

12-4-1978

## Transcript of proceedings

Wayne C. Lenhart  
*Court Reporter*

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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

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

**MAY 21 1979**

Combined with  
UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )

**J. R. FALLOQUIST, Clerk**  
*[Signature]* Deputy

v )  
 )  
WILLIAM BOYD WALTON, et al., )  
 )  
Defendants. )

No. 3831

TRANSCRIPT OF PROCEEDINGS

December 4, 1978

Honorable Marshall A. Neill

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COLVILLE CONFEDERATED TRIBES, )  
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Defendants. )

Combined with

UNITED STATES OF AMERICA, )  
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Plaintiff, )  
 )  
v ) No. 3831  
 )  
WILLIAM BOYD WALTON, et al., )  
 )  
Defendants. )

BEFORE:

The Honorable Marshall A. Neill, Judge

DATE:

December 4, 1978

PLACE:

Spokane, Washington

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APPEARANCES:

For the Plaintiff Colville Confederated Tribes:

MR. WILLIAM H. VEEDER  
Attorney at Law  
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Washington, D.C. 20006

For the Plaintiff United States of America:

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For the Defendants, Boyd Walton, Jr., et al.:

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Attorney at Law  
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Omak, Washington 98841

For the Defendant State of Washington:

MR. CHARLES B. ROE, JR.  
Senior Assistant Attorney General  
Temple of Justice  
Olympia, Washington 98504

and

MISS LAURA ECKERT  
Assistant Attorney General  
Temple of Justice  
Olympia, Washington 98504

and

MR. ROBERT E. MACK  
Assistant Attorney General  
Temple of Justice  
Olympia, Washington 98504

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Defendants. )

Combined with

UNITED STATES OF AMERICA, )  
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v ) No. 3831  
 )  
WILLIAM BOYD WALTON, et al., )  
 )  
Defendants. )

BE IT REMEMBERED:

That the above-entitled action came regularly on for hearing and determination on December 4, 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; the plaintiff, United States of America, appearing by Mr. Robert M. Sweeney, Assistant United States Attorney;

1 the defendants, Boyd Walton, Jr., et al., appearing by  
2 Mr. Richard B. Price; and the defendant, State of Washing-  
3 ton, appearing by Messrs. Charles B. Roe and Robert Mack,  
4 and Miss Laura Eckert, Assistant Attorneys General;

5 WHEREUPON, the following proceedings were had,  
6 to wit:

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1 December 4, 1978, 10:00 a.m.

2  
3 THE COURT: Is Mr. Veeder appearing for the  
4 Tribe?

5 MR. VEEDER: That's right, Your Honor.

6 THE COURT: And, Mr. Sweeney for the government?

7 MR. SWEENEY: Yes, Your Honor.

8 THE COURT: Mr. Roe, et al., for the State.  
9 I was apprised that there was some question whether  
10 Mr. Price intended to be here this morning. Does  
11 anybody clearly know?

12 MR. VEEDER: I talked to him, Your Honor, on the  
13 phone. And I said I'd look forward to seeing him on  
14 December 4th and he said, "I'm not sure I'll be  
15 there."

16 MR. ROE: Well, I had the same type of . . .  
17 I talked to him by phone and -- well, I didn't say,  
18 "Are you going to be there?" I thought it was impli-  
19 cit in the conversation he would be.

20 THE COURT: Well, my concern is, with this  
21 weather, it could be that he intended to come and was  
22 delayed on the roads. It is quite obvious he had an  
23 interest in the proceedings here this morning. So --  
24 well, I suppose we could proceed and, if he shows,  
25 we'll have to bring him up to date on where we are.

1 Now, I'm aware of the fact that there's been a chal-  
2 lenge to the propriety of this hearing. Mr. Veeder,  
3 I take it from the briefs that have been filed that  
4 you're not in disagreement as to the Rule 552 per-  
5 mission to make such a motion to amend proposed  
6 findings. It was based on the terms of the Court's  
7 order. Do I read you right, Mr. Roe?

8 MR. ROE: That's correct, Your Honor. It was a  
9 matter of just orderly treatment of the entire  
10 situation. As far as we're concerned, it appeared  
11 that the Court proposed to have a final order and  
12 then everyone can make their exceptions and --

13 THE COURT: Well, that was my intention.  
14 However, one of the questions raised by the motion,  
15 that I thought was of insufficient moment, that I  
16 should consider counsel's argument on this point  
17 because we're going to have to hear it sooner or  
18 later and the months get away from us and we'll be  
19 in the middle of the irrigation season if we don't  
20 get this matter settled, so I'm going to proceed  
21 with this because -- and I'll tell you frankly the  
22 one that causes me some concern, and it did at the  
23 time I drafted the Memorandum, was the issue of that  
24 Allotment 526. I know you've attacked both my  
25 finding as to quantity of water and the water duty.



1                   MR. VEEDER: I haven't attacked it, Your Honor.  
2 I have asked permission.  
3                   THE COURT: Oh, yeah. I take it that way.  
4 Frankly, I'm still satisfied that there's sufficient  
5 evidence in the record to support those two findings.  
6 I was aware at the time of the drafting of the  
7 memorandum and I'm still aware of the problem that  
8 came up throughout the trial as to whether the Omak  
9 Creek water source had anything to do with this law-  
10 suit or not. I felt, and I'll listen to argument on  
11 this, but I felt that there was sufficient indication  
12 in the record on -- unchallenged. It had nothing to  
13 do with the jurisdictional question and the question  
14 of what water had historically been used on the Allot-  
15 ment 526. I had the concern that perhaps more in  
16 equity than anything else that, if there is other  
17 water available, why should other people be deprived  
18 of water merely by the choice of sources? I don't  
19 know. This gave me a great deal of concern and I'm  
20 also aware of the problem that I have created. So,  
21 for that reason, I preferred to go ahead with this  
22 hearing this morning. And, I've got a list of this  
23 sometime to get that matter settled, and I think the  
24 sooner the better.  
25                   MR. SWEENEY: Your Honor?

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THE COURT: I had my secretary call Mr. Price's office. He is on his way and I think it's just a matter of the roads and the weather this morning. So, I'm wondering if maybe we shouldn't wait maybe 20 minutes.

