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Findings of Fact and Conclusions of Law

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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

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

FEB 1 1978

J. R. FALLQUIST, Clerk

[Signature] Deputy

8 COLVILLE CONFEDERATED TRIBES,)
9 Plaintiff,)

10 vs.)

11 BOYD WALTON, JR., et us, et al.,)
12 Defendants,)

13 STATE OF WASHINGTON,)
14 Defendant Intervenor.)

15 - - - - -)
16 UNITED STATES OF AMERICA,)
17 Plaintiff,)

18 vs.)

19 WILLIAM BOYD WALTON, et ux, et al.,)
20 and THE STATE OF WASHINGTON,)
21 Defendants.)

22 The United States of America, plaintiff in Civil No.
23 3831, submits the following proposed Findings of Fact and
24 Conclusions of Law:

25 FINDINGS OF FACT

26 I.

27 This action concerns disputes among the parties as to
28 the rights to the use of water on lands within No Name Creek
29 Valley in Okanogan County in the State of Washington. The lands
30 involved and the waters available for use thereon are entirely
31 within the exterior boundaries of the Colville Indian Reservation.

32 FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

Civil No. 3421 ✓

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Civil No. 3831

208

1 II.

2 As hereafter set forth in these Findings of Fact, the
3 available waters within the No Name Creek Valley are presently
4 insufficient to satisfy the reasonable requirements of all the
5 lands within the Valley and, as a result, a quantification of the
6 water requirements, together with a designation of the entity,
7 or entities, authorized to regulate the use of water on lands
8 within the Colville Indian Reservation, is required.

9 III.

10 The lands which now comprise the Colville Indian
11 Reservation were acquired by the United States of America from
12 Great Britain pursuant to the Treaty of June 15, 1846 (9 Stat.
13 869). The title to the lands acquired by the United States from
14 Great Britain was subject to rights of occupancy of the various
15 Indian tribes and bands residing on the lands ceded by the Treaty.

16 IV.

17 The Washington Territory was created by Congress through
18 the Act of March 2, 1853 (10 Stat. 172), which Act provided that
19 it would not affect the authority of the United States to make
20 regulations concerning Indians, their lands, property and other
21 rights.

22 V.

23 An Executive Order of President Grant of July 2, 1872
24 (I. C. Kappler Indian Affairs 916, 2d ed. 1904), set aside 2.8
25 million acres of land in the Washington Territory as the Colville
26 Indian Reservation. These lands were intended to be a home for
27 various bands of Indians within the Washington Territory, which
28 bands are now collectively designated as the Colville Confederated
29 Tribes.

30 VI.

31 By the Act of February 8, 1887 (24 Stat. 388; 25 USC 331
32

1 et seq.). Congress established the General Allotment Act which
2 was applicable to all Indian reservations, created by treaty or
3 executive order, including the Colville Indian Reservation. This
4 Act provided for the allotment of lands within Indian reservations
5 to individual Indians and Section 7 of the Act (24 Stat. 390; 25
6 USC 381) provided and does now provide as follows:

7 "In cases where the use of water for irrigation
8 is necessary to render the lands within any
9 Indian reservation available for agriculture
10 purposes, the Secretary of the Interior is
11 authorized to prescribe such rules and regu-
12 lations as he may deem necessary to secure a
13 just and equal distribution thereof among the
14 Indians residing upon any such reservations;
15 and no other appropriation or grant of water
16 by any riparian proprietor shall be authorized
17 or permitted to the damage of any other
18 riparian proprietor."

14 VII.

15 On November 11, 1889, the State of Washington entered
16 the union. This admission of the State of Washington was author-
17 ized by the Enabling Act of February 22, 1889 (25 Stat. 676).
18 Both the Enabling Act and the Washington State Constitution
19 (Article 26) provided that the state disclaimed all right or
20 title to lands within the state owned or held by an Indian or
21 Indian tribe.

22 VIII.

23 The Presidential Proclamation of July 2, 1872, had set
24 aside 2.8 million acres in the Washington Territory for the use
25 of the Colville Tribes. By the Act of July 1, 1892 (27 Stat. 62),
26 Congress ratified an agreement of the Colville Indians to re-
27 linquish title to 1.5 million acres of land in the north half
28 of the original Colville Reservation, which 1.5 million acres,
29 subject to allotments to individual Indians, were to be opened
30 to entry and settlement under the general land laws. The lands
31 in the south half, or diminished portion of the original reserva-

1 tion (1.3 million acres) were to remain in the ownership of the
2 United States in trust for the Colville Indians. The lands
3 within No Name Creek Valley which are the subject matter of this
4 proceeding are entirely within the south half or diminished
5 portion of the Colville Reservation.

