7-7-1978

Continuation of hearing on motion for preliminary injunction and final argument - transcript of proceedings volume XVI, pages 3011-3166

Wayne C. Lenhart
Court Reporter

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.

CONTINUATION OF HEARING ON
MOTION FOR PRELIMINARY INJUNCTION
and
FINAL ARGUMENT

TRANSCRIPT OF PROCEEDINGS

VOLUME XVI

PAGES 3011 - 3166

Spokane Calendar Fri., July 7, 1978 Neill, J.

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

BEFORE:

The Honorable Marshall A. Neill, Judge

DATE:

July 7, 1978

APPEARANCES:

For the Plaintiff Colville Confederated Tribes:

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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

BE IT REMEMBERED:

That the above-entitled action came regularly on for continuation of hearing on Motion for Preliminary Injunction and final argument on July 7, 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; the Defendants Walton

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

I N D E X

Morning Session
July 7, 1978
9:00 A.M.

THE COURT: Good morning.

COUNSEL IN UNISON: Good morning, Your Honor.

THE COURT: Well, this is the time set for summation on these two cases, the Colville Confederated Tribes versus Walton and the United States versus Walton. I don't know which is the best way to proceed. We have the plaintiffs on one side and the defendants on the other. Do counsel have any preference on how you want to proceed in this matter in argument?

MR. SWEENEY: Well, I would think the plaintiff should proceed first. I think counsel for the Colville Confederated Tribes should go first.

THE COURT: All right. I indicated in the second case you are the plaintiff. That is why I asked the question.

MR. SWEENEY: Yes.

THE COURT: All right. Well, then, Mr. Veeder, I think that will probably be the best procedure.

MR. VEEDER: May it please the Court, the primary, indeed the overriding issue, as the Colville Confederated Tribes perceives it this morning, is the condition that prevails in regard to the availability of water in No Name Creek as of this date, July 7, 1978.

Your Honor, may I inquire, what are the time specifications?

THE COURT: Counsel, because of the complexities of the problem, I do not intend to put any particular time on this matter. I think anything that you can tell me that would be of help, I'm going to listen to.

MR. VEEDER: And, I would be greatly pleased if Your Honor would ask questions, because it is most helpful to counsel.

THE COURT: Well, all right. Let me outline some of the points that bother me, that seem to me, at least, to be the issues that have got to be decided in this case.

Of course, first and primarily, I guess, I have got to make some finding as to quantity of water availability. In other words, how much water does the evidence show is available, what is the duty of that water as to irrigable acres, because the two have to be related in some manner. If the facts indicate there are excess waters, then we have the problem of what agency or what authority can allocate or control those excess waters.

I think another issue that bothers me is the extent of the treaty rights as to the water duty. Clearly, under Winters, it is irrigable acres, but there has been in this case the question raised as to whether that is enlarged by the Lahontan trout project. I have a question as to whether

that comes within the Winters doctrine or not.

I think we further have the problem, in the Walton case specifically, whether or not the Waltons succeeded to whatever rights an individual member of the Tribe might have had. This goes to the question you raised earlier, Mr. Veeder, are they reserved water rights for the Tribe or are they for the members of the Tribe, and specifically, may an Indian tribal member whose lands have been allotted to him, taken out of trust status, and then he conveys the fee, whether that carries with it his water rights, whatever those may be. If so, what right do the Waltons have to expand the then-existing irrigable lands, and, as I recall the record, at the time he took the property, I think they already had 35 acres, as I recall, under irrigation, or something like that. Now, can that be expanded within a reasonable time. I have forgotten the name of the case. There is one that talks about that.

Those are the matters that it seems to me we are faced with here. There may be others as we progress, but those are the ones that strike me at the moment as being the main problem.

MR. VEEDER: I observe Your Honor didn't refer to the jurisdiction of the State of Washington. I assume that that is --

THE COURT: Well, that comes under my comment,

"If there are excess waters, what agency or -- "

MR. VEEDER: I see. All right, Your Honor.

Well, basically, Your Honor, I think that it is imperative this morning that we first allude to the issue of the availability of water. I think that that is the momentary crisis, certainly from the standpoint of the Colville Confederated Tribes. We have, for that reason, placed upon the easel what we refer to as the Exhibit 25-1C. Now, that exhibit, on its face, discloses the ground water levels in the aquifer of 1976-77 and the elevations down to the arguments as they proceeded at the close of the case-in-chief.

As shown on 25-1C, there has been a dramatic and a critical decline in the availability of water in the aquifer for the remaining period. On June 16, -- I beg your pardon -- on June 26, because I knew that Your Honor from the first moment has referred to the availability of water as the most crucial, we filed what was referred to as Renewed Petition for Preliminary Injunction, and attached to that petition was data bringing down to date, to the date of the 26th, the continued precipitous decline of water in the aquifer. At that time, it was evident, and by affidavits we projected that in regard to the well which we have alluded to as Colville No. 2 well, we had projected that we would be out of water by July 10. We had also projected that by the middle of July, the Paschal Sherman well, which is the

northern well, would be in grave difficulty. The center well, which is Colville No. 1, we projected would be in serious difficulty before the end of the irrigation season. We would be forced greatly to curtail the pumpage from that well.

Our most recent data, Your Honor, is 7:00 o'clock this morning, and it is evident that the decline in the water table has continued at a most alarming rate. There has, however, been one change that I think is most significant. Mr. Walton shut down pumping on the 1st of July. He shut down, as we understand it, the diversion of water from No Name Creek as of the 1st of July. Now, whether he started up this morning or not, after 7:00 o'clock, I don't know, but what we do know is that the drain by Mr. Walton's diversion has reduced momentarily the threat with which we were confronted on the 26th. That threat was that we would have to cut off probably today or tomorrow. We think there has been a momentary reprieve because Mr. Walton's interference has been taken away as of this time. So, there is clearly established the immediate and direct and all-encompassing conflict between these two users, the Colville Confederated Tribes and the Waltons. That there is insufficient water in that aquifer is indisputable. There is not enough water there, so by probably Monday or Tuesday, the irreparable damage that we are now suffering will become as acute as it

was when Mr. Walton was pumping, as of the end of June, so there is no surplus water as of today.

We have had to cut out 30 acres of land in 903, Your Honor. One of the lower allotments has been shut down entirely. So we are today suffering irreparable damage. We are today, the Colville Confederated Tribes as of today, are losing revenue. They are losing prospects of hay for their operation of the Paschal Sherman Indian School. They are actually, from the standpoint of operations, being truly destroyed, insofar as their ongoing crops as of this moment. That is the circumstance that prevails as of this moment.

It is most significant, Your Honor, and while I am stating this, Your Honor, I hope that you let me file an affidavit nunc pro tunc on this because I am having an affidavit on these very points prepared to show as of this moment the serious circumstances that prevail, the critical circumstances. The momentary diminution of irreparable damage by Mr. Walton's shut-down in service of ground water pumping reflects, as I said before, the total and complete conflict between the Waltons and the Colvilles, and it brings us down to the crucial, to what I believe to be the over-riding legal issue, and that overriding legal issue is this: Where does the title to the rights to the use of the water in No Name Creek surface and ground water basin reside? Where does that title reside?

That brings us to the overriding legal issues to which you alluded, and we have in that connection, hopefully, and made it useful for Your Honor, we have summarized in a motion filed on June 8, 1978 by the Colville Confederated Tribes, attempted to bring these points forward for resolution, and, indeed, they follow very strikingly the legal propositions that Your Honor raised.

But before I go further, Your Honor, because I want to underscore a point of great concern stemming from your statement, you stated that there were 35 acres that was being irrigated when Mr. Walton acquired the property. I respectfully submit, Your Honor, that I have no recollection of 35 acres, but more importantly, I believe, from the standpoint of the legal issues presented here, the Hibner case, to which I think you were alluding, would not encompass the 35 acres if there were such used. I don't recall, as I said, that there were ever 35 acres used by anyone antecedent to the acquisition in 1948 by the Defendant Waltons. I really don't think there were. But I'm not going to argue that point because I would have to check it out, but I don't believe it is, but that would be the situation. But we do know, that the Indians, antecedent to the sale of their property to non-Indians, -- and I think it is important that Waltons bought from non-Indians. They didn't buy it from Indians -- at that time, when the lands left the Indian

ownership, there was no diversion or use of water by the owners of those three allotments. No water had been diverted and used by the Indians at that time.

THE COURT: Counsel, assuming that is true, and I don't recall all of the facts until I review them, but if that is the situation under Hibner, would the non-Indian grantee from the Indian have a reasonable time in which to exercise the rights he might have, that the Indian might have?

MR. VEEDER: I don't think so, Your Honor. I don't think so.

THE COURT: I think that is one of the issues I have.

MR. VEEDER: There are two phases there. The first issue in Hibner, which I respectfully submit has no application here because Hibner is so vastly different. Bear in mind these allotments in Hibner were all off the reservation. They were subject to a separate agreement in regard to water rights. Those Indians had been using some water off of the reservation, and so far as I know, the Shoshone-Bannocks, the Treaty of 1868 no longer pertained to them because it was, really, overruled by the 1906 -- I mean, made no longer applicable by the 1906 agreement that brought -- I beg your pardon, it was the 1898 agreement, that reduced the reservation and took these lands out of the reservation, the Fort Hall Reservation over here in Idaho.

So there are those drastic differences.

Now, I have answered what I believe to be the correct law in regard to the first aspect of Hibner. One, there was no utilization by the Indians when they sold the land.

Now, secondly, the issue arose in Hibner in regard to what are the rights of the non-Indian purchaser after he buys these lands that were outside of the reservation, and which were subject to a separate and distinct agreement? And the court said that these lands outside the reservation would have application, the state law would have application, and here's a unique thing: In the Hibner case, as is true in regard to the State of Idaho, the statutory procedure for the acquisition of rights of use of water, it is not a strict appropriation state. In other words, you can acquire rights to the use of water in Idaho by diverting and applying the water to beneficial use without complying with state law. After 1917 in the State of Washington, that is not true. In 1917, the State of Washington, and I don't -- it is a little strange for me to be quoting the law to you, Your Honor, who has been on the Supreme Court of the State of Washington, but I'm sure that is the case, that in 1917 they came down with what they called a strict requirement for compliance, and there was no strict requirement by purchasers of the land. It was not until, if memory serves

me, Mr. Walton bought his land on August 16, 1948. Now, he knew he didn't have a water right, so he went down to the state eight days later, on August 24, 1948, and filed an application to get a water right. Now, that is the situation, Your Honor. Mr. Walton, the first act after title passed to him, was to undertake to comply with the state law, and the immediate issue there, and I think it is a crucial issue, and I think Your Honor put your finger on it immediately, did he acquire a right to use of water by diversion use of water after, and by complying with state law after 1948?

We, of course, say that the state has no jurisdiction whatever. We say that that is the situation, and we rely upon an unbroken series of Ninth Circuit cases on that proposition. I think the first case that is important -- that was the Montana case of Winters -- where the Ninth Circuit said the state cannot permit the acquisition of rights to use of water that would interfere with the Fort Belknap Indians that were living on the Milk River.

THE COURT: Counsel, on another point, on Monday of this week, the Supreme Court came down with a case, and none of us have the opinion yet, but there is a summary of the opinion in the Wall Street Journal of Monday and Tuesday.

MR. VEEDER: That is the case in the Central Valley of California?

THE COURT: No, according to the news release, it had to do with what may be a change in the Supreme Court's opinion as to the rights as federal versus state on public lands. Now, it's apparently not a treaty case, and so it may not have any bearing here. I know counsel and Court have not even had a chance to see the opinion, but I think it has got to be read to see on what you are talking about right now.

MR. VEEDER: May I --

THE COURT: As to whether the state has any rights in this matter. If the press releases are correct, there has been some modification of the prior rulings on the inter-governmental rights on water in public land, non-treaty. It may have nothing to do with it, but I think, when we finish this today, counsel ought to have an opportunity to read that case and advise what they think.

MR. VEEDER: Can I just make a run at those two cases. There are two cases that came down. I'm not sure whether Your Honor is referring to the Mimbres.

THE COURT: That is the one.

MR. VEEDER: That is a national forest case --

THE COURT: Right.

MR. VEEDER: -- I hope Mr. Price doesn't mind -- with which I have some familiarity. It is a situation there, totally different from this situation. In New Mexico,

the issue that was there, when they withdrew the lands for the national forest, did they reserve rights in the national forest for purposes of recreation, see? Now, that is totally, if I may respectfully submit, Your Honor, different from this situation here.

THE COURT: Well, I merely bring it up because, until counsel has a chance to read the opinion and the Court can, we don't know, and I won't prejudge that.

MR. VEEDER: Well, we had followed that case very carefully and I have to admit that I have been traveling and I didn't get a copy of the case, but I do know what went before the court and I do know what was reflected there in the Mimbres case, M-i-m-b-r-e-s. I don't know how you pronounce it in Spanish. But I don't believe that that situation would have anything to do with this case because, Your Honor, I think we better take a look at the overall picture and about what transpired in the Winters situation, because the reason for the establishment, the basic reason for the establishment of the Colville Indian Reservation was to provide a permanent home and a biding place for the Colville Confederated Tribes, and as Winters has said, and the Arizona v. California said, these reservations of right to the use of water were not limited to the time of the reservation, but were for the future, and, more than that, Winters has express reference to the fact that the Indians

had the rights for agriculture, grazing their herds, or the arts of civilization. In other words, the Winters doctrine conceptually looked to the reservation as a place for human beings to reside and whatever the Mimbres case says, I submit to Your Honor that it differs drastically from what the Colville Confederated Tribe needs and requires today. Nor do I think that there is a single authority that supports the concept in regard to an Indian reservation that, within the scope of the rights, whatever the measure should be here, that they would be restricted in their use of water, and I think that that is what Your Honor is referring to, what were the concepts when the Colville Indian Reservation was created, and what would be the effects of a change in use.

Because Your Honor had referred specifically to that issue, I went back and made a review of the very earliest cases that I could find and I realize that I'm not going to try and file another brief or anything, but I did go back to the early cases in the New England States, and some of the cases turned on agreements that were entered into during the Revolutionary War, and I find absolutely not one single case that says that there could not be a change in use in regard to the case of water. In other words, I do not believe that there is any kind of a straitjacket concept that would say that the Colville Confederated Tribes would be limited to the utilization of waters as of 1872, and the only limitations

that I have been able to find, Your Honor, in this connection are the specific limitations that are imposed by the police power of the state in regard to the citizens of the state who come within the purview of that police power.

It is extremely important, I believe, to emphasize here, Your Honor, that the interests of the State of Washington does not pertain to title. It is an exercise of the police regulations over the citizens that they have control and not a granting of title. Now, we haven't put that into our brief, but Your Honor has raised the point that I think is significant here, that, what does the state do? The state is simply outlining the basis upon which rights to the use of water can be acquired, but the title passes from the United States of America, pursuant to the conduit of state law, in regard to unappropriated waters on the public lands.

I think that that is a drastic difference than the issue of title and, of course, I agree with Your Honor, in the Mimbres case that is important.

Now, there is another case that I will just allude to very rapidly, and that is the case in the Central Valley of California, where the headlines, I think in error, said that the states have control over water on a reclamation project, and certainly that has no application here. That was limited to the 1902 Act, and the Central Valley Federal

Reclamation Project.

So, I have touched upon those crucial points, Your Honor, as to what we are looking at, and what we are concerned with here, as to who has the power and the control over these rights to the use of water, and it goes back to the crucial issue, Your Honor, the crucial issue of, where does the title of the rights to the use of water at this moment in the No Name Creek Basin reside? Where does that title reside? And I respectfully submit, it is the position of the Colville Confederated Tribes in this case that the title was first vested in the Tribes on July 2nd of 1872. That is when the reservation was created, and predicated upon the concept of the Winters doctrine, the full equitable title passed to the Tribes. That is another matter that we briefed extensively, and I don't believe I need to go into it.

So, in connection with the correlative principles of law, however, that are governing here, when did the title pass out of the Colville Confederated Tribes, if indeed it did, and we deny that it ever passed out of the Tribes after it once became vested. We have cited extensive law to Your Honor in our briefs, and I do not need to reiterate them because you have the briefs before you, that absent specific language from the Congress of the United States, the title, once having vested in the Colville Confederated Tribes,

continues to reside in the Tribes. And here is a crucial issue that I respectfully submit must be looked to.

We put in our prima facie case, the Colville Confederated Tribes did, put in their prima facie case as to title when there was offered in evidence the executive order of July 2, 1872, and it is uncontested by the Department of Justice, by the State of Washington, and by Mr. Walton's briefs, that indeed the Winters doctrine is applicable to these rights.

So, I respectfully submit, the burden moved to them to show that in some manner the title moved out of the Confederated Tribes, apparently they say into the allottees, and from the allottees into the non-Indian predecessors of interest to the Waltons.

Now, I have searched the law most carefully on this proposition, and there is not a single case in point on the subject, so I think there are two controlling statutes to which we should turn our attention.

The first is 25 U.S.C. 194, and that 25 U.S.C. 194 says this: that once the Indian has proved the prima facie case, the burden moves to the white men, and that is the language of the statute, to prove that in some manner, the Indian has lost his title, and I respectfully submit there is not a scintilla of evidence or word of law that shows that the Defendant Waltons have sustained their burden of proof

here under that statute.

The next statute is 25 U.S.C. 381, with which we are very familiar, and we have argued it before, and 25 U.S.C. 381 precludes the vesting of title in the Waltons because, as we have argued before, it says that the rights to the use of water in areas such as the semi-arid Colville Indian Reservation, those waters will be allocated by just and equal distribution pursuant to rules and regulations promulgated by the Secretary of the Interior, and the crucial and controlling issues are the terms, a just and equitable distribution among the Indians residing on the Colville Indian Reservation, and that language, I believe, is controlling here, I respectfully submit, Your Honor. There could be no just and equal distribution of the available water supply if the rights had passed to the allottees pursuant to the 1887 Act, and pursuant to the 1906 Act, making it applicable to the Colville Confederated Tribes.

If I may take a moment, I think that I can -- if I were taller, I would be able to. I have a good man that is six-foot, two or three. That is what we need.

(Turning to exhibit on easel.)

Your Honor, we are confronted today with the very issue that I am talking about, the very premise that I am talking about.

The only act that pertains to Indian rights to the

use of water and the Allotment Act and the Act of 1906, the only language is what I just recited to Your Honor, a just and equal distribution among the Indians residing on the reservation.

Now, we have here Allotment 526 and 892. Those are the Colville allotments north of Mr. Walton's property. Now, had there been an investiture of title to water as to the ownership of Allotment 526 and 892, there could be no just and equitable distribution because a just and equitable distribution is really a month-by-month allocation just like we are confronted with today.