MR. VEEDER: Whatever Your Honor desires.

THE COURT: I had suggested that my secretary call Mr. Price's office. He is on his way but I know the weather north of here is not the best and I could very well be that he is just plain delayed. So, why don't we wait until 10:30 and give him the opportunity to arrive.

So, the Court will be in recess until 10:30.

THE BAILIFF: All rise. This Court is now in recess until 10:30.

(Recess taken at this time.)

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THE BAILIFF: Please be seated.

THE COURT: All right. All parties being represented, I guess we can proceed. So, Mr. Veeder, this is your motion.

MR. ROE: Your Honor, --

THE COURT: Excuse me. Mr. Roe?

MR. ROE: As I understand it, you mentioned one point. Is the one point the reserved right as it relates to the upper allotment? Is that the issue that you would like to hear about today?

THE COURT: Yes.

MR. ROE: That's the only point that my brief is focused to.

THE COURT: Well, I don't want to cut you off if you've got some good argument of the other two questions and, after I've reviewed the matter, I tell you I think it's within the scope of the evidence because I recall the evidence on quantity of water varied from 550 up to some were 11 and 1200.

MR. ROE: Well, I just wanted to clarify as to -- we would again urge that, when this is all through today, before any final, final arguments are made that the Court would enter a final order with its findings and conclusions.

THE COURT: Well, I anticipate that but this is

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the issue on the Omak Creek thing. I thought it was of sufficient importance and I have some concern about it that I wanted to hear the positions on it before I proceeded in it. Anything further, Mr. Veeder?

MR. VEEDER: May it please the Court, we have considered very, very carefully the issue to which Your Honor has already alluded -- the rights of the Colville Confederated Tribes to utilize water on the Allotment 526. There is, in our view, no more crucial issue than that presented by 526 for several reasons. I've already set those forth in the memorandum, the motion and memorandum, giving rise to these propositions which Your Honor is considering today under Rule 52(b). The crucial issue was pointed up by Your Honor stating that, from the standpoint of equity, this issue appeared to you to be very important -- if there was an alternative supply, the Indians should turn to that and leave the water of No Name Creek for Mr. Walton. I'm bringing this out because I don't believe counsel was here when the issue was first raised. We submit, Your Honor, in balance, that the equities must necessarily, in our view, the Tribes' view, run in favor of the Tribes. All parties agreed, Your Honor, to the entry of Your Honor's order of July 14, 1976, as extended. Pursuant to that order,

1 the Tribe proceeded to build the distribution system,  
2 the pumps and the entire Colville Project predicated  
3 upon agreement of all parties. They spent large sums  
4 of money to develop their supply of water from the  
5 groundwater, particularly in 526. Now, it is our  
6 position, as we have pointed out, that, from the  
7 standpoint of equity, the Colville Confederated Tribes,  
8 if Your Honor's order is enforced as presented, would  
9 be substantially this: They would have to prepare,  
10 they would have to plan and design an entirely new  
11 irrigation system to take water out of Omak Creek.  
12 And, may I say here now that there's been a conflict  
13 over the right to divert water out of Omak Creek, and,  
14 indeed, the State of Washington, when application was  
15 made by Mr. Walton, denied him the right to divert  
16 water out of Omak Creek by reason of the fact that  
17 there was strong opposition by the downstream users  
18 on Omak Creek. So, we would be in the position, not  
19 only of being forced -- the Tribes would be in the  
20 position, not only of being forced to abandon a very  
21 costly system that was there and put in by agreement  
22 among parties, they would be in the position of having  
23 to build a new system, the design of which we have no  
24 idea. It would probably entail upstream storage, as  
25 near as we can see, at great cost. But, more than that,

1           it would bring about a lawsuit immediately by the  
2           owners of rights to the use of water in Omak Creek,  
3           both above and below the point of diversion. Now,  
4           these are elements that I am offering to Your Honor  
5           in regard to what you call -- to what you referred to  
6           as the equities. I think the equities run very  
7           strongly in favor of the Colville Confederated Tribes.  
8           Now, on that background, I would like to refer to the  
9           proposition that Your Honor has set forth in the  
10          Memorandum Opinion. You have utilized this language,  
11          that in the "quantification of rights to the use of  
12          water of No Name Creek, 526 would be excluded." And,  
13          Your Honor made that ruling upon this predicate --  
14          that water had been historically diverted and used  
15          upon 526 and 892.

16                        I respectfully submit, Your Honor, that the  
17          record does not support that finding. We have checked  
18          with great care the evidence that went into the record  
19          and may I say all the evidence that went in from the  
20          man named Hampson was over our strenuous objection,  
21          that Your Honor had ruled that the Omak Creek water  
22          was out of the jurisdiction of this court. We inter-  
23          posed objection to all that evidence. So, that evi-  
24          dence went in over objection.

25                        Now, in regard to Mr. Hampson's testimony,

1 I'm alluding to page 2068, where Mr. Hampson, on  
2 direct examination, commenced to testify in regard to  
3 the use of water and to which counsel referred to as  
4 Allotment S-526. Now, may I point out at this point  
5 -- Your Honor, how much time do I have on this?  
6 Fifteen minutes?

7 THE COURT: Fifteen minutes. Stretch it a  
8 little if -- go ahead.

9 MR. VEEDER: All right. The important thing,  
10 Your Honor, as we perceive it, is that Mr. Hampson  
11 referred to lands immediately below St. Mary's Mission.  
12 Mary Ann Timentwa Sampson, who likewise testified to  
13 lands immediately below the Mission --

14 We have here, Your Honor, the Tribes'  
15 Exhibit 40, which is an aerial taken in 1936. Now,  
16 that aerial shows, as can be clearly seen, that there  
17 was irrigation from Omak Creek immediately south of  
18 the Mission. Now, I believe, Your Honor, that the  
19 witness, both witnesses, have in mind that alfalfa  
20 field immediately south of the Mission. I do not  
21 believe, Your Honor, that they had any reference to  
22 the lands within the jurisdiction of this court in  
23 the case of Colville v. Walton. If we look at this  
24 aerial, we can point to 526, which is immediately south  
25 of Omak Creek. That land, Your Honor, has never been

1 broken. It has trees on it. It was not irrigated.  
2 There is no evidence of cultivation on it even. Now,  
3 we turn again to Mr. Hampson's evidence upon the point,  
4 Your Honor, and the issue was presented by counsel as  
5 to 526, says was what occurred there. Now, whether --  
6 I personally think Mr. Hampson was totally confused  
7 as to location. Bear in mind, he was tes- -- he was  
8 a boy eleven years old when he saw this. And, he was  
9 my age, so it's a long time ago.

