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Transcript of proceedings Volume XV, pages 2916-3010

Wayne C. Lenhart
Court Reporter

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiff, v. BOYD WALTON, JR., et ux., et al., STATE OF WASHINGTON, Interv. Deft., Defendants,	)	No. 3421
Consolidated with UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM BOYD WALTON, et al., Defendants.	)	No. 3831

TRANSCRIPT OF PROCEEDINGS

Volume XV

Pages 2916 - 3010

Spokane Calendar Friday, June 16, 1978 Neill, J.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiff,	)	
v.	)	No. 3421
BOYD WALTON, JR., et ux., et al., STATE OF WASHINGTON, Interv. Deft., Defendants,	)	
Consolidated with	)	
UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. 3831
WILLIAM BOYD WALTON, et al., Defendants.	)	

BEFORE:

The Honorable Marshall A. Neill, Judge

DATE:

June 16, 1978

APPEARANCES:

For the Plaintiff Colville Confederated Tribes:

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	MRS. JUDITH CORBIN Assistant U.S. Attorney Box 1494 Spokane, Washington, 99210
For the Defendants Walton:	MR. RICHARD B. PRICE Nansen & Price Attorneys at Law Box O Omak, Washington, 98841
For the Defendant State of Washington:	MR. CHARLES B. ROE, JR. Senior Assistant Attorney Gen. Temple of Justice Olympia, Washington, 98504
	MISS LAURA ECKERT Assistant Attorney General Temple of Justice Olympia, Washington, 98504
	MR. ROBERT E. MACK Assistant Attorney General Temple of Justice Olympia, Washington, 98504

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiff, v. BOYD WALTON, JR., et ux., et al., STATE OF WASHINGTON, Interv. Deft., Defendants, Consolidated with UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM BOYD WALTON, et al., Defendants.	)	No. 3421 No. 3831

BE IT REMEMBERED:

That the above-entitled action came regularly on for final argument and hearing on Motion for Preliminary Injunction on June 16, 1978 before the Honorable Marshall A. Neill, Judge, in the District Court of the United States, for the Eastern District of Washington, Spokane, Washington; the plaintiff Colville Confederated Tribes appearing by Mr. William H. Veeder and Mr. Stephen L. Palmberg; the plaintiff United States of America appearing by Mr. Robert M. Sweeney, Mr. Bill Burchette and Mrs. Judith Corbin; the

defendants Walton appearing by Mr. Richard B. Price; and the defendant State of Washington appearing by Mr. Charles B. Roe, Jr., Miss Laura Eckert, and Mr. Robert E. Mack; whereupon, the following proceedings were had and testimony taken, to wit:

I N D E X

E X H I B I T S

	ID	AD
Colville Exhibit No. 25-1 D	2929	2931
Colville Exhibit No. 33-11 A	2931	2934
Colville Exhibit No. 33-14 A	2934	2939
Colville Exhibit 33-9 A	2939	2940
Colville Exhibit 25-1 C	(2940)	2947
Colville Exhibit 19-3	(2967)	
Colville Exhibit 19-5	2974	2976

June 16, 1978
9:30 A.M.

THE COURT: Good morning.

COUNSEL IN UNISON: Good morning, Your Honor.

THE COURT: Call the case, please.

THE CLERK OF THE COURT: 3421, Colville Confederated Tribes versus Boyd Walton Jr., et al., State of Washington, Intervening Defendant, Consolidated with 3831, The United States of America, versus William Boyd Walton, et al.

THE COURT: Are the parties ready to proceed?

MR. SWEENEY: Yes, Your Honor. The Government is ready to proceed. I would like to present to the Court. We have previously filed Proposed Final Conclusions and Findings, and we find that there are two areas in the Government's proposals where there are some typographical errors, and I would submit a correction page for that, and I have served the other parties.

THE COURT: All right. I understood you want to take up the matter of the Tribes' application for a preliminary injunction first.

MR. VEEDER: That is correct, Your Honor.

THE COURT: You may proceed.

MR. VEEDER: Call Mr. Corke, please.

Very briefly, Your Honor, it will be the objective of the Colville Confederated Tribes, in connection with this short hearing on a preliminary injunction, to bring up-to-date the present status of the availability of water in the ground water aquifer, which we have kept close track of up to this moment, and I thought it would be of help to the Court to have that put on. It will only be a short period.

Mr. Corke.

THE COURT: Proceed.

CHARLES PHILIP CORKE, called as a witness on behalf of plaintiff Colville Confederated Tribes, being first duly sworn on oath, testified as follows:

THE CLERK OF THE COURT: Would you please state your full name to the Court.

THE WITNESS: It is Charles Philip Corke.

THE CLERK OF THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. VEEDER:

Q Mr. Corke, you have previously testified in this case, have you not?

A Yes, I have.

Q And you have expressed all of your qualifications and

your background?

A That is correct.

Q Your official status has also been explained; correct?

A That is correct.

Q Now, Mr. Corke, has there been any change in that status since you testified the last time?

A None whatsoever.

Q Are you familiar, Mr. Corke, with the 1978 irrigation season as it relates to the Colville Irrigation Project, the development of water and the utilization of water during this season of 1978?

A Yes, sir, I am.

Q And would you state if there has been any change in the policy operation that you have developed with the Colville Confederated Tribes?

A Well, prior to the commencement of the season, the decision had to be made, how we would operate in 1978; after a full consultation with the Colville Tribes, I made the decision that in this year's operation, we would fully irrigate the 157.9 acres in crop in the Paschal Sherman Indian School project, and in addition would deliver the water required below the granitic lip for the Lahontan trout fishery.

Mr. Watson of Morrison-Maierle was instructed to implement this decision, and compared to last year,

last year the Tribe did, for reasons of economy, voluntarily curtail their water uses. As I said, the decision this year was made to fully supply the water needs for both agriculture and fishery.

Q Now, Mr. Corke, how does that vary from the proceedings last year? Did you deliver any water specifically for trout last year?

A Yes. Yes, we did. Curtailed the agriculture operation to some extent during part of the period in order to deliver the needed water for the fishery.

Q But you are not following that procedure this year?

A Not this year, no.

Q Now, Mr. Corke, have you had an opportunity to review and consider the ground water levels in the No Name Creek aquifer as they relate to the levels that they pertain at the same time as in the irrigation season of 1977?

A Yes, I have. Mr. Watson was instructed to carefully and continuously monitor and measure the operations of the system this year, particularly the pumpage, the deliveries at the granitic lip, and the water levels in the underground aquifer, and that he did.

I have reviewed the results of the water level measurements through yesterday, June 15, that, in spite of the fact that approximately 75 percent as much water

had been pumped as at this same time last year, the levels are now at or below, in the three Colville wells, the levels are at the same as last year, and the rate of decline is such that, if the Colvilles and Mr. Walton continue pumping, the decline presages a disaster for the Tribe in July.

MR. VEEDER: I have no further questions, Your Honor.

THE COURT: Cross-examination, first by the Waltons.

MR. PRICE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. PRICE:

Q Mr. Corke, are you familiar with how much water had been pumped at this time last year by the Tribe?

A Specific quantities, no. Mr. Watson has that data. He reports to me regularly by phone.

Q That will suffice. Thank you. I think we are in a hurry this morning.

Do you know how much, what quantity of water was pumped this year to the present time?

A Not to quantity amounts, no.

Q Okay. Do you know what quantity of water Mr. Walton has pumped to date?

A No, that was one of the problems. Mr. Watson was not allowed on Mr. Walton's property, so we don't have the data on Mr. Walton's operation.

Q You have observed that twice a day, every day; have you not? You have had an observer out there observing his irrigation practices, twice a day?

A They have been observed as to the number of sprinkler heads, yes.

Q Fine, thank you.

Is it not true that, to your knowledge, more water has been pumped by the Tribe at this time this year than had been pumped at this time last year?

A Less water.

Q And is it not true that last year there was somewhat of a precipitous decline at the beginning of the irrigation season, which then leveled out for unexplainable reasons, and then dropped again later on in the irrigation season?

A The only time of a leveling off that I know is when the hay crop was being harvested.

Q There was a leveling off during the irrigation season from the initial decline; was there not?

A Yes, that is right.

Q We can expect that this year, too; can't we?

A I doubt that.

Q You are drawing a straight line curve --

MR. VEEDER: Just a moment, let him finish.

A The frequent measurements this year are declining at a rate that, as I said, presages a disaster right on down.

Q Thank you, Mr. Corke.

THE COURT: Does any other party desire cross-examination?

MR. ROE: The State has none, Your Honor.

MR. SWEENEY: The Government does not, Your Honor.

THE COURT: Any redirect?

MR. VEEDER: No.

THE COURT: You may step down. Thank you, Mr. Corke.

MR. VEEDER: Call Mr. Watson.

MR. PRICE: Your Honor, on behalf of defendants Walton, I would interpose an objection on the basis that this is repetitious. This testimony was brought out during the trial itself. These projections were made by all of the Tribe's witnesses, to the best of my recollection, and I don't feel we are adding anything to the proceedings at this time.

MR. VEEDER: May I respond to that, Your Honor? Just to bring this down to date, I think it is

extremely important.

THE COURT: You may proceed.

T. MICHAEL WATSON, called as a witness on behalf of plaintiff Colville Confederated Tribes, being first duly sworn on oath, testified as follows:

THE CLERK OF THE COURT: Would you please state your full name to the Court.

THE WITNESS: Thomas Michael Watson.

THE CLERK OF THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. VEEDER:

Q You are the same Mr. Watson who testified throughout the trial on the merits; is that not correct?

A That is correct.

Q You testified with regard to your qualifications?

A Yes, I did.

Q And you have the same status you had at the time of that inquiry during that qualification and throughout the trial?

A Yes.

Q Now, Mr. Watson, would you state into the record what your responsibilities have been since April 28, 1978, when the trial on the merits concluded?

A My responsibilities have been to monitor the utilization of water for the Colville Irrigation Project for the purposes of irrigating the allotments and also for the purpose of providing water for the Lahontan cutthroat fishery.

Q What investigations, if any, have you made with regard to the quantities of water pumped by Mr. Walton during this period?

A I have made no investigations of the amount of water pumped by Mr. Walton with the exception of the observation of the number of sprinklers that have been in operation on his property.

MR. VEEDER: I would like to have this marked for identification. This is Colville Exhibit 25-1 D.

(Colville Exhibit 25-1 D marked for identification.)

MR. VEEDER: This is the data, Your Honor, just brought up-to-date.

Q Mr. Watson, I hand to you Colville Exhibit 25-1 D that has been marked for identification. Would you state into the record who prepared the data and then state briefly into the record what is disclosed in that exhibit and to whom the material has been distributed, please.

