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Proposed Findings of fact and conclusions of law (pretrial submission of state of Washington)

Laura E. Eckert

Assistant Attorney General for the State of Washington

Slade Gorton

Attorney General for the State of Washington

Robert E. Mack

Assistant Attorney General for the State of Washington

Charles B. Roe Jr.

Senior Assistant Attorney General for the State of Washington

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

JAN 11 1978

J. R. FALLQUIST, Clerk
dy Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES,)
)
 Plaintiff,)

-vs-

NO. 3 4 2 1 ✓

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

STATE OF WASHINGTON,)
)
 Defendant Intervenor.)

UNITED STATES OF AMERICA,)
)
 Plaintiff,)

NO. 3 8 3 1

-vs-

PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
(PRETRIAL SUBMISSION OF
STATE OF WASHINGTON)

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

FINDINGS OF FACT

1. No Name Creek Valley is a short, narrow valley approxi-
mately four miles in length, running generally north-south and
parallel to the Okanogan River approximately seven miles southeast
of the Town of Omak in the County of Okanogan, Washington.

2. The No Name Creek Valley lands are lands ceded to the
United States of America by Treaty with Great Britain on June 15,
1846.

PROPOSED FINDINGS & CONCLUSIONS
(PRETRIAL SUBMISSION OF STATE) -1-

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1 3. The No Name Creek Valley is located within the Colville
2 Indian Reservation, a reservation created from the public domain by
3 executive order of President Ulysses S. Grant on July 2, 1872 and
4 diminished in size by the Act of July 1, 1892.

5 4. The No Name Creek Valley is located within the State of
6 Washington, a state admitted to the United States on November 11,
7 1889.

8 5. No Name Creek Valley lands are, in part, (1) owned by the
9 United States in trust for the benefit of individual Indians or
10 Indian interests and (2) owned by non-Indians, here, the defendants
11 Walton.

12 6. The Walton property, consisting of approximately 350
13 acres, is located in the central part of No Name Creek Valley, being
14 bordered on both the north and the south by the aforescribed lands
15 of the United States. The Walton property was once allotted lands
16 until severed from federal ownership by transfer by the United
17 States to non-Indian ownership in 1925. Defendants Walton are
18 successors-in-interest to the original patentees, having acquired
19 the property in 1948.

20 7. No Name Creek is a small, intermittent, nonnavigable
21 stream originating in springs located approximately fifteen feet
22 north of the northern boundary of the Waltons' property, on lands
23 owned by the United States, as a trustee, known as Trust Allotment
24 No. 892. From its point of origin No Name Creek flows southeasterly
25 across lands owned by Walton until it crosses the southern boundary
26 of the Waltons' property onto other lands owned by the United
27 States, as trustee, designated Trust Allotment No. 901. The stream
28 thereafter continues in a southerly direction crossing said allot-
29 ment and an adjoining allotment to the south, designated as Trust
30 Allotment No. 903. In its natural condition No Name Creek passed
31 through a marshy area before discharging into Omak Lake at Trust

1 Allotment No. 903. In the mid-1970's, the course of the extreme
2 lower reach of No Name Creek was modified by man, through develop-
3 ment of an artificial channel and otherwise, and the stream now
4 enters Omak Lake on land immediately adjacent and to the east of
5 Trust Allotment No. 903 owned by the United States, as trustee for
6 the Colville Confederated Tribes.

7 8. Omak Lake is approximately eight miles long and up to
8 approximately one mile wide, with depths of up to three hundred
9 twenty-five feet. The lake, supplied by water from several tribu-
10 tary streams, by springs within its beds, and by precipitation, has
11 approximately 3,243 surface acres. No Name Creek's contribution to
12 Omak Lake is comparatively small. Omak Lake has no outlet and is
13 considered a "dead" lake. Its water quality is saline, with high
14 concentrations of sodium carbonates.

15 No commercially valued indigenous species of fish or valued
16 indigenous biota live within Omak Lake. During the early 1970's an
17 exotic fin fish, known as the Lahontan trout, has been introduced
18 into the lake on an experimental basis. These fish, natives of
19 saline water bodies in Nevada, now live in the lake although they
20 cannot reproduce therein. During 1977, Lahotan trout have spawned
21 and apparently reproduced in the extreme lower reach of No Name
22 Creek where modified by man as previously described. The greater
23 portion of Lahontan trout in the lake are spawned at the Winthrop
24 Fish Hatchery, and then planted in the lake.