6 IX.

7 On December 1, 1905, a majority of the Colville Indians
8 entered into an agreement with representatives of the United
9 States whereby portions of the 1.3 million acres within the
10 diminished Colville Reservation would be allotted to Indians and
11 lands remaining after such allotment would be opened for entry
12 and settlement under the general land laws. This agreement was
13 ratified by Congress in the Act of March 22, 1906, (34 Stat. 80),
14 which provided that the surplus lands on the diminished Colville
15 Reservation would be opened to entry upon Presidential proclamation.
16 President Wilson by Proclamation of May 3, 1916, opened the surplus
17 lands of the diminished Colville Reservation to entry and settle-
18 ment. However, no lands within the No Name Valley on the Colville
19 Reservation were disposed of through the general land laws.

20 X.

21 The rights to the possession and use of the lands within
22 the No Name Valley on the Colville Reservation were established
23 beginning in 1917 under the Act of March 22, 1906 (34 Stat.
24 80) providing for the allotment of lands to Colville Indians under
25 the General Allotment Act. The status of lands within the No Name
26 Creek Valley can be categorized in the following manner: (1) lands
27 within the upper valley to the north; (2) lands in the middle
28 valley (owned by Walton); and, (3) lands in the lower valley.

29 A. LANDS IN NORTH NO NAME VALLEY.

30 1. Trust Allotment 526. Trust patent issued
31 April 7, 1917 to Elizabeth Smitakin, a Colville Indian.
32

1 Fee patent issued to Joanna Blake on April 4,
2 1923. Thereafter conveyed in fee to the Pioneer
3 Educational Society for use in connection with
4 St. Mary's Mission School. Title then conveyed
5 to the United States in trust for the Colville
6 Tribe. It contains 115 acres.

7 2. Trust Allotment 892. Trust patent issued
8 April 7, 1917, to Jennie or Sin-o-nalx, a Colville
9 Indian. Title now held by the United States in
10 trust for the heirs of Jennie or Sin-0-nalx.
11 Presently subject to a lease to the Colville
12 Tribe for 5 years commencing September 20, 1974.
13 It contains 120 acres.

14 B. LANDS IN MIDDLE NO NAME VALLEY

15 1. Former Allotment 525. Trust patent issued
16 April 7, 1917, to Alexander Smitakin, a Colville
17 Indian. Fee patent issued to Hettie Justice Wham
18 on August 10, 1925. Title now held in fee by
19 the Waltons. It contains 100 acres.

20 2. Former Allotment 2371. Trust patent
21 issued April 7, 1917, to George Alexander
22 Smitakin, a Colville Indian. Fee patent
23 issued to Paul Smitakin on January 28, 1921.
24 Title now held by the Waltons in fee. It contains
25 100 acres.

26 3. Former Allotment 894. Trust patent issued
27 April 7, 1917, to William George, a Colville Indian.
28 Fee title issued to Hettie Justice Wham on
29 May 5, 1923. Title now held by the Waltons in
30 fee. It contains 150 acres.

1 C. LANDS IN LOWER NO NAME VALLEY.

2 1. Trust Allotment 901. Trust patent
3 issued October 17, 1921, to Mary Ann or
4 Yatkanolx, a Colville Indian. Title now held
5 by the United States in trust for heirs of
6 Mary Ann or Yatkanolx. Presently subject to a
7 lease to the Colville Tribe for 5 years
8 commencing March 23, 1973. It contains 113.95
9 acres.

10 2. Trust Allotment 903. Trust patent
11 issued October 25, 1919, to William Edwards,
12 a Colville Indian. Title now held by the United
13 States in trust for the heirs of William Edwards.
14 Presently subject to a lease to the Colville
15 Tribe for 5 years commencing March 19, 1973.
16 It contains 126.95 acres.

17 XI.

18 When allotment 525 left trust status in 1925, and
19 allotment 2371 left trust status in 1921, and allotment 894 left
20 trust status in 1923, none of the lands within these allotments
21 had been subjected to irrigation.

