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Colville Confederated Tribes' factual and legal analysis and proposed findings of fact and conclusions of law

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiffs, vs. BOYD WALTON, JR., et ux, et al., Defendants, STATE OF WASHINGTON, Defendant/Intervenor.	Civil No. 3421
UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM BOYD WALTON, et ux, et al., and THE STATE OF WASHINGTON, Defendants.	Civil No. 3831

COLVILLE CONFEDERATED TRIBES' FACTUAL AND LEGAL ANALYSIS AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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COLVILLE CONFEDERATED TRIBES' FACTUAL AND LEGAL ANALYSIS AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

"On remand," the Court of Appeals declared, the District Court

> ... will need to determine the number of irrigable acres Walton owns, and the amount of water he appropriated with reasonable diligence in order to determine the extent of his right to share in reserved water. 1/

That quoted excerpt from the Opinion of the Court of Appeals must be read in connection with the Court's earlier declaration that:

> ... the extent of an Indian allottee's right is based on the number of irrigable acres he owns. 2/

Having declared, in plain and serious error, that a non-Indian purchaser of Indian land acquires an Indian right to the use of water, the Court of

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1/ Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (CA 9, 1981), cert. den., 102 S.Ct. 657 (1981).

2/ Ibid.

Appeals continued:

> Thus, the purchaser's right is similarly limited by the number of irrigable acres he owns. 3/

It is too clear for serious question that the Court of Appeals erred most seriously in declaring (1) that Indian reserved rights can be transferred to a non-Indian and (2) that the short supply of water is to be distributed among Indians and non-Indians on the basis of their "irrigable acres." The issue of how rights to the use of water are to be allocated was not determined by this Court and was not before the Court of Appeals for review. It was a pure gratuity for the Court of Appeals to declare, in error, that the allocation among Indians and non-Indians on the basis of irrigable acreage constitutes a "just and equal" allocation. Uncontradicted evidence was offered by the Colville Confederated Tribes that an allocation of a short supply of water on the basis of irrigable acres is disastrous and that there has not and cannot be adherence to that concept.

Blind adherence to the clearly erroneous declaration by the Court of Appeals that a short supply of water should be allocated on the basis of irrigable acreage is not required of this Court. Where, as here, there was not a scintilla of evidence before the Court of Appeals as to the consequences of an allocation of water on the basis of irrigable acreage, it was beyond the power of the Court of Appeals to make that determination. The Supreme Court has declared that:

> While a mandate is controlling as to matters within its compass, on the remand, a lower court is free as to other issues. 4/

This Court is requested to re-examine the clearly erroneous concepts enunciated by the Court of Appeals and to note for review the rejection by the Court of Appeals of the concept that Indian reserved rights can be held

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3/ Ibid.

4/ Sprague v. Ticonic Bank, et al., 307 U.S. 161, 168 (1939). Repeatedly, the Supreme Court has adhered to the principles of the Sprague case. See, Ex Parte Union Steamboat Co., 178 U.S. 317, 20 S.Ct. 904, 44 L.Ed. 1084 (1900); In re Sanford Fork & Tool Co., 160 U.S. 247, 16 S.Ct. 291, 40 L.Ed. 414 (1895); Thornton v. Carter, 109 F.2d 316, 319-20 (CA 8, 1940).

by non-Indians and that the Indian and non-Indian rights are to be apportioned on the basis of irrigable acreage, in clear violation of 25 U.S.C. 381, which requires a just and equal distribution of water "among the Indians" residing on the Colville Indian Reservation.

ON THE ISSUE OF TRANSFERABILITY TO NON-INDIANS OF COLVILLE RESERVED RIGHTS, THE COURT OF APPEALS IS GROSSLY IN ERROR

Title To Reserved Water Rights Resides In The Colville Confederated Tribes -- Has Never Been Taken From Them

It is elemental that title to the lands, rights to the use of water, timber, minerals and all other real property resided in the Colville Confederated Tribes after the creation of the Colville Indian Reservation on July 2, 1872, if not before, which title has been repeatedly recognized by Congress. 5/ On the subject, it has been authoritatively declared by the Supreme Court that:

> Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. 6/

A most careful review of the law establishes beyond successful challenge that the rights to the use of water on the Colville Indian Reservation have continued to reside in the Colville Confederated Tribes. Equally elemental, and indeed recognized by the Court of Appeals, is this principle:

> The general rule is that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history. 7/

Cited by the Court of Appeals in support of that correct conclusion are the cases of Mattz v. Arnett 8/ and Brian v. Itasca County. 9/

5/ Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669-70 (1970).

6/ United States v. Jim, 409 U.S. 80, 82 (1972), citing Cherokee Nation v. Hitchcock, 187 U.S. 294, 307 (1902).

7/ Colville Confederated Tribes v. Walton, 647 F.2d 42, 50 (CA 9, 1981), cert. den., 102 S.Ct. 657 (1981).

8/ 412 U.S. 481, 504-05 (1972).

9/ 426 U.S. 373, 392-93 (1975).

Relative to the continuity of the Colville Indian Reservation and the title of the Colville Confederated Tribes, the Supreme Court, in Seymour v. Superintendent, having briefly summarized the history of that reservation, declared:

> This Act did not, however, purport to affect the status of the remaining part of the reservation since known as the 'South Half' of the 'diminished Colville Indian Reservation,' but instead expressly reaffirmed that this South Half was 'still reserved by the Government for their [the Colville Indians'] use and occupancy.' 10/

Stressed in Seymour is the fact that the 1906 Act of Congress and the 1916 Presidential Proclamation, pursuant to which the Colville lands were allotted and surplus lands sold, the Supreme Court declared that:

> The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards. 11/

An intensive review of the law fully supports the conclusion that none of the acts of Congress pertaining to the Colville Indian Reservation, the Colville Confederated Tribes and members of those Tribes deprived the Colville Confederated Tribes of their rights to the use of water but, rather, those acts of Congress clearly confirmed the title in the Tribes. It is most relevant here that the Court of Appeals, in its final decision, declared:

> The only reference to water rights in the [General Allotment] Act is found in Section 7 [25 U.S.C. 381].... 12/

Quoted verbatim by the Court of Appeals is Section 7, 25 U.S.C. 381, the relevant provisos of which are hereafter set forth:

> ... where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary... is authorized to prescribe such rules and regulations as he may deem necessary to

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10/ 368 U.S. 351, 354 (1962).

11/ Ibid., at p. 356.

12/ Colville Confederated Tribes v. Walton, 647 F.2d 42, 49 (CA 9, 1981). cert. den., 102 S.Ct. 657 (1981).

> secure a just and equal distribution... [of water] among the Indians residing upon [the Colville Indian Reservation].... 13/

Continuing, the Court of Appeals said this:

> There is nothing to suggest Congress gave any consideration to the transferability of reserved water rights. 14/

Having made that correct statement, the Court of Appeals continued with this unusual declaration:

> To resolve this issue, we must determine what Congress would have intended had it considered it. 15/

Succinctly stated, the Court of Appeals, having declared that Congress had not acted upon the issue of transferability of rights to the use of water, proceeded to violate the principle enunciated in Mattz v. Arnett and Brian v. Itasca County, set forth immediately above, which declares that the diminution of Indian rights requires express legislation or a clear inference of congressional intent to seize or diminish the rights to the use of water of the Colville Confederated Tribes. Manifestly, the decision of the Court of Appeals amounts to the purest speculation as to what Congress would have done, had it considered transferability.

Rejecting in totality the undertaking by the Court of Appeals to speculate as to what Congress might have done, had it considered the issue of transferability, the Supreme Court said this:

> It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated. In any event, we discern no hint in the deliberations of Congress relating to the 1973 Act that would compel a different result than we reach here. 16/

In TVA v. Hill, the Supreme Court reviewed carefully the extensive arguments in opposition to the injunction against the Tellico Dam. In

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13/ Ibid. (Emphasis supplied).

14/ Ibid.

15/ Ibid.

16/ TVA v. Hill, 437 U.S. 153, 185 (1978).

rejecting those arguments, the Supreme Court stated:

> ... these principles take a court only so far. Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While 'it is emphatically the province and duty of the judicial department to say what the law is...' it is equally--and emphatically--the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought. 17/

Continuing, the Supreme Court, in TVA v. Hill, declared with specificity the principles that should govern here:

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. 18/

For the Court of Appeals to undertake and determine the will of Congress, where 25 U.S.C. 381 has explicitly declared that rights to the use of water are to be enjoyed by the Indians "residing" on the Colville Indian Reservation -- not the non-Indians -- goes beyond the province of the Court of Appeals in its attempt to amend existing legislation.

In the case of United States v. City & County of San Francisco, the Supreme Court declared the principles which preclude the Court of Appeals from legislating and thereby amending the express provisions of 25 U.S.C. 381 by this declaration:

> The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' 19/

17/ Ibid., at p. 194.

18/ Ibid., at pp. 194-95.

19/ 310 U.S. 16, 29-30 (1940).

As will be reviewed, the Court of Appeals, in total disregard of the express declaration of 25 U.S.C. 381 that "Indians residing" on the Colville Reservation are entitled to water distributed on a just and equal basis during periods of shortage, effectively confiscated the Tribes' rights to the use of water and, by juridical fiat, transferred some of those rights to Defendants Waltons, if there is to be adherence to the Court of Appeals' concepts.

Let it be stressed here that the Court of Appeals lacks the power to veto the express language of 25 U.S.C. 381 and substitute amendatory language by injecting non-Indians into that statute.

Finally, to conclude in regard to the grave error of the Court of Appeals in this matter, further reference is made to the declaration by the Supreme Court in TVA v. Hill, where it is stated:

> We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to preempt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches. 20/

Here, the Court of Appeals undertook to legislate and it had no power to adopt that course.

It is most relevant, under the unusual circumstances presented here, to review the course of conduct by the Court of Appeals. In its June 6, 1980 Opinion, which was withdrawn, the Court of Appeals could not by that conduct vitiate the correct conclusions contained in its first opinion.

Having reviewed the explicit language of 25 U.S.C. 381 and having observed that there was no other legislation in regard to rights to the use of water, the Court of Appeals, in its withdrawn June 6, 1980 Opinion, said this:

> [1] The Allotment Act does not provide for the transfer of Indian water rights to non-Indian allotment purchasers. [2] It was passed in 1887, over 20 years before the Winters doctrine was

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20/ 437 U.S. 153, 195 (1978).

> announced. [3] Therefore, Congress could not have intended to provide for the transfer of reserved rights. 21/

That conclusion is eminently correct. 22/ In the June 6, 1980 Opinion following the quotation of the entire Act -- 25 U.S.C. 381 -- the Court of Appeals said this in a footnote:

> This provision [25 U.S.C. 381] implies that water rights were held in federal trust and not allotted. 23/

As stated in the opening sentences of this Memorandum, the Colville Confederated Tribes reserve their constitutional right to raise the issue again in the Court of Appeals, petitioning that Court to reverse its obviously erroneous declaration that Indian reserved rights can be transferred to non-Indians; that rights to the use of water on an Indian reservation are, in gross error, to be allocated on the basis of irrigable acreage.

Plain And Serious Error Was Committed By The Court Of Appeals In Its Ahtanum Decision In Misstating The Consequences Of The Powers Decision 24/

Nature of the error in Ahtanum 25/ must be examined and rejected if Indian rights are not to be confiscated by misstatements of both the facts and law in the Ahtanum case. In the Ahtanum decision, respecting the limited issues, to which these comments are directed, the Court of Appeals for the Ninth Circuit -- in error -- declared:

> These defendants claim that as successors to certain original Indian allottees for whom the waters were reserved and for the benefit of whose lands the Indian ditches were constructed, these defendants

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21/ See, June 6, 1980 Opinion, Colville v. Walton, rendered by the Court of Appeals for the Ninth Circuit. (Emphasis supplied).

22/ Ibid., at note 13.

23/ Ibid.

24/ United States v. Powers, 305 U.S. 527 (1939).

25/ United States v. Ahtanum Irrigation District, 236 F.2d 321 (CA 9, 1956).

> have acquired a vested interest in and a right to the distribution of the waters diverted by the United States to the same extent as if their lands were still in the possession of the original allottees. 26/

Having made that declaration, the Court of Appeals then departed radically from both the facts and the law in regard to the Powers decision, making this statement:

> That they [the non-Indian defendants] did originally acquire such a right through purchase of allotments seems clear from United States v. Powers, 305 U.S. 527. 27/

The Court of Appeals then made this gross misstatement:

> That case [Powers] holds that white transferees of such fee patented Indian allotments were equally with individual allottees beneficially entitled to distribution of the waters diverted for the Indian irrigation system. 28/

Compounding that error, the Court of Appeals here said this:

> Ahtanum held that non-Indian purchasers of allotted lands are entitled to 'participate ratably' with Indian allottees in the use of reserved water. 29/

That Powers did not even remotely declare that the non-Indians were entitled to share "equally with individual allottees" is too clear for serious challenge. Rather, the Supreme Court, in Powers, specifically denied any such determination, making this crucial declaration:

> We do not consider the extent or precise nature of respondents' [non-Indian purchasers'] rights in the waters. 30/

It is further stressed here that Powers did not apply the concepts or the language of 25 U.S.C. 381. 31/ Rather, the controlling aspect in Powers

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26/ Ibid., at p. 342.

27/ Ibid.

28/ Ibid.

29/ Colville Confederated Tribes v. Walton, 647 F.2d 42, 50 (CA 9, 1981), cert. den., 102 S.Ct. 657 (1981).

30/ United States v. Powers, 305 U.S. 527, 533 (1939).

31/ Ibid.

was the specific language of the 1868 Treaty between the United States of America and the Crow Indian Tribe, whose interests were there involved. The Treaty specifically provided for the allocation of lands to Crow Indian members who decided that they wished to farm. Predicated upon that clause in the Treaty, the Court inferred that they had rights to the use of water.

Most assuredly, the 1868 Treaty has no relevancy here. The Colville Indian Reservation was created by an Executive Order on July 2, 1872. As reviewed above, Congress recognized the title in the Colville Confederated Tribes. 32/ The only principles applicable here are those expressed in 25 U.S.C. 381 assuring the "Indians residing" on the reservation a just and equal share of the water during periods of shortage.

Whatever disposition this Court makes of the objections interposed by the Colville Confederated Tribes to the determination that non-Indians can succeed to the reserved rights of Indians and that the waters in short supply are to be distributed on the basis of irrigable acres, the Tribes are entitled to have the record show for appeal that the errors of the Court of Appeals must again be reviewed.

Hibner And Adair Are Inapplicable To This Case

In arriving at its error respecting the transferability of Indian reserved rights to non-Indians, the Court of Appeals cited United States v. Adair 33/ and United States v. Hibner . 34/ Neither case has application to the Colville v. Walton cases.

The crucial differences between Hibner and Colville are summarized as follows:

1. The allotments in question are not within any Indian reservation. 35/

32/ See, p. 4 , supra.

33/ 478 F.Supp. 336 (U.S.D.C. Ore. 1979).

34/ 27 F.2d 909 (U.S.D.C. Ida. 1928).

35/ Ibid.