A Yes, I prepared the information on the exhibit, the

information that has been distributed to all of the parties involved in these cases up to, I believe, the 6th of June. So, the information provided beyond the 6th of June is new information.

The first two pages of the exhibit show the water level elevations in wells in the No Name Creek aquifer, beginning with the Abandoned Paschal Sherman School well at the north end of the aquifer, and including the Paschal Sherman Colville No. 1 and Colville No. 2 irrigation wells, which are the principal wells used for the purpose of irrigation. Peters Observation Well elevations are also shown.

The second -- pages 3 and 4 of the exhibit show the amounts of pumpage, the gallons taken from each of the production wells, Paschal Sherman, Colville No. 1 and Colville No. 2 irrigation wells, and also observations of the gage height on the flume above Mr. Walton's north boundary, and on the flume on the granitic lip.

In each case, for each type of information presented here, we have information for May and June.

Pages 5 and 6 of the exhibit show the number of sprinkler heads that were in operation by Mr. Walton, showing a breakdown of the number of sprinklers that were in operation from the Walton irrigation well, as well as from the Walton surface diversion.

Q That is all the data? Now, was this prepared under your direction or was this prepared by you, Mr. Watson?

A The exhibit was prepared by me. The information was gathered under my direction by a man that is assigned to the field, and he is there on a full-time basis.

Q Is this material correct, to your personal knowledge?

A It is correct, to my personal knowledge, yes.

MR. VEEDER: The Colvilles offer Colville Exhibit 25-1 D in evidence.

THE COURT: I assume counsel have seen this exhibit?

MR. PRICE: I have seen it, Your Honor.

THE COURT: Hearing no objections, it will be admitted.

(Colville Exhibit No. 25-1 D is admitted.)

Q (By Mr. Veeder) Mr. Watson, would you step to the easel and refer to Colville Exhibit 25-1 C, please. I beg your pardon. Would you refer first to Exhibit 33-11 A, please, and state what that is.

MR. VEEDER: I would like to have this marked for identification, please.

(Colville Exhibit No. 33-11 A marked for identification.)

Q What is the number on that now, Mr. Watson?

A The number on the exhibit is Colville Exhibit No. 33-11 A.

Q And would you state into the record what is depicted on that exhibit?

A Yes. The exhibit shows the comparison of the 1978 and 1977 water levels in the Colville No. 1 irrigation well. The black line on the exhibit shows the 1977 water levels, and the red line shows the 1978 water levels.

Going to the month of May on this exhibit, in 1978, it is apparent from this exhibit that the water levels were declining, beginning in mid-April, and that was when the irrigation on the Colville Irrigation Project began this year. So from mid-April through May, the water levels have been declining and also up to June 15, the water levels have been declining, and in more recent days, in fact, the last couple of weeks, the water levels in the Colville No. 1 irrigation well have been declining at a more precipitous rate. The water level is essentially at the same elevation it was in 1977 at the present time, even though there has been less pumpage from the No Name Creek aquifer this year, and the exhibit in green from June 15 shows a projection of the water level in the Colville No. 1 irrigation well showing that by the end of July, 1978 the

water level will have reached the point of lowest measured water level that was considered accurate in 1977. So far, the decline in the Colville No. 1 irrigation well has been approximately eight feet, and that well was not pumped from until approximately June 3, 1978.

Q Now, have you an opinion, Mr. Watson, as to when you will encounter, from the standpoint of the ground water level on that projection, have you an opinion as to when you are going to have to cut back sharply in the operation of that well during this 1978 irrigation season?

A In my opinion, the operation of the Colville No. 1 irrigation well will become reduced following the end of July, 1978.

Q And what will be the consequence of that, Mr. Watson?

A The consequence of that will be the reduction of the amount of water delivered to the Colville Irrigation Project and that will result in a decrease in the crop production.

MR. VEEDER: We offer in evidence Colville Exhibit 33-11 A.

MR. PRICE: I have no objection, on behalf of defendant Waltons as to the actual levels of water to date. I take exception to any projections beyond

that point, Your Honor, in that they do not reflect what happened last year, in terms of the leveling effect, and we have no experts here. This was not put in the form of an affidavit in advance of the preliminary injunction so that we might rebut that.

THE COURT: Well, I am going to admit the exhibit for the sole purpose of illustrating his testimony, which is an expert opinion.

MR. VEEDER: Your Honor, this injunction was noticed, as I remember, in April, and I think there is no basis for objection at this point.

THE COURT: It is admitted.

(Colville Exhibit 33-11 A is admitted.)

Q (By Mr. Veeder) Would you turn now to Colville Exhibit 33-14, Mr. Watson, and state into the record --

MR. VEEDER: Would you mark that 33-14, please.

THE CLERK OF THE COURT: Is that an A or a B?

MR. VEEDER: That will be an A.

(Colville Exhibit 33-14 A marked for identification.)

Q Would you state into the record, Mr. Watson, the data that is set forth on 33-14 A, please, and identify the

well, its location, and then testify as to the comparison of the water levels of 1977 as they relate to 1978, please.

A Yes. This exhibit also shows a comparison of the water levels in 1977 and 1978 in the Colville No. 2 irrigation well, which is shown on Colville Exhibit No. 8 as Well No. 3, near the south boundary of Allotment 892.

Q And where is that situated, as it pertains to what we call the New Walton irrigation well?

A The Colville No. 2 irrigation well is located to the north of the boundary between the Colville Allotment 892 and the Walton Allotment 925, and the Walton well is located about 100 feet, I would say, south of Colville No. 2.

Q Now, would you proceed to state into the record what else is shown on that? I see you have a red mark on that. Would you state into the record what that is?

A Yes. The long red line on the exhibit demonstrates, shows the water level elevations as measured in the Colville No. 2 irrigation well.

Now, there is a block of red shown between the dates of May 19, 1978 and June 1, 1978 and that red block is intended to and does show the period of time that the Walton irrigation well was operating and the Colville No. 2 irrigation well was not in operation,

and the significance of this period is to show that when Mr. Walton turned on the Walton irrigation well this year, on May 19, that there was a very sharp decline in the water level in the Colville No. 2 irrigation well, even though that well was not being pumped at that time. So during that period of time, there was a three-foot decline in the water level in that well, very sharp drop.

The water level in the Colville No. 2 irrigation well fell below the 1977 level on about June 1 and has been declining at a very rapid rate since that time, and as of June 15, 1978 the water level had fallen a total of about 11 feet and about 5 feet below the water level on that same date in 1977.

Q Have you compared the quantity of water pumped from both Colville 1 and Colville 2 as related to last irrigation season?

A Yes, I have.

Q Would you go ahead and state into the record the quantity of water that has been pumped?

A The quantities of water have been significantly less than 1977. The Paschal Sherman irrigation well, the Colville No. 1 and the Colville No. 2 irrigation wells, all the production wells on the Colville Irrigation Project have pumped about 75 percent of the water that

had been pumped in 1977. The total amount of pumpage through June 15, 1978 has been 240 acre feet.

Q And that is less than last year?

A That is 75 percent of the amount that had been pumped last year at this time, which was about 320 acre feet.

Q Have you made a projection, Mr. Watson, predicated upon the experience you have had, upon your observations, and also as it pertains to the historic use of water from that well, as to when you are going to have difficulty in regard to the delivery of water from the Colville No. 2?

A Yes, I have.

Q And would you state into the record, is that depicted on the exhibit, Mr. Walton?

A This is depicted on the exhibit in a green dashed line extending from June 15.

Q And where is the difficulty going to be in regard to the availability of water?

A The difficulty is going to be very severe, Mr. Veeder. It is more than a difficulty. The well, the water levels in that well are declining very rapidly at the present time, and at that rate of decline, by July 10, 1978 the water level will have reached the point that was reached in 1977, at which time that well had to be discontinued completely.

Q Have you taken into consideration, in making that projection, agricultural operations, including the cutting of alfalfa and harvesting of it?

A Yes, I have.

Q Is that included in the projection?

A I didn't understand your question.

Q Is the contemplated period of cutting the alfalfa included in the projection?

A Oh, yes, sir. We have already gone through the first cutting of alfalfa. That's already within the historical record. We are working on our second crop of alfalfa, and that is taken into consideration, very definitely. The flattening of the water level in 1977 was due, in part, to the reduction in pumping at the time of cutting, but it was also due very substantially to the fact that there was two and three-quarters inches of rain in 1977 compared with about half of an inch of rain in May, 1978.

Q Now, we offer in evidence Colville Exhibit, marked for identification, 33-14 A.

MR. PRICE: Defendants Walton make the same objection with regard to 33-1 A, Your Honor, 33-11 A, pardon me.

THE COURT: 33-14 A will be admitted for illustrative purposes of the testimony of the witness.

(Colville Exhibit 33-14 A is admitted.)

Q (By Mr. Veeder) Now, Mr. Watson, would you step to the easel and look at, identify the Paschal Sherman well, please.

A The Paschal Sherman irrigation well --

Q And this is Exhibit 33- -- what is the number?

A The exhibit is 33-9 A.

MR. VEEDER: 33-9 A. Can we have that marked for identification, please.

(Colville Exhibit 33-9 A marked for identification.)

Q Would you proceed and explain rapidly into the record what is depicted on that well as it is related to both the '77 and 1978 irrigation seasons, please.

A Yes. First, for locational purposes, the Paschal Sherman irrigation well is described by Well No. 1 as shown in Allotment 526 on Colville Exhibit No. 8.

Referring to Colville Exhibit 33-9 A, again, the 1977-78 water level as of June 15 has reached very near the water level that was reached in the Paschal Sherman irrigation well at the same time in 1977. The water level has declined to the same level that the water level had declined to in 1977 on the same date and the decline has been occurring since the

beginning of the irrigation season, which was April 15, 1978 and the rate of decline has been increasing in the month of June.

Q And have you a projection on that, Mr. Watson, as to what you can anticipate, based on the water usage and what has transpired in the previous season and during this season, please?

A Yes. On the basis of the observation made during the previous season, as well as on the observations made during 1978, the Paschal Sherman irrigation well will continue to decline at a very rapid rate, and by August 15, 1978 the water level in that well will have reached the level that it reached in 1977 in mid-September, at which time that well was essentially not capable of producing water.

MR. VEEDER: Now, we offer in evidence Exhibit 33-9 A, Your Honor.

THE COURT: Same objection?

MR. PRICE: Same objection, Your Honor.

THE COURT: It will be admitted for the same purpose. That's 33-9 A.

(Colville Exhibit 33-9 A is admitted.)

Q (By Mr. Veeder) Then, Mr. Watson, would you turn to 25-1 C, please, and would you state briefly into the

record what is depicted on that.