22 XII.

23 By the Act of June 18, 1934, Congress enacted the
24 Indian Reorganization Act (48 Stat. 984; 25 USC 461, et seq.).
25 Among other things, the Act authorized the Secretary of the
26 Interior to restore surplus lands within an Indian reservation to
27 tribal ownership. Section 18 of the Act provided that the Act
28 would not apply to a reservation where a majority of the adult
29 Indians voted against its application.

30 XIII.

31 In order to preserve the status of lands within Indian
32

1 within Indian reservations pending votes by the Indians as to the
2 applicability of the Indian Reorganization Act, Secretary of the
3 Interior Ickes on September 19, 1934, issued an order withdrawing
4 the surplus lands on certain Indian reservations from entry until
5 the matter of the restoration of lands to tribal ownership could
6 be given "appropriate consideration." The lands so withdrawn
7 included surplus lands within the Colville Indian Reservation.

8 XIV.

9 By a ~~Vote~~ on April 6, 1935, a majority of the adult
10 Indians on the Colville Reservation voted against application of
11 the Indian Reorganization Act. However, the Ickes withdrawal
12 order was not revoked.

13 XV.

14 On July 1, 1948, the defendants Walton acquired the fee
15 title to the former Indian allotments 525, 2371 and 894. Allot-
16 ment 525 had left trust status in 1925, allotment 2371 had left
17 trust status in 1921, allotment 894 had left trust status in 1923.
18 These allotments total 350 acres. When acquired by the Waltons
19 in 1948 these lands were improved with a house and were used for
20 the pasturage of horses.

21 XVI

22 Following the acquisition of the 350 acres within
23 former allotments 525, 2371 and 894 in 1948, the Waltons developed
24 a dairy farm upon the property. This development included the
25 irrigation of approximately 69 acres of land and the construction
26 of barns and sheds. A herd of approximately 100 head of cows is
27 presently maintained upon the property.

28 XVII.

29 In order to develop their property as a dairy farm,
30 the Waltons, shortly after the acquisition of the property in
31 1948, applied to the State of Washington for a permit to divert
32

1 water from No Name Creek to irrigate their land. On August 25,
2 1950, the State Supervisor of Hydraulics issued a Certificate of
3 Water Right to the Waltons for the diversion of 1.0 cubic feet
4 per second of water from No Name Creek for the irrigation of 65
5 acres of land.

6 XVIII.

7 Meanwhile, the order of Secretary Ickes prohibiting
8 disposition of the surplus lands of the Colville Reservation dated
9 September 19, 1934, remained unrevoked. By the Act of July 24,
10 1956 (70 Stat. 626), Congress overrode the vote of the Colville
11 Tribe against application of the Indian Reorganization Act and,
12 among other things, directed that the surplus lands on the dimin-
13 ished Colville Reservation be restored to Tribal ownership.

14 XIX.

15 Between the years 1948 and 1975, the Waltons were the
16 only appropriators of water for use upon lands in the No Name
17 Creek Valley. However, in 1975, the Colville Tribe commenced a
18 program for the irrigation of trust and tribal lands north and south
19 of the Walton's lands for irrigation in connection with the Paschal
20 Sherman Indian School (formerly the St. Mary's Mission School). The
21 Colville Tribe program included the installation of three high-
22 yield wells on trust allotments 526 and 892. In addition to
23 providing water for the irrigation of lands on trust allotments
24 526 and 892, these wells, pursuant to an order of court entered
25 July 14, 1976, provided water which was conveyed in the No Name
26 Creek channel across the Walton lands and delivered to trust
27 allotments 901 and 903 for irrigation and to establish a spawning
28 ground for Lohanton trout in the lower reach of No Name Creek.

29 XX.

30 In late 1975, the Waltons installed a high yield
31 irrigation well on their property near the north boundary of
32

1 former allotment 525. This installation replaced a former well
2 installed by the Waltons and during 1976 and 1977 was the primary
3 source of irrigation water for the Walton lands.

4 XXI.

5 Pursuant to the order of this Court, the United States
6 Geological Survey investigated the water capabilities of No
7 Name Creek Valley commencing in late July, 1976, and continuing
8 through October 1, 1977. On or about January 9, 1978, the United
9 States Geological Survey published a report entitled "Water
10 Resources of No Name Creek Valley." At page 31 of the report,
11 the U.S.G.S. concluded, in part, as follows:

12 "The principal sources of recharge to the ground-
13 water reservoir underlying No Name Valley are
14 (1) leakage of water from Omak Creek as it crosses
15 the valley and flows northward in the valley toward
16 the Okanogan River, and (2) precipitation on the
17 basin, which includes that which falls directly on
18 the valley floor, and runoff to the valley floor of
19 precipitation on the bedrock uplands bordering the
20 valley. . . .