If 526, being the uppermost allotment, had a vested right to a specific quantity of water, he would say, yes, I'm going out and use that water on this land and I'm not going to share it with another allottee. So 892 and 526, which overlie the No Name Creek groundwater basin, would have a preeminent right over the 901 and 903, who are down-stream from Mr. Walton. There could not be a just and equal distribution under those circumstances.

THE COURT: Well, Counsel, taking that same theory, if each Indian who is allotted certain land has an allocable right in the water under that statute, and if there is a shortage of water, then under the allocation and the allotment theory, all irrigable acres would have to share in the shortage. Wouldn't this follow?

MR. VEEDER: Within the No Name Creek basin.

THE COURT: Well, I'm talking about this basin, of course.

MR. VEEDER: Yes.

THE COURT: All right. Now, if land has a value only if there is water on these semi-arid areas, that is --

MR. VEEDER: I think we will take that --

THE COURT: -- that is what we are fighting about. How can you say, then, that an Indian allottee who has his allocable rights, proportionate right of water in the basin, cannot pass that on to a non-Indian? If you say that, you are taking away one of his basic rights. In other words, --

MR. VEEDER: To a just and equal distribution?

THE COURT: His land is rather valueless if he cannot transfer it without a water right.

MR. VEEDER: Well, Your Honor, what Your Honor is -- well, I have to disagree with it for this reason, Your Honor: It is very obvious to me that if Mr. Walton purchased a water right, which I deny, then I think there could have been ruling by this Court, -- well, when was it? -- 1970, saying it is quite obvious that these three allotments take from the Indians all of their water rights because there is not enough water in this aquifer for the rest of

them. So the Indian who immediately sold his water right, at the same time dried up 526 and 892 and 901 and 903. That would be the situation that would prevail today. So, Congress, in its wisdom, said this: We are not talking about allottees in regard to water rights, we are talking about Indians residing on the reservation. That's what we're talking about. And that being the case, it is totally consonant with the idea of a permanent home and a biding place because of those three allotments that went out of ownership of Indians in the early '20s, could take from 901 and 903, which were operating at the time -- they were using water at the time -- but when they passed out of ownership, the concept that Your Honor advanced would result in drying up those allotments. It would result in drying up 526 and 892 because there is not enough water. We have proved that consistently since 1975. There is not enough water for all of them, and a just and equal distribution of water among the Indians is the only fair and practical way of handling these rights to the use of water. It is the only way it can be done and have these lands habitable for the Indian people. There would be no water in here if there passed to each one of the Indians a quantity of water sufficient to meet his needs because the moment he sold that land, the very second that he sold that land, he would deprive the other Indians who are forced to participate in this short supply of water

or die.

THE COURT: Well, I don't know that that necessarily follows because it would seem that if that statute can be construed to include the successor of interest to an Indian, then that successor may have to share in the allocation of the shortage also because certainly all the Indians who still reside on the reservation may have to have the water allocated, proportioned, as you have indicated. The thing that is bothering me is whether or not you can say to that statute that the Indian who, prior to the time of the Allotment Act, simply had an inchoate or a right in common with all of the rest of the tribal members to use water for their reservation purposes, to say that the Congress intended by that statute to deprive the allottee of any water simply takes away that Indian's right; doesn't it?

MR. VEEDER: No, Your Honor. I don't think Congress said we will deprive the Indians of the rights of the use of water. It says they will have a just and equal distribution of the water. There is a vast difference. Congress, may I respectfully submit, 10 years earlier, by the Desert Land Act, had taken away from the public lands all rights to the use of water, so when a man got a homestead he didn't get any water rights at all. Didn't get any. Stripped every drop of water from every homestead land after 1877. So, there is nothing unusual about Congress' saying,

we will control the water rights with one hand and control the land with the other. Congress knew what it was doing, it knew its language, it said specifically that it is the Indians who will participate, not the allottees, and here is the crucial point: An Indian allottee on the land like we have now, Sam Sampson, who is the owner of 901, and his mother, are there. They are willing to participate with the other tracts of land on a just and equal distribution. But there could be no just and equal distribution, could be no just and equal distribution among the Indians if the Waltons under that statute have any rights to the use of water. There couldn't be.

I think it is very significant, Your Honor, though, because you have raised the point that I want to allude to. I have read very carefully the cases and the briefs by Mr. Price. He does not say the Waltons have the right to monopolize the water, although they have been monopolizing it, though, since whenever they started irrigating in the '50s, they have been taking all of the water. I think that is most significant. But Mr. Price doesn't say that 526 and 892 and 901 and 903 are not entitled to something. So, we are in this position in regard to the preliminary injunction that is so much in my mind this morning, is that Mr. Walton has not come forward and said one thing about what he would share. This is extremely important. Now, I am not

equivocating on the point. I am not backing off in any sense of the word that we should share with the Waltons. We don't -- I mean the Colvilles -- but I think it is most significant that there is not a single brief that has been filed that says that Walton can continue to do what he has been doing, and, a fortiori, I think it is extremely important, moreover, that Mr. Walton has been taking the developed water out of the stream and diverting it and using it, and I mean the water that has been pumped, very costly water, has been used last year and this year, and I think we have to have a restraining order against that.

But let me continue for a moment, Your Honor, in regard to some recent cases that I think are of overwhelming importance. I think that the case of what we call the Hill case, the TVA case, and the cases that have been cited, are of extreme importance in regard to this litigation. They are important from two aspects.

The Hill case that came down on the very day of our last argument here, the Supreme Court came down and said this: Yes, the Endangered Species Act can stop a hundred-million-dollar project because of the endangered species, and that certainly supports our position in regard to the use of water for the Lahontan cutthroat trout. But I think far more important, from the standpoint of the issue that Your Honor has raised, is the language of the Supreme Court in regard

to the interpretation of 25 U.S.C. 381. There were arguments very similar to what Your Honor just raised, which is a valid argument. Stop and think what this means from an economic standpoint. Mr. Walton without any water will have dry land because certainly the Colville Confederated Tribes are utilizing all of the water now that they can and they would utilize all that Mr. Walton has been taking and still be short of water. We know that. But the Supreme Court, in the Hill case, said this, with great specificity, it is not for the judiciary to rewrite the statute, and I respectfully submit, Your Honor, in response to the point that you just made, that Your Honor would be acting in the legislative field if we attempted to change the language of 25 U.S.C. 381 because 25 U.S.C. 381 is clear beyond question. It is limited strictly to Indians. Now, I cited the authorities in there and I don't have to go through the brief again, but --

THE COURT: Well, Counsel, I am in absolute agreement with what you said about what the Supreme Court said in the TVA case, and as unsound, socially and economically as the result is, I agree that it is a correct decision that the judiciary cannot say that the Congress did not have the power to say what they said, but I don't think that is the problem I face here.

I have a statute facing me here, which, as you

indicated, talks about allocation of water to Indians. The question that I'm troubled by is whether or not we are not taking away the right of an Indian if we take away his right to transfer his share of that water. That is an Indian's right under the Allotment Act. Prior to the Allotment Act, we wouldn't have this problem. Whatever water was there was allocable in common to the residents of the reservation, but Congress came along and said, now we're going to change our policy on the reservation. We are now going to let an Indian actually own his proportionate share of the reservation.

MR. VEEDER: That's right.

THE COURT: And it seems to me that one of the problems I face is: Did Congress intend that that Indian allottee be deprived of a very important right of his share of the reservation if you take his water away?

MR. VEEDER: Your Honor, I don't -- I respectfully submit that Congress had two things at which it was looking. It was looking to the fact that it created a permanent home and biding place by the reservation, and everything to the contrary notwithstanding, certainly the same -- and the other cases say that -- precisely in regard to the Colville Reservation. But it said this: We know -- and this is the language -- it says, we know that where there is a shortage of water, there has to be a just and equal distribution or the one who gets the water first is going

to kill off the rest of them, and that is the situation. Assuming there had been no delivery of water -- sale of lands to the Waltons at all, the first allottee would be able, in the periods of shortage, to dominate all of the stream, and the other Indians would be dried up, and the rationale of 25 U.S.C. 381 says, we are not going to permit that. If an Indian is residing on the reservation and irrigating land, he will be entitled to a just and equal share of that water.

THE COURT: Isn't there a reasonable middle ground, and that is that, if the Indian allottee has the right to transfer his share of the available water on the reservation under 381, that right is also subject to allocation in years of shortage, which Mr. Walton would have to share in that shortage? In other words, it isn't an absolute right, it is a right only to obtain the same right that his Indian predecessor had in that same land.

MR. VEEDER: In other words --

THE COURT: Isn't that possible?

MR. VEEDER: I truly don't think so, Your Honor, I truly don't think so, for this reason: that the situation that we are confronted with as of this moment is this: that when Mr. Walton shut down his well, there was an immediate recovery in the wells north of him. There was that immediate recovery. When Mr. Walton throws his well on again,

and I assume that is going to occur, that we are going to find that he is going to dry up 892, probably, because he is sitting at the end of the aquifer. Now, if that occurs, there certainly is no just and equal distribution there, and there has been no proposal by anybody as to what would be a just and equal distribution, but, once again, I don't want to have this argument interpreted as an agreement that anything passed to Mr. Walton.

THE COURT: I understand that.

MR. VEEDER: But what I am saying is that, if Mr. Walton had bought a homestead, he wouldn't have gotten a drop of water, and when Mr. Walton bought these three allotments, in his own mind he didn't think he got any water. What did he do? He went straight down and tried to get an appropriation from the state. He was in error, but he didn't think he was getting any water or he wouldn't have done that. I think that this is extremely important. Those dates are very important. Mr. Walton bought the land on August 16, 1948. August 24, 1948 he went down and tried to get himself some water. That is what he did. He didn't think -- I have been looking at his appraisals. I have been looking at the price that he paid. I studied it carefully, and I do not find an evaluation of that land as irrigable land, and I respectfully submit that when this gentleman, who was an assessor, was on the stand for the defendants, he was unable

to tell the difference between an appropriative right and a Winters doctrine right, and I find nothing to indicate, not one word to indicate that when the Waltons acquired this land that they paid for irrigable land, because the land wasn't being irrigated, as far as I can tell from the record, and second, it doesn't appear that the appraisal,when the land went out of the ownership of the Indians who are owners, that they got any more money by reason of the fact that the land was traversed by No Name Creek. I find not one scintilla of evidence to support that, and I don't find any evidence in the record on that. So, whatever may be the economic concepts, which are perfectly proper, that Your Honor raised, I find nothing in this case to support the concept that he paid extra money because it was land with water. I don't find any.

But I reiterate that it is the usual and not the unusual that when a man gets title from the national government, that he doesn't get any water rights. I happen to know that very well because my family has got homesteads in Montana and I was raised on one, and I will guarantee you, we didn't have any water. So there is nothing unusual about that situation, that a man gets some land and he doesn't get any water and he doesn't get any water unless there is some available. So, we are not looking at anything unique or anything harsh, but we are looking at the price -- the

precise language of 25 U.S.C. 381.

Now, I have been watching my watch, Your Honor, and I see that I have run on here for almost an hour, but there is one final thing that Your Honor has raised, and that is about using the water for the Lahontan cutthroat trout.

It is the position that we are taking here, Your Honor, that the Colville Confederated Tribes are permitted to use and authorized to use the water, the title which resides in that, for any beneficial use, and we feel, Your Honor, that that encompasses, particularly under the Endangered Species Act, the right to use water to provide a habitat for the Lahontan cutthroat trout to survive.

Now, the use of that water today is of paramount importance because the fish have spawned, the fry, some of them have hatched and others are hatching as of this moment. Maybe that is an overstatement. I'm not out there. I don't know if they are hatching as of this moment, but we do know that they were hatching as of yesterday, and the important thing is that they have to have water down there, and it has to be of a temperature that is adequate to keep it from destroying them, so we are taking the position here, Your Honor, that the matter of title that continues to reside in the Colville Confederated Tribes, and no one has shown that it has moved out, is that they can utilize that water, particularly for an endangered or threatened species, and

that the Hill case to which you have just alluded, and the TVA case, is extremely important in that connection. It is of overriding importance because of the national policy in that connection.

Now, Your Honor, I am hopeful that I will have a chance to respond as the plaintiff for at least a few minutes.

THE COURT: All right.

Mr. Sweeney, you are the plaintiff in the companion case. Maybe you ought to get your oar in and then we will get to the defense side of the whole matter.

MR. SWEENEY: All right.

MR. PRICE: Your Honor?

THE COURT: Mr. Price.

MR. PRICE: May I speak with Mr. Sweeney for just one moment, please.

THE COURT: You may.

(Off-the-record discussion between counsel.)

MR. PRICE: Thank you, Your Honor.

MR. SWEENEY: Well, Your Honor, on behalf of the United States, I will try to be brief.

First of all, I would say that the Government finds much to agree with in the basic principles enunciated by Mr. Veeder. We also find in a number of areas that we disagree with Mr. Veeder's analysis of the law and, as a

matter of fact, with some of the facts, but particularly the law as it applies to the water rights to the No Name Creek basin.

First of all, those two cases decided by the Supreme Court on Monday, the Mimbres Valley case, I haven't seen that decision; however, I am aware of the New Mexico Supreme Court decision, which was upheld by the Supreme Court, and that dealt with -- it was a water adjudication proceeding in New Mexico concerning the Gila National Forest and rights reserved for the National Forest, and the Supreme Court of New Mexico held that there were rights reserved by the United States when it created the National Forest, whatever year it was, 1907 or something like that, for the specific purposes enunciated in the Forest Act, the Basic Organic Forest Act, which were watershed protection, production of timber, and those matters. However, the Government contended that it also had a right to a reserve right dating back to the date of reservation of those lands for the National Forest for grazing purposes, for wildlife protection and also for recreation, and the Supreme Court of New Mexico disallowed those rights to the United States, and, apparently, the United States Supreme Court has upheld the Supreme Court of New Mexico in that regard, but it doesn't have any relationship to the establishment of rights on an Indian reservation through a treaty or executive order.

Now, the other case that was decided is the new Melones Dam, which is U.S. v. California, out of the Ninth Circuit. It was also decided on Monday. That involved the Section VIII of the 1902 Reclamation Act, and whether or not a state, in allowing the Bureau of Reclamation to appropriate waters within a state for a reclamation project, would be subject to conditions imposed by the state. The Ninth Circuit -- well, first of all, the District Court held that the United States was not held to such conditions. The Ninth Circuit also held that the United States could not be held subject to conditions imposed by the state, based on Hancock v. Train, as a matter of fact. It has gone to the Supreme Court. The Ninth Circuit has been reversed, but strangely enough, -- I received about half of that decision in a Telefax yesterday from Washington. It is almost indecipherable. So I am not going to offer it to the Court, but as a matter of fact, just as an academic interest in some other cases that occurred before the Court recently, Hancock v. Train was not even mentioned by the Supreme Court in reaching its decision. It went entirely on the administrative history and the background of the Section VIII of the 1902 Act, which does require compliance with certain state procedures for the Bureau of Reclamation to initiate a water project. Now, that case, I think, would have application probably to Kittitas v. Sunnyside, to Acquevella. It would not,

in my submission, and I haven't seen the case, but from what I understand and what I can read from the part I saw, it would not have an application in this case, although it does speak to federal-state relationships in the West about water rights.

Now, the Court outlined a number of points that you felt should be addressed by the parties in this case.

Now, the finding as to the water availability, as Mr. Veeder has pointed out, I think that under the present state of affairs, and as it has existed since the Tribe embarked upon the program of development in 1975 and culminating now, it is obvious that there is not enough water available for the use of all of the parties to irrigate the alfalfa fields that are available. You have Mr. Watson's testimony, in which he says a firm supply of 550 acre feet will come nowhere near being sufficient, not only for both Walton and the Tribe, which totals about 333 acres, 228 acres for the Tribe and about 105 for the Waltons, and based on a 3½- to 4-foot, acre foot, duty, it wouldn't cover that amount. Mr. Jones figured 700 to 850 acre supply, and, as a matter of fact, so did Mr. Cline figure about an 800-acre-feet supply which would also not be enough, then said that 1100 could be garnered out of the aquifer if the irrigation practices were changed and there was a more heavy stress put upon the aquifer, but that would be looking at a very

speculative situation and not a situation that actually exists. So I have to agree that at this point in time the evidence certainly shows that there is not enough water available within that No Name Creek Valley and No Name Creek stream and that No Name Creek aquifer to supply all of the needs for irrigation purposes for Mr. Walton and for the Colville Tribe.

Now, there was quite a bit of discussion addressed by you and Mr. Veeder and it is included among your points as to the rights that Mr. Walton may have received when he acquired the lands in 1948 which composed the three allotments in the No Name Creek Valley. Now, the position of the United States on that point has been outlined in the briefs, and I will just paraphrase it, but we are adopting Hibner, the rationale of Hibner, to the extent that it holds that a successor to an allottee does get the right to the use of water to the extent that that water right was exercised by the Indian predecessor in interest at the time these lands departed from trust status. I think that is almost compelled by the language in U.S. v. Powers, where it alludes that there is a right. It identifies -- I shouldn't say identifies -- it states there is some such right existing. It did not define the right or establish a standard to measure the right or how it came about, but it did say that there were such rights, in referring to, well, particularly to 381.

The Government also says, well, based on that, Mr. Walton would have a right to share in the reserve water rights for the Colville Tribe and its allottee to the extent that water rights were put to a beneficial use upon his three allotments during the period of its trust status. It would also, in our view, make those rights subject to the power and authority of the Secretary of the Interior to make a just and equal allocation of water among the Indians on the reservation, because I think it takes a very small jump and it's a matter that is constantly appearing in real estate law that you take subject to the rights that were already there. If the rights that were already there were subject to a power, in this case, as of the Secretary of the Interior, to control the allocation of waters if necessary, then your rights to the use of those waters are controlled by that.

Now, where the Government departs from Hibner, because Hibner was two-pronged, and Hibner said that, in addition to the rights that were being exercised by the Indian predecessor in interest at the time the land left trust, the successor would have a right to the use of water that he would put to a beneficial use within a reasonable time thereafter. It didn't define "reasonable time". Now, we believe that if, or I should say the United States' position on this is, if waters on the Walton allotments, for

instance, were put to a beneficial use after the land left trust status, they would enjoy a right to the use of that water to the extent with a priority date of the date they were put to such beneficial use and to the extent that they were put to the beneficial use. The difference is the priority date.

THE COURT: Why wouldn't that, if that analysis is sound, why wouldn't that priority date go back to 1872?

MR. SWEENEY: Well, because, Your Honor, it would be inconsistent with the basic theory of reserved rights for Indians. In July of 1972 (sic), the Colville Reservation was reserved, along with its waters appurtenant thereto, for the use of the Indians. If you extend the priority date of 1872 to use by a non-Indian after it had gone out of trust, you would be, really, going beyond the purpose for which the lands were reserved for the public domain to provide an abiding place for the Indians, and it would be inconsistent, Your Honor, in our view, to do that.

