, Sec. 45.02, p. 4, et seq.

70/ Feb. 8, 1887, c. 119, § 7, 24 Stat. 390.

as in No Name Creek, where the water supply falls far short of the water requirements for the irrigable acreage of all of the allottees and the lands of the Colville Confederated Tribes, the Secretary of the Interior--or anyone else--would be precluded from making a just and equal distribution or from rotating the water among the several parcels of land as had to be done during the 1977 irrigation season, all as found above. As to the Secretarial power to manage Indian property, the Supreme Court said this:

> "Power [of the United States] to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. Lone Wolf v. Hitchcock, 187 U.S. 553, 564, 565, 566. The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation. . . ; for that "would not be an exercise of guardianship, but an act of confiscation."' United States v. Creek Nation, supra, p. 110; citing Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113; Cherokee Nation v. Hitchcock, 187 U.S. 294, 307-308. . . . Spoliation is not management." 71/

XIX.

Defendants Waltons Acquired No Rights To The Use Of Water In No Name Creek When Former Allotments 525, 894, And 2371 Were Purchased

As concluded above, the provisions of the General Allotment Act of 1887 pertaining to the rights to the use of water on arid Indian lands provided for the "just and equal" distribution of such water "among the Indians" residing on the Colville Indian Reservation. The Defendants are non-Indians and, hence, they do not come with the purview of 25 U.S.C. 381, which is Section 7 of the General Allotment Act.

XX.

It is likewise concluded that 25 U.S.C. 381 was in keeping with the stated objectives of the General Allotment Act. That Act contemplated that the Indians would be diverted from the culture to which they had adhered from time immemorial--namely, hunting and fishing--and they were to become agriculturists. 72/

71/ Shoshone Tribe v. United States, 299 U.S. 476, 497-498 (1939).

72/ See Handbook of Indian Law, pp. 207, et seq.

To accomplish that end, the Congress had provided that the allottee could not acquire a right to the use of water. His interest in the stream is limited to a just and equal share of the available water supply. It follows a fortiori that an Indian could not sell a right to the use of water when the allotment passed out of Indian ownership since there was no right vested in the Indian owner. Thus, it is that the Defendants did not acquire any right to the use of water when the aforesaid allotments were purchased. As found above, moreover, at the time when the land passed out of Indian ownership to the non-Indian predecessors of the Waltons, the Indian allottees had never utilized the waters of No Name Creek for purposes of irrigation or other uses, so far as is known.

XXI.

Congress was well aware of the fact that, without water, the Indians could never successfully farm the arid lands of the character found in the No Name Creek Basin. Hence, Congress prevented non-Indians from acquiring rights to the use of water by the language of 25 U.S.C. 381. In clear violation of that law, the Defendants have monopolized all of the waters of No Name Creek, with the result that the Timentwas downstream from them have had their lands in Allotments 901 and 903 rendered inhabitable, all as found above.

XXII.

As distinguished from the General Allotment Act of 1887, which included 25 U.S.C. 381, providing for the "just and equal" distribution of water "among the Indians," Congress had passed 10 years earlier the Desert Land Act of 1877. 73/ By that Act, which was applicable to the "public domain," one who acquired a homestead did not acquire any right to the use of water. Provision was, however, made that on the "public lands" of the United States an appropriative right to the use of water could be acquired. Pursuant to that Act, the first appropriator could--and frequently did--monopolize all of the waters of a stream. 74/

73/ The Act of March 3, 1877, c. 107, 19 Stat. 377; 43 U.S.C. 321.

74/ There has been concluded above that, when the Colville Indian Reservation was created, there passed to the Colville Confederated Tribes equitable

XXIII.