10 We look at this, Your Honor, on page 2069:  
11 Counsel for Mr. Walton says, he's pointing to 526 --  
12 the counsel was pointing to 526 -- he asked him, "How  
13 much acreage was irrigated?" That was the question.  
14 And, here is what Mr. Hampson said, "I would say that  
15 it would have been about 40 acres that could have  
16 been irrigated with rills." He didn't say it had been  
17 irrigated. He didn't say he saw any water in there.  
18 He didn't say how much acreage had actually received  
19 water. And I respectfully submit the issue is so  
20 great involving the entire irrigation system of the  
21 Colvilles that I believe that there has to be evidence  
22 of the diversion and application of water to 40 acres  
23 of land before they are deprived of that.

24 There is no issue as to how much water was  
25 applied. There was no issue how much water was used



1 throughout the year, or when the water was available.  
2 He said, "If there was water --", I would assume  
3 that's what he's saying, " -- there could have been  
4 irrigation."

5 Now, I refer to Mary Ann Timentwa Sampson's  
6 evidence in regard to the same area. And I observe  
7 that the State of Washington, on page 2, has quoted  
8 the same evidence. Now, Mary Ann Timentwa, when  
9 asked about 526 -- and, once again, I'm sure that  
10 they're all talking about the land immediately south  
11 of the St. Mary's Mission, she said, on page 347 --  
12 Counsel said, "526." She said, "That is just a small  
13 little field that they had to give that up, but they  
14 had to give that up because it just wouldn't run that  
15 way." Now, I respectfully submit, Your Honor, that,  
16 predicated upon that evidence, that the Tribe should  
17 not be deprived of their rights to the use of water  
18 on 526. And that is what has transpired.

19 At this point, Your Honor, I'd like to ask  
20 an additional question. You said that the quanti- --  
21 that in the quantification that 526 would be excluded.  
22 Now, I didn't interpret that as a denial of rights to  
23 the use of water from No Name Creek on 526. You said  
24 in quantifying this water. Now, if it is intended,  
25 if the scope of the judgment ultimately to be entered

1 is saying, no, you cannot pump groundwater out of  
2 No Name Creek for 526. And, I respectfully petition,  
3 Your Honor, that the word "quantification" really  
4 doesn't cover it. I think that, if there's going to  
5 be a denial, and we have to face the facts of life,  
6 if there is going to be a denial of a Winters Doctrine  
7 right on 526, then I would respectfully submit that  
8 quantification doesn't cover it.

9 But these are the primary issues that brought  
10 us here today, Your Honor. We are witnessing a situa-  
11 tion where Your Honor has, in effect, ordered what  
12 has been called in California -- the only place I've  
13 found it -- a physical solution. Your Honor's term,  
14 "the equitable disposition of this matter," partakes  
15 of the laws of California, where in 1928, by reason of  
16 the fact that they had the riparian rights to the use  
17 of water down there, the people of California amended  
18 their Constitution and applied the police power and  
19 said you cannot do what you're doing with your ripar-  
20 ian rights here. But, the crucial aspect of that --  
21 of the physical solution, and the State Court, I  
22 don't believe the Federal court has such jurisdiction,  
23 I respectfully submit that it does not, the important  
24 thing where, as here, the Colville Confederated  
25 Tribes are being told you must abandon the established

1 system to which everybody agreed and to which the Court  
2 ordered and you must build a new system and take water  
3 from another supply, then Mr. Walton has the obligation  
4 of paying for that difference. That is the concept of  
5 the physical solution that I don't believe this Court  
6 could order. I don't believe this Court -- I respect-  
7 fully submit, that this Court would not have the juris-  
8 diction if there were facts to support it. But, I  
9 reiterate and reaffirm that, on the basis of the evi-  
10 dence before us -- and the best maps that we had are  
11 these that I've got up here: the 1926 map, the geology  
12 map and then the other maps that go on through and we've  
13 put them up there, I'm not going to take time to refer  
14 to them, but I do wish to bring to Your Honor's atten-  
15 tion that, if we examine these maps and we examine the  
16 testimony, on the best evidence we have is this '36  
17 map, there is not a scintilla of evidence that water  
18 was ever applied there. But, assuming that it had, and  
19 I reiterate again, assuming that it had, there is no  
20 reason to assume that a quantity of water even approach-  
21 ing the 4 acre-feet times 50 acres was ever used there.  
22 And, I submit that this is a very crucial issue on that  
23 point. Now, I don't know how much time I've used, Your  
24 Honor.

25 THE COURT: I think you've got another five minutes.

26 MR. VEEDER: I'd like to save the five minutes for

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closing.

THE COURT: Okay. Well, the government --

MR. SWEENEY: I just have a few brief remarks, Your Honor. First of all, the government supports Mr. Veeder and the Tribe in their analysis of the evidence as it, as not supporting any finding of fact that water from Omak Creek were actually applied at any time, at least, successfully, upon Allotment 526. The closest evidence is Mrs. Sampson's testimony, who said there was a small field and it could be construed, as she was referring to 526. But, even if she was, she said that the water wouldn't run that way, so there was no application. Mr. Hampson barely said that there could have been acreage irrigated on 526. Finally, I think that, by excluding 526 from the watershed of No Name Creek, we fly against the evidence presented by all of the expert witnesses who testified that 526 was actually within the aquifer that was connected with No Name Creek. And, I think it should be construed that way. Thank you.

THE COURT: The State, or Mr. Price? Which one wants to lead off?