25 9. No Name Creek Valley is a land of extremes in temperatures
26 with low temperatures often reaching below zero degrees F., with an
27 average low daily reading in January of 24° F., and with high
28 summer temperatures often reaching into the 90° F. range, with an
29 average maximum daily reading in July of 87° F. The growing season,
30 as dictated by frosts, is from April 12 to October 11. Precipita-
31 tion in the valley averages approximately 12.26 inches each year,

1 with 65 percent occurring in the months of October through April.

2 10. No Name Creek Valley's floor, in its natural condition,
3 was covered primarily by sagebrush, bunch grass, and scrub pine
4 except along the banks of No Name Creek where water-loving plants,
5 such as willows, grew. Rock outcroppings, some very large, are
6 common on the valley's floor. The valley's sides consist largely
7 of granitic rock outcroppings. The soils of the valley do not
8 constitute prime agricultural land. The valley soils are mainly
9 unconsolidated sedimentary materials placed by glacial, erosional
10 and related natural forces.

11 11. Portions of the No Name Creek Valley, while not espe-
12 cially fertile, are irrigable. From 1948 to 1975, the only irriga-
13 tion of lands in the No Name Creek Valley was that undertaken by
14 the Waltons.

15 12. The water duty for irrigation of agricultural lands for
16 the No Name Creek Valley is four acre feet per acre.

17 13. The indigenous fish resource of No Name Creek, quantified
18 either in size or numbers, was and is de minimus, was and is not
19 sufficient to support humans for any extended period of time, and
20 has no commercial value.

21 14. The Colville Reservation was created by President Grant
22 to provide lands for Indians of various tribes and bands from
23 various parts of the Northwestern United States to settle upon so
24 they might become self-sufficient through use of the lands, as
25 appropriate, for agriculture, timber production, mining, fishing
26 and hunting. The natural conditions of No Name Creek Valley
27 dictate uses associated with agricultural irrigation, stockwatering
28 and domestic purposes.

29 15. While the Presidential Executive Order creating the
30 Colville Reservation is silent as to water use, there is impliedly
31 reserved by that document limited rights to use waters of No Name
32

1 Creek for irrigation of agricultural lands, domestic uses and
2 watering of stock relating to No Name Creek lands.

3 16. On August 24, 1948, the defendant Wilson Walton filed an
4 application with the State Department of Conservation, predecessor
5 agency of the State Department of Ecology, for a permit to divert
6 water from No Name Creek as its water flowed across his (non-
7 Indian) lands for use on said lands for agricultural irrigation
8 purposes.

9 17. The Department of Conservation, performing the statutory
10 duties imposed by the state's Water Code (Ch. 90.03 RCW) in proces-
11 sing such application, found that there were public waters available,
12 that the Waltons' application, if approved, would not interfere with
13 any reasonably foreseeable use embodied in the right of another, and
14 that approval would not be detrimental to the public welfare. On
15 August 25, 1950, the Department issued a Certificate of Water
16 Right (Cert. No. 3743) to the defendant Wilson Walton for the
17 diversion of up to 1.0 cubic feet per second of water from No Name
18 Creek for the irrigation of 65 acres of non-Indian land. The water
19 right application procedures of the state afforded any interested
20 persons, including the United States and the Colville Indian Tribe,
21 the opportunity to object to such approval. Neither the United
22 States nor the Colville Tribe objected to the approval of the
23 application submitted by Walton. The state agency applied the
24 applicable state laws properly to the aforestated application of
25 Walton.

26 18. There were waters in No Name Creek, at the time the state
27 issued the certificate described in paragraph 15, in amounts in
28 excess of the amounts necessary to satisfy any needs of the Indians
29 embodied in any impliedly reserved rights to use of waters of No
30 Name Creek, both at that time and for the reasonably foreseeable
31 future after that time.