A Colville Exhibit 25-1 C is an exhibit showing the 1978 projection of the ground water elevation in the Peters observation well.

Q Incidentally, in the case-in-chief, did you enter a similar exhibit?

A Yes, we did.

Q And does this just bring it up-to-date, Mr. Watson?

A This is an updating of the exhibit, I believe 25-1 A that was presented during the trial.

Q And would you proceed, then, to explain the several lines that appear on there and also explain into the record the projection that is depicted there, Mr. Watson.

A Yes. The previous exhibit brought the elevations in the Peters observation well up to February 3, 1978. The orange line shown on Colville Exhibit 25-1 C, the updated version, shows the water levels in the Peters observation well from February 3 down to June 15. So there is a rise in the water level in the Peters observation well until mid-April, the first of May, and then the beginning of a decline in the water level from the first of May, and a very precipitous decline from the middle of May.

On June 6, a green line is shown extending from

the orange line, and that was a projection made on June 6 of the declining water levels in the Peters observation well showing that the water level would be projected to reach the critical elevation as measured in the Peters observation well of 1133 feet by the end of July, 1978, which was the point reached in 1977 at which there was a significant reduction in the quantity of water being pumped from the three production wells of the Colville Irrigation Project because of the very serious water shortage that occurred in 1977.

There is a continuation of the actual observed water levels in the Peters observation well from June 6 to June 15, and there is a very sharp departure from the projection showing that the water levels are declining at a rate faster than was anticipated on June 6. So, from June 6 to June 15, there is a very sharp fall in the water level and the water level in that well has fallen below the water level in the Peters observation well on the same date in 1977.

Also shown on the exhibit is a comparison of the amount of pumpage in 1978 with the amount of pumpage in 1977. The 1977 line is higher and it is the black line beginning on April 6, 1977 and it is labeled as 1977 Water Pumped, and the 1978 amount of pumpage is

shown by the yellow area on the exhibit. On June 15, the quantity of water that had been pumped from the aquifer from the Colville No. 1, Colville No. 2 and the Paschal Sherman irrigation well was approximately 240 acre feet, compared with 320 acre feet pumped that same date in 1977, so there has been a smaller amount of water being taken from the aquifer, and the water levels are at or below the water levels that were experienced in 1977 and proceeding at a very precipitous and a very rapid rate toward a more severe water shortage than was experienced in 1977.

Q Have you an opinion as to what the consequences are going to be if Mr. Walton is permitted to continue his pumping?

A If Mr. Walton is permitted to continue his pumping from the Walton irrigation well, the Colville No. 2 irrigation well will be out of production by the 10th of July, in my opinion, and that will result in very serious water shortage on the Colville Irrigation Project. Colville No. 2 irrigation well is used as a supplemental supply of water to No Name Creek. Developed water from the Colville No. 2 irrigation well is supplied to No Name Creek for the purposes of delivery to Allotments 901, 903 and the Lahontan cutthroat fishery, and with that well out of operation,

will place a much heavier burden on the Paschal Sherman irrigation well for that same purpose.

Did you want me to continue with the pumping from the sump?

Q Well, now, have you made observations -- how much water have you been delivering at the north line of Mr. Walton's property, Mr. Watson?

A At the north line of Mr. Walton's property, we have been delivering the amount of water required to meet the water requirements for Allotments 901 and 903 and the Lahontan fishery. During the early part of the irrigation season, we were not delivering large quantities of water at that point because of natural stream flow that we were relying on for the purposes of the lower allotments and the fishery, and since the early part of the irrigation season, we have been increasing the amount of water up to two cfs, which is the amount of water that has been delivered in recent days. In June, we have been delivering up to two cfs of water, which is necessary to get sufficient water into No Name Creek for the purposes of Allotments 901 and 903 and the Lahontan cutthroat fishery, in view of the taking of water by Mr. Walton at his surface diversion.

Q And, now, have you an opinion, have you made an

investigation to determine how much water naturally would be emanating from the ground water basin, Mr. Watson, at this time?

A Yes, I have made that investigation and I do have an opinion, yes.

Q What is your calculation on that?

A The determination of the water discharging from the No Name Creek aquifer, the natural discharge from the No Name Creek aquifer on June 15, 1978 would be less than .2 of a cfs.

Q Now, how much water is reaching the south end of Mr. Walton's property?

A The amount of water reaching the south end of Mr. Walton's property is one and a-half cfs or less, depending on the Walton operation and how much water he is taking out of the surface diversion of developed water and the natural spring zone discharge.

Q Have you been able to calculate how much water of the developed water that Mr. Walton is taking, exactly?

A I have not been able to calculate exactly how much water Mr. Walton has been taking because I have been denied access.

Q Of the developed waters, now.

A I have not been able to determine the exact amount of the developed water that Mr. Walton has taken, although

he has been taking in excess of the natural spring zone discharge of No Name Creek.

Q Now, how did you arrive at that conclusion?

A I arrived at that conclusion on the basis of the observation made in 1977, at which time Mr. Walton was always diverting in excess of .5 cfs when he was diverting for the purposes of irrigation, and also on the basis of observation in 1978 of the number of sprinkler heads in operation, and essentially his operation has been the same as I observed last year. I made personal observations of his system this year, and he is operating in essentially the same manner. We know the number of sprinkler heads that he is operating from the sump, and we have counted those on a daily basis, and we know that he has been taking in excess of the natural spring zone discharge, which requires that he take developed water of the Colville Confederated Tribes in addition to that spring zone discharge.

Q And that was calculated on the amount of sprinkler heads. How did you make a calculation, then, as to how much water was actually being taken, by observing the sprinkler heads?

A Well, as a minimum of amount of water from the sprinkler heads, six gallons per minute is about a minimum of water that would be discharged through each sprinkler

head. He has been operating up to 40 sprinkler heads at a time from the sump, and that would result in a total pumpage from the sump of 240 gallons -- yes, of about 240 gallons per minute, which is .6 of a cfs, or more, and he has been utilizing more than 40 sprinkler heads during 1978, so I would say that that would be a minimum amount of water that is being pumped.

Q And when you say a minimum quantity, can you give us second feet?

A Of about .6 to .7 cfs.

MR. VEEDER: I offer in evidence, Your Honor, Colville Exhibit 25-1 C.

THE COURT: Same objection?

MR. PRICE: Same objection, Your Honor.

THE COURT: Same ruling. It will be admitted for illustrative purposes.

(Colville Exhibit No. 25-1 C is admitted.)

MR. VEEDER: I have no further questions.

THE COURT: Cross-examination, Mr. Price?

MR. PRICE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. PRICE:

Q Mr. Watson, if I understand you correctly, your projections are that Colville No. 2 would be affected if pumping by both the Tribe and Mr. Walton continues at the same rate; is that correct, on July 10?

A The projection is based on the experience -- can I turn to that exhibit, Mr. Price?

Q Could you answer that yes or no? Is it your opinion that as of July 10 that if the Tribe and Mr. Walton continue at their present levels that Colville No. 2 would be affected in terms of not being able to produce water?

A It is my opinion that if Mr. Walton is permitted to continue pumping that by July 10 the Colville No. 2 irrigation well will be dry.

Q Are you saying that even if the Tribe were not pumping, that if Mr. Walton were pumping all by himself, that by July 10, the Colville No. 2 would be adversely affected; is that what you are saying?

A I am saying that Mr. Walton does have a substantial impact on the operation of the Colville No. 2 irrigation well.

Q By "substantial impact", that indicates to me that the Tribe also has an impact on the Colville No. 2;

doesn't it, in pumping?

A The Tribe has an impact to some degree on Colville No. 2 but the larger impact is from the Walton irrigation well.

Q You projected that the Tribe has pumped about 240 acre feet of water to date, and is it not true that the Waltons have pumped approximately 30 acre feet or less to date?

A I have been denied access to the Walton property, and I do not know what Mr. Walton has pumped from the Colville -- or from the Walton irrigation well.

Q Was Mr. Bill Burchette denied access from the tribal property during the trial when he went out there to determine the water level in the ground so as to determine the need to irrigate as early as the Tribe actually commenced irrigating?

MR. VEEDER: I object, Your Honor. This goes far beyond any examination that I had, and I don't think Mr. Bill Burchette ever tried to get on the land; did you?

MR. BURCHETTE: Not to my knowledge.

MR. PRICE: Pardon me, Bill Bennett.

THE COURT: Sustain the objection. Go ahead.

Q (By Mr. Price) Now, on the natural stream flow that you indicate is occurring and how much Mr. Walton is

taking from his sump, did you take into consideration the amount of spring flow that naturally occurs at Mr. Walton's sump? That's the reason the sump was placed there, is because it was a natural spring development.

A There is no spring flow to the Walton sump that is included in the amount of water being discharged from the No Name Creek spring zone that he has diverted.

Q You didn't take --

A The amount that I'm talking about, Mr. Price, is the amount of water that Mr. Walton is taking at the surface diversion from No Name Creek.

Q I thought you said you have been denied access, so you would have no knowledge how much he is taking.

A We know how much water is being discharged in the No Name Creek spring zone by the water levels in the No Name Creek aquifer.

Q But you don't know what the amount of spring zone discharge is at the sump where Mr. Walton's pump is actually located; do you?

A I am sure that he is taking more water destined for No Name Creek at that point, but that is in addition to the amount he is diverting at the surface diversion.

Q The Paschal Sherman well and Colville No. 1, even based on your projections, will still be in production

after July 10; is that not correct?

A Which well, Mr. Price?

Q Colville No. 1 and Paschal Sherman will still be in production after July 10.

A Yes.

Q And Colville No. 2 is but a supplemental well for the lower allotments; did I understand your testimony correctly in that regard?

A You did not understand my testimony correctly.

Q On Exhibit 33-9 A, Mr. Watson, is not the rate of decline in 1978 less than the rate of decline in 1977, as you have projected there, or as you actually measured it?

A I would have to look at the exhibit.

Q Would you do that, please.

A Colville Exhibit No. 33-9 A, the projected rate of decline in the Paschal Sherman irrigation well, is less than the experienced rate of decline in the Paschal Sherman irrigation well during August.

Q Mr. Watson, my question was, to date, June 15, the level rate of decline in the Paschal Sherman well has been less than it was during the 1977 irrigation season, to June 15; is that not correct?

A That is not correct.

Q Okay. It's just a figment of my imagination that the

one line seems to drop, the '77 line seems to drop more precipitously before it levels out than does the 1978 one?

A In the first part of the irrigation season, as I described earlier in the testimony, the amount of pumpage from Paschal Sherman irrigation well was not as heavy, from all of the wells, was not as heavy as it was in 1977, so up until May 15, the decline in the water level is at a lesser rate than it was in 1977 --

Q Thank you, that answers my question.