MR. PRICE: If you don't mind, Your Honor? Apparently I'm the least prepared. I plead the Court and counsel. With respect to the issue of equity, Your

1 Honor, I thought several times I should ask the reporter  
2 to transcribe the proceeding pursuant to which the order  
3 of July '76 was issued and the amendment to that order.  
4 My recollection, which may be in error, was that I was  
5 intent on having a provision in that Order that the  
6 construction of that irrigation system would in no way  
7 prejudice the rights of Defendant Waltons in any measure  
8 and, in fact, it was specifically provided in that order  
9 that the Waltons would be protected in taking the water  
10 that they had been taking until the Court entered a  
11 decision in this matter. In addition, what does not  
12 appear in the order is my recollection of Your Honor's  
13 statement to Mr. Veeder at the time -- in essence, that  
14 you may undertake such a project and it may be expensive  
15 but that that would be at your own risk -- in essence.  
16 And, I think, if we go back and look at Your Honor's  
17 statement from the Bench, you put the Tribe on notice  
18 at the time of entry of that order that in no way was  
19 the construction of this system meant to aid them or  
20 assist them in their case, either legally or in equit-  
21 able terms. And, I believe they were on notice. When  
22 Mr. Veeder said that all parties agreed to it, yes, we  
23 agreed to the order, which was a monitoring and testing  
24 order. It was not an agreement with the Tribes forever  
25 after would be to utilize that system or in any way use

1           it, that that was totally dependent upon this Court's  
2           ruling.

3                       As to the testimony, it is none of the Court's  
4           concern but we don't have a copy of the transcript. The  
5           State was very kind to make it available to us for a  
6           period of time following the trial of this matter and  
7           I have since returned it to the State. So, I'm not able  
8           to quote directly from Hampson -- Mr. Hampson or Mrs.  
9           Sampson. I do recall that Mr. Hampson was called here  
10          to testify on the basis of a diversion works and irri-  
11          gation on 526, but he was asked about a diversion works  
12          that starts at the falls, below the falls on Omak Creek,  
13          runs across the land to Allotment 526 and that he  
14          testified about and described such a diversion works.  
15          And, in fact, I can state to the Court that maybe Mr.  
16          Hampson had to rely on his knowledge as an eleven-year-  
17          old but he has continued to reside in the area ever  
18          since, to the present day, and he and I walked out there  
19          and walked over the diversion works to Allotment 526  
20          prior to the trial in this matter. So, his memory, I  
21          do not feel, is going to fail him at this point when  
22          he's lived in the area and been familiar fully from the  
23          time he was eleven to the present.

24                       Mr. Veeder seems to indicate that he believes  
25          some of the witnesses must have been talking about land

1            somewhere else. I don't believe that's sufficient for  
2            Your Honor to justify a change in reasoning of the  
3            Court. Thank you very much, Your Honor.

4            MR. ROE: Your Honor, Miss Eckert will represent  
5            the State.

6            THE COURT: Miss Eckert?

7            MISS ECKERT: Your Honor, I might note that there  
8            was some confusion, at least in our minds, as to what the  
9            proceeding today would involve and so our review of the  
10           record has not been as complete as we would like it to  
11           be. But, to the extent that we have reviewed it, we  
12           feel confident that your order -- Memorandum Order is  
13           supported by the evidence, contrary to the assertions  
14           of both Mr. Sweeney and Mr. Veeder this morning. We  
15           pointed out very briefly in a memorandum handed to you  
16           this morning some of the reasons that we believe that  
17           and I can explain a little bit more. There's argument  
18           over whether or not portions or all of Allotment 526  
19           were ever irrigated. We believe that the record does  
20           show that 526 was irrigated and from Omak Creek. If you  
21           look at the Sampson testimony on pages 340, 341 and 346  
22           through 347, I believe that her testimony fairly charac-  
23           terized -- not distorted, but fairly characterized --  
24           indicates that, indeed, there was some irrigation of those  
25           lands from Omak Creek. For example, Mrs. Sampson said,

1 in response to the question, "Do you know the point  
2 where they got the water from Omak Creek?"

3 MR. VEEDER: May I inquire as to where your  
4 testimony -- you're reading?

5 MISS ECKERT: This is from the transcript, page  
6 340 and 341, at this point. And, the answer to the  
7 question, "Where did you get the water from?", Mrs.  
8 Sampson testified, "Right by what was known to me as  
9 Mission Falls. That was constructed similar to our  
10 irrigation." That is the irrigation that she and her  
11 family had performed down on 901 and 903, where she  
12 testified to a wooden flume system which had been in  
13 place. She said, "They took out water on both sides of  
14 the creek." "Question: They had pipes running from  
15 that to bring the water to the Mission?" "No pipes.  
16 Mostly dirt and flume." "Question: Do you recall if  
17 the Mission farmed any land south of the Mission towards  
18 the Peters property?" "Yes. That's the land I'm  
19 referring to as our potato patch." "And, would that  
20 receive some of the water from Omak Creek?" "It was  
21 mostly dry cropped."

22 Page 346 and 347 -- Mr. Price asks Mrs.  
23 Sampson, "Was water from Omak Creek diverted to either  
24 of these shaded areas in green?" And, he's referring in  
25 that -- to, I believe it was the exhibit which is up as



1 Colville's -- or Plaintiff's Exhibit 7. And, her answer  
2 was, "Yes. Just the one nearest to the Paschal Sherman.  
3 That is near the school." "Question: The one --"  
4 "Yes, 526." Mrs. Sampson's testimony is not the only  
5 testimony. Mrs. Covington also testified as follows,  
6 on page 309 and 310 of the transcript: "Question: Can  
7 you in your memory -- first of all, are you aware of the  
8 Peters property which is generally the property where  
9 the spring, which is the source of No Name Creek, the  
10 immediate source, arises, are you familiar with that  
11 property?" "Yes, I am." "Question: To your recollec-  
12 tion, can you recall any farming conducted north of that  
13 property toward the school?" "Answer: I guess you  
14 could say it was a passing memory, you know, you see  
15 something that was done there years ago, but there was  
16 something there, yes." "Question: There was some  
17 farming in that property, wasn't there?" "Answer: Yes."