32 PROPOSED FINDINGS & CONCLUSIONS
33 (PRETRIAL SUBMISSION OF STATE) -5-

1 5. These impliedly reserved rights are limited to the amount
2 of water reasonably necessary to carry out the purposes for which
3 the Colville Indian Reservation was created as measured by the
4 intent of the reservor, United States, at the date of creation of
5 the reservation.

6 6. There is no barrier, "wall," or other impediment created by
7 the original boundaries of an Indian reservation which, as a matter
8 of law, bars state water right laws from applying to waters located
9 on non-Indian lands within the original boundaries of an Indian
10 reservation. "Excess waters" (i.e. waters not needed at any specific
11 time for the purposes for which the reservation was created) on non-
12 Indian lands within the original boundaries of the Colville Reserva-
13 tion are within the authority of the State of Washington to regulate,
14 control and allocate.

15 7. Any use authorized by the State of Washington respecting
16 such excess water on the Colville Indian Reservation is within the
17 context of a system of priorities and would yield to any subse-
18 quently determined and conflicting Indian water usage which is
19 within the scope of the prior rights impliedly reserved to the
20 Indians. (The appropriate and most common procedure for determining
21 a correlation of all water rights, one as against another including
22 reserved rights of the United States, is a "general adjudication"
23 conducted in state court. This procedure has been specially approved
24 and sanctioned in 43 U.S.C. § 666.)

25 8. The State of Washington, by permit to the Defendants
26 Walton, has authorized water usage by the Defendants Walton on lands
27 owned in fee by them.

28 9. At the time allotted lands within the original boundaries
29 of the Colville Reservation were transferred by the United States
30 from federal to non-federal ownership, all rights held by the United
31 States for the benefit of Indians were transferred (unless

1 19. The withdrawal and water uses of Walton authorized by the
2 state as aforescribed have no measurable effect on either the water
3 quality or the water level of Omak Lake or the indigenous biota
4 which live within Omak Lake.

5 20. No Name Creek and the directly related ground water body
6 of the valley have a total yearly production capacity of approxi-
7 mately 1100-1500 acre feet. Carefully managed, this total will
8 satisfy all the agricultural irrigable acreage, and stock watering
9 and domestic requirements of all rights, when fully exercised,
10 claimed by the parties to this proceeding and based upon both
11 impliedly reserved water rights and state water right certificates.

12 CONCLUSIONS OF LAW

13 1. Under our federal constitutional system, powers over the
14 allocation of rights to the use of waters of the United States not
15 within a state are exclusively with the federal government. However,
16 at such time as such waters are thereafter located within a state,
17 the powers over such waters, under our federal system, are shared
18 between the federal government and the state, with the state's
19 powers limited only by the federal power.

20 2. By the treaty between Great Britain and the United States
21 of June 15, 1846, all power over the allocation of rights to use
22 water was vested in the United States.

23 3. By the admission of the State of Washington to the federal
24 union in 1889, the State of Washington obtained power over all
25 waters within the State of Washington regardless of their location
26 except as limited by federal power.

27 4. By the United States' creation of the Colville Indian
28 Reservation, the United States impliedly reserved rights, with a
29 priority date of the date of creation of the reservation, to the use
30 of waters for the benefit of the Indians of the Colville Indian
31 Reservation.

1 specifically excepted) to the successor to the allottee and are
2 thereafter subject to Washington State water right laws.

3 10. The development of the Lahontan fishery is not within the
4 scope of any right to No Name Creek waters impliedly reserved in the
5 creation of the Colville Indian Reservation.

6 11. An injunction is not appropriate at this time, inasmuch as
7 sufficient water for all claimed agricultural and domestic uses is
8 available in the No Name Creek basin system.

9 Dated this 10th day of January, 1977.

10 Respectfully submitted,

11 SLADE GORTON
12 ATTORNEY GENERAL

13 Charles B. Roe, Jr.
14 Senior Assistant Attorney General

15 *Laura E. Eckert*

16 Laura E. Eckert
17 Assistant Attorney General

18 Robert E. Mack
19 Assistant Attorney General

20 Attorneys for Defendant-Intervenor,
21 State of Washington

22 Temple of Justice
23 Olympia, Washington 98504

24 Telephone: (206) 753-2354
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26
27
28
29
30