Where There Are Conflicting Implications, Those Implications Which Support The Colville Confederated Tribes Claimed Rights Will Prevail

The Winters Doctrine rights to the use of water are predicated upon the basic conclusion of the Supreme Court that rights to the use of water, being essential to making habitable semi-arid Indian reservation lands, are impliedly reserved rights to the use of water. 75/ (For Fn. 75, see p. 50) That implication is eaqually applicable here where, without No Name Creek water, none of

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74/ (Continued) title to all of the lands and rights to the use of water on the Colville Indian Reservation. Title to those rights resided in the Tribes and has continued to reside in them. The status of the Colville Winters rights to the use of water differs drastically from lands of the United States disposed of pursuant to the Homestead Laws. The surplus waters on the "public lands" could be acquired and monopolized by a single owner if he could beneficially use all of the waters of the stream. By way of contrast, 25 U.S.C. 381 precludes that monopolization by providing for the "just and equal" distribution of water "among the Indians." Reference is made to the Desert Land Act of 1877 and the principal decisions in the Supreme Court in regard to it.

Key words in the Desert Land Act of 1877 are found in the term "public lands," to which the United States held title and to which it had likewise vested in it the title to the rights to the use of water. Those public lands are the ones which were open "unqualifiedly to sale and disposition." [United States v. O'Donnell, 303 U.S. 501, 510 (1938)]

As declared in the last-cited case, the rights to the use of water flowing over and through the national forests, national parks and national military enclaves were not included in the Desert Land Act of 1877, and were not open to appropriation then or now. That same concept is equally applicable to Indian reservations. [F.P.C. v. Ore., 349 U.S. 435 (1953)]

One of the principal cases recognizing that a prior appropriator can acquire an exclusive right to the use of water, as distinguished from the privilege to receive a share of water on the basis of a "just and equal" distribution is the case of California-Oregon Power Company v. Beaver Portland Cement Company, 295 U.S. 142 (1935). These crucial words from that decision are vital to a comprehension of the nature and extent of the rights to the use of water held by the United States of America:

> "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately." Howell v. Johnson (C.C.) 89 F. 556, 558.

In regard to the Desert Land Act of 1877, which was before the Court in that last-cited decision, this statement is made:

> "The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the [public] land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named."

the Indian lands, tribal lands or allotted lands can be successfully farmed without water. 76/ (For Fn. 76, see p. 50) Thus, it is concluded, as a matter of law, that the implication that water would be retained for the benefit of the tribal lands and Indian allotments, making them habitable for the Indians, overcame any implication that in some manner the Waltons acquired the right to monopolize the meager water supply and thus defeat the objective for which the Colville Indian Reservation was created over 100 years ago. 77/ (For Fn. 77, see p. 50)

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74 (Continued) Any doubt as to the Court's interpretation of the consequences of the Congress' intention in the Desert Land Act of 1877 in separating the title to the rights to the use of water from title to the lands is dispensed with by this language from the Court:

> "The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location." [295 U.S. 142, 162 (1935)]

It is important to observe that the Supreme Court in California-Oregon Power Company favorably cited the case of Howell v. Johnson in support of its most crucial decision. From that case and the page cited by the Court, this quoted language is taken:

> "The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper. . . . It is urged that in some way the state of Montana has some right in these waters in Sage creek or some control over the same. It never purchased them. It never owned them." [89 Fed. 556, 558, C.C.D. (Mont. 1898)].

As is recognized in the State of California, where the doctrine of prior appropriation originated, this statement is made:

> "If the first appropriator has need for the entire flow of a stream, he may appropriate it. The validity of an appropriation of all the water of a stream made in 1864 was sustained by the Supreme Court. And the right to appropriate all the water naturally flowing in a stream if the claimant needs it all has been recognized in other cases." (The California Law of Water Rights, Hutchins, pp. 134-135)

It has likewise been authoritatively stated that "If one acquires and perfects an appropriation of the entire flow of a river, no one else may divert any of the water while the first appropriator is using it under the terms of his appropriation." (Selected Problems in the Law of Water Rights in the West, p. 327, U.S. Dept. of Agri., Misc. Pub. 418)

XXIV.

No official of the United States, at the time the Waltons acquired the property, or at the present time, was or is authorized to imply or advise the Waltons that they would acquire a right to the use of water from No Name Creek or elsewhere when they purchased former Allotments 525, 894 and 2371. 78/

XXV.