18 Mr. Hampson testified under direct examina-  
19 tion, and this is important in the sense that Mr.  
20 Price's question was very precise of the witness, and  
21 the witness had in front of him a map which showed the  
22 allotments, even though he was not familiar with that  
23 particular way of describing property, but Mr. Price  
24 directly asked, "Now, I'm asking about Allotments 526  
25 and 892, 892 being the one just south of 526." And,

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the question was, "Did you see any evidence of cultivation and any evidence of irrigation practices?"

"Answer: Yes, I saw evidence of that, of irrigation there." I'd also draw the Court's attention to the testimony of Mr. Bennett from the Soil Conservation Service, who testified that he recalled that there were irrigation ditches from Omak Creek, and, I believe that testimony was on page -- excuse me -- 1841 and 1842 of the transcript.

Now, we haven't had the opportunity to completely review the exhibits in the matter but I would also draw your attention to Exhibit AAAA-FW, quadruple A, wherein, I believe, the evidence shows that there were approximately 20 acres of land being irrigated from Omak Creek on school land. Now, that goes to the evidentiary question and I believe that what I've just gone over shows that there is sufficient evidence to support your ruling, but more important, in a sense, is what is it and why did you make that ruling anyway. The real question that we're trying to determine here, and I believe the other parties would agree with me, is the determination of the extent and scope of the reserved rights to No Name Creek. And, one of the important characteristics of determining that reserved right is looking towards the intention of the Federal government

1 when it established the reservation and thereby implied-  
2 ly reserved waters under the Winters Doctrine for the  
3 residents of the reservation. The intention is very  
4 hard to determine, as I'm sure you're well aware.  
5 There is no document that says the Federal government,  
6 President Grant or whoever, intends that such and such  
7 water be used. But, when you look at the intention,  
8 then you have to glean it from every possible source,  
9 and I think one of the important sources in this case  
10 is what was the actual practice. And, as I've just  
11 mentioned, we believe that the record does show that  
12 there was some water use on the upper allotments from  
13 Omak Creek.

14 The actual actions of the parties in practice  
15 would tend to bear out the contention that the  
16 intention of the Federal government to the extent it  
17 can be characterized was in terms of using Omak Creek  
18 waters for the upper allotments. In addition, I think  
19 maybe we're just making this too complicated. There's  
20 plain old-fashioned common sense would dictate in a  
21 valley, where you have two sources of water -- Omak  
22 Creek and No Name Creek -- No Name Creek has never been  
23 a major source of water, under anybody's testimony.  
24 It would appear, just on common sense, that that water,  
25 if it was ever going to be used, particularly in the

1 historical sense when the reservation was established,  
2 would be used for those properties through which it  
3 flowed, in other words, downstream, and that Omak  
4 Creek, if it was ever intended to be used, would be used  
5 on those properties through which it flowed, including  
6 Allotment 526.

7 THE COURT: Counselor, do you have any disagreement  
8 with the finding that Allotment 526 is within the No  
9 Name Creek aquifer?

10 MR. VEEDER: That 526 --

11 THE COURT: The north end. Have I got the wrong  
12 number?

13 MR. SWEENEY: No. That's correct.

14 MR. VEEDER: There's no question but that's --

15 THE COURT: No. I'm asking her if she has any.

16 MR. VEEDER: Oh, I thought you were speaking to me.

17 MISS ECKERT: No. It's not within the surface  
18 water. No Name Creek and Omak Creek are not connected  
19 in any surface sense but, in the sense of an aquifer,  
20 yes, I believe the State would agree with that state-  
21 ment.

22 THE COURT: All right. If it's within the aquifer,  
23 it being Tribal lands, it is entitled to the reserved  
24 water. Do you agree with that?

25 MISS ECKERT: Yes.

1           THE COURT: Miss -- got into trouble when I got  
2 into that issue because I -- and, that's why I used the  
3 term -- I addressed this when I got to the quantifica-  
4 tion of the water because there was no question in my  
5 mind but what that allotment was entitled to Winters  
6 rights and it is part of the No Name Creek aquifer.  
7 However, you remember Omak Creek, I think the evidence  
8 is plain in what they call the perched creek, and there  
9 is some percolation down but it's not the major -- if  
10 you're going to take water out of there, I believe it  
11 always has to come from the flow, as I recall his  
12 testimony. Mr. Veeder points out that, by taking that  
13 position, I'm telling the Tribe they must take their  
14 water because that land is entitled to use water. That,  
15 I'm telling them, in effect, they must take the water  
16 out of Omak Creek, which now, then, it appears with  
17 possible rights of other people in the use of Omak  
18 Creek and this is why I have some real concern as to  
19 where to go. How do you get me out of this dilemma,  
20 then?

21           MISS ECKERT: Well, in the first place, I would  
22 simply point out that nobody had ever ordered anyone to  
23 use water and I don't believe that your order, fairly  
24 characterized, required the Tribe to use the Omak Creek  
25 waters. It simply said that No Name Creek waters were

1 not available for that particular allotment. One of the  
2 difficulties arises immediately because of the unique  
3 position of groundwater. The State originally contended  
4 that groundwater was not intended to be reserved at the  
5 time of the reservation and I realize that that position  
6 is not met with favor; however, it would -- our theory  
7 being that, at the time of the reservation, nobody knew  
8 about wells except for shallow dug non-irrigation type  
9 wells, in other words, for domestic uses only and,  
10 therefore, there's some question in our mind whether  
11 or not that water was actually reserved.

12 If, in fact, the water was reserved, ground-  
13 water and surface water, and you go on the theory of  
14 aquifers, I suppose one theory is that the, those  
15 waters, even though they may underlie 526, would be  
16 intended to, in the natural state, they would basically  
17 show up as springs appearing slightly north of the  
18 Walton property, and would have been part of the Omak,  
19 the No Name Creek surface flow, and would, just  
20 naturally, be part of the flow of Omak -- excuse me --  
21 of No Name Creek, downstream, and that the lands which  
22 were intended to be used or served by the flow of No  
23 Name Creek were those lands downstream, and that, as  
24 part of that intention, you have to look to the waters  
25 which supply the primary source of water for that, those

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lower allotments, that is, the allotments below 526.