2. These lands outside of the reservation occupied by Indian allottees were unique in that the arrangement for removing the lands from the reservation provided:

> Article VIII: 'The water from streams on that portion of the reservation now sold which is necessary for irrigating on land actually cultivated and in use shall be reserved for the Indians now using the same, so long as said Indians remain where they now live.' 36/

In total error, Hibner, citing Skeem v. United States, 37/ made this statement:

> The right of the Indians to occupy, use, and sell both their lands and water is now recognized, as this view is sustained in the case of Skeem v. U.S., supra, and, such being the case, a purchaser of such land and water right acquires, as under other sales, the title and rights held by the Indians, and that there should be awarded to such purchaser the same character of water right with equal priority as those of the Indians. 38/

The Court of Appeals for the Ninth Circuit, in Skeem, declared that Indian allottees, who were off the reservation, could lease their properties. The issue was not before the Court and it did not declare that Indian allottees could sell their water or that a purchaser of Indian land succeeded to rights held by the Indians. Indeed, the Act, pursuant to which the Indians exercised their rights, makes no reference to sale or transfer of rights.

It is denied by the Colville Confederated Tribes that they may properly be subjected to misstatements made in connection with a factual predicate that is drastically different from the issues before this Court. It is likewise the position of the Colville Confederated Tribes that errors should not be blindly adopted by the Judiciary.

In actuality, the Court of Appeals, in the case of Colville v. Walton, adopted the misrepresentations by the Department of Justice in the case of

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36/ Ibid., at p. 911.

37/ 273 Fed. 93 (CA 9, 1921).

38/ United States v. Hibner, 27 F.2d 909, 912 (U.S.D.C. Ida. 1928).

United States v. Adair. 39/ Continuing, the Department of Justice asserted in Adair that:

> Non-Indian purchasers are entitled to only as much water (1) as their Indian predecessors actually used for irrigation and domestic purposes when the land was conveyed, and (2) as the non-Indian purchaser 'might with reasonable diligence place under irrigation.' 40/

There can be little doubt that the Department of Justice, both in Adair and in these proceedings, is seeking to protect the Secretary of Interior, who has clearly violated the express language of 25 U.S.C. 381 by failing to make a just and equal distribution of water among Indians residing on the reservations, and who has disposed of lands to non-Indians with at least oblique representations that they would obtain a supply of water.

It is unconscionable to permit the Department of Justice to force upon the Colville Confederated Tribes here its unwanted and rejected representation. Sole purpose of the Justice Department bringing the action of United States v. Walton was to force upon the Tribes the power of the Secretary of Interior to allocate the water rights on the reservation upon tribal, allotted and formerly allotted lands. 41/

The Tribes renew their motion to have the Department of Justice aligned as an adversary in these proceedings to the end that the Tribes will be permitted to respond to the gross errors presented to the Court in Adair and which errors were espoused in these proceedings, particularly in the original appeal. In that regard, reference is made to the observation by the Court of Appeals that the Department of Justice, when contested by the Colville Confederated Tribes, abandoned its appeal rather than being confronted with the shocking immorality of forcing its representation upon the Tribes, while simultaneously representing the opposition. 42/

39/ 478 F.Supp. 236, 342 (U.S.D.C. Ore. 1979).

40/ Ibid., citing Hibner. (Original emphasis).

41/ See, March 6, 1973 letter from Justice Department to U.S. Attorney.

42/ Colville Confederated Tribes v. Walton, 647 F.2d 42, note 6 (CA 9, 1981), cert. den., 102 S.Ct. 657 (1981):

Both The Law And The Facts Belie The Propriety Of Allocating Water Upon The Basis Of Irrigable Acreage Owned By Allottees

There is set forth above the Court of Appeals' opinion that, in determining the nature of the "right acquired by non-Indian purchasers," there are three (3) aspects to be taken into consideration. 43/ There, it is declared among other things that an Indian allottee measures his rights to the use of water on the basis "of irrigable acres he owns." 44/ Additionally, it is declared that the non-Indian purchaser acquires a right that "is similarly limited by the number of irrigable acres he owns." 45/ Continuing, the Court of Appeals declared that:

> In the event there is insufficient water to satisfy all valid claims to reserved water, the amount available to each claimant should be reduced proportionately. 46/

It does not involve expert knowledge to realize that to apportion among owners the available supply of water on the basis of irrigable acreage is to invite disaster. In the No Name Creek Valley and elsewhere, the amount of irrigable acreage far exceeds the available water supply.

Thus it is that, when Congress, in the exercise of its constitutional power, declared that the Secretary of Interior would be authorized "to secure a just and equal distribution" of a short water supply "among the Indians residing" on a reservation, it demonstrated the wisdom that flows from experience.

Anyone with knowledge of the operations of an irrigation system realizes that numerous elements are involved in making a determination for the allocation

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42/ (cont'd)

> "The United States filed an appeal from the decision and the Tribe moved 'not to be bound' by any ruling on U.S. v. Walton, No. 79-4619. The United States has since dropped its appeal [fearful of exposure] and we deny the Tribe's motion."

43/ Ibid., at p. 51, paras. 2, 4 & 5 under section (2).

44/ Ibid., at p. 51.

45/ Ibid.

46/ Ibid.

of a short supply of water among owners, whose total irrigable acreage far exceeds the available supply of water.

As Mr. Charles P. Corke, Chief Engineer, Indian Irrigation, Bureau of Indian Affairs, Department of Interior, testified, allocation on the basis of irrigable acreage results in the application of what is known as the "tea cup" theory. 47/

Stressed by Mr. Corke in his testimony respecting the Ahtanum Irrigation Project, referred to by the Court of Appeals in its repeated references to the case of United States v. Ahtanum Irrigation District, 48/ is the fallacy in the statement by the Court of Appeals that:

> ... non-Indian purchasers of allotted lands are entitled to 'participate ratably' with Indian allottees in the use of reserved water. 49/

Predicated upon his personal knowledge and in light of his authority, Mr. Corke testified that:

> A. During short periods of time it [water] is not distributed on the basis of irrigable acreage [within the Ahtanum Division of the Wapato Indian Irrigation Project]. It is not even distributed on the basis of irrigated acres.
>
> Q. And how is it allocated then?
>
> A. It is allocated on the basis of a number of factors and a judgment call taking into account the land, its location, the soil characteristics of that land, the crops growing on it, their value, their tolerance to drought.
>
> THE COURT: Has the administrative agency gone into the Lahontan [Ahtanum] area with certain controls?
>
> THE WITNESS: It is a judgment shot based on the situation at each time the water gets critically short. 50/

Mr. Corke then testified in response to this inquiry:

47/ T.R. Vol. III, May 7, 1982, at p. 601, ln. 19.

48/ Colville Confederated Tribes v. Walton, 647 F.2d 42, 50-51 (CA 9, 1981), cert. den., 102 S.Ct. 657 (1981).

49/ Ibid., at p. 50.

50/ T.R. Vol. III, May 7, 1982, at p. 599, lns. 20-25; p. 600, lns. 1-8.

> ... As an expert, do you have an opinion as to whether the water in the No Name Creek area within the Colville Irrigation Project could be properly administered on the basis of irrigable acreage?
>
> ***
>
> A. Yes, I do have an opinion.
>
> A. Would you state into the record what that opinion is?
>
> A. That it would not be appropriate. It is unrealistic and unworkable.
>
> Q. What would be the consequences of attempting to distribute water that way?
>
> A. There would be a tea cup for nearly every acre on short occasions, and some lands would be given more water than they should be given and could use beneficially, and others would be drastically short. 51/

Common sense and undeniable facts call for a rejection by the Court of Appeals of its clearly erroneous statement that water rights should be distributed on the basis of irrigable acreage. This Court is not required by any principle of law to engage in a ridiculous undertaking that can only cause disaster. This Court has facts in the record that should dispel a principle of law, which is a disaster to the Indian people of the first magnitude.

In the phases of this Memorandum that follow, the total failure of the Defendants Waltons to prove the amount of water diverted and beneficially used by them is fatal. That failure on the part of the Defendants Waltons underscores the fact that an allocation of water in this case, on the basis of irrigable acreage, is an impossibility. That fact is, moveover, underscored by the fact that the Defendants Waltons did not prove either their irrigable acreage or the quantities of water used on any of that land. 52/

Failure of the Defendants Waltons to offer any evidence as to the "amount" of water diverted and applied to a beneficial use by them or

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51/ Ibid., at p. 600, lns. 14-18; p. 601, lns. 8-22.

52/ See, pp. 40, et seq., infra.

their predecessors, all as will be more fully reviewed, is fatal to their claims.

Court Of Appeals Fails To Comprehend That Water Must Not Be And Cannot Be Equally Allocated To All Lands

Prior to reviewing the failure of the Defendants Waltons to prove the number of irrigable acres, as required by the Court of Appeals, reference will be made to a most serious and basic defect in the Opinion of the Appellate Court.

Stressed above are the inherent errors in the Opinion of the Court of Appeals, which require correction. One of the most serious and basic errors is contained in this quoted excerpt from the Opinion:

> First, the extent of an Indian allottee's right is based on the number of irrigable acres he owns. 53/

Continuing, the Court made an example by stating that, if an allottee owns ten percent (10%) of the irrigable acreage in the watershed, he is entitled to ten percent (10%) of the water reserved for irrigation. 54/ As will be reviewed, the apportionment of water on an irrigable-acreage basis, because of the vast differences in water requirements, cannot be made equally among all acres of land. For example, Waltons' water-logged lands do not require the allocation of any water by reason of the fact that they are not irrigable.

As will be reviewed, there is uncontested proof in the record 55/ that water could not be used on most of the Defendants' lands at any time during the irrigation season. Indeed, as the evidence proved, water is standing on the surface of the land. To allocate to the totally saturated and inundated lands four (4) acre-feet to the acre would be a bizzare injustice. Most assuredly, to allocate four (4) acre-feet to water-logged land would not constitute a "just and equal distribution" of water, as declared by the Court

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53/ Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (CA 9, 1981), cert. den., 102 S.Ct. 657 (1981).

54/ Ibid.

55/ See, p. 25, infra.

of Appeals. 56/

Continuing in error, the Court of Appeals declared that the non-Indian purchaser would acquire the same right as the Colville allottee. The Court then said this, again in total error:

> In the event there is insufficient water to satisfy all valid claims to reserved water, the amount available to each claimant should be reduced proportionately. 57/

It is abundantly manifest that the Court of Appeals proceeded upon the basis that each acre of irrigable land is entitled to the same quantity of water. As stressed repeatedly, it is a waste of water to irrigate water-logged land. 58/ Certain water-logged lands, late in the irrigation season, might beneficially utilize a small quantity of water. 59/

The Court of Appeals obviously confused the term "duty of water" with the quantity of water that could be "beneficially" used. Most assuredly, the terms are not the same. The duty of water on land with an extremely high water table is zero. The duty of water for lands of the character irrigated by the Colville Confederated Tribes in their irrigation project is four (4) acre-feet to the acre. That quantity of water was decreed to the Tribes by the February 9, 1979 Judgment. For each acre of the Colville lands, predicated upon an abundance of expert testimony, the Court awarded four (4) acre-feet to the acre. 60/ There was no duty of water found or declared for the Defendants Waltons by reason of the fact that they did not offer any evidence on the subject.

It was no oversight on the part of the Defendants Waltons that they did not offer, at any time, evidence as to the quantities of water diverted or

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56/ Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (CA 9, 1981), cert. den., 102 S.Ct. 657 (1981).

57/ Ibid.

58/ See, p. 20, infra.

59/ See, p. 25, infra.

60/ Judgment, February 9, 1979, at para. I.

required for their lands. Defendants knew that the vast preponderance of their "irrigable" acreage was waterlogged and could not beneficially use water.

Respecting the operation of the Defendants Waltons, Wilson Walton testified that the maximum acreage that he had put "under irrigation" by 1962 was

> As near as I can judge, somewhere around 55 acres. 61/

Most assuredly, Mr. Walton did not state or remotely intimate how much water he was utilizing. That, of course, is one of the fatal defects in the Walton record.

Wilson Walton likewise testified to this question:

> Q Were you flood irrigating any property to the south of that?
>
> A No, nothing except this that was being naturally flooded from those springs. 62/

It is axiomatic that natural flooding is not of such character that a right to the use of water can be adjudicated. 63/ Stressed again is the fact that the springs were at the surface of the land, inundating it by reason of the water being impounded by the granitic lip. 64/

Early on, in western United States, the courts rejected the kind and type of operation that permeates all aspects of the Walton methods. On the subject, the Nevada Supreme Court said this:

> ... an appropriator has no right to run water into a swamp and cause the loss of two-thirds of a stream simply because he is following lines of least resistance. 65/

It has been authoritatively declared that "duty" of water is a variable depending upon numerous conditions. Most assuredly, water cannot be and must

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61/ T.R. Vol. X, April 13, 1978, at p. 2135, ln. 24.

62/ Ibid., at p. 2135, lns. 17-20.

63/ See, p. 20, infra.

64/ See, p. 27, infra.

65/ Gotelli v. Cardelli, 26 Nev. 382, 69 Pac. 8 (1902).

not be allocated on the basis of irrigable acreage. It has been authoritatively declared that:

> The term 'duty' in relation to water use refers to quantity: the amount of water necessary for effective use for the purpose to which it is put under particular circumstances of soil conditions, method of conveyance, topography, and climate. 66/

From the same source, there is taken the definition of "water duty," as enunciated by Colorado's Supreme Court. This is the language used:

> 'It [duty] is that measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown thereon. It is not a hard and fast unit of measurement, but is variable according to conditions.' 67/

It is then declared that:

> This general formula is only a means for reaching the final test of a valid appropriation: actual beneficial use. It raises questions of quantity limitations and conditions of transmission. 68/

Stressed here is the fact that the issue of the "amount" of water actually diverted and applied to a beneficial use must be determined by this Court. Because the Defendants Waltons offered no evidence in regard to the issue of "amount," it is manifest beyond question that the Colville Confederated Tribes are entitled to judgment against them. To demonstrate that the Defendants Waltons do not require the quantity of water decreed to the lands of the Tribes by this Court, there is a review hereafter set forth of the explicit testimony regarding the saturated and water-logged property, for which the Defendants Waltons are here, in grave error, seeking to have decreed rights to the use of water.

66/ Clark, Waters And Water Rights, Vol. 5, §208.2, at pp. 76-77.

67/ Ibid., §408.2, at p. 79. (Emphasis supplied).

68/ Ibid. (Emphasis supplied).