Now, one of the difficulties in this particular case is the fact situation that we have concerning the devolution of the three Walton allotments out of trust status and through various conveyances into the ownership of Mr. Walton. As far as I can see, the record has nothing to show that there was any use of water on these lands while these three allotments were in trust status, and they left trust

status in the 1920's at various times. Testimony that I recall from Mr. Walton is that when he came and inspected the property in 1948 -- now, at that time it had been owned for a period of 20 or 25 years and been out of trust for a period of 25 years -- he said that there were about 32 acres of land that were being irrigated and he immediately applied for a state certificate to expand the amount of land that could be irrigated and received a water right, I think, of 65 acres from the state, a certificate. But that, in particular, is the Government's position on the rights the Waltons succeeded to.

Now, as to the Lahontan trout case, we take the position that, as Mr. Veeder said, there is no straitjacket on the rights or the uses to which the Indians can put water if they have a right to the use of such water. However, the reserved rights are limited by the uses to which the reservation was created. I don't believe, or we take the position that it is unreasonable to believe that the Colville Reservation was created and reserved from the public domain with an intention to provide a habitat for a non-indigenous fish. However, we do say that the Tribe, and its allottees, in its wisdom and in its discretion if it wishes can take waters, amount reserved, for these lands which were measured by the amount of waters necessary to irrigate the irrigated acreages and utilize a portion of those waters for such a

fishery.

Now, I would point out one thing about the Hill case, that it takes us out of the endangered-and threatened-species thing. The Hill v. TVA specifically applies 16 U.S.C. 1536 of the Endangered Species Act, and in that case, there was a specific finding by the Secretary of Interior that this particular stretch of whatever river it was was a critical-habitat area, and there is a specific regulation which sets forth the requirements for the establishment of critical habitat, and that has not been done here. It hasn't been established under the regulation of the Secretary of Interior under that Act, that this is a particular critical-habitat area.

Now, the Court asked Mr. Veeder that, wouldn't these lands -- well, the issue you presented is whether, after the lands were reserved, and apparently the lands and the water appurtenant to the reservation were held in a communal situation, and then we had the Allotment Act, and lands were apportioned to individual Indians and thereafter were held by the United States in trust for a particular Indian and not for the tribe, wouldn't it render these lands valueless to the individual Indian during that period when that was available if those lands did not receive a right to share in these waters, and it is the position of the United States that the allottees did get that right to share the

waters, and that that Indian allottee had the right to convey his right to share in the waters to a non-Indian, for instance. However, when the non-Indian acquired those lands as to the water rights existing at that time, it would be subject to the requirements or strictures of 25 U.S.C. 381.

Now, the final issue, I think, is the authority to regulate the use of these waters as between the United States and the State of Washington. As pointed out in our brief, Your Honor, the State of Washington's right to control the use of water on land or control land appears, really, from the basic separation through the Desert Land Act, which refers to public land, and the state, when it becomes a state, obtains the power and authority to regulate uses on lands and waters within those lands, subject to that statute, but the lands within the Colville Reservation were never subject to the Desert Land Act and never came under the jurisdiction of the state, and it was also set forth in the Enabling Act and in the Constitution of the State of Washington that it would not pertain to jurisdiction over Indian land, and even Public Law 280 does not pertain to water rights on Indian land. And, finally, it would be an anomaly, indeed, if the state would be allowed to control the use of water, even by non-Indians, within the federal reservation or Indian land because all water rights are correlative, and that is perfectly set forth in 381, which speaks of the Secretary's power to make a just

and equal allocation of water because when you are talking about a water right, you are talking about a water right as against someone else, a competing situation, and there should only be one entity to do that, and it is respectfully submitted that that entity is the Secretary of Interior in this case.

That would conclude my remarks.

THE COURT: All right. Before we start what amounts, I guess, to the opposition side of this, let's take the midmorning recess. Court will be in recess about 10 minutes.

MR. VEEDER: Your Honor, just one moment. Mr. Dellwo advises me that he has both of those opinions, and I have sent to his office to get them.

THE COURT: Good.

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

(Morning recess is taken.)

THE COURT: Mr. Price, do you want to lead off, or do you want Mr. Roe or Mr. Mack, whoever is going to?

MR. PRICE: Well, we have a little controversy in that regard, but I know I will be so confused by the time he is done that I would appreciate the privilege of going before he does.

THE COURT: You may proceed, Mr. Price.

MR. VEEDER: Does that go into the record?

MR. PRICE: May it please the Court and counsel, I would like to state, first off, that I am not a good contemporaneous speaker and I have some notes that I would like to allude to, but before I get into those, I would like to respond to some of the comments by Mr. Veeder and Mr. Sweeney. In addition, I should point out to the Court that I do not have access to a Telefax machine, nor do I have personal contact with anybody at the U.S. Supreme Court, which Mr. Roe will probably assert he does, nor do I have personal involvement in any other Indian water rights litigation that would give me an insight into the California and New Mexico cases handed down Monday, but I am undaunted in that I do have a newspaper clipping, about an inch by an inch, in which Charlie Roe is quoted as saying, "Based on these cases, the State will win every point in every case they are litigating with the federal government."

THE COURT: Mr. Roe is an eternal optimist.

MR. PRICE: So, I will proceed forward on that basis.

This case reminds me of the law school situation we were presented with, where six boys on an expedition were trapped in a cave. The rescuers found them, were able to make voice communication with them, and the engineers calculated that in the time that it would take to rescue the boys, there would not be sufficient air in the cave in which they were trapped for them all to survive. Thereupon, the six boys elected to -- and it was also calculated by the engineers that five of them could survive in the time it would take to rescue them. The six trapped boys then set about in a plan by lot to select one of them who would be disposed of, in hopes of the other five surviving. One boy was chosen, and he first agreed that he would be killed, and then, just at the moment that he was to be disposed of, he changed his mind and decided that wasn't a good idea after all. The other five boys went ahead with the plan and he was disposed of. The boys were rescued, and they were tried for murder. And the story has five opinions written by five different judges as to how they would handle that situation, in terms of, would the boys be convicted guilty of murder, or was there some overriding considerations that would exempt them from a conviction?

I find this Court in no less of an enviable position in trying to decide the myriad of intricacies presented to you in this case. I also hope that the Court recognizes that it is no less easy for us counsel to try and come up with some answers to assist this Court in making a competent decision. And in that regard, I am not as sure of myself as Mr. Veeder. I don't count myself as lucky as him. I don't stand before you professing that the Walton's have an absolute right to all of the water to do anything they want with. This is a difficult case for the Waltons to come forward with. They have lived with the Indians. They have been raised with them. Our position is that we do have to share. I do not believe this world can any longer abide the position that it is all mine or it is all yours, and we are going to have it one way or another. We are all in this together, whether we be American Indians, Blacks, Irish or whatever, and I'm hopeful that that is what separates this country from all other countries, that we have sets of laws which are not an end in and of themselves. We have laws to promote justice, to try and enable human beings to live together in a just, equitable manner.

With that understanding, the Waltons come before this Court asking to consider their arguments on the basis that this is not an all-or-nothing decision, that this Court can make a decision without legislating, without overlooking

existing laws that will provide for the Indians and the Waltons to live together.

Most importantly of all, it has become clearer and clearer to me that Mr. Veeder, and I believe his client, the Tribe, misperceive this case. We, the Waltons, are not attempting to take anything. This case is not about the Tribe losing anything or taking anything away from the Indians. This case is about Indians and about what they got, the manner in which they got it, and what they can do with it after they got it. I have argued from the beginning that we don't have the necessary parties here. I have argued from the beginning that we are really standing in the shoes of the allottees. I am arguing for the Indian allottee much more so than I am for the Defendant Waltons. It is their right. If they have no right, then the Defendant Waltons have no right. If the allottees have some rights, then the Defendant Waltons have some rights.

The allottees, I maintain, are not and never have been represented in this case. The Government says, "Well, we are here," but I call the Court's attention to the decision of the Ninth Circuit in 1970 of the Scholder v. U.S., in which the court remanded the case back to the Ninth Circuit for adjudication of the allottee's interest, specifically pointing out that the case had been brought by the tribe, two tribes, that only their interest had been

litigated, and that basically the allottees who might have an interest antagonistic to the tribes', was not fully brought to the court's attention and should be factually tried out. This is even more important. It's a technicality and I will allude to it again, but all of the allottees in the allotments are not present before this Court. One of the exhibits presented to this Court was a lease by the Tribe of Allotment S-892. It was represented that all of the allottees' interests were involved in that lease. I requested of Mr. Veeder that he produce a title search showing that to be the case and the exhibit that has been introduced in that regard by the title office of the Colville Tribe shows there are six allottees' interests who are not represented, had not signed the lease on S-892 agreeing to the Tribe either using their land or involving them in a litigation package against the Waltons, and I will allude to that again later.

There can be an equitable distribution of water in this case and I do not follow Mr. Veeder's reasoning that there cannot. If the allottees acquired a water right, then they conveyed that water right subject to watever restrictions the Government had placed on it, and the Government, through the Allotment Act, Section 381, had placed a restriction that if it was needed for irrigation and if there was a shortage of water, the Secretary of Interior would allocate the water equally. The Waltons took that restriction

the same as the allottee did, and certainly they have to share in any shortage, just as any other Indian allottee would.

Counsel says he can find nowhere that we have offered that. Apparently he has not read the conclusion portion of my trial brief nor our Proposed Findings of Fact and Conclusions of Law, in which we specifically suggest this, and, in fact, in Exhibit H to my trial brief filed the first day of trial, we set out a specific chart of the various acreages and of the various waters that we feel the parties are entitled to, based on equitable distribution, based on Arizona v. California, of the practicable irrigable acreage.

Mr. Veeder alludes to the fact that Walton can't participate in this water because the reservation was reserved as an abiding place for the Indians to live for all time. It is the Defendant Walton's position that Congress may have had that intention at one time but certainly it changed it and modified that position with the enactment of the Dawes Act, when it saw fit to make Indians citizens, put them out on their own to become American citizens, and to do that, give them a piece of the reservation and thereby take it away from all of the rest of the Indians as a communal group, and allow them to deal with it as their own. Whether to farm it or sell it was up to the individual Indian. It

was no longer to be an abiding place for the individual Indian. It was to be up to him to do with it as he chose. That is consistent with the principles upon which this country is based. We are interested with the individual. We do not place great emphasis on the community, on the government. We are interested in individual human beings. That is an allottee, an individual Indian, and that is what we are trying in this case, and we can't lose sight of that. All of these principles about strict construction of statutes when it is in derogation of Indian interests have no place in this case. We are not derogating anything from the Indian, we are not taking anything, we are not proposing that this Court take anything. We are proposing that this Court acknowledge what Congress gave to the individual Indian, his chance, his capital investment to become an American citizen and to participate economically, which is the only way we have ever found that minority groups can ever become full-fledged citizens, even though we may say they are citizens. Until they gain the economic ability to participate, it is only then that they can fully become and participate in the benefits that we have to offer.

Mr. Veeder continues to refer to the fact that it is the Waltons who are drying up this valley and if Walton turns his pump on again, the Tribe will be without water. It is amazing to me how Walton, who doesn't even have the

capacity, mechanically, to pump that valley dry, who uses about a third of the water that the Tribe is using, is solely responsible for any alleged shortage of water in that valley. It is just incomprehensible to me.

THE COURT: Mr. Price, under your theory of this case, if the record shows that at the time the allottee made the original transfer to a non-Indian there had been no beneficial use of water and a non-Indian apparently at some subsequent time developed the 30 or 35 acres that I previously alluded to, is it your theory that Mr. Walton succeeded to the rights to those acres even though the Indian allottee had not developed them?

MR. PRICE: Yes, Your Honor. The allottee's interest, I am urging upon this Court, is as stated in the Powers case. It is vested but it is inchoate. Once it becomes vested, it doesn't leave. You don't lose it by non-user.

Mr. Veeder, sometime in this case, alluded to the Ahtanum case, where, apparently under some agreement with the Secretary of Interior, non-Indians could under some situations lose the use of water if they do not put it to use. That did not involve an interpretation of the Dawes Act and allottee's interest. In the Ahtanum case, the judge in that case specifically ruled the Class III defendants would participate with the Indians in the water on the reservation.

It did not go further in defining that, but certainly that vested right is there. A vested right is not lost by laches, non-user, and it is there to be used when technology permits, when the state of agriculture or horticulture permits.

In the 1920's, the Okanogan Valley consisted basically of sand and sagebrush. There were a few non-Indian developments in the area. Any that were there were gravity-flow. There were no sprinklers, there were no pumps. The state of technology, agriculture, horticulture, development in that area had not advanced to that state. It does not seem rational to me to claim that the Indian allottee, because he didn't use water while it was in trust status, lost the right to use it when it came out in fee patent to him, which, in fact, one of these allotments did.

It is important to recognize that one of Walton's allotments was acquired in fee ownership by the original allottee. He had it in trust status first and then he was issued with patent with fee title.

If Your Honor's statement were to be correct, then he, too, would lose any right to use water if he didn't irrigate immediately after acquiring the fee title status. I don't believe Congress intended that. I believe Congress intended just what it said: We are going to set the Indian apart as an individual; we are going to allow him to farm his land if he wants to; we are going to allow him to sell

it and use the capital if he doesn't want to farm it. These specific words were used by the man who authored the Dawes Act,the General Allotment Act.

So, my position is that this vested right is there and it is not -- Mr. Veeder seems to allude to the fact that if we allow non-Indians to use the water, that somehow, since non-Indians in this area normally would have developed horticultural and agricultural pursuits sooner than the Indian, all the water would be used up. That is not true. That is not our position. Our position is there is only so-much water on that reservation. There is only so-much water that can be allocated to each tract of land, and based on Arizona v. California, that is the practicable, irrigable acres. Walton can't sit on the land until the year 2000, and say, by the way, I want to pump 3,000 acre feet, nor can an Indian allottee, but they can sit there and when they are ready to develop, develop to the extent of the practicable, irrigable acres in conjunction with other Indians about them.

If there is not enough water to meet that test -- practicable, irrigable acres -- then the water will be pro-rated pursuant to Section 381, as Congress anticipated, and all parties will share, all parties will take a reduction, but all parties will have something to survive with.

Mr. Veeder alleges that he has reviewed the record,

and on the appraisal, he can find that the Waltons or their predecessors do not support the fact that water went with this land. But attached to our trial brief and supplied by the United States Government pursuant to our interrogatories and request for production of documents are the actual posting of the land for sale, involving Allotment S-525, which is one of the Waltons' allotments, along with several other allotment properties being placed up for sale by the United States Government in January of 1925.

In looking at that document, you find that S-525, a hundred acres is offered for sale at $1,950, and I'm quoting, "about five acres of this land might be irrigated from the creek and 50 acres additional can be farmed, balance suitable for grazing". In 1925, all that was available was gravity flow. That is a hundred acres.

We go down to the next allotment, 100 acres, and its price is $1200, almost one and a-half times, or half again as many acres, and the price is $750 less. Obviously, somebody was placing an emphasis on the water with a hundred acres as increasing the price in the value of that land. This was posted for the public. The public read this notice. This is the basis on which they made their bid to buy the land.

Harry George had 120 acres for sale, Allotment S-865, for $1,000. That is more land than S-525, and yet

it is quite a bit lower in price, and if you go through this document, you find that, in fact, water was valued, and water was charged, and the price was based upon the recognition that at least the United States Government thought it was selling something of value, at least they were exacting or extracting from the purchaser of these allotments more money if water was involved.

So, I take issue with Mr. Veeder's comment that there is nothing to support, in terms of appraisal, Walton's position, because I think with regard to the very allotment involved here, we find that is not true.

I had asked for the postings of the appraisals on the other Walton allotments but the United States Government was not able to find such documents.

With those remarks, responding to Mr. Veeder, I would then turn to my planned little epistle here.

With respect to the injunction, Your Honor, the best I understand the Tribe's argument is that since they have a good chance of winning on the merits, you might as well enter the preliminary injunction at this time. And I don't say that sarcastically because that is a legitimate consideration for the Court, one of the four, in deciding whether or not to enter a preliminary injunction.

We, of course, contest that. Only you can know where you stand on that at this time.

The second point is, will the Tribe suffer irreparable injury for which there is no adequate legal remedy. They have to come before this Court and show and substantiate that allegation in order to meet the requirements of a preliminary injunction. The answer to that is, "No." The Tribe has made no allegation that the school, the Paschal Sherman School, will close if this relief is not granted. The only allegation is that the Paschal Sherman School is looking to the hay crop as supplemental income. Supplemental income does not constitute irreparable injury for which there is no adequate remedy at law. Obviously, that speaks strictly to monetary damages, and it is not something that an injunction would speak to.

As for the Lahontan fishery, it has existed and thrived for 10 years prior to coming here today for you to hear about the crisis that if they don't get water tomorrow, something dastardly is going to happen. That fishery has survived, not only survived but thrived for 10 years without any developed water from the upper allotments being pumped down that creek. I suggest, Your Honor, they are probably going to survive two more months and probably survive two more years.

THE COURT: Isn't there a changed condition in that 10-year period? During that period the Indians were not irrigating the irrigable acres, and, therefore, there was

water going down for the use of the fish.

MR. PRICE: There has always been some water going down, Your Honor. The point is, the fish couldn't utilize it even if there was water. There was no channel for them. It was a swampy area. It wasn't until the Tribe in 1976 or '77 went in at great expense and built an actual channel. They put tarp, a black plastic, down. They put board sides on a channel for some distance where they allow, make it feasible for these fish to come into the stream. It wasn't even feasible for them to get in there. The fish are propagated by catching them, taking them to the hatchery, the spawners, and the fingerlings are raised there and then brought back to the lake. The expert testimony by the Tribe is that this practice will continue whether or not the fishery in No Name Creek turns out to be a practical or successful maneuver. But, obviously, there is nothing endangering the Lahontan fishery in terms of whether that water is shut off tomorrow. Some newborn fish in the stream may die. But the fishery, the Lahontan fishery, will not be threatened, its existence in Omak Lake, nor will it be killed. It will continue to survive as they have again this year, are raising the fingerlings in the hatchery, the federal hatchery at Winthrop, just as they always have, and those will be available to the lake.

As I understand the expert testimony with respect

to the fishery, it is that, by artificially structuring the stream channel to allow the fish to naturally spawn, there might be some strengthening of the species over a number of years. They might grow a little bigger; they might be a little hardier stock, but that is the most that I'm aware of in that regard.

Again, this is not something that demands the Court's attention in terms of a preliminary injunction.

The third item is that others must not suffer adverse effects as a consequence of the injunction.