THE COURT: Do we have a difference in concept in when we allocate water on the reservation on the types of lands there? What you'd normally have if the State, for example, were to have a water adjudication suit over an entire drainage where an entire waterway, whatever the technical term is, I've forgotten, normally, you would take all sources of water into consideration and, if they had a full adjudication of the rights of this area, you would consider both Omak Creek, No Name Creek, and whatever else might be in the drainage. But, we have a situation here where you have a tribal entity and, as I read the Winters line of cases, the Tribe has this all-encompassing right to water, and can you use the same concept, or can the Tribe merely say, well, we have some of the irrigable acres, we have so much water within the compounds of the reservation and we have the right to say where we'll take the water and how we'll use it? Isn't that really the problem we're facing in this issue?

MISS ECKERT: I think I'd agree with your characterization of it. It is, indeed, a difficult concept, but I have to come back to what I believe is the touch stone, in this matter, as expressed in the Cappaert case and the Arizona versus Colorado cases, is we have

1 to look at the intention of what was really intended,  
2 and I still have great difficulties, both in terms of  
3 the actual practices in the area, and common sense,  
4 saying that what was intended was that waters in that  
5 area, which, by any visual sense would be served from  
6 Omak Creek, would obtain the benefit of the very  
7 limited waters from No Name Creek. I might also point  
8 out in connection with what Mr. Veeder terms the "equity  
9 argument" that the Tribe has put in place a very expen-  
10 sive and complicated and integrated irrigation system  
11 that was put in place, as far as I understand the record  
12 pursuant to the Testing Order of 1976. Nothing in that  
13 Order, in any way, establishes a right, a reserved  
14 right, to waters from any particular source. It simply  
15 says these are the areas where data is going to be  
16 collected.

17 THE COURT: Excuse me. Mr. Veeder, what was the  
18 date of that Order? I want to go back and look.

19 MR. VEEDER: July 14, 1976. It was extended in  
20 October that year, and then, if memory serves me,  
21 there was another extension December 22, 1976, where  
22 it took it through the 1977 season. There were three  
23 separate portions.

24 MISS ECKERT: I'm sorry. I've been referring to it  
25 as the 16th. It was the 14th of July, I believe.



1                    Basically, what is being done with that Order,  
2                    in a sense, is that the Tribes are attempting and argue  
3                    to bootstrap the Testing Order into a full fledged  
4                    right and then crying "foul" when the possibility exists  
5                    that that system may not be used in the way that it was  
6                    designed in 1976. The burden, if any, falls on those  
7                    who proceed in the face of litigation. It's a common  
8                    rule. It's a rule that's been held in the courts of  
9                    Washington State in Bach (?) v. Sarage (?) and the case  
10                    of Wilbur v. Gallagher. I find it very difficult to  
11                    understand how the equities have suddenly shifted when  
12                    the Tribes surely must have known in 1976 -- the trial  
13                    was still ahead of them -- and, as any lawyer knows the  
14                    outcome of any trial is never certain until its final  
15                    order has been signed and entered. We find that very  
16                    difficult to agree with. I might just also point out  
17                    that the contention that no waters exist from Omak Creek  
18                    because, as an example, Mr. Veeder explained that the  
19                    State had denied a right to Omak Creek waters for the  
20                    Waltons, is simply untrue. That was an assertion made  
21                    by counsel all the way through trial. It was never true.  
22                    There is no evidence on that point. The only evidence  
23                    on that point was that the applications had been held  
24                    pending the various stages of litigation which affect  
25                    water rights on the Colville Indian Reservation. We've

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made no determination one way or another regarding Omak Creek.

Finally, just to summarize, I think what counsel is really doing is, in his characterization of the record that was made before this Court, is he's attempting to retry it, and also to, in essence, make better the record. A record which, by the way, was not properly attacked on cross-examination. Many of the points, which Mr. Veeder made this morning, were simply points which could have been clarified but were not clarified on cross-examination. It should have been obvious to anybody sitting through this trial that a major portion of the State's case, and also Mr. Veeder's case, related to the use of waters on the upper allotments, and the source of the waters on those upper allotments, and I submit, Your Honor, that the Tribes have simply failed to show any affirmative evidence -- and they are plaintiffs in this case -- they've never proved the extent of their reserved right. They're arguing about evidence which was put in mainly by the State, often through the Tribes' own witnesses, and they're now feeling, in essence, that, they're feeling a little sorry for themselves, I think is what's happening. The evidence is coming back to bite them. Well, there are two answers to that: One is they could have

1 put on their own; and, two, they could have cross-  
2 examined, but that does not mean that the record, which  
3 was presented before this Court, doesn't exist, and we  
4 believe that what record there is before this Court  
5 does support the Memorandum Opinion which you entered  
6 in late October of this year, and does support the  
7 proposed orders which have been submitted by the State  
8 of Washington and I also believe by the defendants,  
9 Walton, in this case. Thank you.

10 THE COURT: Mr. Veeder?

11 MR. VEEDER: I have five minutes, as I understand  
12 it, Your Honor.

13 THE COURT: Correct.

14 MR. VEEDER: The issue has been raised about the  
15 application -- the issue has been raised about the  
16 application by Boyd Walton to appropriate water from  
17 Omak Creek. Boyd Walton testified as follows: That  
18 his application for a permit to appropriate water from  
19 Omak Creek was denied because Emmett Aston, who is a  
20 witness for the defendants, objected. Now, they'll  
21 find that on page 2248. You'll find that. It showed  
22 the application was made. It was the Tribes' Exhibit  
23 38, which I offered and Your Honor denied the admission  
24 of that evidence.