WATER-LOGGED LANDS OF DEFENDANTS WALTONS, UPON WHICH WATER CANNOT BE BENEFICIALLY APPLIED

There was introduced into the record Colville Exhibit No. 49-A, "1954 Aerial Photograph, Walton Property." 69/ Colville Exhibit No. 49-A is Plate No. I here, which is set forth on the following page. Plate No. I was prepared by Thomas Michael Watson, Hydrologist and Civil Engineer, employed by the Colville Confederated Tribes in the construction of the Colville Irrigation Project. As Hydrologist and Civil Engineer, Mr. Watson has been intimately acquainted with the Walton properties since 1975 and has thoroughly investigated the water-logged and highly saturated lands that encompass most of the Defendants' property. 70/

It will be observed on Colville Exhibit No. 49-A, Plate No. I here, that the southwesterly tract of land, marked "21," is comprised of 25.1 acres. That land, as testified to by Mr. Watson, based upon his personal observations, has standing water upon it and it was the opinion of Mr. Watson that water could not be beneficially applied by the Defendants Waltons to the land. 71/

Reference is next made to tract "20," which, similar to tract "21," is largely located in former Colville Allotment 894:

> ... [Area 20] has a very high water table as evidenced by the exhibits... and also as evidenced by my own personal observations of water discharging from the ground surface in the area along the road on the extreme eastern side of 894. 72/

Continuing, Mr. Watson testified that Area 20 is

> ... very soggy, boggy, wet ground, and there was water standing in those areas where the cattle had walked across that land. 73/

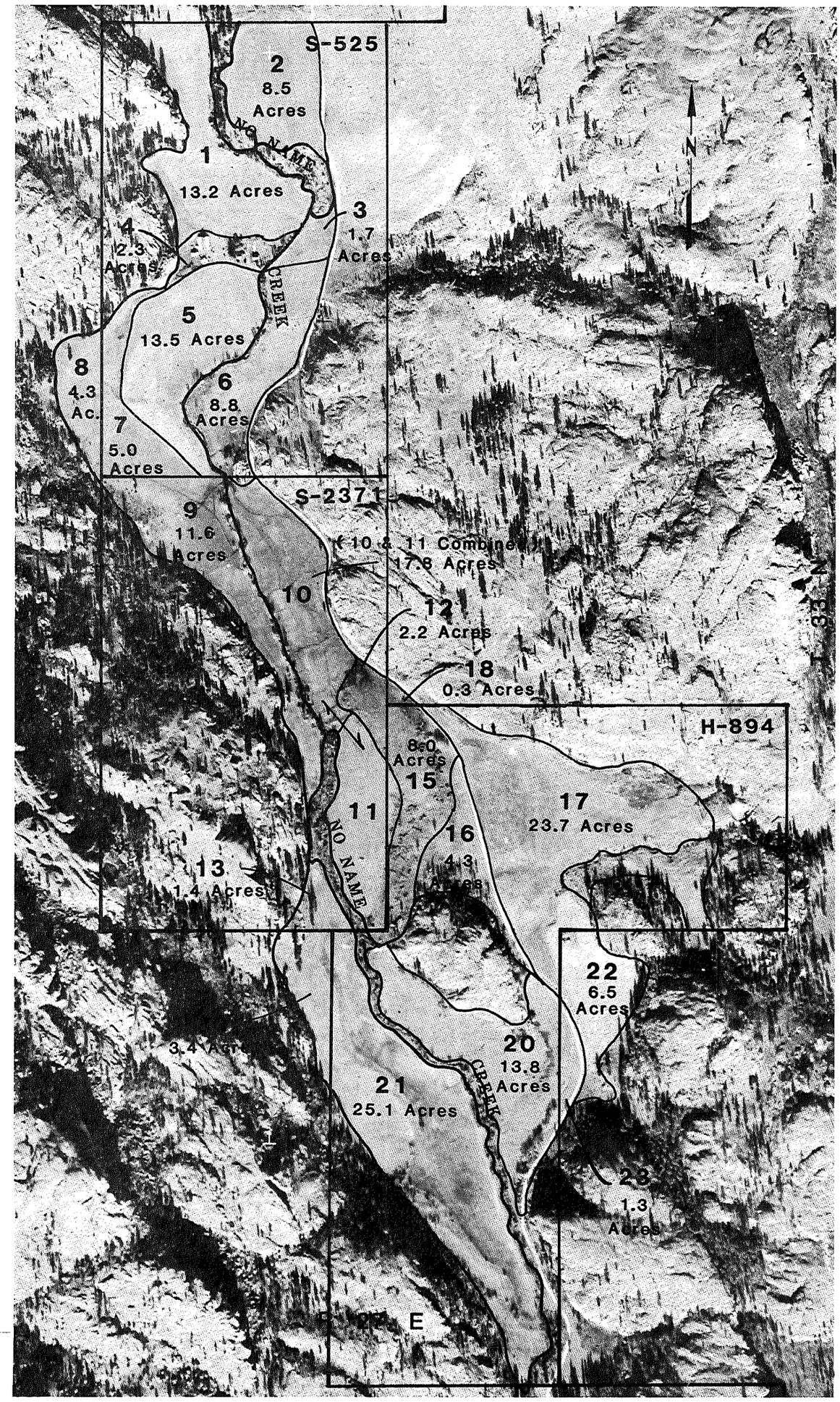
69/ T.R. Vol. II, May 6, 1982, offered at p. 422; admitted at p. 429.

70/ Ibid., at p. 427, ln. 16.

71/ Ibid., at p. 428, lns. 13-18.

72/ Ibid., at p. 429, lns. 4-9.

73/ Ibid., at p. 429, lns. 12-14.



COLVILLE EXHIBIT 49-A

(REPRODUCTION)

1954 AERIAL PHOTOGRAPH - WALTON PROPERTY

(Vol. II Transcript, May 6, 1982,
offered p. 422, admitted p. 426)

PLATE NO. I
page 21

The Tribes' witness testified that "... water cannot be beneficially applied to that land." 74/

Respecting Areas 20 and 21 on Plate No. I, at p. 21, supra, this colloquy between the Court and the witness transpired:

> THE COURT: You are saying wherever you get the water, it doesn't do any good to put it on that land?
>
> THE WITNESS: The water table is so near the surface of the ground in that area that throughout the irrigation season any application of water there, to a large degree, has a negative impact.
>
> THE COURT: It reduces the productivity?
>
> THE WITNESS: In my opinion, yes. 75/

Continuing, the Tribes' expert witness, Thomas Michael Watson, Hydrologist and Civil Engineer, testified in regard to Area 17 on Colville Exhibit No. 49-A, Plate No. I here, at p. 21, supra. To the 23.7 acres in Area 17, the witness testified that "This land is irrigable to some degree." 76/ The witness testified, respecting Area 17, that:

> ... there is a water table underlying this land. The stream that we are talking about, the spring that enters Allotment 894 from the east is a surface water stream as it enters Allotment 894 ***
>
> There is no longer a visible surface water source there at all. That water diffuses underground, and when it encounters the valley floor in Area 15, that water emerges and forms an extremely wet, boggy, soggy area. 77/

Witness Watson testified, respecting Mr. Wilson Walton's earlier testimony, that:

> ... he could not get his equipment on that land to cultivate that land because it was wet and soggy, and he never got on that land to cultivate it. 78/

74/ Ibid., at p. 429, lns. 20-21.

75/ Ibid., at p. 430, lns. 15-22.

76/ Ibid., at p. 434, ln. 20.

77/ Ibid., at p. 435, lns. 3-13.

78/ Ibid., at p. 435, lns. 17-20.

Then, witness Watson declared, respecting Area 15, that:

> It is a very soggy, boggy area in 1954. It is a very soggy, boggy area today.
>
> It encompasses 8 acres within Allotment 894....
>
> ***
>
> That same kind of condition extends westward into Allotment 2371, and into an area described as 12, there are 2.2 acres in Area 12 of the same general character [soggy, boggy and waterlogged]. 79/

Continuing, the Tribes' expert Civil Engineer and Hydrologist, testifying in regard to the lands in Areas 10, 11 and 13, stated that the lands in question, comprising 17.8 acres, are

> ... very saturated soil, and it is an area in the 1954 photo that shows standing water, running water moving from east to west toward No Name Creek, and that area now is at the northern end of the Walton sump, but these lands are extremely wet and application of water such as we see in the exhibit that was discussed earlier where the sprinklers are shown sprinkling ponded water, this area is located right at the boundary between Area 10 and Area 12, and it is an area that was historically an area of ground water discharge. That area will perpetually be wet, and it characterizes this whole area described as 10 and 11. 80/

Respecting Tribes' Exhibit No. 8, 81/ the witness was asked to locate the areas photographed in the exhibit, to which he testified that the areas are "... substantially non-irrigable." 82/

Relative to Area 9, appearing on Tribes' Exhibit No. 49-A, Plate No. I here, at p. 21, supra, the witness referred to the fact that it contained 11.6 acres and that it is an area of

> ... high ground water table, and there is substantial evidence on the photo as evidenced by the coloration of this area that it is wet. 83/

79/ Ibid., at p. 437, lns. 12-25.

80/ Ibid., at p. 439, lns. 16-25; p. 440, lns. 1-3.

81/ See, p. 24 , infra.

82/ T.R. Vol. II, May 6, 1982, at p. 440, lns. 4-18.

83/ Ibid., at pp. 440-41, commencing at line 24.

In defining what was meant by "substantially non-irrigable," the witness stated that:

> It would be totally impractical to even begin to consider the application of large quantities of water to that land. ***
>
> *** ... it would be totally impractical to distribute even a small percentage of that water duty [4 acre-feet per acre] on this land. 84/

The witness testified that the land had a very high water table but that some water could, in the late irrigation season, be utilized on the property. 85/

With regard to that area, the witness testified:

> Certainly, it would not be anywhere near a full water duty [for Area 7]. 86/

Commenting on Area 5 on Colville Exhibit No. 49-A, Plate No. I here, at page 21, supra, the witness stated that it contained 13.5 acres of land. 87/ The witness then declared that Area 5 was comparable to Area 7, requiring

> ... less than a full duty of water, in fact, about a half duty of water would be beneficial in some years on that particular tract of land. 88/

Mr. Watson further testified with regard to Area 6, containing 8.8 acres of land, and declared that:

> ... it would require less water than Area No. 5, for example, [which required approximately half a duty of water]. 89/

It was that area, concerning which testimony was given by witness for Defendants Waltons, that grew corn "without irrigation." 90/

84/ Ibid., at p. 441, lns. 7-25.

85/ Ibid., at p. 442, lns. 18-23.

86/ Ibid., at p. 443, lns. 17-18.

87/ Ibid., at p. 444, ln. 19.

88/ Ibid., at pp. 444-45, commencing at line 24.

89/ Ibid., at p. 445, lns. 12-13.

90/ Ibid., at p. 445, ln. 21.

Area 6, the witness testified, contains 1.7 acres of land and 1.5 acre-feet per acre would be the water requirement that could be used beneficially on that land. 91/

There follows the review of expert testimony establishing completely the physical phenomenon that causes the Walton lands to be waterlogged and, in many places, to be actually inundated. Waltons' irrigation of those water-logged and soggy lands is, of necessity, waste per se.

Physical Phenomenon Gives Rise To The Permanently Water-Logged Characteristics Of The Lands Of The Defendants Waltons

Geological phenomenon gives rise to the permanently water-logged characteristics of the lands occupied by the Defendants Waltons. On the following page is Plate No. II of this Memorandum, Tribes' Exhibit No. 44. 92/ Set forth in red on Tribes' Exhibit No. 44 is the non-irrigable lands within the Walton property, which include former Colville Allotments 525, 894 and 2371. The land in red -- the vast preponderance of Waltons' land -- is water-logged by reason of the high water table. That land, as will be reviewed, is not irrigable and it is not entitled to have rights to the use of water decreed to it.

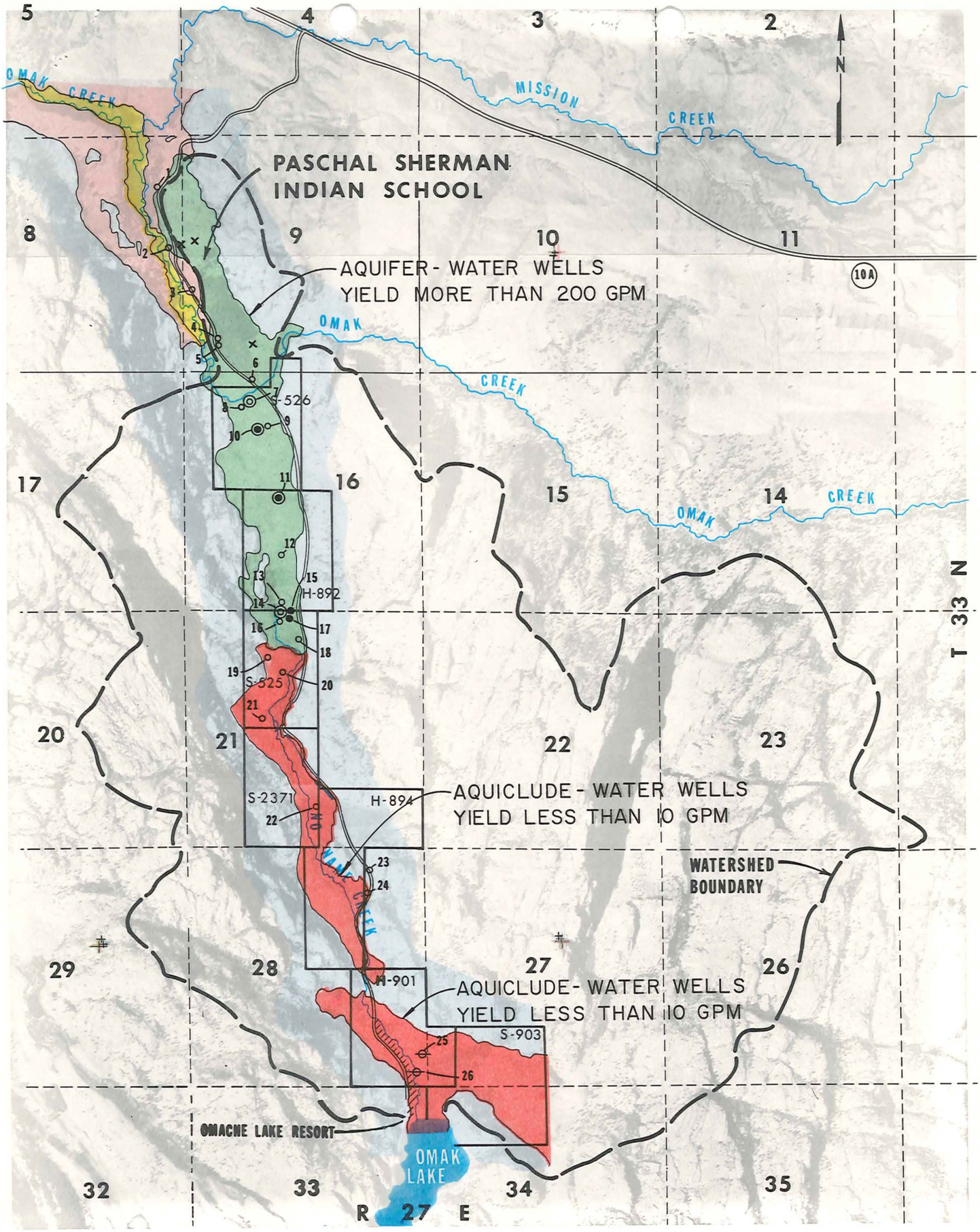
In explicit, undeniable and unchallenged detail, Tribes' witness Michael Kaczmarek, Groundwater Hydrologist and Soil Scientist, testified as to the cause of the water-logged lands. 93/ There, Mr. Kaczmarek refers to the existence of the granite lip, which is a natural barrier that precludes the groundwater from draining out from under the lands of the Defendants Waltons. As a consequence of the fact that the land is not drained, it is saturated throughout virtually the entire length of the Defendants' property.