A -- 1978, the decline in that water level has been much sharper than in 1977.

Q Did you make any projections -- strike that.

Why is it that Mr. Walton's pumping or continued pumping, based on your projections, would only adversely affect Colville No. 2 and not the Paschal Sherman or Colville No. 1 as of July 10, 1978?

A The pumping from the Walton irrigation well will adversely affect all of the wells in the Colville Irrigation Project because he is relying on the same water, the same source of water, that all the wells are drawing from, namely the No Name Creek aquifer.

Q Do you have a projection for the other two wells, as to when they might not be able to produce? Did you already testify to that?

A Yes.

Q In regard to Mr. Veeder?

A (Nodding yes.)

MR. VEEDER: Did you withdraw your question, Mr. Price?

MR. PRICE: Once, the question was answered, Mr. Veeder.

Q Mr. Watson, are you familiar with the fact that the Tribe commenced irrigating in the middle of April, April 15 of 1978?

A Yes, I am.

Q And had been continuously ever since?

A I would not say that they have been irrigating continuously ever since, no.

Q They have shut down for cutting?

A Yes.

Q Okay. Other than that, have they irrigated continuously?

A No.

Q When else did they not irrigate?

A There have been periods during the 1978 irrigation season when the Tribe has not been pumping from the No Name Creek aquifer. There has been substantially less water pumped from the No Name Creek aquifer in 1978 than in 1977.

Q I don't think it's necessary that we keep repeating.

Mr. Watson, are you familiar with the fact that the Waltons didn't commence irrigating until well into the month of May?

A I am familiar that the Waltons began irrigating about mid-May.

Q And you are familiar with the fact that the No Name Creek Valley has received substantial amounts of rainfall over and above that received during the same time during the 1977 irrigation season?

A I know that the precipitation during the recharge season has been about 25 percent above normal,and that the water levels in the No Name Creek aquifer are back to where they were in 1977, simply demonstrating that in an above-average year of precipitation, there is not sufficient water for both the Colvilles and the Waltons.

Q Mr. Watson, I asked you if you are familiar with whether or not the aquifer, or the No Name Creek Valley, received substantially more rainfall during the 1978 irrigation season to date, as opposed to the 1977 irrigation season to date.

A In 1977, in May, there was 2.75 inches of rainfall recorded at the Omak 2 Northwest weather station. In 1978, there was .51 inches of rain.

Q I will ask one more time, Mr. Watson. For the irrigation season to date -- I didn't ask for May, I asked for the irrigation season to date -- in comparison with 1977, has not the valley received substantially more rainfall than '77?

A No.

Q During the period of time that the valley did receive rainfall this irrigation season, the Tribe continued to irrigate throughout all of those rainfalls; did they not?

A I have no personal knowledge as to the total accuracy of your statement, Mr. Price. I was not there during all periods of rain, but I do know that there was --

Q That would answer my question, Mr. Watson, --

A -- irrigation going on during rain --

Q -- thank you.

THE COURT: Does the State desire, Mr. Mack?

MR. MACK: Yes.

CROSS-EXAMINATION

BY MR. MACK:

Q Mr. Watson, your projections about water availability and delivery for the remainder of the year, do those include the Allotments 901 and 903, as well as 892 and 526?

MR. VEEDER: Could I hear that question again, please.

Q (By Mr. Mack) Your testimony about the projections of water availability as one approaches -- as one proceeds through the summer, and the delivery of water, do your statements about the delivery of water include or contemplate the delivery of water to Allotments 901 and 903, in addition to 892 and 526?

A The projections reflect the delivery of water to No Name Creek for the purposes of Lahontan cutthroat fishery and the irrigation of Allotments 901 and 903.

Q So the answer is yes?

A With that clarification, yes.

Q Mr. Watson, do you have an opinion as to whether, by August of this year, there will be enough water to fully irrigate all of what you consider the irrigable acreage in the No Name Creek Valley?

A Do I have an opinion?

Q That was my question, yes, do you have an opinion.

A Yes, I do.

Q And what is that opinion?

A In my opinion, there will be -- there will not be. There will be a severe shortage of water in August, 1978, for the purposes of the Colville Irrigation Project and the Lahontan cutthroat fishery exclusively.

Q My question was asked with regard to the irrigable acreage which you testified to -- I don't know how many weeks ago, now -- and is the Court correct in understanding that it is your opinion that there would be insufficient water by August in this system to satisfy the irrigation requirements above the irrigable acreage figures which you testified to previously?

A If Mr. Walton is allowed to continue pumping from the Walton irrigation well and diverting from the No Name Creek stream, there will be a severe water shortage to the Colville Irrigation Project and the Lahontan cut-throat fishery in August, 1977 (sic).

Q Last year, assuming Mr. Walton had not withdrawn water, would there have been sufficient water to meet fully the irrigation requirements of the remaining irrigable acres or the irrigable acres in the No Name Creek Valley, in your opinion?

A Mr. Walton diverted and pumped about 275 acre feet in 1977, and that would have gone a long way in assisting the Colville Confederated Tribes in irrigating throughout the remainder of 1977, although they were only operating through the early part of August on most allotments, and by September, irrigation had been discontinued on all allotments, with the exception of 903. Irrigation had been discontinued on Allotment 526,

on 892 and 901, and they were struggling --

Q Well, --

A -- trying to get water to No Name Creek for the exclusive purpose of the Lahontan fishery and Allotment 903.

Q Maybe you could respond to this question precisely, Mr. Watson. Isn't it your opinion that there was inadequate water last year for the full irrigation of all of what you believe are the irrigable acres in the No Name Creek Valley for the Colville Irrigation Project?

A Yes.

Q And how about this year? Is it also true that there would be insufficient water for the full irrigation of the irrigable acres you have already testified to?

A If Mr. Walton is allowed to continue pumping and --

Q Disregarding --

A -- and diverting from the No Name Creek stream.

Q Disregarding Mr. Walton.

A Through careful management of the remaining supply in the No Name Creek aquifer, it may be possible for the Colville Irrigation Project to continue and to sustain some damage that has already taken place due to Walton's diversion and pumping, both in 1977 and in 1978. The reason we are in the situation in 1978 that we are

in --

Q Well, I didn't ask you that.

A -- is in part due to --

Q I didn't ask you that.

MR. VEEDER: He has got a right to respond, Your Honor.

THE COURT: No, he has answered the question. Go ahead.

Q (By Mr. Mack) Mr. Watson, isn't it true, based on what you have testified to today, that if Mr. Walton were to discontinue his withdrawals of water, and considering the projections which you have testified to on numerous exhibits, isn't it true that there would be insufficient water to meet fully the irrigation requirements and water duties which you testified to for the number of irrigable acreages which you testified to -- you may not recall them at this point, but you testified to -- for the Colville Irrigation Project in 1978 throughout the irrigation season; isn't that true?

A There is insufficient water to irrigate the irrigable lands of the Colville Irrigation Project in 1978.

Q Thank you. Now, Mr. Watson, your testimony today about the pumping that has already occurred, isn't it not true that the pumping that has occurred and the pumping decisions that have been made by you or the Tribe for

the withdrawal of water for this project have not been based on a projected water available figure for the summer, or for this summer, of 550 acre feet?

MR. VEEDER: May I have that question again? I don't understand it, Your Honor.

Q (By Mr. Mack) Isn't it true that the decisions that have been made to date for the pumping of, withdrawal of water, for the Colville Irrigation Project have not, in fact, been based on the assumption that there will only be 550 acre feet available, 550 acre feet of water available for the project throughout the summer?

MR. VEEDER: That goes far beyond any question that was asked on direct examination, Your Honor.

THE COURT: I think it's rather pertinent. I'm going to let him answer it.

Q (By Mr. Mack) Isn't that true? The decisions --

A The 550 acre feet, Mr. Mack, is the firm annual supply of the No Name Creek basin, in my opinion. That is the amount of water that can be withdrawn from the aquifer on a sustained basis, without encountering the severe water shortages that were encountered in 1977 and are projected for 1978.

Q Yes, but isn't it true that the pumping decisions, the decisions made so far to date on how much water and when to withdraw for the Colville Irrigation Project,

had been based on -- well, haven't really been based on any figure, or if based on a figure, not on that 550-acre-foot figure; isn't that true?

A The management of the water in the No Name Creek basin by the Colville Confederated Tribes is based on the amount of water that is available in the aquifer and trying to, in a very practical and pragmatic basis, on a week-to-week basis, the decisions are made to distribute the available water in the best manner available, and that is the basis that we are proceeding on now, and that is the basis that we proceeded on last year.

Q And those decisions vary week-to-week, day-to-day?

A Those decisions vary with time, depending on the conditions in the aquifer; that is correct.

Q And the elements that enter into those decisions vary from week-to-week and day-to-day; is that correct?

A They vary depending on the conditions in the aquifer, the conditions of the crops, and the management of the water for this multi-purpose project. The Lahontan fishery and the irrigation is based on the situation, on a very pragmatic solution of the problems, depending on the conditions in the basin.

Q And isn't it true that they vary from week-to-week and day-to-day based on the amount of water in the ground

that can be withdrawn, which also varies from time to time?

A It is true that the water levels vary with time, and --

Q And that enters into the decision?

A Yes, it does.

Q Thank you.

THE COURT: Does the Government desire cross?

MR. BURCHETTE: One question.

THE COURT: Mr. Burchette.

CROSS-EXAMINATION

BY MR. BURCHETTE:

Q Mr. Watson, you testified that there is 550 acre feet of water available as a firm annual supply of water; is that correct?

A Yes.

Q You also testified earlier in the merits of this case that there is approximately 800 acre feet of water that may be available on an average basis; is that correct?

A I did not say that that water was available. You have to make a very distinct -- you have to distinguish between firm annual supply, Mr. Burchette, and average annual available. Now, the average annual available is the amount of water that occurs throughout a 12-month period, and that water is not available in its

full amount during the entire irrigation season. The irrigation season is only a part of the year, and of the 800 acre feet, as I testified to previously, there is a substantial amount of water that is not available during the irrigation season that enters the aquifer and is discharged by the aquifer and flows through the No Name Creek stream and into Omak Lake, so that water is not in any way available for the beneficial purposes of irrigation and the Lahontan cutthroat fishery on the basis of the system that has currently been in operation, on the basis of the experience that we have had in 1975, 1976, 1977 and now into 1978. That water is simply not available in its entirety. It does represent an average, and during dry years, that average supply cannot be relied upon.