25 Now, Emmett Aston, who, if memory serves me,

1 has a lumber mill or something, some kind of an  
2 operation downstream -- was the one who interposed the  
3 objection because of the interference to his operation  
4 down there. So, the issue of the Omak Creek water was  
5 squarely presented in this proceeding and we offered  
6 the evidence, we proved it. Boyd Walton himself  
7 admitted he made the application to appropriate water,  
8 and it was denied. So, what we are being required to do  
9 is buy a very expensive lawsuit if we undertake to build  
10 a new system, abandon the present system, and take water  
11 out of Omak Creek, which is totally inadequate, totally  
12 inadequate to serve that land, as we all know, during  
13 the irrigation system. Which brings me to one of the  
14 most crucial points of all in this, Your Honor, the  
15 evidence to which counsel referred, reading from the  
16 Timentwa testimony, pertained to the land immediately  
17 south of the Mission and not down to 526. Your Honor,  
18 may -- this will be in the record -- we should read  
19 from page 339, 340 and 341 and we'll see that counsel,  
20 I'm sure not intentionally, but certainly, departed from  
21 the record as really presented. I go back again to the  
22 fact that Mary Ann Timentwa said that there was, the  
23 water wouldn't run in that ditch to the land. I go back  
24 again to the fact that Mr. Hampson said that he had  
25 never seen any water in the ditch. He said it could

1 have been used. And I respectfully submit in the  
2 crucial aspect of where we are today in regard to a  
3 judgment coming down, is that we are entitled to know  
4 how much water was used, the method of diversion, the  
5 quantity of water utilized and all the other aspects  
6 and features of the "historic use," which we deny, Your  
7 Honor. I think that we're inviting a disastrous  
8 situation by being required to close down a very sub-  
9 stantial part of the operation. Bear in mind, and  
10 once again I realize there are arguments against my  
11 position in regard to equities of this situation, but  
12 we put in a walking forty -- I mean, the Tribe put in a  
13 walking forty up there, a very expensive operation, they  
14 put in very expensive wells; I don't know the full costs  
15 of abandoning that system but it will run into tens of  
16 thousands of dollars, Your Honor. I'd like to make one  
17 additional point on this overall issue. It is unclear  
18 to me whether Your Honor ruled and whether the State of  
19 Washington is arguing that the Tribe has a Winters  
20 Doctrine right in Omak Creek. We assert that we do.  
21 But, we also know that there are numerous Indians on  
22 that creek that likewise have rights -- whose rights  
23 are going to be prejudiced. Now, I respectfully submit  
24 that, while it is not an issue of fact -- and that's the  
25 only reason I'm here today -- 552(b) relates to facts --

1 the argument as to the law as to the intention and  
2 things like that, I think, go far beyond this point.  
3 But, I respectfully submit that there was certainly no  
4 intention by anyone that the Colvilles would enter into  
5 the protracted and costly and, I'm sure, contentious  
6 litigation if we were to move onto Omak Creek today,  
7 build a system and start pumping water out of there.

8 I submit that Your Honor ruled that you did  
9 not have jurisdiction and, therefore, there couldn't  
10 have been an adjudication of Winters rights. I submit,  
11 moreover, Your Honor, that, from the standpoint of  
12 operations, which we're going to be looking to very  
13 shortly, the Tribe stands to be irreparably damaged if  
14 they cannot use No Name Creek water on 526.

15 And, I thank you, Your Honor.

16 MR. PRICE: Your Honor?

17 THE COURT: Yes?

18 MR. PRICE: May I have a few minutes?

19 THE COURT: You may.

20 MR. PRICE: In listening to the arguments go back  
21 and forth and the question of Your Honor about maybe  
22 what the Court was doing with the term "quantification"  
23 -- not using Allotment 526 in terms of its quantifica-  
24 tion, it seems to me that the Court was not saying that  
25 the Tribe did or did not have a waters right in Omak

1 Creek. I don't think the Court had to reach that issue.  
2 And, by stating it in terms of not using quantification,  
3 the Court avoided that issue and I think that's exactly  
4 what the Court did and intended to do and it makes  
5 sense in terms of an appropriate solution without  
6 adjudicating Omak Creek and still recognizing that there  
7 is a body of water there that has been used historically  
8 and is available for use. If someday somebody wants to  
9 litigate and adjudicate the waters of Omak Creek, that  
10 is open to questioning for anybody to do -- the Tribe  
11 or anybody else who may be on the creek or using waters  
12 therefrom. I do not think your order gets us into that  
13 realm or will bring that down upon anybody's shoulders  
14 unless they want to involve themselves by taking affir-  
15 mative action. So, I'm satisfied with the terminology  
16 that you have used, eliminating 526 for quantification  
17 purposes in terms of the rest of your decision.

18 Thank you.

19 THE COURT: Well, ladies and gentlemen, the chief--  
20 Mr. Roe, did you have something?

21 MR. ROE: Your Honor, may I just add and, in an  
22 attempt to respond in part to Mr. Veeder's --

23 MR. VEEDER: Well, may I have response too, Your  
24 Honor?

25 THE COURT: You may have --

1           MR. ROE: What I -- all I have to say, Your Honor,  
2           is with regard to the State's position with regard to  
3           Omak Creek. As you recall, at the very outset of the  
4           trial, the State did suggest the possibility, if it was  
5           encouraged in any way, to initiate adjudication of Omak  
6           Creek because, undoubtedly, No Name Creek is nothing  
7           more than a distributary stream out of that whole  
8           system. And, so, we do have this unfortunate situation  
9           you're in where you're trying to determine what reserved  
10          rights attach to No Name Creek Valley lands where you  
11          have two streams in the valley. And, our position is  
12          this that, throughout this case, that the United States  
13          and the Indians do have reserved rights, as the Court's  
14          held, to the lower portions of the valley -- the lower  
15          two-thirds or three-fifths, whatever it is, where the  
16          waters break out and flow south and that's what we  
17          think the United States intended when it created the  
18          reservation. We also agree that there is a connection  
19          with Omak Creek and No Name Creek through a groundwater  
20          aquifer. But, we don't believe -- and, the fact that  
21          they're connected does not mean that there are reserved  
22          rights to irrigate the lands in the upper valley out of  
23          that aquifer but, more importantly -- the important  
24          point there is with regard to the lower valley No Name  
25          Creek lands that, if there are withdrawals upstream in