As will be seen on Plate No. II, the granitic barrier rises above land surface, creating a groundwater lake throughout the Walton property.

91/ Ibid.

92/ See, T.R. Vol. I, May 5, 1982, at p. 263, Exhibit No. 44 identified; admitted at p. 270. Exhibit No. 44 is entitled "General Distribution Of Aquifer And Non-Aquifer Materials."

93/ Ibid., at p. 270, commencing at line 22.



EXPLANATION

AQUIFER – GEOLOGIC MATERIALS WHICH READILY STORE AND TRANSMIT GROUNDWATER.

AQUICLUDE – GEOLOGIC MATERIALS WHICH STORE GROUNDWATER BUT WHICH HAVE VERY LITTLE CAPACITY TO TRANSMIT GROUNDWATER.

AQUIFUGE – GEOLOGIC MATERIAL WHICH NEITHER STORES NOR TRANSMITS GROUNDWATER.

– NO NAME CREEK BASIN AQUIFER

– OMAK CREEK ALLUVIAL AQUIFER

– AQUICLUDE MATERIALS CONSISTING OF LAKE BEDS AND FINE GRAINED ALLUVIAL DEPOSITS.

– AQUIFUGE MATERIALS CONSISTING OF GRANITE BEDROCK.

PLATE NO. II
Page 26

TRIBES' EXHIBIT 44

GENERAL DISTRIBUTION OF AQUIFER AND NON-AQUIFER MATERIALS

DECEMBER, 1977

In that connection, reference is also made to Tribes' Plate No. III, Tribes' Exhibit No. 45, which appears on the following page. 94/ Respecting the physical phenomena represented there, Tribes' witness Kaczmarek explained the fact that the water impounded in the groundwater lake, which encompasses Defendants Waltons' properties, is at such a level that water flows from wells drilled by the Defendants. On the subject, Tribes' witness Kaczmarek testified as follows:

> ... the water levels rising up in that well are actually above the land surface at that location. So, we constructed the well with a high enough casing that the water would not flow out of the casing. 95/

Relative to the saturation of Waltons' lands, for which they are claiming water rights, Mr. Kaczmarek, referring to Tribes' Plate No. II here, at page 26, supra, testified:

> Well, what we are seeing is that the slowly permeable -- poorly permeable aquiclude materials act as a barrier to ground water movement very similarly to the way that the granite bedrock acts as a barrier to ground water movement.
>
> ***
>
> The acquiclude materials are saturated, and although they are very poorly permeable, there is a certain amount of permeability there, so the ground water is also moving very slowly through them towards the granite lip, and the granite lip again acts as a barrier to that movement causing ground water levels to have to rise above that and essentially pond behind it until they rise to an elevation such that they can spill over it. 96/

There was offered into evidence Tribes' Exhibit No. 46-A, "September 28, 1936 Aerial Photograph -- Walton Property," which is Plate No. IV here, at page 29, infra.

As a Soil Scientist and expert in the field, Mr. Kaczmarek utilized established procedures in viewing the 1936 photograph, Tribes' Exhibit

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94/ T.R. Vol. II, May 6, 1982, offered at p. 278; admitted at p. 281.

95/ Ibid., at p. 284, lns. 13-17.

96/ Ibid., at p. 285, lns. 19-25; p. 286, lns. 1-15.

PLATE NO. III
page 28

COLVILLE EXHIBIT 45

(REPRODUCTION)

NO NAME CREEK BASIN

GROUNDWATER PROFILES ON WALTON PROPERTY

(Vol. II Transcript, May 6, 1982,
offered p. 278, admitted p. 281)

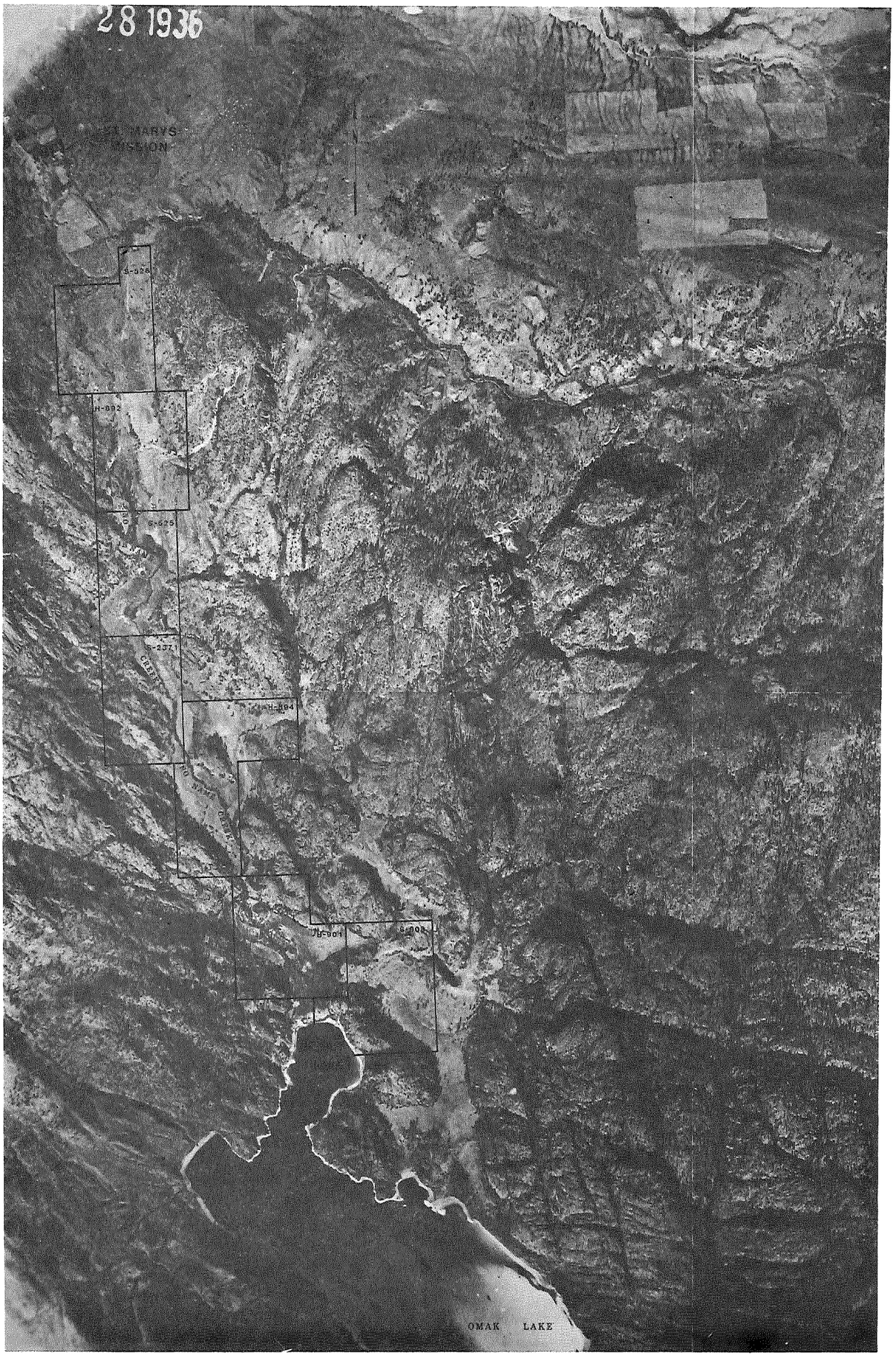
NO NAME CREEK BASIN

GROUND WATER PROFILES ON

WALTON PROPERTY

SOURCE: UNITED STATES GEOLOGICAL SURVEY
GROUND WATER SITE INVENTORY
WATER-LEVEL DATA

SCALE: HORIZONTAL 1"=300'
VERTICAL 1"=20'



COLVILLE EXHIBIT 46-A

(REPRODUCTION)

SEPTEMBER 28, 1936 AERIAL PHOTOGRAPH - WALTON PROPERTY

(Vol. II Transcript, May 6, 1982,
offered p. 309, admitted p. 321)

No. 46-A, Plate No. IV at page 29, supra, and testified that Colville Allotment 894, immediately north of the granitic lip, was not irrigated in the year 1936 and had not been irrigated up to that time. 97/

Mr. Kaczmarek then examined Tribes' Exhibit No. 47-A, 98/ Plate No. V of this Memorandum, which is set forth on the following page. That exhibit is "September 1, 1946 Aerial Photograph -- Walton Property," two (2) years antecedent to the time when the Defendants acquired the lands, title to which had been out of Indian ownership at the time for more than 25 years.

Relative to the water-logged character of the Walton property in 1946, Mr. Kaczmarek testified respecting the area northward on the Walton property above the granite lip. On the subject, he said this:

> We see dark areas of dense vegetation that coincide with the areas of shallow ground water and seepage. We see phreatophytic vegetation over on the northeast corner of this soil unit. 99/

As to the meaning of "phreatophytic," witness Kaczmarek declared:

> That's water-loving vegetation. That's where you actually have water seeping from the surface on that particular location and flowing across the ground and into No Name Creek. 100/

Mr. Kaczmarek continued testifying in regard to the water-logged character of the Walton property in 1946, which had not been irrigated by the non-Indian Whams, and made these statements:

> Moving north through that allotment [No. 894] onto Allotment 2371, we see the area of ground water discharge on the valley floor.... ***
>
> ***
>
> As we move up to Allotment 525, we see additional lands of similar nature portrayed on the aerial photograph where our records of the ground water

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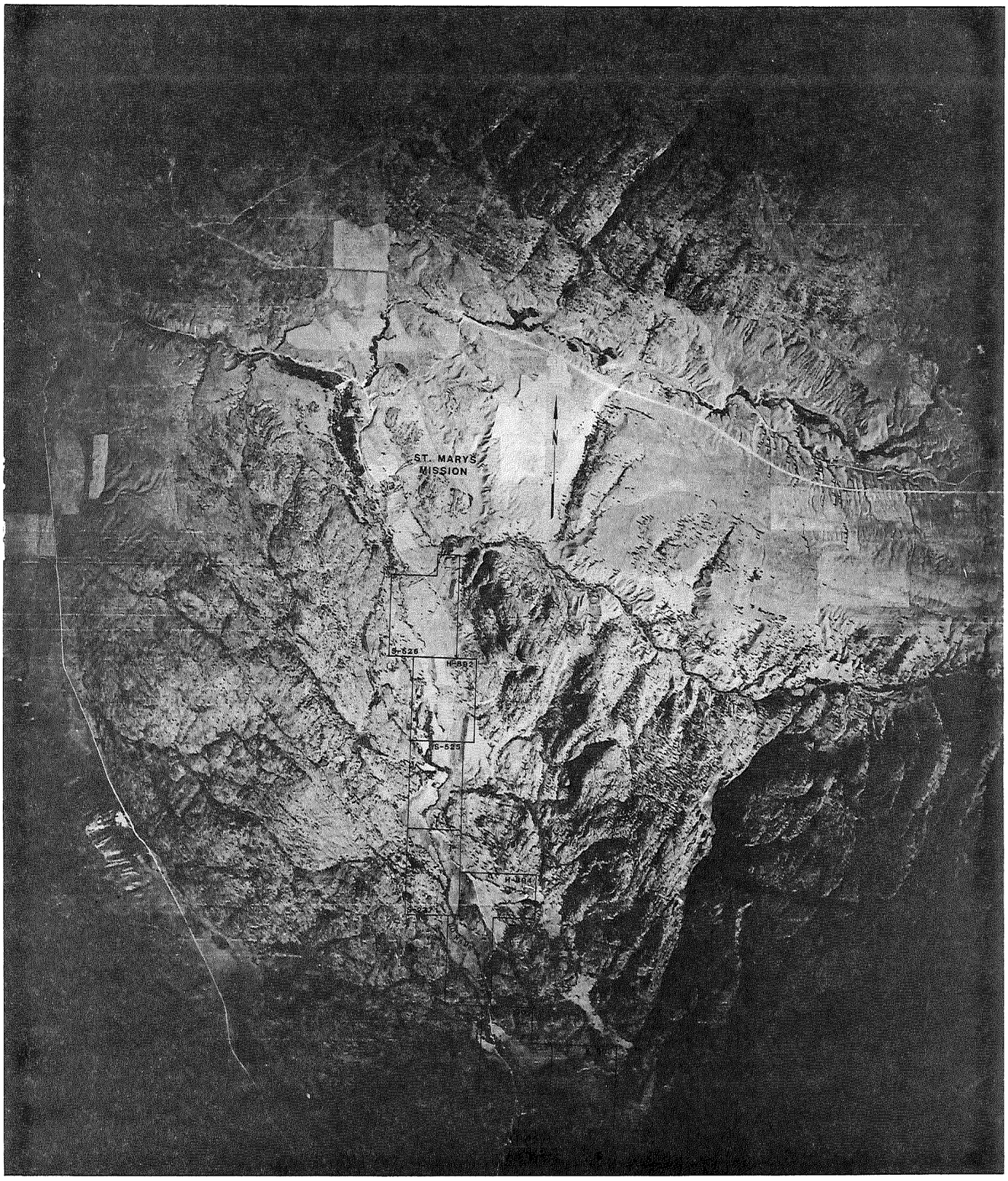
97/ Ibid., at p. 314, lns. 23, et seq.; pp. 315-16.

98/ Ibid., offered at p. 317; admitted at p. 321.

99/ Ibid., at p. 319, lns. 14-18.

100/ Ibid., at p. 319, lns. 22-25.