Q But --

A Even the amount that is available during the irrigation season from that average annual. So you have to be very careful in using that kind of --

Q I recognize how careful you have to be with those two phrases, those terms, and that is why I'm concerned, because if you have got 550 acre feet of water available as a firm annual sustained amount of water that is available for use, but yet you have 800 acre feet figure which you say is average over a period of a year,

including the irrigation season and other parts of the year as well, but is it not true that there would be more, on an average year, say not a drought year, but an average year, the medium year, where we have got the average amount of rainfall, there would be more than 550 acre feet available for use in the aquifer; would there not? Do you follow my question?

A I follow your question, Mr. Burchette, but it's not that simple a matter. In an average year, you don't know what the coming year will bring. For example, in 1977, the pumping by Mr. Walton and the diversion by Mr. Walton led to a very pronounced decline in the aquifer. If that pumping and diversion had not taken place, the water levels in the No Name Creek aquifer would have been substantially higher than they were this year. There was an above average recharge in 1977-78, and without that pumping and diversion in 1977, the water levels would have been much higher and there would have been the opportunity to manage the available resources during this average year. There would have been more opportunity, more flexibility to manage that during this year, but under the conditions that persisted in 1977, it is not possible to benefit from the additional water available from a very wet year that may enter the aquifer. That is what we see

here in 1978, even though we have had a very wet period, the water --

Q But aren't you saying -- excuse me, just a second. Let me see if I can get it clear in my own mind.

The 550 acre feet is what you would recommend, that that would be the limit that would be taken out of the aquifer year in and year out? Is that what you are saying? Or, are you saying that that is the minimum, that is the amount of water that would be a safe amount of water that we could utilize year in and year out, but some years, be it maybe 1978, maybe 1981 or '82, whatever, depending on the circumstances, there may be more available water for use and it would be appropriate to take that water without damaging the sustained amount of the 550 acre feet that we are relying on as our sustained or firm annual supply?

A This -- the management decision to take in excess of 550 acre feet is a decision that is very difficult to make at any time because if you make that decision, if you make the decision to take more than 550 acre feet, you are running the risk that the recharge season following the period of taking more than 550 acre feet would be very light, and that the water levels would not have recovered enough at the beginning of the next year to be able to take the 550 acre feet the next year,

so that is the kind of decision that you are left with.

550 acre feet is the amount of water, in my opinion, that should be taken from the aquifer on a sustained basis, and I think that the management decision to take more than the 550 acre feet depends on the circumstances and depends on a certain degree of risk in taking that additional water.

MR. BURCHETTE: That is all I have, Your Honor. Thank you.

THE COURT: Any other cross? Any redirect?

MR. VEEDER: I have no redirect.

THE COURT: You may step down.

MR. VEEDER: Call Mr. Kaczmarek, please.

MICHAEL R. KACZMAREK, called as a witness by plaintiff Colville Confederated Tribes, being first duly sworn on oath, testified as follows:

DIRECT EXAMINATION

BY MR. VEEDER:

Q Mr. Kaczmarek, you testified in the case-in-chief; did you not?

A Yes, I did.

Q And you occupy the same status and position you had at the time you testified?

A That is correct.

Q Would you turn to Colville Exhibit 19-3, please.

Now, Mr. Kaczmarek, for the record, would you state into it what is depicted on Colville 19-3.

A Colville Exhibit 19-3 is titled, Groundwater Profiles for March 29, 1977; April 19, 1977; June 10, 1977; and September 27, 1977; and the exhibit shows ground water profiles from the north end of the aquifer to the south end of the No Name Creek aquifer for those periods of time, based on the observations of water levels in the wells.

Q Now, Mr. Kaczmarek, have you participated in the development of the data as shown on the exhibits for Colville No. 1, No. 2 and Paschal Sherman, and have you been here during the testimony of Mr. Watson?

A Yes, I have.

Q And have you an opinion as to the consequences of the present level of the ground water basin, as it pertains to the induction of water or an increased induction of water from the Omak Creek source of supply?

A Yes, I do.

Q And what is that opinion?

A It is my opinion, based on the performance of the aquifer, both the drawdown, the drastic drawdown we experienced last year during the irrigation season, and the observation of recovery this year, that there

was no induction of an additional recharge from any source into the aquifer, and I think that, if I could refer to Colville Exhibit 25-1 C, we could explain that a little more thoroughly.

Q Would you do that rapidly, please.

A Certainly. As shown on Colville Exhibit 33-9 A, -11 A, and -14 A, and in the other exhibits showing tabulated data, the recovery of ground water levels in the No Name Creek aquifer during the 1977 to 1978 recharge period, has brought the ground water levels in the aquifer to a level approximately three feet lower than the level by about the first week of April, 1978, than the ground water level during comparable periods of time during 1977.

In other words, based on observation of the ground water level in the aquifer, as of April, 1977, excuse me -- 1978, we have less ground water present in the aquifer than we had in the same period of time at the end of the recharge season in 1977.

Now, what I have done to evaluate the type of recharge and availability of the water and potential for induction of recharge due to the pumping stress we experienced last year was to look at the depiction of the rise in aquifer water level shown on Colville Exhibit 25-1 C for the 1976, the 1977 period, and

compare that to what we observed in the 1977 to 1978 recharge period, and as shown on Colville Exhibit 25-1 C, we have a line which is labeled, Projected Water Level in Peters Observation Well from February 3, 1978, Based on the 1976 to 1977 Recovery.

What I have done is looked at -- first, let me explain that that line is an exact duplicate of what happened in the 1976 to 1977 period, and I have compared the projection which we made earlier in the year with what happened in 1976 to 1977 for the parts of the line that lie above the approximate elevation of 1140 feet, which was the lowest point at which ground water levels in that well, the Peters observation well, reached in 1977 during the 1976-77 irrigation season.

The reason I selected that portion of the curve to compare, is that when the water levels in the well and in the aquifer are at the same elevation, then the conditions throughout the aquifer are the same. In other words, the amount of area left to be recharged versus that which is saturated with ground water, the same as the area and volume of material that is being recharged, is the same. If there is a ground water divide, for example, which has been proposed as one theory of the aquifer operation, then the ground water divide at periods of time when the elevations are

comparable, when the ground water divide is in the same position. So all of the conditions for the 1976-1977 plot of actual rise in ground water levels, compared to the projected rise that we made for the 1977 to 1978 season, would be under comparable conditions and should be at the same rate, assume, based on the fact that we are looking at the same elevation.

Well, then, what I have done is look at the plot of the actual recovery of the aquifer in the 1977 to '78 recharge period, again, at that same elevation for those segments of the line above elevation approximately 1140 feet, and this is the line that is labeled, Observed, and colored gold on the Exhibit 25-1 C, and what we witness there is that, rather than having a comparable rate of recharge under similar conditions in that zone of elevation, we find that the ground water levels in 1977 to 1978 period have actually been rising at a somewhat more rapid level than they did in the preceding 1976 to 1977 recharge season, and the only variable that we have here within this zone of elevation is the precipitation.

So what this demonstrates, of course, is that, in this 1977 to 1978 recharge period, we have experienced precipitation during the recharge period for the months of approximately -- I would have to look at the data

again -- it is approximately October of 1977 through April of 1978. We have got precipitation of approximately 23 to 25 percent in excess of the norm. In other words, much more during the recharge period than we had in the preceding year. That is the reason that we have a more rapid rate of recharge for the comparable portions of the curves above the elevation of 1140 feet.

Now, it is also very interesting to contrast the gold portion of the curve above the elevation of 1140 feet for the observed rise in aquifer levels for 1977 to '78 to that portion of the curve below elevation 1140 which is labeled, Water Level, Peters Observation Well, Based on Actual Measurements Through February 3, 1978, on Colville Exhibit 25-1 C.

The only difference in conditions that we have for the portion above 1140 and the portion of the line that is down to approximately elevation 1128.75, which was the lowest ground water level reached in the 1977 irrigation season, is that we know that the volume of the aquifer material that was dewatered during the 1977 irrigation season, is less -- the deeper you go into the aquifer, the less volume you have available in it -- and we also know that below approximately elevation eleven hundred and -- well, we know that as

the water levels decline in the aquifer, we have less natural discharge through the spring zone, so in this lower portion of the curve, below elevation 1140, we are looking at a smaller volume of material, we are looking at diminished to no discharge through the spring zone. If there were an induction of ground water into the aquifer as the result of heavy pumping stress, such as we experienced to draw the water levels down to this elevation, then the recharge should be more rapid, the rise in the water levels that we observed should be more rapid in the lower part of the curve than in the top part of the curve, simply because there is no water flowing out when the recharge takes place, and there is a smaller volume of material to fill up, but, in fact, what we see is that the water level measurements through February 3, 1978 show that the ground water levels in the aquifer rose at approximately the same rate for that period of time as they did after February 3, up in the higher part of the aquifer where we were starting to experience natural spring zone discharge, and where we had a larger volume of material to recharge.

This demonstrates very well, in my opinion, the fact that the heavy pumping stress that we experienced last year did not result in any induction of additional

recharge. In fact, even though we have 25 percent more precipitation during the recharge period, and though we experienced heavy pumping stress last year which theoretically should have induced ground water under some theories, we came out with actually less water in the aquifer this year than we had last year.

Q Have you an opinion as to whether there is a ground water divide, Mr. Kaczmarek?

A Yes, I do.

Q And what is your opinion?

MR. PRICE: Your Honor, I don't know what ground water divide has to do with this point, with the preliminary injunction.

THE COURT: Sustain the objection.

Q (By Mr. Veeder) Mr. Kaczmarek --

MR. VEEDER: I want to make an offer of proof on this.

Q -- would you state into the record, if you had been permitted to testify, what your opinion would have been on that subject.

A Yes, I will. It is my opinion that there is no ground water divide.

Q Have you undertaken any analysis, then, Mr. Kaczmarek, in regard to the elevations as of 1978 as they pertain to Exhibit 19-3?

A Well, yes, I have. I have compared the ground water elevations observed in the Colville irrigation wells No. 1 and No. 2 and Paschal Sherman Indian irrigation well to those from the preceding year.

Q Could you very rapidly depict that on Colville Exhibit 19-3?

A Yes, I could. I have a copy of an exhibit which hasn't been offered that has those numbers on it, laying on the desk over here. Perhaps I could get that and a scale, I could just rapidly put them on the exhibit here.

MISS ECKERT: Counsel, so the record is clear, are you still on the offer of proof portion?

MR. VEEDER: No, I'm through with it.

THE WITNESS: Could I have the scale and the triangle?

Thank you.

Q Would those be 19 -- ?

A What I have in my hand is Colville Exhibit 19-5.

MR. VEEDER: May I have this marked for identification, please.

THE WITNESS: If we have another copy of that, I can look at it while it's being marked.