The uncontested and unrebutted testimony is to the effect that if a preliminary injunction is granted, the Defendant Walton will be out of business, and their business is the sole means of their livelihood. Without qualification, I suggest to the Court that at most the loss of a few bales of hay, if that even occurs, the loss of one of the parties' livelihood so outweighs the loss of a few bales of hay that the preliminary injunction should not be granted.

The fourth item that the Court might consider is whether or not the granting of a preliminary injunction would be in furtherance of the public interest.

I do not believe that this is a public-interest case that the courts have in mind. I would suggest the situation of maybe the construction of a nuclear plant in downtown Spokane could have potential adverse effects of

injuring hundreds of thousands of people if something goes wrong, if the type of situation where the public's interest might be of paramount interest, such as the Court would be compelled to grant a preliminary injunction.

This is basically a private litigation between two parties. It does not bring into play the public interest even though the case itself may be of public interest. It is not the type where a preliminary injunction is needed to protect the public interest.

On these bases, we believe the Tribe fails to meet the requirements, the legal requirements, of a preliminary injunction and that the ultimate question should be decided without the devastating effect of entering a preliminary injunction with regard to the Defendants Walton at this time.

THE COURT: Mr. Roe.

MR. PRICE: Charlie, if you could just give me --

THE COURT: Oh, excuse me, I'm sorry.

MR. PRICE: I hate to say this, Your Honor, but I'm just getting started.

THE COURT: All right. I might at this time advise counsel, maybe you already know, that I have a naturalization proceeding at 1:30, and so at noon I'm going to recess the arguments in this case until 2:30, while I go

in the other courtroom and take care of the naturalization matter, so I'm not trying to put any time limit on you.

MR. PRICE: All right. Thank you, Your Honor.

In reading through the myriad of cases respecting Indian law, on the subject of Indian law, it is difficult and seems to me sometimes impossible to try and make sense of the swings in the courts' position when one week we will read of a decision that apparently upholds tribal sovereignty above all else, and then in the next week the U.S. Supreme Court will come down with a decision that says the tribe cannot prosecute non-Indians on the reservation and have no rights with respect to non-Indians on their lands. But I think there is a thread, there is a theme that runs through these cases, and the basis of the Tribe's argument is sovereignty. They are sovereign, and they have power to regulate the water on that reservation. I think the courts do acknowledge that any Indian tribe has certain vestiges of sovereignty, not total. I think we all agree, and Mr. Veeder will have to agree, that ultimately Congress, the United States, is the paramount authority, even with respect to divesting the Indians entirely of any rights, if Congress so chooses.

But the thread that I find is that when the Indians are dealing with themselves, controlling their own affairs, zoning, inheritances, the tribal sovereignty will prevail, even to the exclusion of what we would consider the

denial of constitutional rights to certain Indians on the reservation, but when the Supreme Court has to take a look at the Indians vis-a-vis a non-Indian, the Court refuses to throw out the Constitution and say tribal sovereignty is going to prevail.

We are dealing with a case, not of internal tribal regulation, but of tribal regulation and non-Indian interest, which are directly together, and in that case I think it is important that we find, distinguish, that we don't take one case that says tribal sovereignty should prevail and try to apply it in every other case.

The judge in the Confederated Salish and Kootenai Tribes -- forgive me for the mispronunciation if there is one -- in the U.S. District Court in Montana, I thought, spoke to this issue and spoke very well.

He cited -- he referred to the Tribes' reference to the McClanahan v. Arizona State Tax Commission case, in which the Tribe was alleging that tribal sovereignty, based on that case, should prevail over all else. That case involved the Indians' attempts to have the non-Indians remove their wharves from Flathead Lake in Montana, claiming that they acquired no such right as successors to allottees or as homesteaders.

In citing the McClanahan case for the proposition of sovereignty of the Tribe, the Court stated as follows:

"The Court cannot agree. In the complex and sometimes uncertain area of Indian law, care must be exercised in attempting to apply language used in one factual situation in a totally different context. McClanahan was concerned with the rights of a state to impose a tax on income earned by an Indian on a reservation. Here, we are concerned with the rights of both individual Indians and their non-Indian grantees under grants by the federal government pursuant to congressional action."

I find a great deal of analogy in the judge's reasoning there, and how applicable, it seems to me, it should apply in this case.

The Colville Confederated Tribes and the United States of America have initiated this action seeking relief in the form of an injunction. The crux of the Plaintiffs Tribes' case is that there is a shortage of water for all of the desired uses in the No Name Creek Valley, and that the entire cost of the shortage can be laid at the Defendant Waltons' feet.

I would like to preface the rest of my remarks with the admonition that one seeking equity must do equity. To do equity in this case would require of this Court that the total water resources available to the land included

within the No Name Creek Valley be considered and evaluated. This was not done, and it was not done because the plaintiff was successful in limiting the Testing Order of July 24, and as amended, from collecting and evaluating any resource data below the granite lip.

We came before this Court some years ago for the Testing Order involved. Defendant Waltons asked that the Testing Order include the area below the granite lip. That was not included, however, because the Tribe objected. However, this Court, in effect, by doing that, has excluded -- if I may approach the exhibit, Your Honor -- 46 percent of the entire water basin, as exhibited in one of the plaintiffs' exhibits. 46 percent of the drainage basin has been excluded from consideration as being a potential and available water resource for the lands in question.

My point is, if we are going to consider 901 and 903 lands that are included within that drainage basin, why are we not including the waters that arise there?

The Defendants Waltons put on testimony from Mr. Maddox, from Mr. Hampson, and from Defendant Walton himself, that there are waters which arise on the surface and are obviously located underground within that portion of the drainage basin. Even the Tribes' exhibits show that they consider that an aquifer, a portion of that as an aquifer, as opposed to an aquiclude, and this is highlighted on their

colored exhibits.

I'm suggesting that that is not equitable. What is equitable about allowing the Tribes, through their legal counsel, to dictate to their expert witnesses, the fact-finders, if you will, just what facts they could find and what they couldn't find; and I would like to refer to the transcript in that regard, Your Honor.

Mr. Mack's questioning of Mr. Watson. This is at page 793, the cross-examination of Mr. Watson.

"A We are dealing with a very small basin, and the Omak Creek and the No Name Creek basins are totally separate except to the extent that water is contributed naturally from the Omak Creek to the No Name Creek Basin.

"Q And are they separate based on your view as a hydrologist, without any other consideration, or are they separate based on your view as a hydrologist pursuant to the tribal resolution which you have described?

"A Those are my orders, Mr. Mack.

"Q Pardon me? Would you repeat that?

"A I'm operating under the resolution of the Colville Confederated Tribes. I'm operating under the direction of Mr. Corke, and the Colvilles have decided that Omak Creek is a separate watershed

and that artificial induction of water from that creek to the No Name Creek basin is not what they like. It is not what they desire."

I'm suggesting, Your Honor, that in a case of equity, it seems inequitable to me to allow one of the parties to dictate exactly what the fact-finders should be finding if they intend to do equity themselves.

The inequity of the situation seems to me to be highlighted by the fact that prior to Mr. Veeder's becoming actively involved in this litigation, the Tribe entered into an agreement with the Defendant Waltons in which he actually granted them easement to divert surface water from Omak Creek down through the No Name Creek channel, and this was done for an entire year, where the Tribe put to beneficial use that water in connection with their Lahontan fishery.

If the Tribe can find it beneficially useful to divert the surface waters at one time, but then for purposes of a litigation package against the Defendant Waltons, pass a resolution that they find that it isn't to their best interest to use that water for purposes of that litigation, I believe that we have allowed inequities to creep into the case to the extent that they are detrimental and prejudicial to the Defendant Waltons.

In other words, I would like to analogize it to the fact that, basically, we have a water spigot in the

No Name Creek Valley. We can have as much or as little water as you need. A water shortage can be created by turning the spigot down. In other words, by not putting your pumps as low as they might otherwise go. Or you can have plenty of water if you want to divert from Omak surface flow.

I find the Court in a difficult position when it is being asked to do equity when one of the parties litigating is actually controlling and manipulating the water that is in question in this case.

Plaintiffs' own expert witnesses -- before I pass on to this next point, I want to add to this equitable consideration again and refer to the fact that our offer of proof from hydrologist Fred Jones who, on his offer of proof, testified that the surface waters from Omak Creek, without detracting from other beneficial users, could be employed to meet all of the needs within No Name Creek Valley, minimum and maximum. I have gone back over his offer of proof. I tried it three different times and in three different places he says the same thing. I think Mr. Jones, it is interesting in that he was hired by the United States Government to do his fact-finding and his research to see what he could come up with and this is one of the matters that he felt important, that he felt was applicable to this case, and then after his findings were calculated, the Government found, for one reason or another, that it would

not benefit them to put that material in evidence and so the Defendant Waltons attempted to elicit that information. I believe it becomes important again when the Court recognizes that we are here to do equity.

Again, in 1975 the Tribe put an exhibit into evidence that indicated that Walton's use, in fact, I believe we have it up before you right now, Your Honor -- again, if I may approach the exhibit, just to refer to the number -- 25-C, it shows that in 1975 Walton was the only user of water for beneficial application, and that his use for his entire consumptive needs, irrigation and domestic, barely even made a ripple in that chart in terms of the amount that the aquifer was affected, barely even made a ripple, and that the aquifer fully recovered prior to commencement of the '76 irrigation season without any trouble whatsoever because basically it hadn't even been tapped.

Then in 1976, we start to see more precipitous declines. I come back to Mr. Veeder's again. I still to this day don't understand how Mr. Walton can be responsible for precipitous declines in '76 and '77 when their own exhibit shows that his use of water makes no dent in the aquifer whatsoever. If there is a precipitous decline, it is obvious from the facts the Tribe has presented who is the cause of that precipitous decline, and if the Tribe wants to pump themselves out of water, I would suggest to

this Court they are probably capable of doing it. I do not think that lays any fault at the feet of Mr. Walton. The Plaintiff Tribe, Your Honor, argues at some length that it is federal law which should control,not state law. Defendant Waltons concur in part with that and we set out in some length in our brief, from pages 23 through 31, that, indeed, it is federal law which we are attempting to interpret and apply in this situation.

There is an important distinction, however, between Mr. Walton and the Tribe. Although we recognize certain vestiges of sovereignty with respect to a tribe's dealing with its members within its property, that sovereignty cannot overlap and conflict with a federal policy which has specifically dealt with property formerly part of an Indian reservation, including the appurtenant water rights. The federal government has the power and right to manage and even divest the Indians of land and water to the extent Congress sees fit.

With that power in mind, Congress specifically undertook, in 1887, by means of the General Allotment Act, to terminate Indian reservations as such and transform the Indians' property rights from a communal holding to an individual private ownership. The legislative history and acts subsequent thereto are indicative of this clear intent on the part of Congress.

Representative Skinner expressed the typical attitude and sense of concern in this excerpt from the House debate of the bill in late 1866, and I quoted from that in our brief, and I would like to quote from some of the legislators who, in 1885, 1886 and 1887, were the men who actually drafted, were the movers behind the General Allotment Act, to get a sense of what they were about.

"These were hard times for the Indians. There is no question but that the white man was set about developing this land, occupying every last inch of it."

There were a few men in Congress out to protect those Indians, and they thought they were doing a good job.

Representative Skinner:

"Mr. Chairman, from the beginning of our existence as a nation, the Indian has been the subject of national legislation, but at no time so much as now has there been such a pressing necessity for the adoption of a general Indian policy, the enactment of some measure that will lead to a correct solution of the Indian problem. As long as the Great West remained unoccupied or sparsely settled by the white man, and abounded with game, the Indian retired before the advancing civilization of the white man and subsisted by the chase.

But now, the white civilization of the East has been met by the white civilization from the West. The game has been destroyed, the food supply from that source is gone from the Indian, gone forever. This being a true statement of the situation, the Indian must either perish, depend on the government for support, or abandon his thriftless habits and learn to eat bread in the sweat of his face and finally rise to the level of the civilization that surrounds him and take upon himself the duties and responsibilities of American citizenship. Starvation, pauperism or independent, self-supporting citizenship, between these, the Indian must take his choice, or rather we, as guardians, must choose for him."

Congress, again, is recognizing that it is making the choices. There is no question about it. The Indian was not left with a choice. We, as white Americans controlling the government, were making the decisions for the Indian and still today do that.

With respect to the General Allotment Act, Congress understood that it was about to change the manner with which it was dealing with Indians. Up until then, there had been communal holdings. The Indian had been dealt with as a group, but now Congress is about something

different.

The words of Representative Perkins:

"In the judgment of the great mass of American people, the time has come when the policy of keeping Indians in their tribal organizations and restraining and controlling them by bayonets and shotguns must be abandoned, and a new era inaugurated, an era of education, an era in which they shall be enabled and required to qualify themselves for the duties of American citizenship and to support themselves by industry and toil. That is the spirit and object of this bill."

This "bill" being the General Allotment Act.

The Plaintiff Tribe would have this Court believe that although land was patented in fee for use and benefit of individual Indians, that the appurtenance of water somehow magically remained with the Tribe, apart from the land, to be administered and used by a nonexistent tribal government.

One of my quotes in here that I passed over to save some time is a lengthy speech in which the tribal governments are castigated, the tribes are not spoken highly of, and whether or not that was a fact, Congress thought it was a fact, and Congress took that into consideration in passing the General Allotment Act.

The Plaintiff Tribe highlights this position at page 10 of their summation which they have submitted to this Court where they cite time and time again the Court's admonition that, how could Congress give the Indians the land and withhold from them the water that was necessary to make that land valuable? That admonition is no less persuasive in terms of the General Allotment Act when Congress was attempting to divide up that land and give it to the individual Indians. If Congress was so instilled and imbued with the idea that the Indian had to have water, does it really make sense to believe that in their attempt to save the Indian, they were going to give him individual tracts of land and then leave the water to a nonexistent tribal government? -- a nonexistent tribal government that, if it did exist, according to Congress, was being misadministered in favor of the tribal chiefs, and the individuals were getting left out anyway.

Why, if the press of the white man was taking every piece of land the Indians had, why would Congress leave the water rights up for grabs and not give it to the individual allottee? The purpose behind the Dawes Act was to allow the Indian as an individual to have rights of citizenship and take his land into court and protect it, if need be. He couldn't do that as a member of a tribal community. He had no right, no standing. As an owner of

land under the General Allotment Act, he could. What good does it do for him to go into court and protect and save his land if some irrigation company is out there and already acquired the water rights through an act of Congress, which is exactly what Senator Dawes, Senator Perkins and all of the other senators who were promoting the General Allotment Act saw as happening if they didn't act to protect the Indian.

Congress, by means of the Dawes Act, was attempting to protect Indian property rights. To have transferred the land without appurtenant water would have left the most important aspect up for grabs by non-Indians and tribal chiefs, from whom Congress was attempting to protect the individual Indians in the first place.

It is impossible to believe that in transmitting the property to private ownership, that the desert lands would be conveyed without water, which is essential to the life of the Indian and the crops he or she raised.

Congress intended that, when the land had been conveyed to each man, woman and child on the reservation, that there would be no tribe left, and the U.S. Government would be totally free of administration of any Indian affairs, as there would be no tribe and no reservation left to administer. The individual Indians would be citizens of the U.S. with property the same as any other citizen.

In quoting from Senator Dawes again, in a speech

to Congress prior to passage of this Act:

"If you make the Indian a self-supporting citizen of the United States, all these things disappear of themselves. When that time comes, there can be no reservation to abolish or perpetuate, no Indian agent to appoint or dismiss, no treaty to keep or abrogate. The work is accomplished when the Indian has become one of us, absorbed into the body politic, a self-supporting citizen, and nothing is left of the questions that are troubling us, and if he becomes a citizen, then all of the machinery disappears like an April cloud before the sunrise."

It is obvious that Senator Dawes was a little more optimistic than history has proven him out, but the import, the significance of Senator Dawes' statements, of the author of the General Allotment Act, is that they were getting out of the Indian business. If they were getting out of the Indian business, how can we believe Congress was going to leave some tribal government administering water rights? Congress would accomplish nothing to get out of the Indian business and still have itself or Indian tribes administering the water without which the land was useless.

Obviously, this transition would involve some competing use of water for irrigation purposes and to the extent that occurred, Congress had the foresight to provide

that some entity would have the power to administer in such situations. Obviously, the Tribe was not the appropriate entity, as in most instances, as far as Congress was concerned at that time, there was no central form of government amongst tribes, and in those cases where some form of government did exist, Congress felt the interests of the tribal chiefs were many times at odds with the best interests of the individual members of the tribe.

It is interesting to note in reading the history of the various bands and tribes making up the Colville Indian Reservation that at the time and after the passage of the General Allotment Act in 1887, these tribes and bands were still warring with one another, actually perpetrating war on each other. Are we to believe that some one of those bands was going to control and administer water? That the Lake Band was going to tell the Okanogan Band whether they could have water or couldn't have water? Were the Nez Perce members going to tell the Okanogan group what water they could and couldn't have? I think it is unrealistic to assume that the various tribes in that reservation were going to put up with such an administration, much less Congress.

Section 381 of the Dawes Act was an attempt to provide an administration of competing property rights, but in no way does it attempt to withhold the property right of water or reserve it in any manner for administration by a

nonexistent tribal government.

Section 381 was no different than the section in the General Allotment Act that calls for the Secretary to administer and carry out, effectuate, the General Allotment Act, have it surveyed, have the individual Indians make application, get the work done. Section 381 was an administrative act, and it does not in any manner withhold or speak to withholding any rights to the Tribe, as opposed to allowing the water to vest in the allottee.

Certainly the Secretary of the Interior cannot act to allocate water unequally among the allottees, and we cited the cases in our brief on behalf of that proposition, in, basically, U.S. v. Powers. And Felix Cohen, the prophet, if you will, of Indian water law, subscribed to that position.

If the Secretary of the Interior cannot act to distribute the water unequally, neither can the Tribe. That is why I persist in my argument on behalf of the Waltons that the necessary parties are not present in this case.

The Tribe has asserted that it is entitled to initiate and administer a water code, not on its lands acquired in 1956. Well, let me put this another way.

The Tribe, back in 1901, ceded all of its lands, even the diminished south half of the reservation, back to the United States Government. Mr. Veeder says, "Show me,

Mr. Price. Show me, Defendant Waltons, where the water ever went out of the Tribe." Well, I call his attention to the Act which he put into evidence, which we are all familiar with, the McLaughlin Act, or Agreement, in which the President sent out McLaughlin, and he obtained an agreement from the Indians by which they ceded all of the lands back to the United States Government. This agreement was never ratified by Congress, but it was adopted almost word-for-word verbatim in the 1906 Act, and the United States Supreme Court has had occasion to speak to that exact situation, where McLaughlin obtained an agreement from another tribe, the Rosebud Sioux Tribe. It was never ratified by Congress, but Congress enacted an act which incorporated the pertinent language and the U.S. Supreme Court said it was done, it was effectuated. So, yes, title did move out of the Tribe, and it didn't come back until 1956.