COLVILLE EXHIBIT 47-A

(REPRODUCTION)

SEPTEMBER 1, 1946 AERIAL PHOTOGRAPH- WALTON PROPERTY

(Vol. II Transcript, May 6, 1982,
offered p. 317, admitted p. 321)

> level show that the ground water levels are at or near the land surface. 101/

Testifying from north to south on Tribes' Exhibit No. 48, Plate No. VI here, at p. 33, infra, "Soil And Land Capability Classification -- Walton Property," the witness declared that, in the entire southern portion of former Allotment 894 and northward into former Allotment 2371, the soils are water-logged. This is a direct statement from that unchallenged testimony:

> When we use a W2 symbol, we are looking at a situation where we have the waterlogged condition throughout most of the growing season up and through mid-July to late July. The land is characterized in the state of nature by a considerable number of water-loving plants, which is one of the criteria we use, in fact, to describe the lands. 102/

Continuing northward, the witness testified that, in former Allotment 2371, occupied by the Defendants Waltons,

> ... we have an area of serious waterlogging which we have designated with a 4W3-X7 over 3A, and that is an area in which we have a perennially high water table. In fact, my personal observation of that area is that it is an area of ground water discharge. It is adjacent to the piezometer W-3 where we see the water flowing from the piezometer year round, and that is an area which remains wet year round and has water flowing from the surface of the land. 103/

Evidencing the totally saturated and water-logged nature of the Defendants Waltons' property, the witness testified further that:

> The soil unit 4W2-X7 over 3A extends northward to encompass approximately 75 percent of the Walton Allotment 525, which is his northernmost allotment, and again, it is the W-2 indicates that we have wet soil profile conditions throughout most of the year. 104/

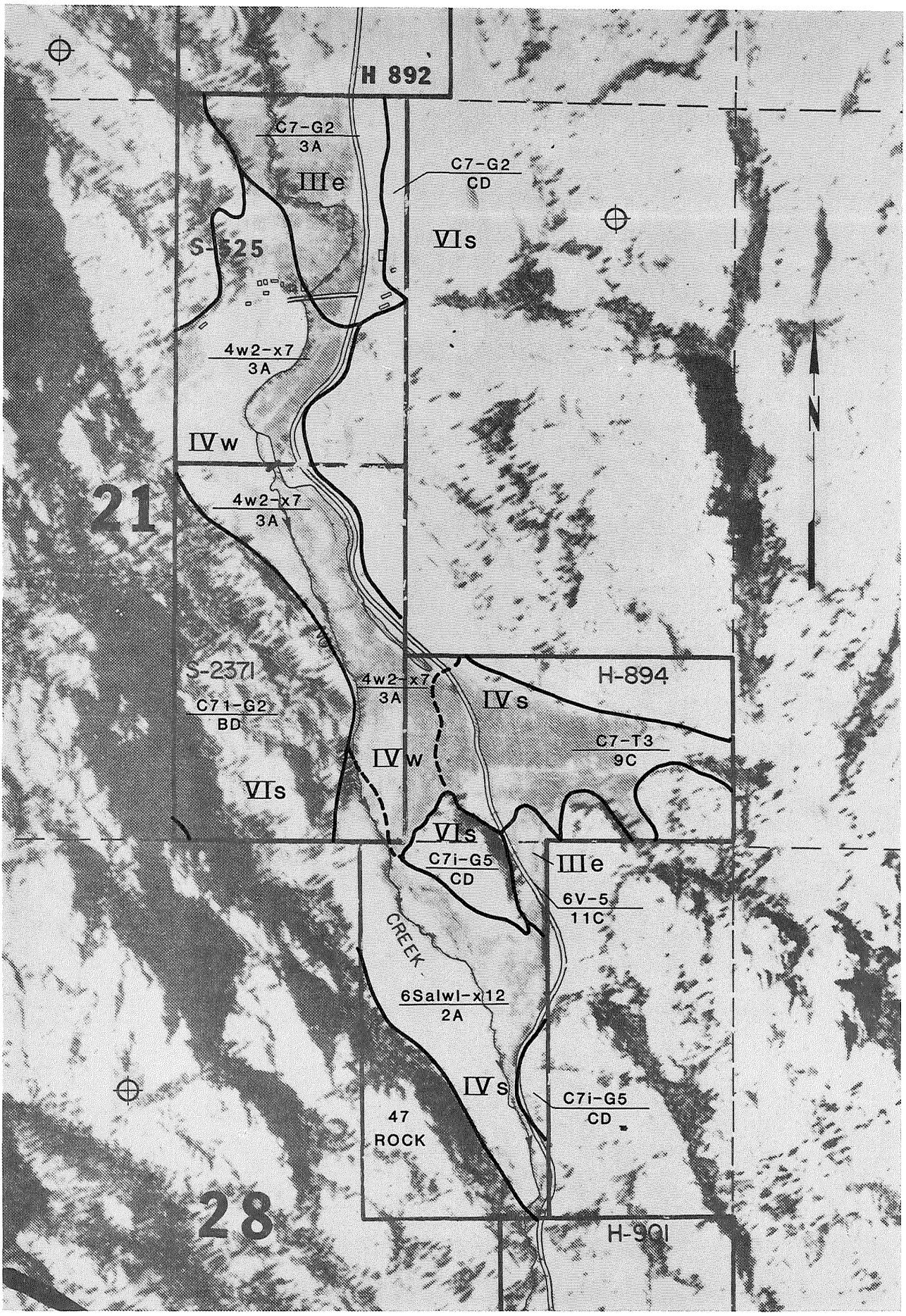
The witness then referred to Plate No. III, at p. 28, supra, which demonstrates the high water table throughout the Walton property, and stated:

101/ Ibid., at p. 320, lns. 1-23.

102/ Ibid., at p. 300, lns. 20-25; p. 301, ln. 1.

103/ Ibid., at p. 301, lns. 7-16.

104/ Ibid., at p. 301, lns. 17-22.



COLVILLE EXHIBIT 48

(REPRODUCTION)

NO NAME CREEK BASIN

SOIL and LAND CAPABILITY CLASSIFICATION- WALTON PROPERTY

(Vol. II Transcript, May 6, 1982,
offered p. 287, admitted p. 298)

> My personal observations are that there are a number of areas within that soil mapping symbol that are actually discharging ground water to the surface again throughout a portion of the growing season. 105/

With care and specificity, the Tribes' Soil Scientist, trained in photogrammetry, related that science to his soil survey, proving conclusively the saturated and water-logged character of Defendants' land, and likewise related the soil survey to Tribes' Exhibit No. 46-A, Plate No. IV here, at p. 29, supra.

Confirmatory evidence was offered by soils expert Kaczmarek by reference to exhibits comprising photographs disclosing water standing on the surface in August 1981 within the Walton property. The photograph is Tribes' Exhibit No. 8. There, Mr. Kaczmarek stated:

> ... I refer to the sump only to point out that the photograph is located at the, near the northern end of the sump on Allotment 2371, and that the photograph is taken from the road along the east side of the valley.... 106/

The photograph of the saturated and flooded soils on the Walton lands in the late irrigation season was related by Mr. Kaczmarek to Tribes' Exhibit No. 48, Plate No. VI here, at page 33, supra, fully demonstrating, to use the language of the expert witness:

> ... we are looking across one of the waterlogged soil units where we have shallow ground water table, and we have a certain amount of natural seepage. 107/

Continuing with regard to the Walton properties in late August, the witness stated:

> ... this [the land in question] certainly wouldn't require irrigation if it is already saturated and wet, which it is, and I simply wanted to point out that fact on the photograph. 108/

105/ Ibid., at p. 302, lns. 1-5.

106/ Ibid., at p. 322, lns. 18, et seq.

107/ Ibid., at p. 324, lns. 7-10.

108/ Ibid., at p. 324, lns. 13-16.

Let it be stressed that the Defendants Waltons purported to irrigate that water-logged land and had sprinklers applying water to it. 109/

Continuing with regard to the photograph marked Tribes' Exhibit No. 9, witness Kaczmarek again located lands within Tribes' Exhibit No. 48, Plate No. VI here, at page 33, supra, which are designated in the soil survey as waterlogged - 6Al-Wl. 110/ Relative to the photographs demonstrating the grossly saturated area contained in the Walton allotments, Mr. Kaczmarek testified as to the saturation of the soils and the wet areas using Colville Exhibit No. 10. 111/ Again, the photograph was correlated with the soil surveys of the area so waterlogged that water was standing on the surface of the lands. Having testified from Tribes' Exhibit No. 3, the picture being taken August 6, 1979, the witness correlated the soil survey, Tribes' Exhibit No. 48, Plate No. VI here, at page 33, supra, with the photographs of the area and likewise related the photographs to Tribes' Exhibit No. 45, Plate No. III here, at p. 28, supra.

There, the intolerably high water table is depicted throughout the Walton property. The lands are so saturated and the groundwater is under a degree of pressure of such character that a pipe put in the land, for which Defendants Waltons are claiming water for purposes of irrigation, results in the water pouring out of the pipe. In other words, the correlation between Tribes' Exhibit No. 45, "Groundwater Profiles On Walton Property" (Plate No. III here, p. 28, supra), when related to the soil survey and when related to the photographs of wet lands being irrigated by the Defendants, the testimony of Mr. Kaczmarek, which stands unrefuted in the record, belies any claim for water rights by the Defendants Waltons for the properties in question.

Mr. Kaczmarek declared this in response to the inquiry as to whether the waterlogged and saturated conditions continued throughout the year:

109/ Ibid., at p. 324, lns. 4-17.

110/ Ibid., at pp. 324-25.

111/ Ibid., at p. 325.

> A. Yes. In referring to Colville Exhibit No. 45, which I think is representative of the ground water conditions out here from year to year, we see that in the early spring, in March of that year, we had high shallow ground water conditions throughout the valley floor on the Walton property, and we see that in September the 12th of that year, after a period of withdrawal from ground water for irrigation and what is normally the period of substantial decline in the seasonal ground water levels....
>
> So, there is very little fluctuation in the ground water season and, of course, the reason for that is because it is recharged continuously from the north to the slowly permeable soils. 112/

An additional photograph, Colville Exhibit No. 6, was considered by expert witness Kaczmarek and he located it within the area for which the Defendants Waltons are claiming water rights and stated:

> ... Colville Exhibit 6... is a photograph which is a view from northwest to southwest, the land located on the valley floor of No Name Creek Valley right on the common boundary between Walton Allotments 2371 and 894, and just south a few hundred feet from piezometer 3 [see, Tribes' Exhibit No. 45, Plate No. III here, at p. 28, supra], which is the one we described earlier with the water flowing from it. 113/

Viewing Colville Exhibit No. 7 and locating it with regard to the lands claimed by the Defendants Waltons, for which they are asserting water rights, the Tribes' witness said this:

> It [Colville Exhibit No. 7] is viewing the No Name Creek Valley floor on the Walton property from east looking towards the west, and we see it, soil unit 4W2 soil unit, 4W2 soil unit and we can see on the surface of that soil unit the 4W3 soil unit [see, Tribes' Exhibit No. 48, Plate No. VI here, at p. 33, supra]. 114/

Continuing, the witness testified:

> We see also the location of piezometer PW2 right along the margin of that 4W3 soil unit. We see standing water on both the 4W2 and the 4W3 soil units. 115/

112/ Ibid., at p. 327, lns. 12-25; p. 328, lns. 1-3.

113/ Ibid., at pp. 329-330, commencing at line 19. (Emphasis supplied).

114/ Ibid., at p. 330, lns. 7-13.

115/ Ibid., at p. 330, lns. 14-17.

Further evidencing the consequences of the high water table in Allotments 525, 894 and 2371, an expert in photogrammetry, Elmer M. Clark, testified as to the condition of Allotments 2371 and 894 in 1963, a full 40 years after the land properly passed out of Indian ownership and into the non-Indian ownership of the Whams, who occupied the lands for more than 20 years.

Referring to Tribes' Exhibit No. 50-A, "September 7, 1963 Aerial Photograph -- Walton Property," Plate No. VII here, set forth on the following page, Mr. Clark testified:

> Q. Now, do you observe any irrigated areas in Allotment 2371 and 894? I am still referring to Tribe's Exhibit 50 and 50-A.
>
> A. I see nothing in the same or similar pattern in that area. I see the water saturated areas by the darker spottings from the --
>
> Q. Can you distinguish that high water table from the irrigated areas?
>
> A. That is a common practice being used by the Soil Conservation Service. They utilize these same photos to determine --
>
> Q. High water tables?
>
> A. -- moisture in the soil, and anything that is evident on the surface of the plants or the soil changes.
>
> Q. Have you an opinion, Mr. Clark, as to whether there is any irrigation in Walton Allotment 2371?
>
> A. This photograph does not show any irrigation in that area in Allotment 2371.
>
> Q. Now, would you move to Allotment 894, and tell us whether you have an opinion whether there is irrigation in Allotment 894 in the year 1963?
>
> A. I do not see any patterns reflecting irrigation or crops of any type like that. I see only certain areas that are saturated near what eventually became the tank. 116/

Expert witness Clark testified in regard to Tribes' Exhibit No. 47-A, Plate No. V here, at p. 31, supra, in response to a request to testify based upon his expert opinion as to whether there was irrigation on Walton Allotment

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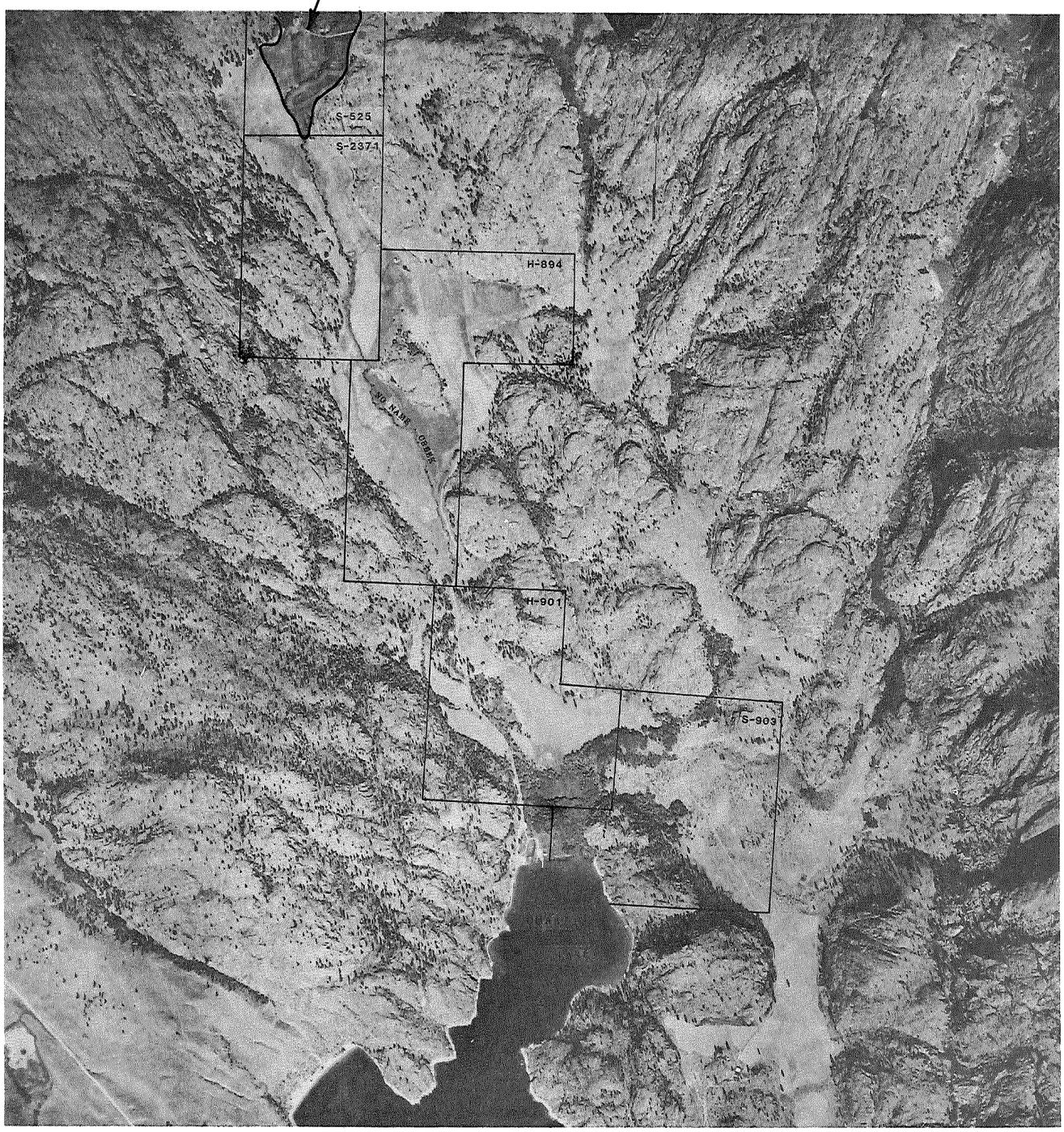
116/ T.R. Vol. III, May 7, 1982, at p. 538, lns. 1-25.