(Colville Exhibit 19-5 marked for identification.)

Q Would you state into the record what is set forth in that exhibit and who prepared it and the accuracy of it, please.

A Colville Exhibit 19-5 is a table of values used in plotting the ground water profile elevations that are depicted graphically on Colville Exhibit 19-1, 19-2, 19-3 and 19-4. We have on the stand here Colville Exhibit 19-3.

Down the left-hand side of the table, we have a series of dates at which ground water level measurements were made by the U.S. Geological Survey, and across the top of the table, we have headings for each individual well in which these observations were made, and then the tabulated values are shown for the date in each particular well.

I compiled this information. It was typed under my direction, and I checked it very carefully after having extracted the information from the U.S. Geological Survey records.

Q It is accurate, to your own personal knowledge, then; right?

A That is correct, and I might add, there are two sets of measurements here, one for the 3rd of April, 1977, and one for the 10th of June, -- excuse me, that should be 1978, I see there is an error on the exhibit. The

date that is indicated as the 3rd of April, 1977 should read 1978.

Q Would you make that correction.

A I will make that correction. I don't have the exhibit that is marked in front of me.

Thank you. The measurement taken on the 3rd of April, 1978, I will mark that 1978 in red ink and put my initials beside it, Your Honor, and the measurements taken on the 10th of June, 1978 were taken by our man in the field as part of this year's operation.

Q And, to your personal knowledge, this is accurate; right?

A Yes, that is correct.

MR. VEEDER: I offer in evidence Exhibit 19-5.

THE COURT: 19-5 will be admitted.

(Colville Exhibit 19-5 is admitted.)

Q (By Mr. Veeder) Mr. Kaczmarek, would you very rapidly draw on the depiction of the level of 1978 ground water levels on your ground water profile.

A Yes. The elevation shown for the date of 3 April 1978 for the Paschal Sherman irrigation well is 1146.89 feet.

MR. PRICE: Your Honor, I'm going to object

to any marking on this exhibit. This exhibit purportedly was drafted with some accuracy, and I feel that it should remain intact. The Tribe had time to prepare an exhibit. They put in an exhibit already that purports to show the elevation, and trying to mark with a ruler at this point, I think, would detract from the exhibit that is already in evidence, and would do nothing but be repetitious.

MR. VEEDER: Your Honor, I think it is simply a depiction to carry out and bring down to date on one of the very important exhibits we put in in the case-in-chief. That shows 1978 ground water levels, Your Honor, that is all.

THE COURT: I'm going to let him do that, but it better be identified as being added at this time.

MR. VEEDER: Well, he will put on his initials and the date that it is added on there.

THE COURT: All right.

MR. PRICE: The question, Your Honor, is as to the accuracy with which he can, with a ruler, line it up with the markings, the calibrations on the side, so that it is anywhere near accurate.

THE WITNESS: May I explain how I do that?

Q (By Mr. Veeder) Mr. Kaczmarek, can you state into the

record whether you took this exhibit yesterday and checked out the calibrations? Did you review the whole thing for the purpose of being absolutely accurate this morning?

A The exhibit, Colville 19-3, was prepared under my supervision for the preceding trial hearings, and I'm very familiar with it. I looked at the exhibit yesterday, prior to, in preparation for doing this, and what I propose to do here is to go to the base line of the exhibit, which is elevation 900 feet above sea level, and scale off from that elevation with a true scale, which I'm holding in my hand, the correct elevation for the water level in the Paschal Sherman Indian irrigation well and the other two wells, and that is precisely the same exact technique which I used to prepare the initial draft of this exhibit, which was then finished in final form by our draftsman, based on that work, so it is exactly how the initial exhibit was prepared.

THE COURT: You may mark the exhibit. The Court will take a 10-minute recess while he does that.

THE BAILIFF: All rise. This court stands at recess for 10 minutes.

(Morning recess is taken.)

THE COURT: Gentlemen, I took a longer recess than planned because I had to get ahold of my Clerk and find out some possible dates to hopefully conclude this case, because it is perfectly obvious we aren't going to finish here today by 12:00 o'clock, and I have a full afternoon on other cases.

The first open dates I have are July 6 and 7. That is just what we are facing, gentlemen.

MR. VEEDER: Your Honor, I have a conflict on the 5th and 6th.

THE COURT: I didn't look past that. I thought that was about as far out as we hopefully go. We are going to get right in the middle of the critical period.

All right, how long is your conflict, Mr. Veeder?

MR. VEEDER: I think I could be back here -- I'd be here on the morning of the 7th, Your Honor.

THE COURT: Well, can we conclude this in one additional day? I didn't anticipate this was going to take this long today.

MR. VEEDER: Well, I will assure you that we have got one more question for Mr. Kaczmarek. I have three questions for Mr. Koch, and that will be it, from the standpoint of the preliminary injunction.

THE COURT: So you believe that all that is

left is the summation, argument?

MR. VEEDER: That's right.

THE COURT: I would think you could do that in a day.

MR. VEEDER: I would have no problem in 15 minutes, Your Honor.

MR. PRICE: I would anticipate --

THE COURT: Mr. Price?

MR. PRICE: Contrary to Mr. Veeder's suggestion, I would anticipate we may be confronted with going through this very same thing again, and I think counsel should advise the Court, because if he is, we are going to run into the very same problem again.

THE COURT: Mr. Roe?

MR. ROE: Just from my memories of the Chamokane, I think, from the State's standpoint, we can shorten up dramatically from that, so I think we can do it within a day if people on that side of the room can kind of split it 50-50 with us.

MR. SWEENEY: Well, as far as the Government is concerned, our argument, our summation, will be rather brief, and I'm sure that we won't impinge very much on a day's time. In fact, I would think that even a day would be more than ample to cover the final

argument.

THE COURT: Well, I'm a little concerned, because I thought the morning was going to be ample today, but it has proven to be wrong, but a one-day -- well, let's do this: We will make it July 7. You can be here at that time?

MR. VEEDER: Yes, Your Honor, I will.

THE COURT: And we are simply going to finish it in one day. Now, there will be no further testimony. Well, I shouldn't say that. I don't know whether we will finish the preliminary injunction testimony today or not.

MR. VEEDER: We are going to be through with my injunction evidence.

THE COURT: I know, but that is only half the case.

MR. PRICE: Thank you, Your Honor.

THE COURT: And, well, we will do the best we can. Let's get going, but I'm going to hold July 7 open to hopefully conclude this matter.

MR. VEEDER: Thank you, Your Honor.

THE COURT: Proceed.

DIRECT EXAMINATION, CONTINUED

BY MR. VEEDER:

Q Mr. Kaczmarek, would you step to your exhibit there, 19-3, and state into the record what you have marked on it, please.

A Yes. I have marked on Colville Exhibit 19-3 water level elevations in the Colville No. 2, No. 1 and the Paschal Sherman irrigation wells for the date of 3 April 1978, and those elevations are, respectively, for the Paschal Sherman irrigation well, 1143.89 feet; for Colville No. 1 irrigation well, 1145.23 feet; and for the Colville No. 2 irrigation well, 1142.98 feet, and I measured up from the elevation at the bottom line of the Exhibit 19-3, which is an elevation of 900 feet, I scaled up from that using a scale and marked those elevations in the wells with a red pen, and I have drawn a line connecting those elevations showing the water table surface profile between the three wells for the date of April 3, 1978, and I have initialed that with the date 16 June 1978 on the exhibit.

MR. VEEDER: I have no further questions. You did put your initials on that?

THE WITNESS: Yes, I did.

MR. VEEDER: All right. No further questions.

THE COURT: Cross-examination?

MR. PRICE: I have none, Your Honor.

MISS ECKERT: The State has none, Your Honor.

THE COURT: The Government?

MR. SWEENEY: The Government has none, Your Honor.

THE COURT: You may step down, Mr. Kaczmarek.

MR. VEEDER: Call Dr. Koch, please.

DAVID LAWRENCE KOCH, called as a witness by plaintiff Colville Confederated Tribes, being first duly sworn on oath, testified as follows:

THE CLERK OF THE COURT: Would you please state your full name to the Court.

THE WITNESS: David Lawrence Koch, K-o-c-h.

DIRECT EXAMINATION

BY MR. VEEDER:

Q Dr. Koch, you did testify during the case-in-chief, did you not?

A Yes, I did.

Q And you occupy the same status that you had at that time?

A Yes, I do.

Q Would you state into the record the circumstances that now prevail in regard to the Lahontan cutthroat trout

spawning.

A At this point in time, the Lahontan cutthroat trout spawning run from Omak Lake to No Name Creek is in process, and it will probably continue for another two to three weeks.

Q And now, would you state into the record the water requirement, the necessity of water at this time, No Name Creek water.

A Okay.

Q To provide for the spawning.

A At this point in time, we need the water supply for two purposes, one, for the attraction of the adult fish seeking the fresh water in which to spawn, and also for the incubation of the eggs which are being placed in the gravel and that are already in the gravel.

Q Now, what would be the consequences, based upon your experience and your knowledge as an expert, if we were to cut back or reduce the quantity of water now being delivered to the ongoing spawning fish?

A Well, if we cut the water back at this point in time, we would do two things: One, we would terminate the spawning run, and two, we would probably end up with 100 percent mortality on the eggs, as we did, say, in 1975 when we did the initial experiments on egg incubation in No Name Creek to determine the success

rate. The success there was very good for the first three weeks, at which time Mr. Walton began his irrigation season, and after that point in time, the silt and the organic waste load being carried by the stream settled over the eggs and the temperatures elevated, which essentially presented a 100 percent mortality of the eggs, and that similar-type thing would occur, and --

Q Occur when?

A As soon as we would cut the water back.

Q At this season?

A At this season.

Q Now, how much longer do you think, from the standpoint of the spawning and from the standpoint of the development of the fish, that you are going to require water down there, Dr. Koch?

A Well, in terms of the actual spawning activity, we will require the eggs -- or the water for another, probably two to three weeks for the spawning run, at which time it will be completed, and then for the last eggs that are laid down in the gravels, we will require approximately 25 to 30 days for incubation, so we are looking at mid-July for the water supply that we have at this point in time, and once the fish hatch, then we will require, say, a little bit less water through the end

of August so that they can develop their swimming abilities and develop their adaptabilities to survive in the alkaline saline waters of Omake Lake.

MR. VEEDER: I have no further questions.

THE COURT: Cross-examination?

MR. PRICE: Thank you, Your Honor.

Good morning, Dr. Koch.

THE WITNESS: Good morning.

CROSS-EXAMINATION

BY MR. PRICE:

Q What if the water were reduced after the midpart of July?