There is neither decisional law, construing 25 U.S.C. 381, nor is there any decisional law supporting the claim that rights to the use of water passed to the Waltons when title to Allotments 525, 894 and 2371 was acquired to those former Allotments from previous non-Indian owners. As found above, there was

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74/ (Continued) As previously stated, when the Colville Indian Reservation was created, the full equitable title to both the lands and rights to the use of water passed to the Colville Indian Tribes. The General Allotment Act and the Act of 1906 did not deprive the Tribes of their title to those rights to the use of water. Congress alone could have taken those rights by the power of eminent domain.

75/ See above Winters v. United States, Conclusions of Law XIII, pp. 40-41, fn. 63, lines 22 et seq.

76/ See Conclusions of Law XXI, pp. 47 et seq. See also Finding XXIV, p. 18, et seq.

77/ The Winters Decision is but a phase of the long-standing precept of the law that ambiguities and disputed interpretations will be resolved in favor of the Indians. See in that regard Col. Ex. 2(12), pp. 16 et seq. There is reviewed in detail the conclusion that the Colville Confederated Tribes would have exclusive jurisdiction over the water of Lake Rossevelt. It is an "... established principle that statutes affecting Indian interests are, where ambiguous, to be construed most favorably to the Indians involved." (Col. Ex. 2(12), pp. 9, 20, and cited cases.) That is precisely the predicate of the Winters Doctrine which upheld the policy that the United States, when it created the Indian reservations, intended that those Tribes would have a permanent home and abiding place, which policy could not be effectuated without water -- the circumstance prevailing in the No Name Creek Basin.

78/ An agent without authority cannot convey property or bind the United States of America in regard to that property. Utah Power and Light Co. v. United States, 243 U.S. 389 (1916); United States v. California, 332 U.S. 19 (1946).

never any evidence that, when those Allotments were owned by Indians, any of the waters from No Name Creek were diverted and applied to the irrigation of any of the lands within the former Allotments. 79/

79/ See Finding XXXIV, p. 22.

There has never been a decision interpreting 25 U.S.C. 381. There have been various references to it by way of obiter dictum. Moreover, there has never been a decision rendered declaring that rights to the use of water passed to a non-Indian purchaser under the circumstances pertaining to the lands and rights to the use of water in these consolidated cases.

It is pertinent to review the case of United States v. Powers [305 U.S. 527 (1931)] and its background. There the Department of Justice initiated the case in 1934. In that case, Powers, a non-Indian, was named a defendant. It is equally important to observe that the Department of Justice, in the Powers case, denied that the Crow Indians, upon whose reservation the case arose, held Winters Doctrine rights to the use of water. Rather, the contention was made by the Justice Department that the United States of America acting through the Secretary owned those rights to the use of water. The trial court rejected [U.S. v. Powers, 16 Fed. 155 (U.S.D.C. Montana, 1934)] the contention of the Department of Justice, declaring that the Indians were the owners of the Winters rights and not the United States. From an adverse ruling by the lower court, an appeal was taken to the Court of Appeals for the Ninth Circuit. The Ninth Circuit sustained the position of the trial court that it was the Crow Indians who owned the Winters rights and not the United States. More importantly, the appellate court reversed the lower court and directed the dismissal of the case. It did so because the trial court attempted to adjudicate rights to the use of water when that trial court lacked jurisdiction due to the want of indispensable parties who had interests in the stream but who were not before the court. [U.S. v. Powers, 94 F.2d 783 (CA 9, 1939)] From that ruling of the Court of Appeals for the Ninth Circuit, the Department of Justice sought review before the Supreme Court. That Court made short shrift of the matter. It made this succinct ruling:

> "The decree of the Court of Appeals dismissing the bill [in the Powers case] must be affirmed." [U.S. v. Powers, 305 U.S. 527, 528 (1939)]

There was no decision in the Powers case on the merits. It was a simple case of the denial of jurisdiction. It will be observed, moreover, that in the Powers case the Crow Treaty of 1868 utilized language relative to the farming by individual Indians which rendered the Powers Decision totally inapplicable to the circumstances in these consolidated cases involving the lands and rights to the use of water in the No Name Creek Basin.