21 The best estimate of the perennial yield of the
22 hydrologic system in No Name Valley under the
23 conditions of heavy pumping stress indicated in the
24 preceding paragraph is about 1,100 acre-feet per year.
25 Such stress would result in little or no springflow
26 (ground-water discharge) to No Name Creek above
27 site N5 and would assume that the ground-water
28 reservoir would be recharged to the extent of 400
29 acre-feet from precipitation on the basin and 700
30 acre-feet by leakage from Omak Creek. The increase
31 over the 1977 pumping stress would cause even further
32 northward migration of the cone of depression to
capture more leakage from Omak Creek and more recharge
from precipitation on that part of Omak Creek basin
overlying or flanking the No Name Creek ground-water
reservoir."

26 XXII

27 The United States of America, as trustee, owns at least
28 228.4 acres of irrigable lands with the No Name Creek Valley. In
29 addition, the Waltons assert a right to use of water for irriga-
30 tion of 105 acres of land owned in fee by the Waltons.

31 FINDINGS OF FACT AND
32 CONCLUSIONS OF LAW - 9

1 XXIII.

2 The waters available from the basin in No Name Creek
3 Valley are insufficient to satisfy the water requirements necessary
4 to irrigate both the lands held in trust for the Indians and the
5 lands owned by the Waltons.

6 XXIV.

7 The Waltons use of water on their lands within No Name
8 Creek Valley prevents the irrigation of trust land in the Valley
9 thereby causing a loss of productivity and a reduction of value
10 of the trust lands.

11 CONCLUSIONS OF LAW

12 I.

13 This Court has jurisdiction of the subject matter and
14 the parties to these proceedings.

15 II.

16 The creation of the Colville Indian Reservation in 1872
17 reserved for the Colville Confederated Tribes and its members the
18 amount of water necessary to satisfy the future as well as the
19 then present needs of the Reservation. The reservation of waters
20 became effective as of the date the Colville Indian Reservation
21 was created.

22 III.

23 The allotment of lands on the Colville Indian Reserva-
24 tion pursuant to the General Allotment Act of 1887 vests each
25 allottee of lands with the right to the use of waters necessary
26 for the allottee's needs with a priority date as of the creation
27 of the Reservation.

28 IV.

29 At the time of transfer of Indian allotted land to
30 non-Indian ownership, the non-Indian is entitled to the right to
31 the use of whatever quantity of water was being utilized by the
32

1 previous Indian allottee when the land was removed from trust
2 status and this water right would have a priority date as of the
3 date of the creation of the Reservation.

4 V.

5 Following the transfer of land from Indian to non-
6 Indian ownership, the successor's right to the use of water is
7 predicated upon the application of water to a beneficial use upon
8 the lands with a priority as of the date of such use.

9 VI.

10 The rights of the Colville Confederated Tribes and its
11 members to the use of waters on lands within No Name Creek
12 Valley has a priority date of 1872 and is prior and paramount to
13 the rights of the Waltons to the use of water upon their lands
14 in No Name Creek Valley.

15 VIII.

16 Since the water available for use on lands within No
17 Name Creek Valley is insufficient to satisfy the needs of the
18 Colville Confederated Tribes and its members, the judgment to be
19 entered in these proceedings should enjoin and restrain the
20 Waltons from using water in No Name Creek Valley which interferes
21 with and diminishes the amount of water available in the Valley
22 to satisfy the needs of the Colville Confederated Tribes and its
23 members.

24 IX.

25 The State of Washington has no jurisdiction or authority
26 to control or regulate the use of water on lands within the
27 exterior boundaries of the Colville Indian Reservation, whether
28 such lands are trust lands owned by the United States or fee lands
29 owned by non-Indians.

30 X.

31 The judgment to be entered in these proceedings should
32 declare that the Certificate of Water Right issued by the State

1 of Washington to the Waltons on August 25, 1950, to be void and
2 of no effect.

3 XI.

4 The judgment to be entered in these proceedings should
5 enjoin and restrain the State of Washington from issuing any
6 permits or certificates of water right for the use of water on
7 lands within the exterior boundaries of the Colville Indian
8 Reservation.

9 Respectfully submitted,

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