The Colville Tribe did not, under the Howard-Wheeler Act, incorporate, and did not choose to incorporate, back in the 1930's, under the Wheeler-Howard Act, but in 1956, instead, the United States Government conveyed back the lands that had been ceded to it, and when the United States Government did that, it did it subject, the terminology is: "Subject to all existing and valid rights".

Congress understood, realized something had moved away from the Tribe during that intervening period, between

the period of the General Allotment Act and the time when the Tribe reacquired the property in 1956.

The Tribe hasn't lost anything. They can go out and control any water they want on their lands. On their lands. But there are other lands owned by individual Indians who have rights.

When Congress conveyed back the land to the Indians in 1956, it also provided in that very same statute that money would be appropriated for Congress to purchase water, water rights and other lands, for the Tribe.

If Congress didn't recognize that something had moved away from the Tribe, then why provide for the buying of it back?

I believe that it's -- some Indian allottee, if this Court were to rule in the Tribe's favor, is going to get a real rude awakening someday if he is presented with a tribal water code which, if I read it correctly, listed a priority for fishing as a top priority, with irrigation somewhere down the line, and if the Tribe comes by and says, "Pardon me, Mr. Indian Allottee, we have need for that water for a fishing program, and you may not use it for irrigation," and, based on a decision in this case in which, purportedly, that Indian allottee's interest is represented, I think he would find it very surprising indeed.

Again, I assert that it is the Indian allottee's

interest we are litigating here, and to the extent that the Tribe is trying to promote a water code which is inconsistent with those individual allottees' rights, this Court does not have the necessary parties.

The Tribe is asking this Court to enunciate principles affecting almost every major body of water west of the Mississippi. The fact that it has those ramifications doesn't mean the Court can back away from a decision, but I emphasize again the importance of that decision, I think, requires necessary parties. I think allottees are necessary parties to that type of a decision.

I have previously called your attention to the technical defect, what I consider a technical defect in title to Allotment S-892, which is the allotment immediately north of the Defendant Waltons', of the six non-signators to the Tribe's agreement. If an injunction were granted and the Tribe were allowed to pump water from 892 down to Allotments 901 and 903, what of the interests of those unrepresented interests in 892 who may say, by the way, Tribe, that is our water, we don't want it going to 901 and 903. We want it used on our land, and if there has to be any proration of water, we are entitled to that water, not 901 and 903. These are some questions that I think are not mere technicalities but are glaring, in terms of the Court considering granting what the Tribe is asking for.

I alluded to the Scholder v. United States, 1970 Ninth Circuit case, and I will quote briefly from it:

"We remand this phase of this case to the District Court for determination of the validity of the charges."

Some charges in connection with an irrigation project.

"The issue was not fully examined below, in part because those appellants who had a day in court, the Pala and Rincon Bands, did not emphasize this aspect of the case. Undoubtedly, the issue is of more concern to the individual allotment holder than it is to the bands. The issue was not fully briefed before this court. The appellees failed to direct our attention to any authorization for the imposition of the charges, pointing instead to statutes authorizing the assessment of the construction charges."

The Tribe isn't emphasizing its right to adopt a water code in derogation of the rights of allottees, and I do not believe I have seen the United States Government resisting, on behalf of the allottees, any such assertion.

The Tribe claims they are attempting to fill a void. Mr. Tonasket, Council Chairman, as a witness before this Court, got up here and said, "We asked the government to act." It was a plaintiful plea. I agree. "We have asked the government to act. We need to fill a void." There is something wrong with that, however. It is not

attempting to fill a void, Your Honor. They are attempting to usurp power. They can control the waters on their lands that the Tribe owns. They can adopt a water code with respect to those waters, but they have to respect the rights of the allottees and the successors. They have not done that in their code, and until the Secretary of Interior acts, it cannot be done.

There is before this Court an affidavit from the Secretary of Interior, Secretary Cecil Andrus, stating that he is working, promulgating rules and regulations that apparently would speak to some of the issues involved in this case. I find it difficult that, with such important and grave consequences, that this case could carry, that, pending the adoption of those rules and regulations, that the Court could give any credence to the Tribe's water code or a decision that might run contrary to those rules and regulations.

I'm not so sure I even want him to promulgate rules and regulations because they may be adverse to my client, but in all practicality, I have to look ahead to what some court might do and suggest, and with an important part of the case pending, in limbo with an affidavit from the Secretary of the Interior that he is acting with all due speed to try and resolve the Tribe's allegation of a void, I think possibly some consideration should be given

to that area.

Our argument, as I have stated before, is not anti-Indian, or anti-Tribe. I think, in the last issue of the Colville Indian Tribune -- I don't have the name exactly correct -- in referring to this trial, I and the Defendant Waltons are referred to as the "bad guys". I think it's important that the Plaintiff Tribe and the United States Government, as well as the Defendant Waltons, recognize that there are no bad guys or good guys in this litigation. We are all here with legitimate interests, attempting to work together in a civil form, to resolve what differences we have. I think the Plaintiff Tribe, if they would give more attention to the matter, would see that there is just as much need for the allottees' interest in this case as there is their own, because when this case is all said and done, they return to being individual Indians again, not just tribal members trying to fight a case, a unified case against a non-Indian, but they become individual members again, with their own interests, about what water rights do they have with respect to each other, and that issue is before this Court through Defendant Waltons. The true party in interest, the allottee, is not here.

Your Honor, there is a given amount of water on that reservation. The Waltons can't usurp more than their share, nor can anybody. It is not a question of waiting

a reasonable time or when is the water going to be put to use. There are practicable, irrigable acres which can be measured and calculated. There is a given amount of water, which can be calculated, and it can be applied to the lands and if there is a need for allocation, we have the means to do it.

In terms of the water availability and water duty, I would not be accurate if I didn't say I questioned the Tribe's experts, in terms of their 550 acre feet. It is interesting that it is exactly the same figure that the Tribe placed in a proposed pretrial order a year before the measurements were actually made that enabled them to calculate their so-called 550 acre feet firm annual water supply. I also question it because they had a goal in mind. I do not question the United States Geological Survey. I believe they made an honest attempt without any goals given to them, any orders or directions other than to measure and quantify the water that was available, and my best recollection is that there was competent testimony of 1100 acre feet available on an ongoing basis. Mr. Maddox testified on behalf of the Waltons that there might be more than that. I would prefer to rely on the United States Geological Survey testimony in this case, in that Mr. Maddox's testimony, to me, was basically for the purpose of corroborating, testifying to the accuracy and the ability of the United

States Geological Survey, rather than his having done all of the measurements himself.

Based on the 1100 acre feet of water available, I have a chart which I would like to hand to Your Honor, and to all of counsel, that would just assist me in running through my argument a little quicker, if I might, Your Honor.

We have used the Tribe's figures on their efficiencies, even though we don't agree that a private person economically could exist on some of the efficiencies that they use, 50 percent efficiency in some instances. We have gone ahead and used them, and, based in part on Mr. Bennett's testimony, 70 percent efficiency for most of the system and a 50 percent efficiency on portions of the tribal system, we come up within the acceptable range of available acre feet of water for the Tribes' needs and for the Waltons' needs, whether it is based on 36 inches of water or whether it is based on 42 inches of water.

The graph we have set out here, we believe, is an accurate depiction of testimony that we believe was credible testimony, and the Court could rely upon it in reaching its decision on whether or not there was sufficient water available.

Finally, in trying to tie up what Congress intended with the Dawes Act, we don't need to look just to the authors of the bill, we can look to what actually happened,

and in that regard, I think it is important that the deposition of Ire Parker -- we were fortunate to get that from him just prior to his death -- which takes me off track.

Two of the surveyors died. The first one, I interviewed early on in the litigation, before I was able to get his deposition, passed away. He was the man who actually surveyed the original allotments for the Smitakens, which are now the Walton properties. The second one died a short time after his deposition.

If this Court adopts some rule that the successor or the Indian allottee acquires only that water which he was using when the land came out of trust status, this Court and every other court in the land is going to be faced with trying to preserve testimony that in another decade will no longer be available,and are we really to believe that people's rights are going to depend on whether or not they can find an 85-, 95-year-old individual that can go out and say, "Yes, I walked on the land when I was 16 and they were irrigating umpteen acres." It just isn't going to happen anymore. I don't believe people's rights were intended to be relegated to whether or not they can find a witness from antiquity to state what water was being used. If we rely upon the practical, irrigable acres and the vested water right, we have solved the problem.

In terms of what happened after Congress, we have

surveyors out there at congressional direction, at the executive direction, the President's direction, surveying the land, individual Indians picking out tracts of land. What kind of land were they picking out? Dry land? No. They were picking out tracts of land with water on them, and, as Ire Parker pointed out, some of the allotments in the Nespelem area are very funny-shaped allotments, thin, thin pieces of land, so that some allottee could get down to the river, get down to the creek. The Indian allottee thought he was getting water or he wouldn't have been concerned about the allotment being surveyed in that manner.

Congress intended that if the individual allottee didn't want to use the land, farm it, be a farmer, he didn't have to be. He could use it as capital and go out and start some other free enterprise endeavor. On the Walton Allotment 525, we have Louie and Paul Smitakens, sons of Alexander Smitakens, asking the land be sold in fee, the allotment, so that they could have the money. The government, in asking for the application for the land to be sold, stated:

"Heirs need proceeds to extend their business interests and provide themselves a home."

Louie and Paul, in signing their petition for the sale of inherited Indian lands, which were allotments:

"We wish to invest the money in business. We will sell on deferred payments or cash."

They had a trucking business, in part, and they were going to take this money and use it. Why? Why would the government keep the water that made this land valuable if it really intended for these people to go out and sell the land and use the capital and invest it? Congress intended this to happen, and we have actual evidence in this case that it did happen. This supports the defendants' proposition that Congress intended water to go with the land. The allottees thought they were getting it when they selected the allotment. They sold the land at a price that reflected the price of water. They got the payments. It didn't go to the Tribe. The payments went to the individual Indians. To me, that is important.

THE COURT: Counsel, it is 12:00 o'clock. I said I didn't want to cut you off, but -- .

MR. PRICE: I think you can at this point, Your Honor. I was just checking to see if I had tried to direct to some of the issues that you raised.

THE COURT: Well, let's recess the case until 2:30 and you can look your notes over and see if you want to continue.

MR. PRICE: Thank you.

THE BAILIFF: All rise. This court stands at recess until 2:30.

(Luncheon recess is taken.)

Afternoon Session

THE BAILIFF: Court is reconvened following recess. Please be seated.

MR. SWEENEY: Your Honor, one of these two cases that were mentioned on the July 3rd decision by the Supreme Court was United States v. New Mexico, and Mr. Veeder obtained a copy and our office made a copy and I was going to hand it up.

THE COURT: I think someone furnished us a copy of that already during the noon hour.

MR. VEEDER: I gave the bailiff one of those, Your Honor.

THE COURT: Thank you, Mr. Sweeney.

Mr. Price, I guess we interrupted you for lunch.

MR. PRICE: Thank you, Your Honor. I feel like I am taking a lot of time, but as I look back on the trial, every time I got up to introduce something, I recall the Court saying, "That can be in final argument," or, "That is more appropriate for argument, Counsel." I guess I am just trying to get my day in court here, one way or the other, and I will wind it up shortly.

The reason I have laid so much emphasis on the General Allotment Act and the language of the authors or proponents of that specific legislation is that I think that is the controlling factor in this case. The Powers case,

U.S. v. Powers, U.S. v. Alexander, the Montana case. I can't recall the name of it right now. All the cases that talk about or are presented with the question of whether or not there was a vesting of water rights with the allotment of the lands have answered that question in the affirmative. Whether or not it is dictum is for this Court to decide, but I am impressed with the fact that all the courts that have had to face that issue directly or thought they had to face that issue have stated in one form or another that, yes, that water right did vest with the allotment.

I think that carries some weight in terms of the rationale and persuasiveness of the General Allotment Act, which has always been in issue in those cases, and those courts and those judges have been basically trying to interpret the General Allotment Act, and I think that is persuasive and should be persuasive to this Court.

In the Kootenai Salish case, v. Polson, the District Court case in Montana, which I alluded to many times in my brief, I would like to quote, finally, from the basic conclusion of that case because it so parallels the fact situation in this case.

The court:

"With respect to the final contention (that is the Tribe's) that because riparian rights were not expressly granted by Congress, they cannot be

implied. Plaintiff raised two fundamental principles of Indian law, one, only Congress has the power to abrogate Indian property rights."

I have already directed myself to that. I think they have, through the General Allotment Act, not abrogated them, but transmitted them.

"Two, statutes in derogation of Indian property rights must be narrowly construed."

Again, I am maintaining to the Court that we are not here in derogation of Indian property rights, but we are trying to uphold individual Indian property rights.

"The Court, of course, recognizes these standards. There can be no question, however, that by means of the General Allotment Act and the amendments thereto, Congress expressed an intent to exercise its dominant power over Indian land by dividing and conveying those lands, including lands riparian to Flathead Lake, in fee to Indians and non-Indians. In all other situations in which the federal government holds title to the beds and banks of navigable waters, a fee patent issued by the United States to riparian lands would include the rights of access and wharfage without an express provision in the patent. This is established as early as 1861."

I am contending in this case that the United

States Government knew how to reserve property rights. It knew how to reserve mineral rights, which it did in connection with conveyance of Indian allotments. It knew how to reserve water rights, which we cited extensively in our brief on the various instances and cases where the government has specifically reserved the water rights in opening up certain portions of the Indian reservation lands for entry under the mineral laws and other such laws.

In this case, the exhibits presented to this Court show conclusively that the United States Government did not reserve any property rights. It conveyed the land to the allottee in fee patent and to non-Indians totally, without reservation, with all appurtenances. The wording is quite clear. There is nothing that the Tribe has presented that says that Congress or the courts of this land interpret a fee patent differently because it happens to have originally been in the Indian reservation land. I know of no such document. When the United States conveyed those lands, they knew what they were about. It knew how to reserve those property rights it did not want to convey, but chose to convey all of the appurtenances that went with the land. The property rights include as an appurtenance, water.

I am again quoting:

"Where the United States holds title in trust for Indian tribes, federal common law is applicable to a

determination of the extent of a federal grant, despite the lack of any express congressional language to that effect. Given these principles, this Court cannot escape the conclusion that Congress must have intended that the fee patent issued would include the customary riparian rights of access and wharfage. The fact that Congress did not expressly delineate these rights does not negate their existence. It was not necessary for Congress to specify every incident of ownership which accompanies a patent to lands on an Indian reservation.

"This conclusion is confirmed by the Senate Report on the Villa Sites Act in 1910 and the circular issued by the Department of the Interior. Certainly without the rights of access and wharfage, lands riparian to the south half of Flathead Lake would not have been considered as valuable as suggested in the report and circular."

I am contending that the exhibits that we have introduced with respect to the posting and appraisal of this land confirms the fact that the United States Government intended it to reflect water value, and, in fact, sold it as such.

The one exhibit that I have not called Your Honor's specific attention to is a letter with respect to appraising one of the Waltons' allotments prior to its being

sold in fee. That letter is from the Superintendent of the Colville Reservation to the Indian farmer who was making the appraisals, specifically rejecting his petition for one of the sales of the land until he went out and appraised the land again, calling to the Indian farmer's attention the fact that there was being development of irrigation on certain of the lands, and this would make the land more valuable, and that it should be appraised to reflect that increased value. In other words, the government intended the Indian allottee to get full price and full value for that land. What more could emphasize the fact that the United States Government thought it was selling the water with the land?

The judge continues:

"It is significant also that for more than half a century, the defendants and other riparian owners, with the full knowledge of the Federal Government and the Tribes, and without objection from either, expended large sums of money for docks and wharves abutting their lands on the south half of Flathead Lake. Many persons built and maintain homes and business enterprises . . . .

"Now, after more than 50 years of such activity on the Lake, plaintiffs claim that the riparian owners who have constructed piers and wharves beyond the high

water mark are trespassers, should be enjoined from further trespass, and be requested to move immediately all buildings and structures beyond the high water mark. To grant this relief in light of the factual and legal considerations set forth above, would be a grievous injustice to the defendants and others in a similar position."

The court in that case relied heavily on the government's advertising of the property as being valuable and actually referring in these circulars to the fact that the wharves and piers could be built and would add to the value of the property. I think we had the same factual situation in this case.

Finally, in summation, Your Honor, if I might approach the drawing board, I would just like to, if I can, pictorially, try and talk about the vesting of this water right in terms of what the Waltons succeeded to, if anything.

In the black square, I am indicating we have a tract of land, and we will call it the Colville Indian Reservation. Within the confines of that Indian reservation, there is a certain amount of water that is not going to change, basically. That water can only go so far. The individual -- the Tribe communally owned that water at one time. Then, through the General Allotment Act, Congress came along and said, we are going to take chunks out of

there. We are going to allow the individual Indian to own that, farm it, and if he wants to, sell it. To sell it, it had to have water.

The Indian allottee invested that portion of the water vested in that allottee at the time he acquired title to it, and his successors acquired that same title. By claiming that the successor to the Indian allottee gets that water right, we have neither lessened nor made more the water available to the remaining members of the Indian Tribe. It's still the same amount of water. Congress dictated how it was going to be transmitted to individual ownership. The fact that the Indian decides to sell it to a non-Indian does not lessen, in any manner, the remaining water the Tribe had, because they had what water was there, less the little chunks that had been granted by Congress.

So, in denying the Tribe's requested relief for injunction, we are not taking anything away that the Tribe had to begin with. We are merely recognizing what Congress did, that the individual Indian was to have this land, a portion of it, anyway, and the water that went with it, to use it for his own benefit.

And with respect to the quantification of that water right, we believe the water duty which we have presented to Your Honor in the form of the chart and the amount of water that is available there, we have presented

to you on the chart, and we would ask that Your Honor consider that as the appropriate finding of fact from which to base your conclusion of law.

The only other comment I have at this time is that Mr. Veeder, I think probably by mistake, indicated that the Waltons didn't acquire from an Indian. I think that is just an oversight. Mr. Moomaw was an Indian, and to the best of my knowledge, he was a Colville Indian.

Again, in closing, the only thing I can say is that I think we are arguing an allottee's interest and right that Congress intended him to have, and, as such, the Waltons succeed to that right.

Mr. Driscoll spoke to new citizens' being administered the oath this afternoon, and he said -- he pointed up to a lot of problems in this country, but he said what makes this country different is that we are able to manage our problems. We are able to work with them. He said, to quote him as best I can, "We are able to balance our conflicts," and he referred to the Bakke case, "And it is obvious the Supreme Court was attempting to balance, the best it could, competing interests." I agree with Mr. Driscoll, that is what sets this country apart, and we are asking this Court to balance these competing interests, and we think the legislative history supports the balance that we are asking for and that, in law, the injunction should

be denied.