A That is when I said it could be reduced. We are right now looking at approximately 1.5 cfs, and I feel that we could drop it to approximately 1 cfs after the hatching is completed.

Q My question is, assuming that it was dropped below that 1 cfs after the fish have hatched, that would compel them to move into the lake; would it not?

A Not necessarily. That would depend on -- when the fish first hatch out, they spend a certain amount of time in the gravels themselves before they get up into the main current. This is while they are developing, their musculature is developing, their swimming abilities are

developing, and they require about a month's period of time for this development to occur and also for their physiological mechanisms to develop so they can tolerate and regulate the high concentrations in Omak Lake.

Q Okay. Have you done any experiments to determine whether or not the fish, once they develop their swimming abilities, can survive by going directly into the lake?

A In 1973, in relation to the Pyramid Lake situation, in which the water quality is almost identical, we carried out physiological experiments to determine when, in their lives, would they experience the least stress being dumped right into the lake, and we determined at that point that the least stress occurred 90 days past hatching.

Q Okay. Have you done any tests in this creek, in this lake, to determine what the effects would be if the fish went directly into the lake upon obtaining their swimming ability?

A I have not done any direct tests, but based on experience, the survival would be extremely low if the minute they hatched they were dumped into the lake.

Q There would be a survival rate, it is just a question of how much?

A It would probably be less than one percent, would be

my estimate.

Q Okay. You say that the fish are now utilizing one and a-half cfs?

A That is right.

Q As I recall, the Tribe has pumps just below the granitic lip. The fish stream channel then proceeds beyond the pumps to the head of Omak Lake. I also understand that the Tribe is withdrawing water from those pumps below the granitic lip for application on 901 and 903, which means you are not getting one and a-half second feet; doesn't it?

A It is not continuous. We are in the process of regulating day and night flows to make best utilization of the water we have available. We have cooler water, we don't get as much heating during the nighttime. So we request more flows during the hot periods of the day and less flow during the night.

Q My question was, you are not utilizing one and a-half second feet for the fish at the present time; are you?

A Not continuously, no.

Q And in terms of regulating and managing those fish, couldn't you get optimum use of the water by putting the pumps at the head of Omak Lake after the fish have been able to utilize whatever water comes over the granitic lip, rather than taking it out just after it

goes over the granitic lip?

A That would have to be a management decision by the Tribe, and we would have to determine exactly what time we would get the least amount of stress from those conditions.

Q All I'm saying is, wouldn't the fish survive if the water were utilized by the fish before it got to the pumps rather than the pumps taking it out before it gets to the fish?

A I didn't quite understand that.

Q Couldn't the fish utilize the water as it comes over the granitic lip if the pumps, tribal pumps, were moved to the end of No Name Creek channel that you have developed and then taken out for beneficial application, rather than taking it out before it reaches the fish channel?

A I think you create other types of problems, like, during the spawning run, for example. If you took it out of, say, the mouth of No Name Creek for irrigation, you would diminish the attraction flows for the adults out into the lake, which --

Q You are doing that right now by pumping, where the pumps are presently located; aren't you?

A But we are still channeling at a point where it enters the lake and we are not, say, reducing any velocities

or creating any eddy effects or anything down at the mouth of the creek. You would also increase your --

Q Dr. Koch, I don't follow that. You are now pumping up above where the fish utilize the water.

A Right.

Q I'm suggesting if you just move the pumps down below where the fish utilize the water, you are going to lessen any effect on the water needed for those fish and then take the water out after the fish have utilized it.

A In terms of the incubation of the eggs and that, you are probably correct, but in terms -- if you put a pumping structure down at the mouth of No Name Creek, you are going to interfere with the spawning run.

Q By withdrawing water?

A By withdrawing water, by having a structure there in the stream that would, say, inhibit their migration.

Q I see.

MR. PRICE: No further questions. Thank you, Doctor.

MR. SWEENEY: I have a couple of questions.

THE COURT: Mr. Sweeney.

CROSS-EXAMINATION

BY MR. SWEENEY:

Q Dr. Koch, what is the status of the Lahontan trout?

A It is officially classified under the Endangered Species Act, which I understand was just affirmed by the Supreme Court yesterday, the Endangered Species Act. They are classified officially as a threatened species, and both the categories, Endangered and Threatened, carry with them the same protective rights under that law.

Q Now, I understand the spawning is underway at this point in time right now?

A That is correct.

Q And there are fish coming up the lower reaches of the No Name Creek?

A That is correct.

Q And creating redds?

A That is correct.

Q Now, is any work being done in the other method that these fish were promulgated, that is, taking the fish out of the lake as they congregate by the mouth and then artificially spawned?

A Yes.

Q Is that underway now?

A That is taking place, and there has thus far been

approximately 65 to 70,000 eggs taken to Winthrop National Hatchery.

Q Do you have any estimate of how many fish have actually gone up No Name Creek for spawning purposes?

A At this time, we don't have an exact number of what has actually run, and we don't know what the full extent of the run will be, being's it's only about half over at this point in time.

Q Okay. Now, as far as this pumping that was talked about, the pumps that are below the granitic lip, that are utilized by the Tribe, are not taking water out of an aquifer, are they?

A No, they are not.

Q They are just pumping the water from the stream bed and distributing it to 901 and 903?

A That is correct.

MR. SWEENEY: Thank you.

MISS ECKERT: No questions, Your Honor.

THE COURT: Redirect?

MR. VEEDER: I have nothing further, Your Honor.

THE COURT: You may step down, Dr. Koch. Thank you.

Do you have another witness, Mr. Veeder?

MR. VEEDER: That is all. We are through.

THE COURT: Any other parties wish to put on any evidence?

MR. PRICE: Your Honor, this has happened more than once, where we get 90 percent of what Mr. Veeder believes is the case on, and 15 minutes left for the other 10 percent. I would ask that, if the Court is going to not make a ruling today, that we proceed when we return. Our witnesses would be very brief, very short, however. I do not anticipate it would be lengthy.

THE COURT: What is the position of the State?

MISS ECKERT: Your Honor, with respect to the Motion for Preliminary Injunction, we are not parties and we did not intend to present any evidence in this matter.

THE COURT: All right. United States?

MR. SWEENEY: The Government does not intend to present testimony on that.

THE COURT: Can you give me, Mr. Price, any estimate at all of time you might need for answering these contentions?

MR. PRICE: About five minutes, Your Honor.

THE COURT: You have got five minutes. Go ahead.

MR. PRICE: Call Mr. Walton to the stand.

WILLIAM BOYD WALTON, defendant herein, being first duly sworn on oath, testified as follows:

THE CLERK OF THE COURT: Would you please state your full name into the record.

THE WITNESS: William Boyd Walton.

THE CLERK OF THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. PRICE:

Q Mr. Walton, immediately prior to the commencement of this action, in 1970, was there any water being pumped either to the north of you or to the south of you by the Colville Confederated Tribes, United States Government, or anybody else?

A No, there was not.

Q You were the only person in No Name Creek -- strike that.

You testified that you irrigate approximately 100 acres at the present time; is that correct?

A That is correct.

Q Okay, and then the Tribe has put on testimony that they are presently irrigating approximately 157 acres; is that correct?

A That is correct.
Q And have you calculated that to be that the Tribe has about 61 percent of the land, total land, that has been irrigated?
A I have.
Q And you have heard the testimony this morning that the Tribe has pumped approximately 240 acre feet of water to date?
A Yes, I have.
Q And how much water have you pumped to date?
A 30 acre feet.
Q And have you calculated the amount of water that the Tribe has pumped to date of the total as being 89 percent of the total water pumped to date?
A Yes, I have.
Q Mr. Walton, have you been in the valley and on your property during the 1978 irrigation season?
A No, I have not. I have been in court quite a bit of the time.
Q The time you haven't been in court, have you been on your property?
A Yes, I have.
Q Have you observed the rainfall that has occurred in the valley during the 1978 irrigation season?
A Yes, I have.

Q Have you observed the irrigation practices of the Tribe during this period of time?
A Yes, I have.
Q When did you commence irrigating this year?
A One pump started May 15, one pump started May 18.
Q Are you familiar with when the Tribe commenced irrigating this year?
A Yes, I am.
Q When would that be?
A If my memory serves me correctly, April 14.
Q From the time the Tribe commenced irrigating, were there periods when the valley received substantial amounts of precipitation?
A Yes, there was.
Q Did you observe whether or not the Tribe continued to irrigate during those times or discontinued to irrigate during those times?
A They were continuing to irrigate.
Q Do you have an opinion as to whether or not the Tribe has employed economical and good horticultural practices in terms of the application of their irrigation water during the 1978 irrigation season?
A The amount of water that they put on their land both far exceeded what the crop needed and the cost of putting it on would far, it would be too expensive and

would far exceed what the crop needed.

Q Have you made a cutting of alfalfa this year?

A Yes, I have.

Q And when would that have been?

A June 1.

Q And do you have knowledge as to the productivity of that cutting?

A Yes, I do.

Q And what was it?

A It was the greatest I ever received, 3.4 tons pre acre.

Q And how much -- and this was accomplished with the withdrawal of 30 acre feet from your pump in addition to other irrigation?

A That is correct.

Q Mr. Walton, if you were denied access to water for irrigation purposes during the 1978 irrigation season, do you have an opinion as to whether that would affect your business or not?

A Yes, I do.

Q Your business being the dairy business; is that not correct?

A Yes.

Q And what is your opinion as to how it would affect it?

A It would force me out of business.

Q And, Mr. Walton, do you and your family have any other

source of income, other than the dairy business?

A No, we do not.

MR. PRICE: I have no other questions. Thank you, Mr. Walton.

THE COURT: Cross-examination, Mr. Veeder?

MR. VEEDER: Yes.

CROSS-EXAMINATION

BY MR. VEEDER:

Q Mr. Walton, you have testified that you have 100-and-how-many acres irrigated to date?

A 102.

Q Are they all under irrigation today?

A Yes, they are.

Q You have 100 acres being irrigated to date?

A Yes, I do.

Q How many acres did you have irrigated last year?

A Approximately the same, 102.

Q And how do you calculate your irrigated acres, Mr. Walton? Are they all irrigated at the same time?

THE WITNESS: May I take some time to explain this, Your Honor?

THE COURT: Well, what do you need to answer his question?

Q (By Mr. Veeder) When you --

A I do not have sprinklers on every single acre of irrigation that goes all the time, no.

Q And there are periods when you don't operate more than 60 acres; is that right?

A No. I operate all 100. I don't have enough sprinklers to cover 100 acres simultaneously.

Q So, as a matter of fact, sometimes you don't irrigate as much. You will be irrigating around 60 acres; is that right?