See Transcript Vol. II, May 6, 1982,
p. 456, Lns. 8 - 18; p. 457, Ln. 20;
p. 463, Ln. 10



COLVILLE EXHIBIT 50-A

(REPRODUCTION)

SEPTEMBER 7, 1963 AERIAL PHOTOGRAPH-WALTON PROPERTY

(Vol II Transcript, May 6, 1982,
offered p. 452, admitted p. 455)

525, which is the most northerly tract of land occupied by the Waltons. With regard to the year 1946, Tribes' expert witness, Mr. Clark, testified that:

> There is no pattern of irrigation or irrigated lands in Allotment 525. 117/

There, the witness testified that, in the year 1946, there was an irrigated area of 8.3 acres. 118/

Continuing in regard to the lack of irrigation on the lands in 1946, two (2) years antecedent to the time when they were occupied by the Defendants Waltons, Tribes' expert Elmer Clark declared that:

> There is no evidence of irrigation south of the road or anywhere on that Allotment 525 on this photograph. 119/

For the year 1946, Mr. Clark turned to Tribes' Exhibit Nos. 47 and 47-A, Plate No. V here, at p. 31, supra, and stated that:

> There is no evidence of irrigation at all on [Allotments] 2371 or 894. 120/

Tribes' witness Clark examined the 1936 photograph, Tribes' Exhibit No. 46-A, Plate No. IV here, at page 29, supra, and testified as follows in regard to the possibility of irrigation on the Walton properties in the year 1936:

> Q. Have you an opinion as to whether there was any irrigation on 525, 2371 and 894 at the time of the 1936 photograph?
>
> A. There is nothing there at all.
>
> Q. In regard to irrigation?
>
> A. No, there is nothing there in regard to any irrigation on 525.
>
> Q. What about 2371 and 894?
>
> A. 2371 and 894 have no evidence of, in these photographs, of having irrigation or irrigation in the last several years or a couple of years. 121/

117/ Ibid., at p. 539, lns. 14-15.

118/ Ibid., at p. 540, lns. 21-24.

119/ Ibid., at p. 542, lns. 11-13.

120/ Ibid., at p. 542, lns. 18-19.

121/ Ibid., at p. 545, lns. 15-25.

The testimony of the expert witnesses underscores and explains why, for a period in excess of 20 years, the non-Indian Whams, early predecessors of the late-comers Defendants Waltons, did not formulate an intent to irrigate land that was saturated, inundated and waterlogged. The total lack of intent to appropriate rights to the use of water necessarily precludes the operation of the concepts of due diligence, all as required by the Court of Appeals in its remand here. 122/

REMAND REQUIRED DEFENDANTS WALTONS TO PROVE "AMOUNT" DIVERTED AND APPLIED BY THEIR PREDECESSORS IN INTEREST TO A BENEFICIAL USE -- THERE IS A TOTAL FAILURE IN THAT PROOF

There is hereafter reviewed in explicit detail the fact that the non-Indian Whams, who acquired the former allotments now occupied by the Defendants Waltons, did not acquire a right to the use of water by reason of water being "appropriated" by the Indian allottees at the time title passed to the non-Indian Whams in the early 1920s. 123/ As declared there, this Court found, as a matter of undeniable fact, that "The former Indian allottees had not irrigated these lands" antecedent to the transfer of the lands to the non-Indian Whams, who were distant predecessors in interest to the come lately Defendants Waltons. 124/

It is equally clear that the non-Indian Whams, in the more than 20 years that they held title to the lands now occupied by Defendants Waltons, did not appropriate "with reasonable diligence after the passage of title" to them any of the waters, the rights to which are the subject matter of these proceedings. 125/

Failure on the part of the Defendants to prove previous use by the Colville allottees of the water of No Name Creek antecendent to the sale of

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122/ See, p. 50, infra.

123/ See, pp. 42, et seq., infra.

124/ Colville Confederated Tribes v. Walton, 460 F.Supp. 1320, 1324 (U.S.D.C. E.D. Wash. 1978).

125/ Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (CA 9, 1981), cert. den., 102 S.Ct. 657 (1981).

their properties; failure of Defendants Waltons to prove appropriations "with reasonable diligence after the passage of title" from the allottees to non-Indian ownership is part and parcel of the Defendants Waltons' failure to prove the most rudimentary element -- the diversion of a specific quantity of water and the application of it to beneficial use.

The burden of Defendants Waltons -- which they failed to sustain -- is too clear for question. The Court of Appeals stated:

> On remand, it [this Court] will need to determine
>
> [1] the number of irrigable acres Walton owns, and
>
> [2] the amount of water he appropriated with reasonable diligence
>
> in order to determine the extent of his right to share in reserved water. 126/

There Is Not A Word, Not A Scintilla Of Evidence As To The "Amount" Of Water Diverted Or Applied Beneficially By The Defendants Waltons Or Their Predecessors

It was not through oversight that the Defendants Waltons failed to offer evidence in regard to the quantity of water that could be diverted and applied beneficially. Defendants Waltons most assuredly knew and acted upon the knowledge that their lands were waterlogged to the extent that water could not be beneficially applied. Thus it was that Defendants ignored the mandate. Justice requires that the Defendants' tactics of offering highly tenuous, non-evidentiary data must not be rewarded.

It is respectfully submitted that the principles of equity under the circumstances cannot and should not be permitted to aid the Defendants Waltons. Defendants know that they have historically wasted not only the waters that are naturally available to them in No Name Creek, but they have, in gross immorality, seized, diverted and converted to their own use -- wasting huge quantites -- the waters pumped into the stream by the Colville Confederated Tribes for use on Colville Allotments 901 and 903 and for the Lahontan Cutthroat Trout.

126/ Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (CA 9, 1981), cert. den., 102 S.Ct. 657 (1981).

Failure Of Defendants Waltons To Prove "Amounts" Of Water Diverted And Beneficially Used Bars Any Adjudication To Them Of Rights To The Use Of Water

As previously stressed, there resided with the Defendants Waltons the burden of proving the diversion and use of water by the non-Indian Whams "with reasonable diligence after the passage of title" from the Colville allottees in the early 1920s to the last-mentioned non-Indians, distant predecessors in interest to the late-coming Defendants Waltons. Likewise stressed above is the fact that the non-Indian Whams did not succeed to any right to the use of water "being appropriated by the Indian allottees at the time title" passed to the Whams by reason of the fact, as found by this Court, that "The former Indian allottees had not irrigated these lands," antecedent to the transfer of them to the non-Indian Whams. 127/

Although Ahtanum was gravely in error in misstating and misapplying the obiter dictum from the Powers decision, it was eminently correct in establishing the principles of law that govern here, when it declared:

> ... it is a fundamental maxim of the law of waters that an individual's rights, no matter how measured or described, can never exceed his needs. 128/

That Defendants Waltons did not offer a word -- a scintilla -- of evidence as to the quantity of water diverted and applied beneficially to any of their lands is too clear for successful challenge.

Respecting Defendants' burden of proof -- their claim for rights to the use of water -- in the last Ahtanum decision, the criterion that is controlling here is well stated in these terms:

> It is plain that under Washington law.... To perfect an appropriation under the rules applicable in most western states, including the State of Washington, the user must apply the water to a beneficial use with intent to appropriate. 129/

127/ Colville Confederated Tribes v. Walton, 460 F.Supp. 1320, 1324 (U.S.D.C. E.D. Wash. 1978).

128/ United States v. Ahtanum Irrigation District, 236 F.2d 321, 341 (CA 9, 1956).

129/ United States v. Ahtanum Irrigation District, 330 F.2d 897, 904 (CA 9, 1965), cert. den., 381 U.S. 924 (1965). (Emphasis supplied).

Continuing, the Court of Appeals declared -- fatal to the claims of Defendants Waltons -- that:

> The beneficial use is the test and the measure of an appropriative right. 130/

Because Defendants Waltons did not offer a scintilla of evidence as to the diversion and application of water from No Name Creek to a beneficial use, they failed to sustain their burden of proof.

Underscoring not only the failure of Defendants to prove that the non-Indian Whams appropriated rights to the use of water "with reasonable diligence," the Defendants Waltons failed to prove this excerpt quoted by the Court of Appeals:

> As stated by the Supreme Court of Washington: 'An appropriation of water consists of an intention to appropriate followed by a reasonable diligence in applying the water to a beneficial use.' 131/

It is important here that the Court of Appeals, in the last Ahtanum decision, reviewed in specific detail the fact that claimants, in the status of Defendants Waltons, must prove "amount" both as to quantity and time during which waters were utilized. Defendants Waltons, having failed to offer a scintilla of evidence as to the quantity of water used by them, failed both as to amount, which would have been applied to beneficial use, and the time in which that water was diverted and applied to a beneficial use.

The Court of Appeals, in the last Ahtanum decision, quoted from an authoritative opinion of the Supreme Court of Utah:

> 'It is elementary that an appropriation of water is limited by time as well as by amount; in other words, that an appropriator's right is limited by the quantity of water which he has beneficially used and the seasonal period during which he has used the same. *** And in the case at bar the respondents' appropriations must be limited to the amount of water they can use beneficially during the period of the year when they have actually been accustomed to use the same.' 132/

130/ Ibid.

131/ Ibid.

132/ Ibid., at p. 908.

With care, the Tribes conclusively proved that the vast preponderance of the water-looged lands, permeating all areas of Waltons' property, could not use water beneficially. The Tribes proved the outrageous waste of water by Defendants, who irrigated lands so saturated that water was ponded. Waltons' lands, for which water rights are claimed, are swampy, saturated and waterlogged.

It is the law that governs here: Diversion and beneficial use must be proved and the Defendants Waltons have failed to prove these factors.

Under the heading of "Beneficial Use," Wiel, in his authoritative work on rights to the use of water, declared:

> Beneficial Use--The Final Test.--The appropriator is not to-day entitled to the quantity actually diverted and taken into possession if he uses only a portion of it; his right is limited to the amount so actually used. 133/

Wiel correctly stated that:

> Water codes usually contain the provision 'beneficial use shall be the basis, the measure and the limit of the right.' And statutes generally enact the same rule in other forms. 134/

Washington State is in no sense an exception to the rule, all as stressed by the Court of Appeals in the last Ahtanum decision. 135/ It is provided by Section 90.03.010, R.C.W.A., that, subject to existing rights, rights to water may be acquired "only by appropriation for a beneficial use ...." 136/ The controlling element is, of course, the term "beneficial use," concerning which the Defendants Waltons failed to offer any evidence.

Kinney has summarized the principles of law governing here in declaring that:

> ... there is one general rule... as settled by law in all the States where the law of appropriation is in force, and that is that the quantity of water which can be lawfully claimed under a

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133/ Wiel, Water Rights In The Western States, Vol. I, 3d ed., §877, at p. 1547.

134/ Ibid., at p. 504.

135/ See, p. 42 , supra.

136/ Revised Code of Washington Annotated, §90.03.010, at p. 271.

> prior appropriation is limited to that quantity or amount which is needed and within the amount claimed, and within a reasonable time, is actually and economically applied to the beneficial use or purpose for which the appropriation was made or to some other beneficial use or purpose. 137/

As declared by the Court of Appeals for the Ninth Circuit in the last Ahtanum decision and as repeated by Wiel, Kinney stated that:

> 'Beneficial use shall be the basis, the measure, and the limit of all rights to the use of water....' 138/

In bringing to date the basic and fundamental principles here involved, Clark stated:

> The right to the use of water may be subject to time limitations in addition to quantity limitations. Traditionally the surface-water right has been considered a 'vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever.' 139/

Failure of the Defendants Waltons to prove on "remand... the amount of water appropriated with reasonable diligence," is a fatal defect to the Defendants' claims. That defect is not only limited to the failure to prove the "amount of water" diverted and applied to a beneficial use, but the failure likewise pertains to the failure of the Defendants Waltons to prove "the number of irrigable acres" that Walton "owns." 140/

TRIBES' MOTION FOR JUDGMENT AGAINST DEFENDANTS WALTONS SHOULD BE GRANTED -- THEY ADMIT LACK OF DUE DILIGENCE

Failure Of Defendants Waltons To Respond To Tribes' Motion For Judgment Constitutes Admission Of All Well-Pleaded Facts

At the conclusion of the evidence offered by the Defendants Waltons on May 5, 1982, the Colville Confederated Tribes moved to file a "Motion For

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137/ Kinney On Irrigation And Water Rights, Vol. II, 2d ed., §877, at p. 1547. (Emphasis supplied).

138/ Ibid., at p. 1551.

139/ Clark, Waters And Water Rights, Vol. 5, §408.1, at p. 73. (Original and Supplied Emhasis).

140/ Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (CA 9, 1981), cert. den., 102 S.Ct. 657 (1981).

Judgment." 141/ Response has not been made to that Motion for Judgment by the Defendants Waltons. Provision is made under Rule 8 of the Federal Rules of Civil Procedure that:

> Rule 8(d). Effect of failure to deny.
>
> Averments in a pleading to which a responsive pleading is required... are admitted when not denied in the responsive pleading.

An abundance of authority supports that basic and fundamental principle of pleading. Quite obviously, Defendants Waltons did not and could not respond to the Tribes' Motion. Under those circumstances, the well-pleaded averments contained in the Tribes' Motion for Judgment stand admitted. There is set forth below an abundance of authority supporting that proposition. 142/

141/ T.R. Vol. I, May 5, 1982, at pp. 244, et seq.

142/ Respecting the consequences of Defendants Waltons' failure to respond to the Tribes' Motion for Judgment, reference is made to this authoritative declaration by the Court of Appeals for the Seventh Circuit:

> "... plaintiffs allege in their petition that Cardilli possessed actual notice of the judgment. Respondents' failure to deny this allegation in their answer must be deemed an admission under Fed.R.Civ.P. 8(d)...." Shakman v. Democratic Organization of Cook County, et al., 533 F.2d 344, 352 (CA 7, 1976), cert. den., 429 U.S. 858 (1976).

From the same Circuit, these statements are taken:

> "... the complaint expressly charged defendant with violations.... *** Failure to deny the violation alleged constituted an admission of facts alleged. *** In this state of the record, we cannot say the court erred in issuing the injunction...." McComb v. Blue Star Auto Stores, 164 F.2d 329, 331 (CA 7, 1947), cert. den., 332 U.S. 329 (1948). See, also, Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters, etc., 627 F.2d 853 (CA 8, 1980).

On the subject of judgment on the pleadings, Moore states:

> "Under the orthodox rule, a motion for judgment on the pleadings must be sustained by the undisputed facts appearing in all the pleadings, supplemented by any facts of which the court will take judicial cognizance." 2A Moore's Federal Practice, §12.15, at p. 2343. See, numerous cases respecting motions for judgment on the pleadings in 1980-81 Cumulative Supplement to Moore's Federal Practice, pp. 118, et seq.