We also ask that this Court consider in the interim as part of its order that to the extent there is any shortage of water, should it occur, that the water be pro-rated on the basis of the practical, irrigable acres between the parties.

I thank you very much, Your Honor.

MR. VEEDER: Before counsel sits down, I realize this is entirely out of order, for me to interpose an objection. Are you speaking of this chart that was handed to the Court during your argument?

MR. PRICE: We are just using that as a display.

MR. VEEDER: Are you offering this in evidence, Mr. Price?

MR. PRICE: No.

MR. VEEDER: It was handed to the Court for his use?

I object to it, Your Honor.

THE COURT: Well, I am treating it the same as an illustration given during summation.

MR. VEEDER: I just want the record to show that I am making a serious objection to this course of conduct of counsel.

THE COURT: Mr. Price.

MR. PRICE: I would be happy to write it up on the board as an illustration. I thought I would save the Court some time.

THE COURT: I have no problem with it.

Mr. Roe.

MR. PRICE: Thank you, Your Honor.

MR. ROE: May it please the Court, if it is satisfactory to the Court, the State has divided up its argument. I will deal generally with the primary issue that the State is concerned with in this case, and that is the authority of the State to issue water rights such as the one issued to Mr. Walton, and deal briefly with the issue which we have referred to in the past as moccasin rights, the rights of a successor to an Indian allottee.

Mr. Mack will deal basically with the facts along the lines of your introductory remarks this morning, dealing with the quantity of water available and the scope of the reserved right.

Before I move into the basic argument, I want to mention something about the two cases that have been referred to continually this morning. I have had no contacts with the Supreme Court of the United States except to discuss with the Deputy Clerk on Monday of this week what those cases seem to hold, and he read to me portions of those cases, and since that time, of course, Mr. Sweeney,

through Mr. Veeder, has provided us a copy of one of them. I had hoped that I would be able to have both copies here and be able to be better prepared to discuss in detail some of the teachings of those cases, because I think, in terms of mining law, I guess there is a lot more gold in those cases for the State of Washington than there are for some of the other parties in this suit.

First of all, I think, just to bring to your attention, at a minimum, I think there are some basic teachings in those cases which are relevant here, even though, as I say, I haven't read one of them, and I only read the other one between 1:30 and 2:30.

First of all, the Supreme Court has ruled rather conclusively that it is the United States, not the Tribe, that has reserved these rights that we are talking about in this case. In other words, they have confirmed what I think was the fair analysis of the conclusions in the Cappaert case, which the Court is familiar with, which was decided in 1976, dealing with pup fish.

The second issue that I think that the Court should be aware of is that the Supreme Court earlier this week has discussed formulas for measuring the scope of federally-reserved rights and the amounts of water within those scopes and they have cast those formulas in terms of limitations in minimums.

Thirdly, the Court has discussed the issue that is troublesome to the State, and that is the issue of the wall around the reservation which latter-day revelation has given to the United States and the Indian Tribe the conclusion that the state laws can't permeate the boundaries of the reservation. I think that, surprisingly, both cases deal with that issue, even though I don't have, and I cannot tell you that I have read all of the California v. United States case, but I would refer to Your Honor, when he initially looks at them, on the issue of who reserves, the United States or the Indians, look at page 4, at pages 2 and 4, I think. It would be decisive on that, on the limited amount issued that I mentioned. That would be pages 4 and 5, especially in the footnote on page 5, and further, there are numerous teachings about the dominancy of which we talked in this Court in this case and a number of other cases about dominancy of federal water law, and, more importantly, I think there are some road signs, as I call them, clearly pointing that the United States Supreme Court is on the verge of announcing what we have been contending the law has been for a long time, that state water laws can be, as they have in the past, applied lawfully within the boundaries of an Indian reservation. Specifically in the kind of windshield survey on my part, I would refer you to page 21 of the opinion. Also, as I understand it, Footnote 9 on page

24 of the California opinion deals specifically with that subject.

I would request at this time, Your Honor, permission on behalf of the State, because these opinions, I think, are real significant, the opportunity to file a supplemental brief dealing directly with the issues I have just mentioned. Of course, I wouldn't have any objection to anybody else presenting their views, but they are of special importance, I think, to us.

Now, then, I want to dwell, basically, only on one issue, and that is the issue of the State's jurisdiction. Is there a wall around the reservation? In more precise terms, the question to be answered involves the validity of the State's action granting a permit to the Waltons in 1949.

The United States and the Tribe, inconsistent with long-understood federal-reservation and state-reservation relationships, now contends that there is that wall that I mention around the reservation, lying on its boundaries, which state law cannot permeate or pierce.

It seems to me that the starting point in the analysis of cases like this is to set forth the basic proposition and that is that state water law applies to all the waters on non-Indian lands at all locations within a state, including federally-established Indian reservations, unless one of two things takes place. Stated in question

form, the first question to be asked is, has the state water law been removed or preempted from these waters on non-Indian lands either by a federal statute or a federal treaty, and the second basic inquiry, the first being preemption, is whether state water right laws have been ousted from these non-Indian lands because they interfere with the tribe's limited powers of self-government. By "limited", I mean the powers to govern its members and its property interests.

So, turning to the second inquiry first, can the State of Washington's action in this case involving excess waters interfere in any way with the Colville's tribal powers? Emphasized in earlier cases, the State's claims in this case do not deal with an assertion of power over the Colville Tribe or its members, and, likewise, we do not deal with any assertion of power over any reserved rights established by the United States for the Colville's benefit.

The first point that I want to emphasize is that the State does recognize the Winters doctrine. It has ever since I have been at the Attorney General's office and before, and that is approximately two decades.

We recognize that the United States does establish from time to time reserved rights to waters of creeks located in federal Indian reserves, and we recognize that they do, in this case, with regard to No Name Creek.

It is a critically important ancillary concept

which must be remembered, however, to properly fashion the outcome of this case, and that is that Winters does not stand for a proposition that all waters within a federal reserve are, as a matter of law, reserved to the benefit of the Indians.

In 1976, as I mentioned earlier, the United States Supreme Court, in the Cappaert case, announced that the reserved rights were those limited amounts necessary to carry out the purposes for which a reservation was created, and that includes an Indian reservation, but that amount is no more than is necessary, and I would say, after reading the Mimbres Valley case, that that includes another limitation that it will be at a minimal amount. The point is that there can be, and oftentimes are, excess or surplus waters within the streams of the reservation. Let me just say that there is a perfect example that the Court can take judicial notice in the Colville Reservation situation, taking into account the Columbia River. There are, without question, surplus waters in almost all circumstances year round in that stream as it flows through the Colville Reservation. I might say on that point that the State has been issuing water rights as late as earlier this year to non-Indian landowners within the Colville Indian Reservation and another reservation bordering the Columbia River. So far as I know, neither the United States nor any of the

tribes involved have chosen to challenge the validity of those state permits in any judicial or quasi-judicial form.

I must repeat that the state law only applies to excess or surplus waters on non-Indian, non-federal lands.

Now, turning to how the State Water Code is administered, it is our view that the State Water Code has been implemented so that, as a matter of law, permits entered, issued under the Code, cannot, in any way, impair any federally-reserved Indian rights.

First of all, just a matter of wording in every permit, these permits are issued as "subject to existing rights," and that would include any existing rights of the Indians. In the context of the Colville Reservation, all the federally-reserved rights of that reservation, which would be in the year 1872, would take precedent in the context of a water shortage, over any state water rights, based on a permit, because a permit couldn't be issued until the 1917 Water Code was enacted.

So, it is our view that state law based permits issued under the 1917 Code in 1949 and 1950, in the case of the Waltons, does not, indeed it cannot, authorize any interference whatsoever with the exercise of prior rights of the Indians. Thus, in a year when there is not enough water to satisfy the exercise of the reserved right, then the state's right is unexercisable for the period of that

shortage. The state right, the Walton permit in this case, is only what they say in Western Water law "paper right" under such a factual pattern. I should hasten to add that there are all kinds of paper rights in that sense. It is a common occurrence in Western water law. It is only when the excess waters or the surplus waters return to the stream that the state water right permit may be reactivated, come out of its dormant status.

Thus, it seems to us that there can be no valid contention that the State authorized interference with prior rights of the United States and the State did not authorize such a happening. It's even expressly precluded in the permit issued to the Waltons. Of course, the real problem in this whole case is that we are dealing with an unadjudicated stream. No one really knows who is entitled to what, either whether they are basing their claim on the federally-reserved rights held by the United States or those who have been transferred, such as Waltons' moccasin rights, successor to an Indian, until such time as they are quantified by a court. Under such circumstances, there can be no way, as a matter of law, that water rights can interfere with the powers, the water rights administration program of the State of Washington, can interfere with the self-government powers, if any there may be, of the Tribe over rights reserved for them by the United States.

Now, I want to turn briefly to the critical issue of state jurisdiction as it revolves around the question of, have state water right laws been preempted from application within the original boundaries of the Colville Reservation on non-Indian lands by operation of the supremacy clause? In other words, has the state water law been pushed out of the Colville Reservation, either by statute or treaty of the federal government? In as rapid-fire order as I can, the answer is, I think clearly, no, to all contentions by the United States and the Tribe, that federal statutes or the Washington State Constitutional provisions have erected a wall on the reservation through which the state's water rights laws cannot pierce.

First of all, Mr. Sweeney, and his predecessor, Mr. Sweeney, and his predecessor, and Mr. Burchette, have continually suggested to the Court that the federal Enabling Act that allowed Washington to enter the union contained some provision along the lines of preemption. It certainly, in our view, clearly does not. Note carefully what the federal disclaimer says. It provides, in pertinent part, that the people inhabiting said proposed state, which includes the State of Washington, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying with the boundaries of those states and said, "and to all lands lying within said limits

owned or held by any Indian or Indian tribes," and then it says, "and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

The application of the State's Water Code in this case are to non-federal lands. Thus, we do not violate the mandate of that Enabling Act provision in any respect. The State does not assert, by word or deed or power, through its Water Code in this case, any claim of power over either Colville tribal members or their interests. Its application is only to the excess waters and to non-Indians and involving non-Indian lands.

Further, just briefly to mention that absolute jurisdiction and control language that is set forth in the Enabling Act, first of all, the United States Supreme Court has held in the Organized Village of Kake case, which is cited to you, that that language of "absolute" is not the equivalent of exclusive. And, secondly, and more importantly for the purpose of this case, it is only talking about Indian lands, not non-Indian lands within the reservation. It is for the precise, same reasons that I just stated, Your Honor, that similar language in the Washington Constitution does not preempt the state law.

Now, the next federal law or statute that the United States suggests to Your Honor precludes the

applicability of state law is Public Law 83-280. They cite that portion that says, "Nothing in this section shall authorize the alien nation, encumbrance or taxation of any water rights belonging to any Indian tribe that is held in trust by the United States." Well, the important point here, of course, is that that only applies to Indian interests, and the State of Washington, as I am becoming repetitive, isn't interested in those Indian interests. They are talking about the excess waters, and we are, on the non-Indian lands.

Now, the United States also says that the State's counterpart of the statute, Public Law 83-280, which is RCW 37.12.050, contains the same bar, and, again, the barring language relates only to Indian interests. It is not a reservation-wide geographic bar.

Further, the executive order of the present grant and the background relating thereto shows no intention to preclude the applicability of state law and on this point I will defer to my partner, Mr. Mack, to discuss that in more detail.

Now, 25 U.S.C. 381, part of the Dawes Act, has been discussed at length this morning. I can only say that for once I may agree with Mr. Veeder, in part, because it only deals with the power of the Secretary to allocate among Indians in an equitable fashion for something that hasn't

been mentioned here, and that says, for agricultural purposes. So, it is not even a statute that allows for allocation among other types of uses.

In a nutshell, then, Your Honor, there is no clear intent derived from any federal statute or any federal action which supports a conclusion that state water rights laws have been removed under all circumstances from non-Indian lands in excess water on the Colville Reservation.

Now, I want to shift gears very dramatically for a moment. Even assuming that our analysis, our basic analysis is incorrect, that is, that the State is there unless it is pushed out either by federal statutes, treaties or interference with the powers of the Tribe to govern themselves and their interests, the federal government seems to take the position that, if our state laws are to apply, we must find some federal statute that grants that power, and I ask the Court to examine three statutes. They are in our briefs and I won't repeat them more to say than that Public Law 83-280 invited the states to apply their laws within a reservation and by Chapter 37.12, RCW, at least since 1963, in the Colville Reservation, if not before, Washington State civil laws, including its water laws, have been applicable to non-Indian fee lands within the Colville Indian Reservation. This is the clear, literal reading of the State's actions.

Secondly, I would ask the Court to examine a portion of the General Allotment Act, six and seven, 25 U.S.C. 349, which states that, "Upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to allotments have been made, shall have the benefit and be subject to the laws, both civil and criminal, of the state and territory in which they reside."

In other words, this section stated that when an allotment process was complete for a given Indian, he is subject to all of the laws of the state and territory in which he resides. Accordingly, when an Indian allottee conveys his allotment to a non-Indian, that non-Indian would be subject to the laws of the state, territory, so far as water laws are concerned.

Finally, again, once in a while Mr. Veeder and I do agree on something, and apparently we do, at least in part. The Colville Tribe provides us assistance on the third federal statute we bring to your attention, the one that I think is, while not completely relevant here, one that should be taken seriously into account, and that deals with waters on non-Indian homesteaded lands within a reservation.

Now, Mr. Veeder points out, and he mentioned today in oral argument, that the only way to establish water rights

when those types of lands, wherever located in the federal domain, are transferred to non-federal status, that the Supreme Court of the United States has held that no water rights pass with that transfer. The Supreme Court also has told us, where do you look? You look to state water law. That is the only place they can go to look. And while there are apparently no homesteaded lands in question here in the No Name Valley, cases like this have a broad application and sometimes are read to have application outside the boundaries of No Name Valley into areas where there are homesteaded lands on the reservation, and to that extent, I bring that statute to Your Honor's attention.

Finally, the Supreme Court has decided a number of cases recently involving Indians or water rights which contain valuable road signs to assist in resolution of cases of this type.

First, in the Oliphant case, decided on March 6 of this year, as well as the Charleston Products case, decided March 31, 1978, among others, we note the increasing importance that the United States Supreme Court is giving to the history and long-held understandings, practices, actions, customs, of responsible governmental officials to determine jurisdictional relationships of government in Indian reservation and Western water right law situations. In this context, we note, again, the long-held understanding,

not only of Washington State Water Code administrators, but lawyers of the Department of Interior and the Department of Justice, those views having been brought to the Court's attention earlier in our briefs, that state water laws apply to surplus waters on non-Indian lands within the reservation. The Washington State engineer who administers the Code, the Code now administered by the Honorable Wilbur Hallauer, has issued many permits on the Colville Reservation and other reservations throughout the State. Most, like the Waltons' permit, were not objected to, either by the Tribe or the United States at the time of the issuance by the State. The State of Washington's administrative practices are in accord with the West-wide practice of the sister-state water code administrators.

The Court is aware of and may take judicial notice of the position of the United States Department of Justice taken on the surplus waters issue in the Bel Bay case, which is still pending before Judge Voorhees in the Western District. The United States' position taken at the beginning of that case, and the position of the Department of Justice was that state water laws could be validly applied to excess waters on non-Indian lands. Indeed, it was for that very reason that the Justice Department's position that the excess-water doctrine had validity, that the Lummi Tribe intervened in the case, alleging the

Department of Justice was not properly representing the Tribe.

Further, the Court is aware of and can take notice of the Portland Solicitor's Office of the Department of Interior, supporting the state authority over surplus waters in the context of state power on the Tulalip Reservation. In this regard, I bring the Court's attention to the Tulalip Tribe v. Walker. There, Judge Charles Denny upheld the power of Washington State's Water Administrator, Mr. Walker, to issue permits relating to surplus waters on non-Indian lands within the original boundaries of the Tulalip Reservation near Everett. The exact issue faced by the court there is faced by the Court here.

The Court could also take notice that at this very moment -- I sound like Mr. Veeder -- at this very moment, that at this very moment, the United States, in the Chamokane Creek case, asks this Court to confirm, in the United States, a water right with a 1952 priority date to withdraw and make use of waters located within the boundaries of the Spokane Reservation, based on Washington State law.

Finally, in this area, we note and commend to the Court's careful attention, that the Ninth Circuit, as early as 1908, if not before, has recognized the validity of water rights relating to surplus waters within an Indian

reservation, based on state law, and I am referring to the case of Conrad Investment Company v. The United States, which we have cited in our brief, which is 161 F.829. Indeed, the court held that the stream in that case, Birch Creek, should contain 1,666 miner's inches to satisfy federal reserve Indian rights, with the remainder of the stream, which is within the reservation, available to satisfy the non-Indian right. The diversion in that case was a diversion located within the original boundaries of the reservation. It was almost identical to the Ahtanum Creek litigation, where it was a boundary stream, and that there were water rights established with regard to waters flowing through that Birch Creek, as opposed to through the reservation. I want to note that the court, in that case -- it is the Court of Appeals -- granted, enjoined, -- granted injunction against the investment company, Conrad Investment Company, so that 1,666 miner's inches would bypass by their diversion, its diversion works,to satisfy the reserve right, but the important point was, in that creek, that the facts of the case show that the minimum flow in that stream, historically, was 2500 miner's inches and the maximum was in the range of 150,000 miner's inches, and I quote from that case, just briefly. This is on page 834 of 161 Federal Reporter.

"This decree does not at any time reserve all waters

of Birch Creek for the complainant, but leaves a considerable flow of water to be retained by defendant's dam and used in its system or irrigation."

And I want to add to this, Your Honor, that the rights, I think it was quite clear, I did investigate this matter at the Federal Records Center in San Bruno, California, earlier, that it is quite clear that the rights that Conrad Investment Company were relying upon which had their base of diversion inside the reservation although their use was outside the reservation on non-Indian lands, was based on state law, the law of the State of Montana. So, even the Ninth Circuit, as long ago as 1908, has recognized the validity of the state permits where there are excess waters involved.

I do want to speak briefly as to the arguments made by Mr. Veeder and Mr. Sweeney.

With regard to the state jurisdiction, I only want to say one point. Counsel for the Tribe says that there is a long line of unbroken, "an unbroken series", I think were the exact words, of cases which say that the State has no power inside the reservation. He cited United States v. Winters, and then he described what Winters said correctly, and that says that state rights can't interfere with prior federal-reserved rights. Two points. As I mentioned earlier, Winters doesn't say anything about precluding the state power. To the contrary, it seems to me that it

probably says there are some situations where state water rights law can apply.