A I have a cycle which the sprinklers go over. When the cycle is completed, I have irrigated 102 acres.

MR. VEEDER: I have no further questions.

THE COURT: Further examination of the witness?

MISS ECKERT: Not by the State, no.

MR. SWEENEY: Not by the Government, Your Honor.

MR. PRICE: No.

THE COURT: You may step down, Mr. Walton. Thank you.

Anything further?

MR. PRICE: Nothing further for the defendants Walton, Your Honor.

THE COURT: Is the Government not involved in this?

MR. SWEENEY: No, Your Honor.

THE COURT: The testimony by Dr. Koch raises a question that I hadn't anticipated here. Do we have a problem with the threatened species in the Lahontan trout in view of yesterday's opinion by the Supreme Court? That is a new issue that I hadn't realized we might face in this case. Does anybody have any comment on that?

MR. VEEDER: I have some comment on it, Your Honor.

THE COURT: All right.

MR. VEEDER: I think that in our briefs, and I assume we will have a period of summation, that we emphasize very, very heavily the importance of the Hill case that was, that the 6th Circuit confirmed. Now, I confess to you I have read two newspapers and I saw a nice picture of the snail darter that was preserved, but I think it is extremely important here, Your Honor, that the will of the Congress as expressed in regard to the endangered and threatened species was upheld, and think the United States of America and the Colville Confederated Tribes are at this point, Your Honor, carrying out the will of Congress in regard to this threatened species.

THE COURT: Well, let me raise this question,

and all I note is, the newspaper account so far of the snail darter case, but that appears to be a case in which the particular stretch of river to be affected by that Tennessee Valley dam was the only place where these particular fish species are remaining. Here we have a different situation, where, as I understand it, this species is in Pyramid Lake. This is an artificial chain, and, I think, at least I'm going to suggest that that may make a difference in this case, but I haven't read the opinion yet.

MR. VEEDER: Well, neither have I, Your Honor, and I'm looking forward to reading it, but I think it is extremely important as our evidence in the case-in-chief demonstrates that the law and the rules and regulations promulgated and adopted in connection with this refer to the endangered species wherever found, and I think that that is going to be one of the very important elements in this matter, Your Honor. I think the fact that the national government decided to bring the fish up here and the law as it is expressed, namely, wherever found, and that is the language and we will bring it before you if Your Honor wants us to, is the controlling element. I don't think it matters that the endangered or threatened species happens to be transplanted in an area hopefully that will cause them

to survive. I think the crucial thing is, are these endangered or are they threatened species, and, of course, they are.

THE COURT: It is an issue we are going to have to examine. One of the problems that I think is in this case, and some counsel will totally disagree with this, I'm not entirely satisfied, and I just am expressing this without making any decision about it, that the Lahontan fishery, whether that comes within the reserved rights under the Winters doctrine. This is not the natural fishery that is involved, in, like the salmon runs in the rivers where these were a natural species depended upon by the Indians at the time of the treaties. There were no such things at the time of the treaties as these fish in Omak Lake. I have some concern whether the reserved water doctrine under Winters goes beyond irrigation rights in this case. This is something that I'm merely pointing out, my concern. I expect I will hear some argument about this in due time.

MR. SWEENEY: Your Honor, that is addressed to the Government's brief that was filed and we have taken a position -- and the State has taken a position on that very point, and so has Mr. Veeder, on behalf of the Tribe, and I assume Mr. Price. On that Tellico

Dam case, I talked to the Department of Justice attorney this morning. He is sending me a copy of the opinion, which is 40 pages long. That is the majority opinion. I don't know how long the dissent went, but I think maybe --

THE COURT: I assume I can't follow the dissent, anyway.

MR. SWEENEY: But I think maybe we should have a look at that case, but that did turn on the exact language of the Endangered Species Act, which covers endangered and threatened species and also their habitat. Now, whether or not this can be construed -- whether No Name Creek can be construed as a habitat for Lahontan cutthroat trout may well be the turning factor on that.

THE COURT: Well, it's a new issue that I wasn't even aware of until this morning, and something we are going to have to wrestle with. I'm going to raise this question since we were not able to conclude this matter today. This matter is going over to July 7. We will start at 9:00 o'clock in the morning so we will have a full day if we need it. If no action is taken by the Court between now and July 7, which is about three weeks, where is the burden here, where is the problem? The testimony here this morning indicates

that we are getting right into the time that there is a critical, possible critical water situation. My question, I guess, is, if the Court does not rule today, at least temporarily, and I really don't feel very comfortable if I'm forced to do it on what I have learned this morning without some education by counsel, are we going to run into a serious problem in the next three weeks, if things just stand the way they are?

MR. VEEDER: I think that is going to be the situation, Your Honor. I believe that if we go ahead the way we are going, as the testimony evidenced, and I think is undoubtedly the situation, that when we convene the next time, the issue will be squarely before us, how much damage are we going to sustain by reason of the overdraft on the aquifer. I think this is where we are now.

THE COURT: You operated last season under a stipulation or a tacit agreement, and I don't recall the terms of that, insofar as the amount of water that was permitted to go over the lip and on down for the use of both the fish and 901 and 903. Is it feasible that that same stipulation could take care of the problem for the next three weeks?

MR. PRICE: Defendants Walton are agreeable to that, and suggest that that order be rendered in

effect, not with respect to the three-week period, but possibly beyond that, but it certainly will be agreeable.

THE COURT: Well, by July, or around July 7, hopefully we will reach -- I was going to say some permanent conclusion, but that is just as far as this Court is concerned.

What do you think about continuing under the agreement that you operated under last year until we can get this matter up on July 7?

MR. VEEDER: Well, we are, in effect, Your Honor, under that agreement right now. Right now, we are operating on the basis of two second feet and a second and a-half being delivered below Mr. Walton. As the evidence shows, though, we are confronted with a very serious problem if Mr. Walton is taking water that we think is developed water, that is serious. Secondly, Your Honor, which I think is extremely important, is that we have access to Mr. Walton's property. If Your Honor is going to maintain the status quo, I think that we have to have access to Mr. Walton's property under some kind of a direction from this court.

THE COURT: For what purpose?

MR. VEEDER: So we will know how much water

Mr. Walton is diverting out of that stream system predicated upon the quantity of water that we are putting in there. It is certainly our view that under the laws that exist in the State of Washington, as it exists, this developed water is really personal property, it is delivered into the stream system pursuant to the laws that exist. We have the right to deliver that water down there with reasonable losses for evaporation and transpiration and seepage. It is our view, as the evidence showed today, that Mr. Walton is diverting water in excess of what could be reasonably taken. Now, the only way we can verify that is to have authorization for access onto his land.

THE COURT: Mr. Price, if the matter is just held in status quo for the next three weeks, why should not the Tribe's experts have access to Mr. Walton's property for purposes of examining amounts of water being withdrawn?

MR. PRICE: Because, Your Honor, that gets us right back into the merits of the case that involved weeks of expert testimony, the tests that were run to try and determine what was developed water versus what was natural increment of the stream flow. What we are interested in is the one and a-half second feet over the granitic lip. The Tribe is getting that. What

purpose does it serve to go in there and make this determination?

MR. VEEDER: Serves this, if I may respond, respectfully, Your Honor, is that we are of the opinion, based upon the testimony we showed today, is that Mr. Walton is taking more water than he is entitled to and that we would be able to reduce, perhaps, the two second feet below what it is if Mr. Walton were not taking water that we developed, that belongs to the Tribe. I think that is the situation. We have to have that verified.

THE COURT: Mr. Roe, do you have a comment?

MR. ROE: The only comment I have, it seems to me that the Court might wish to consider suggesting to the two parties involved, agreeing on a ditch rider and watermaster who would be an agreed individual who would be authorized to ensure that no one is operating outside of the order of pendente lite, or whatever you signed last year, and kind of avoid this problem of having one of the adversaries going on one of the other adversaries' property. It worked out in other cases, in my own experience, rather well.

THE COURT: Well, I recognize that as a common means of solving one of these things. I had a question in my mind whether, for the relatively short

period of time, it justified the expense and the problems of appointing a watermaster. I would like to avoid it, but would hope -- I think one of the problems, I sense it, anyway, is the fact that for the present purposes, it may not be material how much water is being used by Mr. Walton, providing the agreed amount is passed over the granitic lip and is available for the fish and the lower allotments.

MR. PRICE: Yes.

THE COURT: I recognize that we may, and I have no way of foretelling this, that it may affect the available water for the Tribe on its upper irrigation, and I don't know whether that is an issue under your tentative agreement or not.

MR. VEEDER: (Nodding no.)

MR. PRICE: It wouldn't in the period that we are talking about until we come back to court, Your Honor. It may later on in the season, of course.

THE COURT: Well, I recognize that.

Well, gentlemen, we have to bring this to a head, and I wish we had some way to do this other than piecemeal, but one judge can only stretch so thin, and I'm having lots of difficulty with this and other cases, but I can't help that so I'm going to ask counsel to continue, the parties to continue under the stipulation

or interim order that was entered by agreement of the parties pending the hearing on July 7, and we will devote that day to hopefully concluding this matter in its entirety, as far as this level of the litigation is concerned.

MR. PRICE: Your Honor, would you define "this level"? Does that go beyond the preliminary injunction?

THE COURT: No, when I refer to, "this level", I anticipate some of the rulings that come out of this case are not going to be satisfactory to one party or the other and the Ninth Circuit is probably going to take a look at my rulings.

MR. PRICE: You anticipate both your preliminary injunction and the --

THE COURT: I anticipate getting rid of this case on July 7. Thank you, gentlemen. I will see you on July 7.

Court will be in recess until 1:00 o'clock.

THE BAILIFF: All rise. This court stands at recess.

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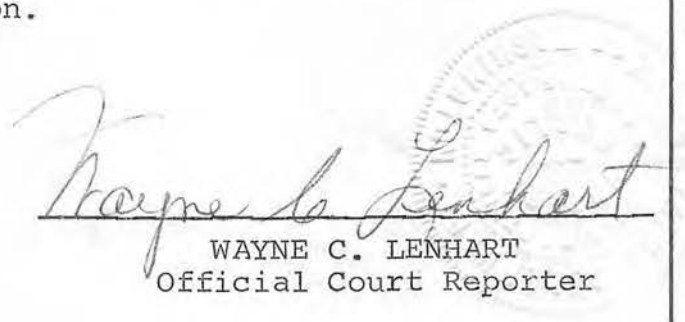
C E R T I F I C A T E

I do hereby certify that the foregoing is a true and correct transcript of my notes taken in the entitled proceeding and on the date stated.

I further certify that the transcript was prepared by me or under my direction.



WAYNE C. LENHART
Official Court Reporter

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