The purpose of Rule 12(c) has been well stated in these terms:

> "The motion for judgment on the pleadings under Rule 12(c) has its historical roots in common law practice, which permitted either party, at any point in the proceeding, to demur to his opponent's pleading and secure a dismissal or final judgment on the basis of the pleadings. The common law demurrer could be used to search the record and raise

These Undisputable Facts Are Admitted By The Defendants Walton

It is asserted -- it cannot be denied -- by the Tribes in their Motion for Judgment that:

1. Title to Allotment 2371, now occupied by the Defendants Waltons, passed out of Indian ownership on March 31, 1921, and was acquired by the non-Indian Whams.

142/ (cont'd)

procedural defects, or it could be employed to resolve the substantive merits of the controversy as disclosed on the face of the pleadings. In contrast, the Rule 12(c) judgment on the pleadings procedure primarily is addressed to the latter function of disposing of cases on the basis of the underlying substantive merits of the claims and defenses as revealed in the formal pleadings." Vol. 5, Federal Practice And Procedure, Wright, §1367, "Judgment on the Pleadings--In General," at p. 685. See, also, 1980 Pocket Part, §1367, at pp. 195, et seq.

Courts of Equity will apply the principle where, as here,

"... the defendant admits all well-pleaded allegations of the bill, including the inadequacy of the legal remedy."

27 Am.Jur.2d §194, Equity, at p. 748.

It has been stated that:

"The general rules of equity pleading relating to the necessity of an answer or other defensive pleading and its functions, use, and sufficiency are, of course, applicable in injunction suits. After an answer has been filed in a suit for an injunction, every matter in the complaint or bill which the defendant has failed to answer, which he could have answered directly, is to be presumed against him; and the court will consider only those parts which are responsive to the complaint or bill." See, 42 Am.Jur.2d §276, at p. 1070.

It has also been authoritatively stated that:

"... admissions may arise by implication from a party's failure to plead or from his failure to deny. If the law requires him to file a pleading responsive to that of his adversary and he neglects or fails to do so, he may be taken as admitting the cause of action or defense, as the case may be, stated in his adversary's pleading. ***

"It is an established rule of pleading that where in the pleading of one party there is a material averment which is traversable but which is not denied by the other party, it stands admitted for purposes of the suit. Hence, any well-pleaded averment of fact in the plaintiff's declaration, petition, or complaint which is not expressly denied in the pleading or answer must be taken as true for the purposes of the action." 61A Am.Jur.2d §175, Pleading, at p. 175.

2. Former Colville Allotment 894 passed out of Indian ownership on May 5, 1923, and title vested in the Whams on that date.

3. Title to former Colville Allotment 525 passed out of Indian ownership on August 10, 1925, and title vested in the non-Indian Whams.

4. The non-Indian Whams, for a period of 20 years, did not intend to appropriate and take the rights to the use of water in No Name Creek away from the Timentwa family, located downstream from the former allotments now occupied by the Defendants, which were originally acquired by the non-Indian Whams.

As stated, throughout the 20-year-period, when the Timentwa family occupied Colville Allotments 901 and 903, there was never "any time" when the Timentwas were deprived of water to irrigate their lands from No Name Creek due to any interference from the Whams, who occupied the property upstream from the Timentwa family. 143/

Mary Ann Timentwa, on cross-examination, responded to an inquiry as to the number of acres irrigated in Colville Allotments 901 and 903 downstream from the former allotments now occupied by the Defendants Waltons, and stated:

> The irrigated area [under the Colville Irrigation Project now in operation, Allotments 901 and 903] is almost precisely the same area that was irrigated by the Timentwas. 144/

During the trial on the merits, the Tribes' Civil Engineer testified that:

> There are 30.4 acres of irrigated land on Allotment 901. 145/

It is of utmost importance that, at the May 5, 1982 hearing, there was further reviewed the fact that the Colville Timentwa family utilized all of

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143/ T.R. Vol. II, May 6, 1982, at p. 324, lns. 17-24.

144/ Ibid., at pp. 497-98, testimony of Thomas Michael Watson, Civil Engineer/Hydrologist for the Colville Confederated Tribes.

145/ Ibid., at p. 484, lns. 22-23.

the flow of No Name Creek for a period of 20 years after the non-Indian Whams purchased the properties:

Q. I see. What are you designating as Tribal water, Mr. Watson?

A. The natural flow of No Name Creek that in the 1920's and 1930's, was used by the Timentwas in Allotments 901 and 903 for a substantial area of irrigation.

Q. That is when you say we had about a half second foot of water flowing in the creek?

A. The USGS Survey records in 1972, show that there was .50 cubic foot per second in No Name Creek as it crossed the Walton property.

Q. And the Timentwas were using the totality of that water, correct?

A. The Timentwas were using a substantial portion of that water based on my own personal investigation of the system, the remnants of which --

A. You can just answer that yes or no. ***

***

Q. *** Mr. Watson, wasn't it your testimony that the Timentwas were using substantially all that water?

A. The Timentwas were using most of the natural flow of No Name Creek at that time.

Q. Thank you. It was also your testimony that from the half second foot rill irrigation, it would be possible to irrigate approximately 30 to 40 acres; is that correct?

A. That's correct.

Q. So that in effect during the '30's and '40's anybody using reasonable diligence, the maximum amount that they would be able to put under irrigation would be 30 to 40 acres, isn't that correct?

A. It is correct that the full beneficial use of water at that time could not have extended to more than 30 to 40 acres.

Q. Fine.

A. The physical supply of water was insufficient to irrigate more land.

Q. What made it possible to irrigate more land than 30 to 40 acres? Was it the advent of electric power into the valley?

A. No. It was the development of the Colville wells. 146/

There was thus established and reaffirmed that, for a period of 20 years after the lands passed out of the Colville allottees' ownership, the non-Indian Whams did not appropriate rights to the use of water in No Name Creek.

Lack Of Intention To Appropriate For 20 Years; Lack Of Appropriation Of Any Specified Quantity In Regard To Any Particular Land Defeat Any Claim Of Due Diligence By Defendants Waltons, As Required By Court Of Appeals

Absent an intention to appropriate, it is an impossibility to initiate an appropriation. As stated in the Big Bend Transit decision:

> Appropriation of water consists of an intention to appropriate followed by reasonable diligence in applying the water to a beneficial use. 147/

Since the inceptive moment of the doctrine of prior appropriation in the State of Washington, the need for "an intent" to appropriate has always been considered a prime requisite. 148/

146/ Ibid., at p. 471, lns. 5-20; p. 472, lns. 3-25; p. 473, ln. 1.

147/ United States v. Big Bend Transit Co., 42 F.Supp. 459, 468 (U.S.D.C. E.D. Wash. 1941).

In 78 Am.Jur.2d 321, at p. 759, under the heading "Elements, requisites, and mode of appropriation," this statement is made:

"It is generally held that to constitute a valid appropriation of water there must be a bona fide intent to apply it to some beneficial use."

In 93 C.J.S., §175, at p. 923, "Intent as to Use of Water," it is declared that:

"The intention of the appropriator is an important factor in determining the validity of an appropriation; the appropriation, in order to be effective, must be made with a genuine present design or intention to apply the water to some immediate beneficial use, or in the present bona fide contemplation of a future application of it to such a use ...."

148/ Ellis v. Pomeroy Imp. Co., 1 Wash. 572, 21 Pac. 27 (1889). There, it is stated that:

"Appropriation, as herein used, may be defined as the intent to take, accompanied by some open, physical demonstration of such intent, and for some valuable use." Ibid., at p. 29. (Emphasis supplied).

In Offield v. Ish, 21 Wash. 277, 57 Pac. 809 (1899), this statement is made:

More than a quarter of a century elapsed between the time title passed out of Indian ownership and an intention to appropriate water rights in No Name Creek was first formulated on the stream by the Waltons. That protracted period is far in excess of the time during which water could have been applied with "reasonable diligence," as required by the Court of Appeals. The authorities cited below would limit reasonable diligence under the circumstances here to one year after title passed from Colville allottees to the non-Indian Whams.

INCONSISTENCIES, CONTRADICTIONS, CONJECTURE, SPECULATION, AND OTHER DATA LACKING EVIDENTIARY STATUS, PERVADE ALL ASPECTS OF DEFENDANTS' CLAIMED IRRIGABLE AND IRRIGATED ACREAGE

It is elemental that this Court is required to "... find the facts specially and state separately its conclusions of law thereon...." 149/ Equally elemental is the fact that those findings must be predicated upon "substantial evidence." 150/ From the same source, it is declared:

148/ (cont'd)

"Appropriation of water consists in the intention accompanied by reasonable diligence to use the water for the purposes originally contemplated at the time of its diversion." Ibid., at p. 810. (Emphasis supplied).

See, also, Longmire v. Smith, et al., 26 Wash. 439, 67 Pac. 246 (1901).

In State ex rel. Ham... v. Superior Court of Grant County, et al., 70 Wash. 442, 126 Pac. 945, 952 (1912), this statement, quoting from the laws of the State of Washington, is made:

"'Any person... desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended storage or diversion....'"

The need for intention, as evidenced by the posting of a notice of the "intended" act of appropriation, was a requisite to initiating an appropriative right.

See, Sander, et al., v. Bull, et al., 76 Wash. 1, 135 Pac. 489 (1913), where the need for the intent to appropriate is likewise stressed.

In Re Waters of Doan Creek, 125 Wash. 14, 215 Pac. 343 (1923), summarizes in detail the need for an intention coupled with action to complete an appropriation.

149/ Rule 52(a), Federal Rules of Civil Procedure.

150/ Omaha Indian Tribe v. Wilson, 575 F.2d 620, 639 (CA 8, 1978).

> We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof.... 151/

All of the evidence offered by the Defendants Waltons can be categorized as being too speculative, too conjectural and too contradictory to constitute a basis for findings.

At the outset, in regard to the claims of the Defendants Waltons for water, it is essential to establish the fact that Wilson Walton, who acquired the property approximately a quarter of a century after the lands had passed out of Indian ownership, did not himself believe that he had a right to the use of water by reason of the acquisition of the property. This colloquy is important:

> Q. Mr. Walton, when you purchased the property, did anyone tell you that you had a water right?
>
> A. No.
>
> Q. Did the Colville Confederated Tribes or the federal government or anyone acting in any kind of official capacity for those two entities, did they tell you that you had a water right of any kind?
>
> A. None whatsoever. 152/

Believing that he was without a water right, Wilson Walton, as this Court found,

> Immediately after purchasing the land in 1948, Walton applied to the State for a permit to divert 3 cu. ft. per second from the creek to irrigate 75 acres. Pursuant to this application the state in 1950 issued Walton a certificate of water right to irrigate 65 acres by diverting 1 cu. ft. per second. This certificate was granted 'subject to existing rights.' 153/

In its June 6, 1980 Opinion, which was withdrawn, the Court of Appeals declared:

151/ Ibid., at p. 649.

152/ T.R. Vol. XI, April 14, 1978, at p. 2168, lns. 5-12.

153/ Colville Confederated Tribes v. Walton, 460 F.Supp. 1320, 1324 (U.S.D.C. E.D. Wash. 1978).

> ... the earliest diversion of water for his land was made by his grantor between 1942 and 1948. 154/

Contradictions dispel any verity that might be attributed to Defendants' non-evidence respecting their alleged irrigated and irrigable land. For example, Wilson Walton testified that Field No. 7, appearing on Defendants' Exhibit XXXX (set forth at page 54, infra), contained 40 acres and was all irrigated. 155/ Mr. Walton must not be permitted to make misstatements, as he has undertaken to do. In the first proceeding respecting the land in Field No. 7, he declared that the land was not irrigated. A copy of Defendants' Exhibit T-W appears at page 55, infra. The Exhibit was offered in evidence by Defendants and they now seek to contradict it. In that regard, see, page 18, lines 9-12, above.

In the original proceedings, Wilson Walton testified, as disclosed on Waltons' Exhibit T-W, Plate No. IX here, on page 55, infra, that ten (10) acres of land were irrigated in the northeast portion of former Allotment 525. Contrary to that evidence, Boyd Walton, on May 6, 1982, offered into evidence Waltons' Exhibit SSSS, showing that there was no land irrigated in the northeast portion of former Allotment 525. 156/ Defendants' Exhibit SSSS is Plate No. X here and appears at page 56, infra.

By way of further contradiction on the part of the Waltons respecting the conjectured use of water, reference is made to Defendants Exhibit PPPP, offered into the record on May 5, 1982, by Boyd Walton. Defendants' Exhibit PPPP is Plate No. XI here and appears on page 57, infra. It is to be observed that, although Wilson Walton, on August 9, 1982, testified that Field No. 7 was irrigated, Boyd Walton testified, on Defendants Exhibit PPPP, that Field No. 7 was not irrigated.

Evidencing the striking disregard for any degree of accuracy, it is to be noted that Boyd Walton testified that, in 1949, lands were irrigated in

