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Response by United Sates to statements of issues

Robert M. Sweeny
Assistant United States Attorney

John E. Lamp
United States Attorney

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5 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6 COLVILLE CONFEDERATED TRIBES,)

7 Plaintiff,)

No. 3421 ✓

8 vs.)

9 BOYD WALTON, JR., et al.,)

RESPONSE BY UNITED STATES
TO STATEMENTS OF ISSUES

10 Defendants.)

11 UNITED STATES OF AMERICA,)

12 Plaintiff,)

No. 3831

13 vs.)

14 WILLIAM BOYD WALTON, et al.,)
15 and THE STATE OF WASHINGTON,)

16 Defendants.)

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

MAR 8 1982

J. R. FALLONIST, Clerk
Deputy

17 I.

18 PREAMBLE

19 Pursuant to the directive of the Court, the parties to
20 these consolidated proceedings have submitted lists of issues to
21 be determined on remand of the proceeding from the Ninth
22 Circuit, together with statements as to the propriety of
23 reopening the record to receive additional evidence upon a
24 particular issue. Each of the parties was given the opportunity
25 to file responses to the other parties' statements of issues.
26 The following constitutes the response of the United States to
27 the various statement of issue.

28 II.

29 ISSUES TO BE DETERMINED

30 The United States submits the following issues should be
31 determined:
32

1 1. Does the State of Washington have a continued role in
2 these proceedings?

3 The State of Washington asserts it has standing to remain
4 in these proceedings to (1) argue the validity of state permits
5 for the use of water within the Colville Reservation from water
6 systems other than No Name Creek, and (2) because of the state
7 adjudication of the waters of Omak Creek pending in this Court
8 in In re Omak Creek.

9 With reference to the State's first assertion to justify
10 its continued participation in the case, the Ninth Circuit held
11 that the State of Washington has no jurisdiction to regulate the
12 use of water in the No Name Creek water shed and that
13 Mr. Walton's state permit is null and void. The Supreme Court
14 refused to review this issue and the State has no further
15 legitimate interest in this case.

16 With reference to the State's second assertion, the In re
17 Omak Creek state water adjudication, this creek rises and flows
18 through lands within the Colville Reservation and empties into
19 the Okanogan River, the Reservation boundary and it would appear
20 that the Colville Tribe's right to the use of Omak Creek water
21 would not properly be the subject of a state water adjudication
22 proceeding. See also the recent 9th Circuit decision in Northern
23 Cheyenne Tribe vs. Adsit, ____ F.2d ____, (9th Cir. Feb. 22,
24 1982), holding that where a state has disclaimed jurisdiction
25 over Indian lands [and waters] upon its entry into the union,
26 it cannot assert jurisdiction over the regulation of Indian waters
27 until sovereign immunity has been waived and the disclaimers
28 repealed.

29 2. What is the amount of water reserved to the Tribe to
30 protect and maintain replacement fishing grounds?

31 The Ninth Circuit held that the Tribe's have a reserved
32 right for a fishery to maintain the replacement fishery grounds.
At trial Dr. Koch was presented as a witness by the Tribe and he

1 testified to an amount of flow necessary at various times during
2 the year to protect the fishery. The amount of water in acre
3 feet can easily be calculated from Dr. Koch's testimony and the
4 record need only be opened on this issue to calculate the total
5 amount of water required annually for this purpose (285 acre
6 feet). Further, the reserved fishery right is in addition to
7 and not included within the Tribe's reserved agricultural right.

8 In this regard, the United States disagrees with Walton's
9 assertion that the fishery right is included in the irrigation
10 right. The United States also disagrees with the State's
11 assertion that water for fishery must first be used for agricul-
12 tural purposes.

13 3. Should the Court confirm that the Tribe has a reserved
14 right in the waters of the No Name Creek basin to irrigate
15 Allotment 526?

16 The trial court declined to award the Tribe a reserved right
17 from the No Name Creek basin to irrigate allotment 526 and this
18 holding was affirmed by the circuit court. In view of the time
19 required to determine a right to the use of Omak Creek waters,
20 the United States requests that the water necessary to irrigate
21 526 from No Name Creek be confirmed.

22 4. Do the defendants Walton have a reserved right to
23 water from the No Name Creek basin?

24 The record in this case shows that the Lands now owned by
25 the Waltons passed out of Indian ownership in the 1920's and
26 that the use of water on this property did not occur until
27 the 1940's. The application of water to the land by Walton
28 after he purchased the property in 1948 cannot be construed

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30 ///

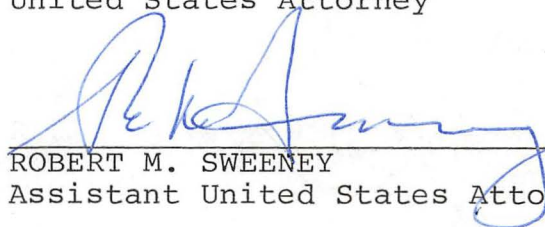
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1 as diligent application of water to allow a sharing of the
2 reserved water right. In this regard, a definition of the
3 "diligent application" would be appreciated.

4 Respectfully submitted,

5 JOHN E. LAMP
6 United States Attorney

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8 ROBERT M. SWEENEY
9 Assistant United States Attorney

10 Post Office Box 1494
11 Spokane, WA 99210-1494

12 Telephone: (509) 456-3811
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