The second part is that Mr. Veeder only, in that long, unbroken series, didn't mention any other cases, and certainly there are no cases in the United States Supreme Court that hold that.

Now, then, secondly, I didn't plan on talking about the whole issue of the allottee's rights, non-Indian allottee's rights as successor to an Indian. I just want -- I call them moccasin rights for shorthand purposes, standing in the moccasins of the Indian. It seems to me that the analysis there is pretty easy, and with regard to the folks on this side of the table, on this side of the room, that would come off at somewhat at odds with them, especially the position taken by Mr. Veeder.

First of all, we do recognize there are reserved rights. The non-Indian obtained whatever the Indian had. The Indian had a portion of the water right. When the transfer of that right took place, there is a complete severance of the federal trust. When that took place, then it was water owned by a non-Indian, and here is where we part, is that, at that point, when the non-Indian obtains the allotment, water rights, then they become subject to the regulatory powers, forfeiture laws, of the state law.

The issue of reasonable use has come up. I think

what is going on there, and maybe someone else is a lot wiser, surely there are many that are, but I think what the Court did in that case was to mix up an allotment right, a portion of the reserved right, and the water law that attaches to that with Western water law, dealing entirely with appropriation. If you don't put water to a beneficial use within a reasonable time after you have shown an intention to do so, why, you don't get the benefit of the relation-back theory. Now, I think that, without going into detail there, that the District Court in Idaho in the 1920's engrafted a piece of state law that wasn't really applicable to the situation involved. The way I look at it, there is no freezing of the right at the time of the transfer from federal to non-federal. There is no freezing of that right. Whatever the Indian had when I acquired it, if I acquired one, I can continue to exercise that right. The only difference now is that after its determination of severance from the federal trust, then this whole gamut of Washington water law falls upon it. Whether I can continue to exercise it in that situation depends on whether I am not somehow limited by Washington state laws.

The gist of the argument by counsel for the Colville Tribe is, in effect, to do in, I think, some of the valuable rights they have. I think the Court has asked a number of questions along this line. Stated in its

simplest form, if you don't have water rights to sell, your land hasn't value. As a practical matter, you are frozen with keeping your lands. I don't think that is what Congress intended by the Allotment Act. I think there was an intention that individual Indians be given a piece of property and if they wanted to sell that property to someone else, they could do so, and most importantly, at fair market value, and that can only take place in most of the arid West where Indian reservations are located, if water rights attach, and that is the sickness I see with the position -- it is almost a policy position as well as a legal position -- of the position contended for by Mr. Veeder.

There is only one comment I want to make about Mr. Sweeney's argument, and that is that, at the very last of his statements, he said, suggested that somehow we have to have one entity, manager of water resources. That is an ideal, and Judge Voorhees suggested that in the Bel Bay case. As I tried to point out in some detail when I went over, paragraph by paragraph, where I thought Judge Voorhees had gone wrong, that just isn't the situation. It is not the situation. Congress didn't -- Congress has never suggested that there should be -- there is one water allocation system, and to the extent, I think, Your Honor, that there is a congressional intent to have one water manager for all waters within that watershed with an estate, every road

sign that I see, from the McCarran Amendment in the early '50s until the opinion that was entered on Monday by Justice Rehnquist, if there is going to be one, that is certainly pointing towards the state. In other words, the policy should not be to oust the state, but to bring the state into position where it can take care of these water-related decisions in a rational manner.

So, I ask the Court, in conclusion, to approach very cautiously the revolutionary, revisional law contended for by the United States and the Colville Tribe in this case. It has the seeds for causing a great disarray, which Justice Marshall described in the Charleston case, in the administration of the water rights law throughout the Western United States.

Thank you, Your Honor.

THE COURT: Mr. Roe, as I get your statement, it is the position of the State that you claim the right to allocate or give water permits under state law --

MR. ROE: That's right.

THE COURT: -- to the extent that there is excess waters on non-Indian lands within a reservation. That's shorthand, but is this what you are saying?

MR. ROE: That is right.

THE COURT: That raises a question. The availability of so-called excess waters is not a static

thing.

MR. ROE: Exactly.

THE COURT: So, if your position is correct, at what point do we know there is excess waters? I can make a ruling on the evidence in this case as to the existing situation right now, but that may not hold for next year.

MR. ROE: That is true in every situation.

THE COURT: So, as a practical matter, how do you handle it?

MR. ROE: Well, the practicalities of it is that that is Western water law, and that is Western water. Because of drought and the demands placed by human beings, some days they want to take vacation, they don't want to plant this, they don't take as much water, all of these things. Some people are not going to get the rights, and sometimes -- .

THE COURT: Well, I understand that we are not dealing with this reserved right, but by the very definition of the State's position, you are limiting yourself to excess waters.

MR. ROE: That is right.

THE COURT: And it seems to me that this adds another dimension to the problem of the normal adjudication and allocation of waters within a watershed.

MR. ROE: I hear, and I don't hear, your

point. We had the same problem, as you know, when you dealt with the In re Stranger Creek for the Washington State Supreme Court. We have the riparian rights doctrine in this state. You confirmed that. It is alive and well. In many, many respects, it is identical to reserved right. It sits there dormant for many years, but that doesn't stop the State of Washington from issuing all kinds of prior-appropriation doctrine permits, but if somebody wants to warm up one of those permits, riparian rights, exercise them, with an earlier date, I think it is almost an exact same situation. It is a very unsatisfactory situation. Water laws developed that way in the West, and in those cases where they had so-called California or dual-system doctrines developed, that we operate with a lot of unknowns, and the only way that we could answer it is through general adjudication whereby we can confirm claimed rights that have been established in the past so we know them precisely and then we can regulate them, and, I should add, by the way, Your Honor, that in the context of the McCarran Amendment, which consented that the United States, including the United States representing the Indian interests, to be joined and required to participate in general adjudications, including adjudication of state court, as you are well aware. That case that you were involved in in the Supreme Court was exactly that type of rights, readjudicated Indian rights.

Until we have an ideal situation where we can adjudicate all of these rights, we just have all of these unknowns that we have to live with, but I don't spot that as anything but not a very well designed system, but I don't think that is the type of, almost a policy conclusion, that should preclude the state from continuing what it has been, in a dominant role, in the entire water systems of our state, including those on the reservations.

THE COURT: It isn't the first time that I find that what I wrote on the Supreme Court causes me difficulty when I get here.

MR. ROE: Thank you, Your Honor.

THE COURT: Mr. Mack, do you have something further for the State?

MR. MACK: Yes, Your Honor.

Your Honor, I would limit myself generally to three areas, seeing as how the State has already filed written argument and most of the matters dealing with the facts of this case have been dealt with in some detail.

One of those is this notion of the figure which the Court, or the analysis which the Court must employ in deriving a figure for the water availability for this valley.

The second is the history of use of the water in the valley, which, at least as far as the State is concerned, has relevance to Your Honor's decision.

Third, is what the State sees as three elements of the physical situation in the valley which complicate the Court's ability to derive a figure for the Winters reserved rights in the valley, and so I would proceed along that line.

First, this notion of how, what analysis the Court is to employ for deriving the water-availability figure, there has been some testimony, especially on the part of the Tribes, as to, the term used by them was, "firm annual supply", and some suggestion, at least, that the Court should be looking at that figure, if, in fact, such a figure could be ascertained, and that that is a figure which then should be plugged into, if you will, a Winters reserved right equation, along with a figure for water duty, and for irrigable acres, and by simply doing that, then the Court would derive the answers to this case.

For a variety of reasons, the State thinks that is not only too simplistic an approach here, but it would be an erroneous approach. The reasons for that start with the fact that Western water law, in all of the states, including Washington, is based on the notion of use. Western water rights are generally, as the courts have used the term, usufructuary. They depend on use, and one year there may be a surplus of water and one year not, and so those who hold the rights may not be able to exercise them.

The Tribe's firm annual supply figure is essen-

tially, as has been pointed out in our written argument, based on sort of a dought-year analysis, and it ignores those years in which there may be more water than there would be in short years.

Indeed, three other things need to be said here. One is that the Tribe itself, in designing its system and in putting water to use, does not at all rely on any firm annual supply figure, but rather looks to how much water is available in a particular year or particular month or particular week, as anyone would.

Second, if the Tribe is correct that the Court must look to a so-called firm annual supply, and that that is the extent of the water that the Court should consider of use in the valley, then the question immediately arises, the following question arises -- the following question arises, at least in my mind, did President Grant, then, intend in reserving water for No Name Creek Valley to reserve simply that amount of water which now the Tribe has decided is 550 acre feet, and that is the outside limit of the Winters reserved rights, since that is the only firm annual supply figure and the only one that could be reserved. I don't think he did, and I think it points out the erroneous reliance on that figure.

Third, we have counsel for the Tribe's statement today that with regard to just and equal distribution of

water, that that is a matter that varies from month to month, as counsel for the Tribes stated, and he even got down to the problems for each individual allotment in the valley on that.

I might add that at page 44 of the Tribe's argument, written argument, the Tribe itself says that one has to look to Western water laws to determine what this water available -- how one determines rights in this valley.

The Court has a lot of figures in front of it. It has Dr. Maddox's figure of 1200 to 1300 acre feet. It has Mr. Cline's figure of 1100 acre feet, assuming certain conditions, and somewhere under a thousand acre feet, assuming other conditions. It has Mr. Watson's various figures. It has Mr. Jones' figures; although Mr. Jones' figures changed occasionally, they always were safely between the estimates of the United States Geological Survey and those of the Tribe, and fell somewhere in the middle.

The State would also point out that the United States' method for coming up with a water availability figure and a water duty figure is found on pages 9 to 11 of the final argument, written argument, of the United States, is a strange system, according to, at least in our view, and should not be relied on by the Court.

The United States has used an averaging method, it seems, at least on pages 9 to 11. It takes the various

estimates of the experts and adds them up and divides by the number of experts and decides that that is a reasonable way to proceed.

It seems to have two problems. One is that sometimes an expert's numbers are added in and sometimes they are not, depending, apparently, on what the result ought to be. Dr. Maddox's figure on water duty is plugged into the average for the water duty. His figures on water availability, apparently because they are high and would raise the average, are not plugged into the calculations for water availability, with no explanation for that, for the discrepancy.

The second problem, really, is why this sort of thing should not be done. If Your Honor had a jury -- at least I learned this the first year of law school, disagreed with it, but I learned it otherwise -- had a jury that came in with an average figure, on a damage, for example, on a liability claim, Mr. Sweeney, if he were involved in the trial, the United States would be the first one to ask that that verdict be thrown out. It is simply not a proper way of coming up with the figure, and it is not a proper way to do it here.

With regard to the water duty figures, Your Honor mentioned at the beginning of the day that he was concerned with that. That is a difficult matter on which there was an

abundance of testimony. The State would simply say that the Court has before it the testimony of those people most experienced in this area of Washington State, primarily Mr. Bennett who came up with the reasonable figure, not based on any contrived analysis or, in fact, based on outdated publications, but on actual use in the area. It is a figure that is not low, but it is not high. There are parties to this litigation that would like the water duty figure and the irrigable acreage figure to be as high as possible, with the water availability as low as possible. That produces the best results, from their standpoint. But I think, fairly stated, the water duty figures that were put forward by various witnesses, including Mr. Bennett and Dr. Maddox, were far more reasonable than the figures put forth by the other people.

Now, the second area I would like to get into is the historical use in the valley, Your Honor.

There are two important points here. First, in some years, there has been, and in future years, there may be, excess waters in the No Name Creek Valley, and I use the term, "excess waters", in the way we have used them today. And, second -- and there has been no evidence presented at all during the trial contradicting this -- second, in the period of 1948 to 1950, which was the period in which the State issued its surface water permit for the

right to divert surface water to Mr. Walton, there were excess waters, if one looks to the use of waters in that valley, and I ask Your Honor for a while to look at the actual use of waters at various periods, for irrigation primarily, in the No Name Creek Valley, which, by the way, according to the pretrial order, is the area we are concerned with, and I speak not of some aquifer, not of some basin, not of someone's preconceived notion of what the valley ought to be, but the valley as it physically, geographically, exists today, and as it existed at the time the reservation was created.

In 1950, when the certificate was issued by the State, the one under attack here, there is no question, according to the testimony Your Honor has heard, that, first of all, there was no objection from either the United States or the Tribe to the issuance of that permit, that certificate, and, second, there was no other use in the valley with which that water right could interfere. The State at that period looked not to the theoretical limit of the use of waters under all Winters rights in that valley, but to the actual use of water, and at that time, in the late 1940's and in 1950, there were excess waters. As Mr. Roe pointed out, the State permit and the certificate which is governed by the permit, in part, clearly stated that the right given to Mr. Walton was subject to all preexisting rights, and that

includes Winters reserved rights, which, if they were to be exercised, may, in fact, provide in all years or some years that Mr. Walton may have little or no water under his State permit or certificate. Nevertheless, in 1950 he did have the use of waters under that certificate, and for some years thereafter, because of the lack of use of other waters in the valley, and may, in fact, have use in future years.

We also ask Your Honor to look at the historical use of waters in this valley for allotments which are not Mr. Walton's, first, Allotments 901 and 903. The use of Winters reserved rights waters for those allotments derived their waters from No Name Creek, there is no question, in limited amounts. With regard to Allotments 892 and 526, the exercise of Winters reserved rights for those allotments derived their surface waters from Omak Creek and not from No Name Creek. Important here is, first of all, the fact that this was done, and, second, the fact that at the time of the creation of the reservation, it was certainly within the contemplation of the federal government that such waters would be the surface waters used for those upper parcels of property, and that certainly was the contemplation at the time the allotments were created.

As the Waltons point out at page 5 of their supplemental memorandum, in quoting from Felix Cohen's handbook on federal Indian law with regard to the Powers

case, that it "compells the view that the right to use water is a right appurtenant to the land within the reservation and that unless excluded, it passes to each grantee and subsequent conveyance of the allotted lands."

The use of waters from Omak Creek, at least for the upper allotments in this valley, was the use of waters under the Winters reserved rights, which they became appurtenant to that allotment, and the Winters reserved right, to the extent it was exercised for surface waters in that upper allotment, was certainly to use waters from Omak Creek and not from No Name Creek. There is substantial evidence from the more elderly people who testified who knew about the valley, about the historical use of irrigation waters in this area, and that conforms with the State's view.

We should also look, I believe, at the history of federal behavior with regard to this reservation, and I go into this not for any argument of estoppel against the federal government, but because the Supreme Court, in various cases, including the Cappaert case, including Oliphant, and including the recent case of Andrews v. Charleston Products Company, has emphasized the importance in this area of looking at federal administrative behavior and congressional actions, to see what the actual intention was in creating the reservation, or in creating the federal right. We have

fully briefed this and mentioned it in our written argument, but I would just like to say today that consistently, until the beginning of this litigation, the federal government, in various ways, recognized a state jurisdiction over the use of waters on the Colville Reservation, and recognized the applicability of state law, water law, on the reservation. We have cited some of those statements. They can be found with regard to the Bureau of Indian Affairs agents on the reservation, both in the last century and in this century. They may be found at the highest level of the Executive Branch of the government. They may be found in various statements of congressional committees throughout the years and in statements by the Commissioner of Indian Affairs.

The United States Government, with regard to this particular reservation, always spoke of the reservation made here in limited terms. There are congressional statements to that, and we call the Court's attention especially to the proposed legislation in 1908 by the then-Secretary of Interior Garfield for the additional reservation of water within the Colville Reservation for federal power purposes, which, to this date, at least, and we propound this, put it forward today, was an implied recognition by the Secretary that the federal government had not reserved all waters on the Colville Indian Reservation for federal purposes, and it was an implied recognition that the recognition of waters on

this reservation was, in fact, a limited one. In this regard, the date at which President Grant sat down and signed his executive order is important, 1872, because of the various policies then in effect in the Department of Interior and the Executive Branch and the Congress, in regard to various Indians' rights and with regard to the nature of rights created by treaty by reservation. Indeed, it is because of the importance of the 1870's that this reservation was not created by treaty. It was at this period that the Congress and the Executive Branch both decided that the signing of treaties with Indian tribes was wrong, in that it seriously misled people as to the nature of the rights Indian tribes have, and the nature of the reservations made by the federal government.

There is also the constant history of no objection by the Tribes or the federal government to State action.

Now, finally, Your Honor, there are three matters which I think of, in physical terms, with regard to this reservation or this valley, which I think complicates your duties.

Before I get to those, though, I would like to treat the one thing that continues to swim around here, and that is the Lahontan cutthroat trout. The State has filed a supplemental memorandum on the recent TVA case. I would only add three things. One, that there is a major

distinction in that the snail darter was, of course, native to the waters in the TVA area, whereas this fish is not native to these waters.

I guess I have only two things on this, and, second, the result of the Tribes' argument, apparently, would be that, if, for example, it could not get all of the water in this valley by importing Lahontan cutthroat trout, that, if it could even import snail darters, that it could ask for more water, or that, the people who opposed the dam, the Tellico Dam, if they could not have found a native fish, they would have imported an endangered fish and dumped it in the river and then claimed that the dam should be stopped. The important distinction here is that the Lahontan cutthroat trout is not native to this area. The State does not object to tribal efforts to raise a Lahontan cutthroat fishery, but it does object to the ballooning effect that that has, apparently in the Tribes' view it is Winters reserved rights. Almost an unlimited claim for reserved rights could be made under such a view.

Now, the three final things I would like to go into concern, number one, the surface waters here, and number two, the groundwaters, and number three, the allotments.

There has been much talk during this trial, and Your Honor had a great deal of trouble because of counsels'

arguments over which surface waters ought to be considered in this trial, and the State heard, as everyone else did, from the Tribes and the United States that Omak Creek wasn't involved in this case. Indeed, the State is somewhat surprised that in all of the exhibits the United States and the Tribe put in, that Omak Creek appears and was not blacked out. Indeed, if the exhibits on which Omak Creek appears put in by the Tribe and the U.S. were to be removed, it would have no case. The reason is that Omak Creek is an integral part of the No Name Creek Valley. It always has been and it probably always will be, and it is not because the State has put it there. The pretrial order did not limit this Court to simply look at the surface waters of No Name Creek.

Omak Creek is important for two reasons. One is that there would be a much diminished groundwater supply if it were not for that creek. On that, everyone agrees. But, second, and most important to the State, Omak Creek has been the historical source of water for irrigation purposes for much of the land in the No Name Creek Valley, and there are no blinders which can hide that fact, and the State believes that that is relevant in a determination of which allotments, for all of the allotments that exercise Winters reserve rights, which ones exercise Winters reserve rights, to what limit, and from what source.

The second complicating factual matter, at least as far as the United States and the Tribes are concerned, is the groundwater here. The Tribes would have the Court believe that there are, indeed, two different aquifers, one conveniently above Mr. Walton's property and one below it, and that they are separated by this so-called aquiclude. If that is the case, it is possible that the Court should apply, by the Tribes' arguments, two different analyses in determining, coming up with -- in other words, two different water availability figures for the aquifers and the lands that overlie them.