1 the aquifer from whomever that -- like in the Cappaert  
2 case, which is a surface water case, not a groundwater  
3 case, that the United States can bring an action to  
4 enjoin that pumping. That doesn't mean they have  
5 reserved rights to use the land, the water in that  
6 aquifer for lands owned by the United States. Our  
7 position is that there probably are -- if we were  
8 adjudicating Omak Creek -- and which you have inferen-  
9 tially found in this case, if not directly, that you,  
10 the Court has found that there are some reserved rights  
11 coming out of Omak Creek surface waters from, for 526,  
12 and that we think that's a reasonable interpretation of  
13 what is obviously very blurry facts but, if you take  
14 what I guess Miss Eckert said, "common sense" has to  
15 prevail in these matters where you have a stream high  
16 in a valley and another stream low in the valley, it  
17 seems to me almost common sense that the reserved rights  
18 for the upper portion, taking in account the situation  
19 of 1872, has to be, with regard to the upper valley,  
20 the reserved rights are out of Omak Creek and the down-  
21 stream portions are out of No Name Creek. And, I  
22 think that's how you solve that problem that you were  
23 having a problem with earlier. I don't think that the  
24 fact that they're connected means that they got a water  
25 right that floats around the reservation and put them

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on any lands that are irrigable. They have to be appurtenant, have some reasonable relationship with something that is known by the United States at the time that the reservation was created.

Thank you, Your Honor.

THE COURT: Mr. Veeder, do you --

MR. SWEENEY: May I make a remark? Because, they're getting into what the United States intended in 1872 when it reserved the lands and waters of the Colville Reservation for the benefit of the Colville Confederated Tribes. And, I think the Court found, in your Memorandum Opinion, that the United States reserved these lands and these waters to provide the establishment of a homeland for the Colville Confederated Tribes and its members. What the State would say, apparently, is that the extent of that intention is calculated as of 1872, even though it's undisputed in the law that the Winters right doctrine is open-ended, can be utilized at a later time. The State would then contend that, based on the farming practices of 1872, that circumscribed the intent of the United States as to the reservations of these lands and waters. It wouldn't affect what the Indian, if he's bound to be chained to the 1872 concept of farming, it would put him at a distinct and substantial disadvantage as compared to the non-Indian land-

1 owners on the reservation, who could utilize the  
2 advanced farming techniques and, thereby, diminish the  
3 squatter's reserve for the Indians, who are tied to an  
4 1872 concept. And, I don't think that's what the United  
5 States intended at all when the reservation was created.

6 MR. VEEDER: I'll be extremely brief, Your Honor.  
7 It seems to me that we have gotten into the issues of  
8 law, into the issues of the Winters Doctrine intentions  
9 and everything else. The only thing that brought me  
10 here, Your Honor, was that I truly believe that there  
11 is not evidence to support Your Honor's findings in  
12 regard to 49 acres of land in 526 and the requirement  
13 that we take, oh, 200 acre-feet, or more or less, 4  
14 times, really, 50 acres. I don't believe that anybody's  
15 even remotely shown that historically there was any  
16 water used but, most assuredly, and I'm sticking to the  
17 facts, they never did show the quantity of water, the  
18 capacity of the ditch, the water requirements or any  
19 other features that require us to be put off onto Omak  
20 Creek. And I also submit that the contention that I  
21 gather from the State of Washington is that you can make  
22 an adjudication in Omak Creek, and I respectfully submit  
23 that you, yourself, ruled that you didn't have jurisdic-  
24 tion.

25 Thank you, sir.

1           THE COURT: Gentlemen, I want to take another  
2 look at this issue. It's probably of some concern all  
3 the way through this case. I want to go back and read  
4 that order. My recollection is that that should not  
5 prejudice anybody's rights. That was an order entered  
6 in the midst of the lawsuit in order to keep the opera-  
7 tion going up there. But, I will review that order to  
8 make certain of its provisions. Both Mr. Walton and  
9 the State have submitted their proposed orders I had  
10 requested, so I wanted to review the various provisions.  
11 Now, Mr. Veeder --

12           MR. VEEDER: I refrained until I got your ruling,  
13 Your Honor.

14           THE COURT: And, I didn't know, Mr. Price --

15           MR. SWEENEY: Your Honor, we submitted a proposed  
16 order Friday.

17           THE COURT: I only had two of them here but I  
18 thought there was another one came in. But, I think,  
19 Mr. Veeder, I'll ask you to proceed in submitting your  
20 order because, whichever way I ultimately go on this  
21 question of Omak Creek water would merely change some  
22 figures, it wouldn't change the provisions in the order,  
23 other than the quantification. And, I can make such  
24 changes as that as I resolve this issue. I want to,  
25 really want to go back and look at that testimony and

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that Order.

As indicated all morning, I've had concern ever since I started working on that Memorandum Opinion. I can't quite get out of my mind the fact that there's an underlying unfairness here to deprive a person of water merely because somebody else is making the choice of alternate sources of water. But you know, common sense and equity doesn't always follow the law, unfortunately, and I have some concern and I want to review that.

I do want to thank counsel for coming in this morning. I recognized that this could have waited until we put the whole matter in an order and then we'd had an attack on the order, but I wanted the expression of counsel on this particular issue before I made a final determination on that. So, I do appreciate your coming in and I will advise counsel as promptly as possible, but I don't think you need delay presenting a proposed order, because it will only change the figures in the quantifications.

MR. VEEDER: I'll submit it as soon as -- very soon, Your Honor.

THE COURT: I'll tell you -- I'm going to be out of the district the last ten days or so of December. I probably won't get to this until after New Year's, so

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I'll give you until the end of the month --

MR. VEEDER: All right.

THE COURT: -- to put your order in.

MR. VEEDER: Thank you, Your Honor.

THE COURT: But, we've got to get this resolved before we open up that irrigation season up there again in the spring of '79. So, thank you. The Court will be in recess.

THE BAILIFF: All rise. The Court is now in recess.

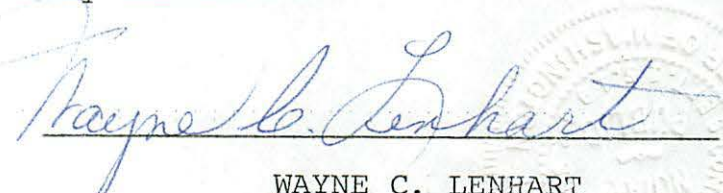
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C E R T I F I C A T E

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

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



WAYNE C. LENHART  
Official Court Reporter