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Reference is frequently made to the case of United States v. Hibner, 27 F.2d (U.S.D.C. Ida., E.D., 1928). The Hibner facts are totally different from the facts here involved. The formerly allotted lands in Hibner were outside of any Indian reservation. Moreover, the lands had been irrigated by the former Indian owner, a circumstance not presented in these consolidated cases. Another extremely important factor in Hibner is the "Agreement" there involved. Under the "Agreement" between the Ft. Hall Tribes and the United States, the Ft. Hall Indians "do hereby cede, grant, and relinquish to the United States all right, title, and interest..." to the

XXVI.

Affirmative Defenses Of Adverse Possession, Estoppel, Laches, Acquiescence, Or Other Equitable Principles Are Not Available To The Waltons

It is concluded as a matter of law that the affirmative defenses of adverse possession, estoppel, laches, acquiescence, or other equitable principles are not available to the Waltons in these consolidated cases. In the Ahtanum case, which was tried in the Southern Division of this Court, the Court of Appeals specifically denied that those defenses could be raised as against the United States of America and the Yakima Indian Nation, there involved. 80/

79/ (cont'd) lands which were ceded and which included the allotments in the Hibner case. [Vol. 1, Indian Affairs, Laws and Treaties, Kappler, 2d ed., p. 704, Act of June 6, 1900, "An Act to ratify an agreement of the Indians of the Ft. Hall Indian Reservation in Idaho, and making appropriations to carry the same into effect," Article I.] It is also provided that the Ft. Hall lands, which were "ceded, granted and relinquished..." shall remain part of the public domain. Those lands were no longer "reserved lands," they were part of the public domain, title to which was in the United States. [Act of June 6, 1900, Article IV] One of the most crucial provisions of the "Agreement" which existed in Hibner, was as follows:

> "Where any Indians have taken lands and made homes on the reservation and are now occupying and cultivating the same, under the sixth section of the Fort Bridger treaty hereinbefore referred to, they shall not be removed therefrom without their consent, and they may receive allotments on the land they now occupy...." [Act of June 6, 1900, Article III]

Another unique provision, in regard to Hibner, is this quotation from the above-mentioned 1898 agreement:

> "The water from streams on that portion of the reservation now sold which is necessary for irrigating on land actually cultivated and in use shall be reserved for the Indians now using the same, so long as said Indians remain where they now live." [Act of June 6, 1900, Article VIII, p. 706]

As the Court in Hibner recognized, it was confronted with an unusual set of circumstances. More importantly, however, in regard to forcing the Tribes to share their rights to the use of water, is this fact: The Tribes had, by the arrangement of 1898, ceded, granted and relinquished all of their claims in and to the ceded lands.

80/ Please refer to Motion of Colville Confederated Tribes argued and submitted to this Court July 12, 1976. United States v. Ahtanum Irrigation District, 236 F.2d, 321, 334 (CA 9, 1956); Appellees' Cert. denied 352 U.S. 988 (1956); 330 F.2d 897 (1965); 338 F.2d 307; Cert. denied 381 U.S. 924 (1965).

XXVII.

The State Of Washington Has No Jurisdiction Over The Rights To The Use Of Water Of No Name Creek

The State of Washington is without jurisdiction over the rights to the use of water of No Name Creek. The United States has pre-empted that jurisdiction and the State of Washington, when admitted to the Union, agreed to that pre-emption of exclusive jurisdiction as between the State of Washington and the National Government. 81/

XXVIII.

The Colville Irrigation Project Is Entitled To Any Water Salvaged, Or Developed, Or Saved Through The Reduction Of Acreage Or Reduced Water Use Under Water Requirements

A right to the use of water being for any beneficial use, it is elemental that the Colville Confederated Tribes may utilize the water of No Name Creek to the extent they are legally entitled for any beneficial use. Hence, the use of water for irrigation, schools, livestock, fishing, recreation or any other beneficial purpose comes within the purview of their Winters rights to the use of water. 82/