The third problem, and I submit that this is the most important factual problem in determining water availability, is the allotment problem, and I explain that in this way: If the lands in this valley had not been allotted, the arguments, of the Tribes at least, would make much more sense because the Tribes ask Your Honor to look at the Tribes as the one holder of all Winters reserve rights in this valley, and if Your Honor does that and Your Honor can find water availability figure, water duty figure, and irrigable acres figure, then Your Honor's task is very simple. It could be answered in one paragraph as to what the extent of the Winters reserve rights are.

Unfortunately for the Tribes, although they may irrigate all of these lands today, these lands have all been

allotted out and what the allotment did, in effect, was to divide up, as Mr. Price pointed out, the Winters reserve rights that were reserved for this valley by President Grant. I don't even intend to get into the problem of devolution of property ownership, and that is to say whether the Tribes are limited by the property rights held by those which have now given property to the Tribes, including the Pioneer Educational Association. But it is the State's view that Your Honor should seriously consider that because of this factor, in order to determine a water availability figure and an irrigable acreage figure, that Your Honor must look to each individual allotment and in analysis, using the basic premise for each, nevertheless must be employed differently for each allotment. That is to say that Allotment -- and I forget which is the farthest north. I believe it is 526 -- although it has a certain irrigable acreage and a certain water duty, it is the same as the water duty for 903. It has a certain different water availability for this reason: It was certainly not in the contemplation of the federal government that the aquifer, for example, that underlies 903, was reserved for 526. There were certain waters that it was within the contemplation of the federal government were reserved for that allotment, namely groundwaters, in a small supply, and surface waters, and those surface waters, as used by every

subsequent owner of 526, were Omak Creek waters.

Now, in conclusion, I would say, Your Honor, that the question has arisen today as to Mr. Veeder's discussing the question, did Mr. Walton succeed to any Winters reserve rights, what happens in water-short periods? The simple fact of the matter is that all of the holders of Winters reserve rights by allotment in this valley have the same priority dates. I don't know how else one would determine that. So, since they all have the same priority date, I think one would look to traditional Western water law as to how to cut back. There certainly would be no junior appropriator, and since the federal government has not come up with some view as to how to do that in this valley, I don't know how it would be done, but I don't believe that truly is a problem. From our standpoint, at least, Mr. Walton's Winters reserve right, the extent to which he has succeeded to one, has the same identical priority date as all of the others in this valley, and they would share water equally, and according to that right, in bountiful as well as in drought periods.

Thank you, Your Honor.

THE COURT: Mr. Veeder, you asked for a chance to answer the contentions.

MR. VEEDER: Yes, Your Honor, and the regrettable thing about it is that perhaps I should have

asked for several hours, in light of the language that has been used here. For example, Mr. Mack just got through a moment ago saying that Omak Creek waters had been used to irrigate 526. That is simply untrue. There is not a scintilla of evidence in the record that 526 was irrigated from Omak Creek, not one word. I think he is confused. There is land at the mission that has been irrigated, but that is not part of 526. That is not part of 526, and I think it is a, really an outrage to have the record distorted in the manner that this has been distorted here.

I realize the full implication of these things. I comprehend the pressure that the State is under, but I respectfully submit that we have been grievously put upon by what I believe to be a lack of understanding by counsel. I think that is the kindest thing I can say.

There are several things, however, that I think that I have to turn to at once.

Your Honor commented, if I recall, that there was fishery water until the Tribe began irrigating. Perhaps I misunderstood what Your Honor said, but that is what I thought came through, that had the Tribe not started irrigating, there would be fishery water. Now, if I misunderstood Your Honor, I would refrain from pressing this thing, but the fact is there was no fishery water. There was no water running past Mr. Walton's property during

the spawning season. The only time water went by down below Mr. Walton's property was during the non-irrigation season, when he was not taking the water. I think Your Honor might be interested in our brief on this, at Footnotes 170 and 179, and in Volume VIII of the transcript, at page 661. We point out that, as soon as Mr. Walton turned on his pumps and began taking water, there was no water down there, and it killed the eggs that were incubating there, and certainly during the irrigation season, there never has been water down in that area because Mr. Walton took it all, and the evidence proves that.

Now, there is another issue, and, of course, the preliminary injunction issue that is before Your Honor this afternoon becomes extremely important. The irrigable, the irreparable damage issue, I think, has been fully covered. I think that we are suffering irreparable damage; I think that damage is great; I think that from the standpoint of closing down 903, and may I say that by closing down 903 we have lost 30 acres of crop. Now, it has been that kind of thing that brought us to this point of having to request a preliminary injunction, an injunction that would give us some relief for the balance of the irrigation season, and I think that is a very vital issue this afternoon.

Now, in that regard, we have statements about public use by counsel for the Waltons. I think that when we

review the law in this matter, the issue of public use comes up in regard to Indian reservation, in regard to schools, and the other matters, and the public interest is of importance under the circumstances here. No one ever suggested that -- in fact, we put in evidence to the contrary -- that the Paschal Sherman Indian School, while supported by the Tribes, has the benefit of the No Name Creek supply of water, and some of the income, and some of the substance comes from it, but the destruction of that is irreparable damage, just as much as any other kind and type of irreparable damage that transpires. No one said the Paschal Sherman School would be supported and maintained by that irrigation system. So, I wish to clarify that situation right now. No one ever asserted.

Now, in regard to possibility of success -- that is one of the elements in regard to a preliminary injunction -- on the possibility of success, I believe it has been conceded here, because counsel for Waltons, and, indeed, everyone else, has said, no, we are not going to take all of the water away from the Colville Confederated Tribes. There is going to be some kind of a sharing. Now, I have read the cases as carefully as anyone can, and I have found not one word about a sharing. I find no basis for sharing here. I point out, and no one even responded to this, either to our briefs or to our arguments, Your Honor, that,

absent some kind of legislation taking from the Colville Confederated Tribes the rights that were vested in them, those rights would continue to reside with the Colville Confederated Tribes, and this is the issue before Your Honor: By what act were they deprived of these rights? What took the water from them? 25 U.S.C. 381? Well, the only possibility of 25 U.S.C. 381 being sensibly utilized is the memo that we have outlined on the just and equal distribution of the varying quantity of water on each parcel of Indian land, and, as I have said, it is truly limited to the Indians and not to the Waltons.

There are other factors that I will touch upon very rapidly, and, once again, I am greatly concerned over the language that was used. The statement that there is some kind of an aquifer down below the granite lip in 901 and 903, well, that is absolutely contrary to anything in this case. There was no aquifer down there, and there was no aquiclude. I think the counsel for the Waltons confused the green lands there as what is designated as irrigable lands. Those are irrigable lands, Your Honor. It has got nothing to do with groundwater, has nothing to do with an aquifer.

I move on once more to the issue of 46 percent of the lands within the No Name Creek basin. That, once again, has nothing to do with this issue. Those waters that do

come down, the small amounts that do come down, come down in the winter and spring, and the evidence supports that, so there is nothing here where you can get additional supply of water for 901 and 903.

Now, the 1956 Act was borne down again very heavily upon restoring "surplus lands" that had been previously been opened for homestead acquisition. Now, the 1956 Act has nothing whatever to do in regard to No Name Creek basin. Nothing. The 1956, I repeat, did not restore one thing or was there anything taken from it, the No Name Creek basin, by reason of the opening of the lands, the surplus lands, for homesteading. There were no homesteading lands so the 1956 Act in no way pertained to them, and manifestly did not pertain to the rights to the use of water.

We move on down to another situation, repeated reference to the Omak Creek. Your Honor, we went through this repeatedly, and Your Honor, in my view, correctly ruled that the only issue that was here was the waters for allotments being served from No Name Creek. Obviously, Omak Creek has a contributing factor, the infiltration of water. No one has even suggested that that be taken away, but we are saying, and I think this is extremely important in view of the state of the record in this case, that when the Waltons tried to appropriate Omak Creek water, the State of Washington denied those petitions because of objections

that were interposed, because of objections to -- there was no water available. Now, I confess, Your Honor objected to my offer of that proof, but that offer is in the evidence today. I mean it is in the record. It is extremely important that the State of Washington refused to allow permits to appropriate water out of Omak Creek when the Waltons made an application for it. I think that that is an element that is going to be highly important in this record.

I move on down to another element that I think Your Honor has had brought to your attention on repeated occasions this afternoon, and among them were that the allottees in some manner are going to be damaged by this lawsuit and by a decree in it. We move into the issue that was raised by counsel for the Waltons and the fact that there were some, and I don't -- I think this is a matter of rebuttal rather than argument -- should have been rebutted rather than argued here by counsel, and he didn't raise it on rebuttal, but the reference is made to the parties who allegedly -- and I don't agree that this is true -- allegedly were not signatories to these leases, these 10-year leases under which the operations are going forward today. Bear in mind, however, that if there is some substance to what counsel said, the leases were signed by the Superintendent of the Colville Indian irrigation --

the Colville Indian Reservation, fully authorized by the Secretary of the Interior, and the reference may be of importance to Your Honor, 25 C.F.R. 131.2, in which there is provision for the Superintendent, he stands in the shoes of the Secretary in this matter, to sign for allottees, and these are not allottees, they are fractional owners. What their interest is, if there are such people, we don't know. But we do know that the Superintendent had this authority and we do know that he signed them, so there is no question that these leases are valid and the allottees have full power and authority to ask that the Colvilles represent them in this litigation.

A very, very important point, Your Honor, that I think we have to turn to in regard to the request for the preliminary injunction, there are not 105 acres of irrigated land by the Waltons. They are not irrigating 105 acres today. The evidence that we put in showed -- and that they put in, we used their map -- that there was 65 acres at the very outside. In fact, there is less than that. So, if, in some manner, Your Honor should turn to how this could be allocated, we cannot live with 105 acres of irrigated land for the Waltons. That is an extremely important issue and one of the principal reasons why I objected strenuously to this tabulation. It has got down here 100 acres of land for the Waltons. That simply is incorrect, Your Honor.

There may be 100 acres of irrigable land, but Your Honor knows there is a great difference between irrigated and irrigable land, so any prorating on the basis of a hundred would be grievously in error from the standpoint of the Tribes, if there is to be any kind of an apportionment, and I would certainly resist it, is that the allocation would be on the basis at the outside, of 65 for the Waltons and 157 for the Tribes, or, if we are going to go on an irrigable basis, it would be 105 acres for the Waltons and 228 for the Tribes, but under no circumstances could we live with the idea that there would be that kind of acreage entitled to water, that is 100 acres for the Waltons. Under no circumstance would that be possible.

We move to another issue and another mistake. It is stated that the Moomaws were Indians. Well, at the time they were certainly not Indians. They -- I guess they became a member of the Tribe in 1954 or something like that, but they certainly were not members at the time that the lands were purchased, and Moomaws did not purchase those lands. The lands went to the family of Whams, or however you pronounce it. So, it is not a matter of an Indian using water. This is extremely important, Your Honor, because we have the Department of Justice using Hibner. We hear Hibner talked all the way through. The issue was, were there any lands irrigated by Indians antecedent to the sale of the

properties to non-Indians, and the answer is, "No, there was not."

We come, again, to the issuance of permits by the State of Washington, and if there is one basic element that we will stand by here, based upon the precepts of the law as we are fully acquainted, and I'm sure Your Honor is, that the State does not receive any benefits from the fact that the United States failed to interpose objection when an application was made. That laches and estoppel do not apply to the United States or the Tribes is very, very clear, and, once again, I have no way of knowing what they are talking about, whether there were objections interposed or not, but there was certainly agreement by the State of Washington, I might add, after this case was initiated, that there would be no permits issued within the reservation, and that is an element, once more, an element that comes up anew in these matters. I realize, Your Honor, that we have pushed this clock a long way around this afternoon, and there are matters that, I assume, will be disposed of today, but we are down to the point, Your Honor, where we are taking the position that statements in the record that were made by counsel have to be corrected in regard to the appraisal of land, another issue that was raised. We go back and check the data that was before Your Honor in the record, and you will find that there is no designation between irrigated and

irrigable acres, irrespective of the comments and the matters that were read to Your Honor. It is clear that they made a difference in the appraisal between arable lands, that is dry lands, or rocky lands, and those are the distinctions. Once again, I sincerely hope that these matters will not be utilized against the Tribes.

Finally, Your Honor, I'm going to make one more run through these cases. The Powers decision made no -- was a dismissed case. We know that, and we have argued it and put it in the brief. The Spear-Morgan case that apparently counsel has relied upon certainly had nothing to do with this. The Court said, we don't have jurisdiction. That was the one, the Spear-Morgan case, I reviewed that. The Alexander case has absolutely nothing to do with this situation. It pertained to the irrigation district on the Flathead Indian Irrigation Project under special legislation. The Kootenai Salish case was referred to. It's called the Namen case. That involved the sale of villas. A man went down and bought a piece of land bordering on Flathead Lake. Water rights were not involved in that case at all. It was, did the man have the right to build a wharf out from his land for boats? Did the man have the right to go down to the shore of Flathead Lake and have access to the lake? Water rights were not there involved, nor was 25 U.S.C. 381 involved.

Now, we turn to the Scholder case. Now, that case, and I brought it here because I think it is extremely important, Your Honor, that we look at these cases that were alluded to by counsel, and the decision that are applicable here and the excerpts that were copied out of them. The Scholder, S-c-h-o-l-d-e-r, v. United States, 428 F.2d 1123, did not involve water rights at all. It involved an allocation of costs that they tried to place upon the Indian people, costs for the building of a reservoir, a building of a ditch across Indian land. Now, that has absolutely nothing whatever to do with this case. The quotations that were taken from it were lifted out of context, so we are in this position, Your Honor, that 25 U.S.C. 381 has never been construed by any court, and I submit that this is the first time through for it, where the issue was squarely presented, and I repeat what I said before, I emphasize what I said before, that 25 U.S.C. 381 relates strictly to Indians and not to non-Indians. It relates strictly to a just and equal distribution among Indians and not allottees, and I thank Your Honor very much.

MR. PRICE: Your Honor, I failed to make one comment with respect to the injunction matter, and I would ask the Court's indulgence just to state that my understanding of the law with respect to preliminary injunctions is to preserve the status quo and the courts, in cases I read,

interpret that as the last peaceable act immediately preceeding the initiation of litigation, and I do want the Court to be aware that we were seven years into this litigation when the Tribes embarked upon a program that they say now they are being harmed by not enough water. I do not believe that meets the test of "last peaceable act prior to initiation of the lawsuit".

MR. VEEDER: Well, I would like to respond to that. Under the circumstance where counsel for the Waltons agreed to Your Honor's order of July 14, 1976 authorizing and recognizing and approving the Colville Irrigation Project, the installation of the wells, and the operation of the wells, was the last peaceful period among the parties. It was agreed to by all of the parties, and I respectfully submit on review that that would be known as a status quo.

THE COURT: Well, Counsel, this matter of status quo is really a kind of a shorthand for the elements that go into consideration for preliminary injunction. The Ninth Circuit has heavily criticized that use as a test, and I think properly so because, really, what they are talking about is status quo. You are talking about looking at the elements that have already been alluded to here. Where is the relative merit, the relative damage? Is it a permanent damage? Can it be redressed by some other action? What of the probability of success? I really think those are the

things the Court has to look at on the preliminary injunction, and although the status quo has come into our language, as I say, it is kind of a shorthand as to how to arrive at these other elements. But on that matter, it is the Court's view in the matter that probability of success in this is far from certain.

I have some real problems as I approach the final decision in this case. When I look at the matter of relative damage, who is going to be hurt by whether I grant or deny a preliminary injunction, I think that becomes a little one-sided. I think that if the Waltons are wrong in their exercising rights which they may not have when we reach the end of this case, that the Tribe has adequate redress. I don't think I see anything here of a permanent damage. There is a temporary damage such as you alluded to, Mr. Veeder, that you may have already lost 30 acres of a hay crop. That can be priced, and if the Waltons caused that damage wrongfully, we can put a damage figure on that. On the other hand, to cut off the Waltons' water at this stage, that seems to me, causes a different type of damage that is pretty hard to determine because there is an ongoing business operation and the mere fact that they may lose a crop may not be the whole story, and so, as I look at the relative positions of the parties, I'm going to deny the preliminary injunction. Hopefully, this is going to be for

a rather short period of time, as soon as I can get on to my final analysis of what you gentlemen have told me here today and, hopefully, it will not be too protracted before I render a decision, at which time the aggrieved party may, of course, exercise a right of appeal, at which time the question of holding things in abeyance will become supersedeas bond of some kind, I presume. But as things stand now, I will deny the preliminary injunction, and the case stands submitted.

MR. ROE: Your Honor --

MR. SWEENEY: Excuse me, Your Honor. I believe Mr. Roe, at the start of his argument, in reference to the two new cases, wanted to know whether the Court would accept a memorandum.

THE COURT: Yes.

MR. SWEENEY: And I hate to see another brief in this case.

THE COURT: Well, I don't want to cut off anybody's right to educate the Court. However, these are new cases that have come in since the briefs were in. I think I can read those cases and make up my own mind about how they fit into the problems that face me. I just don't have the cases yet to read. I simply got them at noon, the one case, but Law Week, next week, will have those cases verbatim, and I will read them.

MR. SWEENEY: And then neither the State nor the United States will submit a brief; is that correct?

MR. ROE: Well, we would like to -- we think that the cases are very beneficial to our position. We would like to do that. I heard Your Honor, and I know he reads well, but we would like to point out some --

THE COURT: Well, my difficulty here, I don't want to unduly protract this case. It has been going on too long already. Now, if you can submit a brief, then Mr. Veeder has a right to give his own analysis of what these cases say. Now, how many days are you going to take to do this?

MR. VEEDER: Your Honor, I petition Your Honor to shut this thing down, and we will take whatever consequence flows from it. I would like to conclude future briefs' being filed in this matter, Your Honor.

THE COURT: Well, I think we just as well cut it off and if I misconstrue the cases, why, you can tack it onto motions for reconsideration, I guess. So, the matter will stand submitted.

MR. ROE: Your Honor, I just had one other thing. There was a statement by Mr. Veeder that there was an agreement by the State, apparently not to issue any further permits within the boundaries of the Colville Reservation during the course of this trial, and no permits

have been issued. I just wanted -- I don't know of any such agreement, and, secondly, I don't think it is in the record of this case, and, secondly, there have been permits issued, at least one to my personal knowledge, for agricultural irrigation out of the Columbia River out of excess waters.

THE COURT: It may or may not have any efficacy. We will find out.

THE BAILIFF: All rise. This court stands adjourned.

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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

WAYNE C. LENHART
Official Court Reporter

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