81/ See above Conclusion of Law, No. I, et seq., History And Background. See also Colville Tribes' Motion for Partial Summary Judgment in re the lack of state jurisdiction, Brief, in support, the matter argued and submitted July 12, 1976. See also United States v. McIntire, 101 F.2d 650, 653-654 (CA 9, 1939) holding specifically that the Enabling Act, pursuant to which the State of Washington was admitted into the Union, precluded the State's jurisdiction over rights to the use of water on Indian reservations. See also United States v. Ahtanum Irrigation District, et al., 236 F.2d 321, 328 (CA 9, 1956). In the Ahtanum case, the State of Washington was a party and is bound by the decision of the Ahtanum case, which case arose in this court in which the Court of Appeals specifically declared that the State was without jurisdiction over Indian rights to the use of water. See also United States v. Winters, 207 U.S. 564 (1908); United States v. California, 332 U.S. 19 (1946).

82/ See 1 Wiel, Water Rights in the Western States, 2d ed., sec. 378, What Constitutes a Beneficial Use. See also 1 Clark, Waters and Water Rights, 54.3 et seq., which includes all of the uses to which the Paschal Sherman Agricultural and Development Program desires to utilize the meager supply of water in No Name Creek.

XXIX.

The Collville Irrigation Project is entitled to utilize flooding or rill irrigation upon any of its irrigable lands. It is concluded, as a matter of law, that the entitlement of the Colville Irrigation Project for its 288.4 irrigable acreage within its service area for rill or flooding irrigation is 1339.1 acre-feet of water annually. Moreover, the total reasonable water requirements for sprinkler irrigation, to which the Colville Irrigation Project is entitled, is 1062.2 acre-feet of water annually. By using the sprinkler irrigation systems both above and below the Walton property, the Colville Irrigation Project achieved far greater efficiency in the use of the short supply of water available than it would have achieved by flooding or rill irrigation. Hence, the Colville Irrigation Project is entitled legally to utilize that entitlement for irrigation purposes for the Lahonton Cutthroat Fishery or otherwise. It is likewise legally entitled to the benefits of the salvaged and developed water, all as found above. 83/

83/ See Findings LVIC and LXV, p. 32 et seq. See Findings LXXI, Reduction Of Irrigated Acreage, Water Use, And Salvaged Water Used For Fishery.

1 Clark, Water and Water Rights, Salvaged or Developed Water, sec. 52.3 D:

> "If one by his own efforts adds to the supply of water in a stream, he is entitled to the water which he had developed, even though an appropriator with a senior priority right might be without water. The reason for the rule is the obvious one that a person should reap the benefits of his own efforts, buttressed by the view that a priority relates only to the natural supply of the stream as of the time of the appropriation."

Right of Recapture, Ide v. United States, 263 U.S. 498, 506 (1924):

> "'One who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and depercolation, necessarily incident to practical irrigation. Consideration of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that an appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his right. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but subject

XXX.

The Colville Water Code

It is concluded, as a matter of law, that the Colville Confederated Tribes, in the exercise of their powers of self-government, were fully authorized in adopting the Colville Water Code. Pursuant to that Water Code, the Colville Confederated Tribes have filled an administrative vacuum which prevailed within the Colville Indian Reservation in regard to the regulation, allocation and administration of water resources. 84/

XXXI.

The Colville Confederated Tribes, having determined that there is insufficient water in No Name Creek to meet their own reasonable water requirements, were fully within the exercise of their powers of self-government in determining that the Waltons will not be permitted to divert and use any of the waters of No Name Creek.

XXXII.

The Colville Confederated Tribes are Entitled to Judgment and Injunction Against the Waltons

Predicated upon the preceding Findings of Fact and Conclusions of Law, the Colville Confederated Tribes are entitled to a Decree adjudicating their rights to the use of water as being prior and paramount to any claims asserted by the Waltons. The Tribes are, moreover, entitled to an injunction prohibiting the Waltons from interfering with the Tribes use, or Paschal Sherman Indian School use, of the waters of No Name Creek through diverting either the surface or ground waters from No Name Creek or from the No Name Creek Aquifer.

Respectfully submitted,

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83/ (con't) to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to be commingled with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used.'"

84/ Col. Ex. 2(12), p. 20 et seq., "Jurisdiction of the Tribes."