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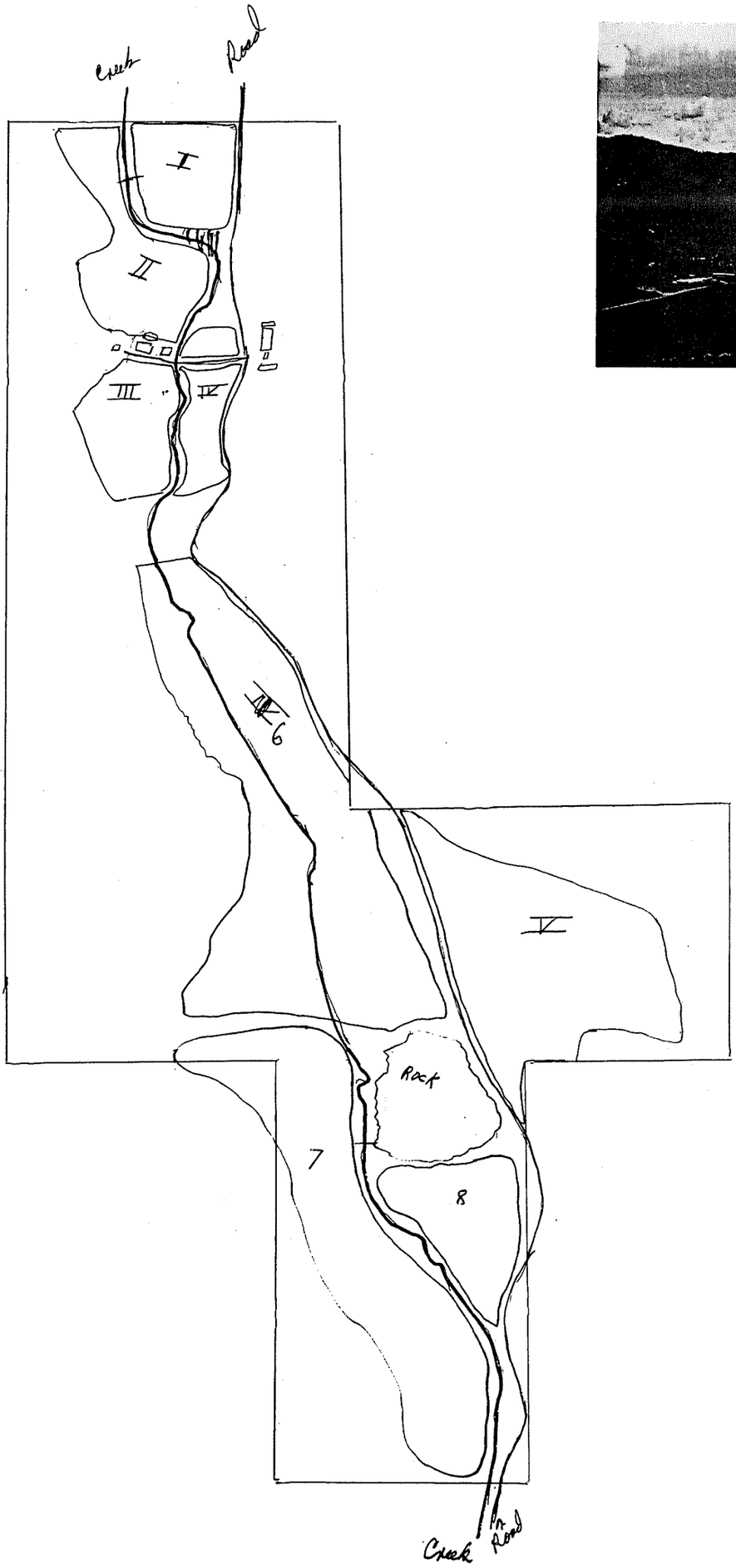
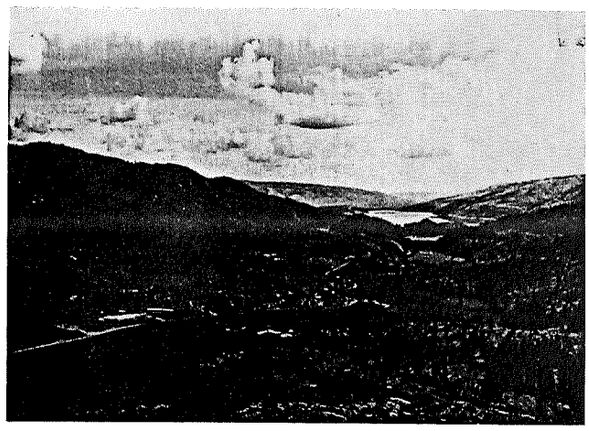
154/ See, June 6, 1980 Opinion, Court of Appeals for the Ninth Circuit, at note 17.

155/ Transcript of Record, August 9, 1982, at p. 78.

156/ Ibid.

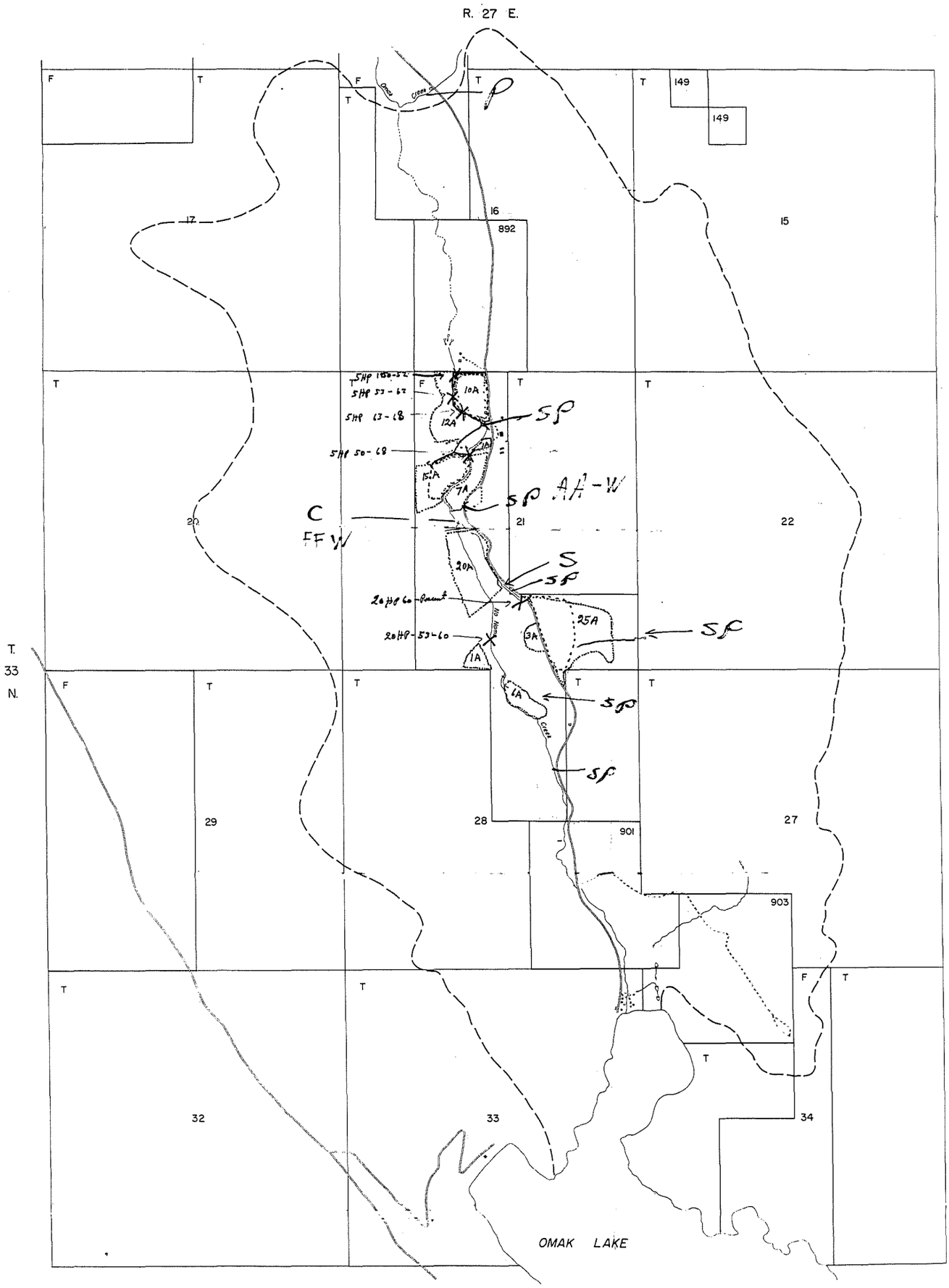




DEFENDANT'S EXHIBIT XXXX-44

WALTON EXHIBIT XXXX

PLATE NO. VIII
page 54



Preliminary Copy Subject to Change

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

NO NAME CREEK BASIN
COLVILLE INDIAN RESERVATION
WASHINGTON

AUGUST 1974

0 1/2
SCALE IN MILES

LEGEND

Improved Road		Water Tank	
Unimproved Road		Abandoned Pump Site	
Perennial Stream		Diversion Dam	
Intermittent Stream		Beaver Pond	
Canal		Buildings	
Well & Pump (Ground Water)	903	Indian Allotment	
Pump (Surface Water)	T	Tribal Land	
Gaging Station	F	Fee Land	
Spring		Wet Spot or Marsh Area	
Observation Wells		Watershed Boundary	

Compiled & Drafted by Land Services, Portland Area Office, from 7½' Orthophoto & 15' Quadrangles, & field data supplied by the Colville Indian Agency.

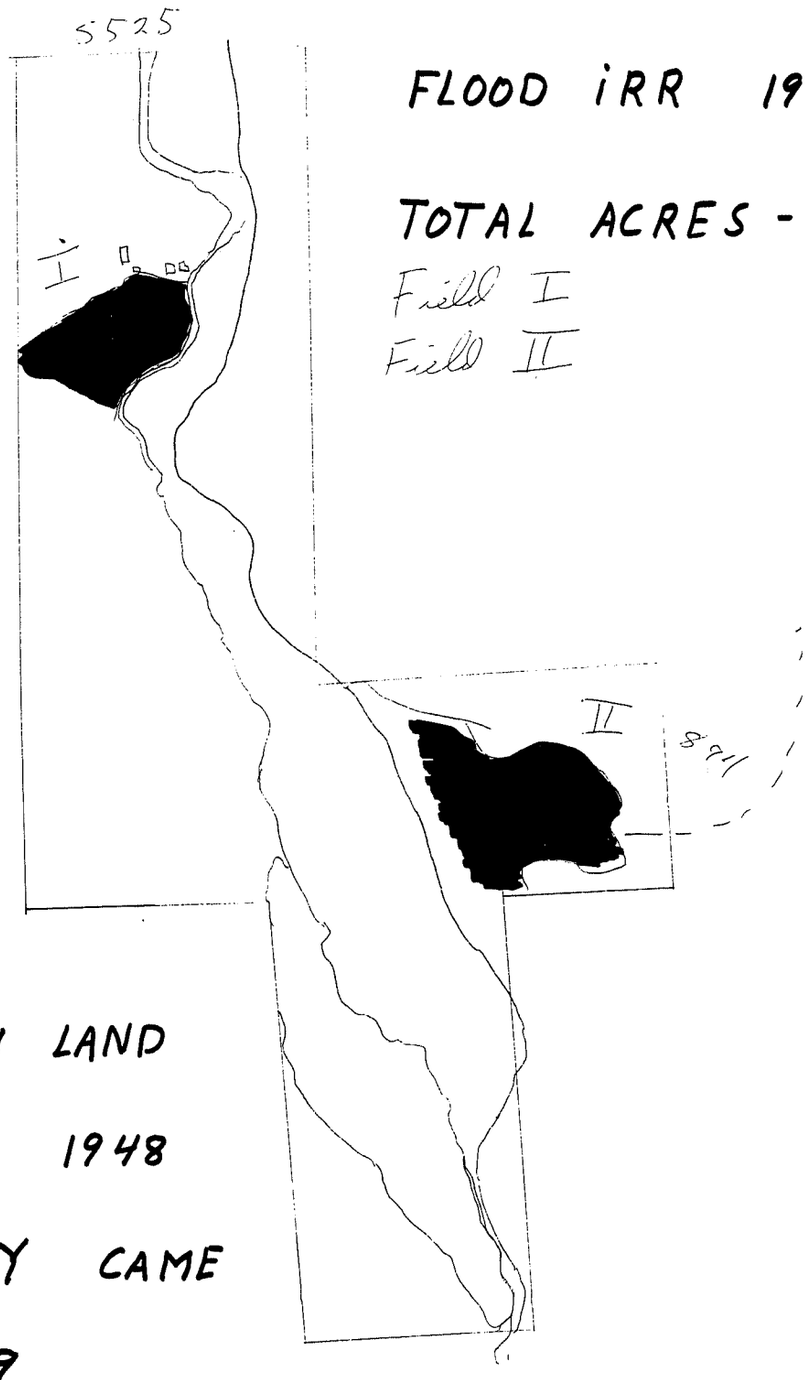
RECEIVED
SEP 2 1974
ZIONTZ, PUTZEL, MORRISSET & CHESTUF

DEFENDANT'S EXHIBIT No. T-W

PLATE NO. IX
page 55

WALTON EXHIBIT T-W

1949



FLOOD IRR 1949

TOTAL ACRES - 32

Field I

Field II

WALTONS

MOVED ON LAND

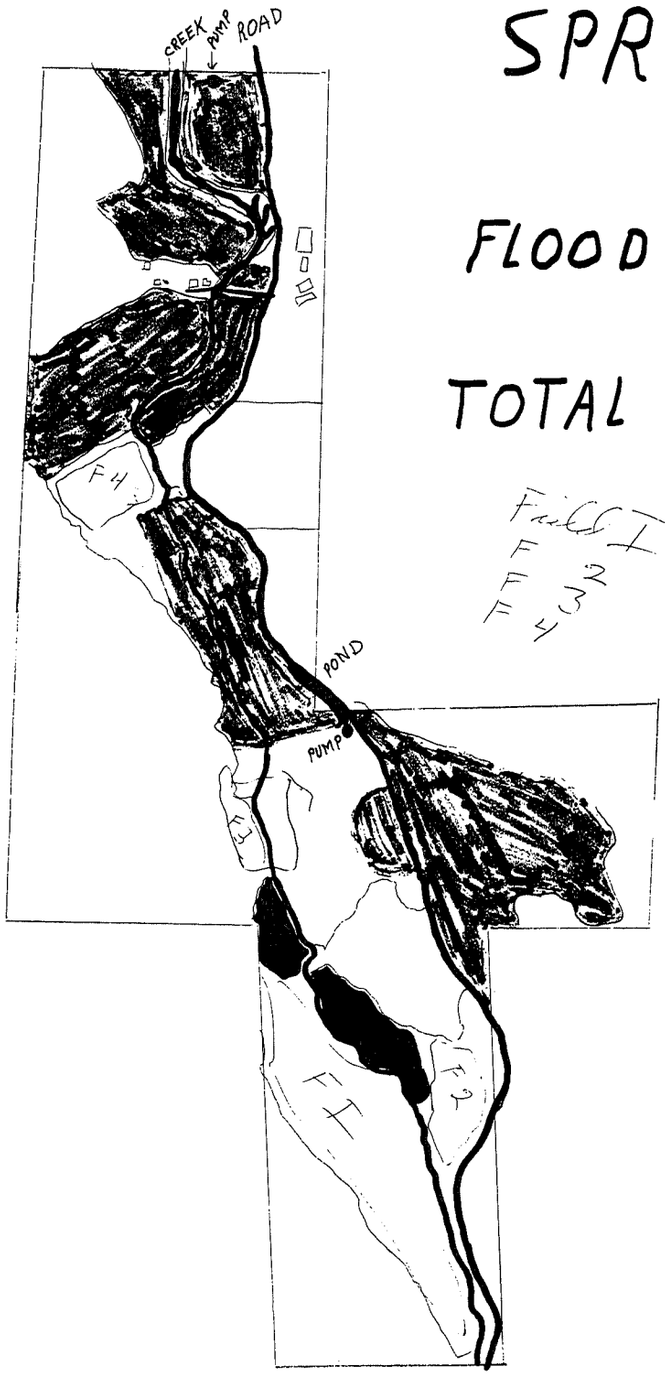
LATE JULY 1948

ELECTRICITY CAME

NOV 1949

WALTON EXHIBIT: SSSS

1981



SPRINKLER IRR ■

FLOOD IRR ■

TOTAL ACRES IRR -- 105

Field I
F
F
F 4 3²

WALTON EXHIBIT: PPPP

tract 894, as set forth in Defendants' Exhibit SSSS, Plate No. X here, at page 56, supra. However, Boyd Walton testified that, in 1950, as disclosed by Defendants' Exhibit RRRR, Plate No. XII here (appearing on the following page), the lands in tract 894 were not irrigated.

It is abundantly manifest that not only did the Defendants Waltons avoid testifying or offering evidence as to the "amount" of water diverted and applied to their water-logged premises, as required by the Court of Appeals, but the Defendants likewise systematically avoided being accurate in regard to the "irrigated and irrigable lands," which were saturated to such a point that it is impossible to determine which of the water-logged lands have had water applied to them and which of the water-logged lands have not had water applied to them.

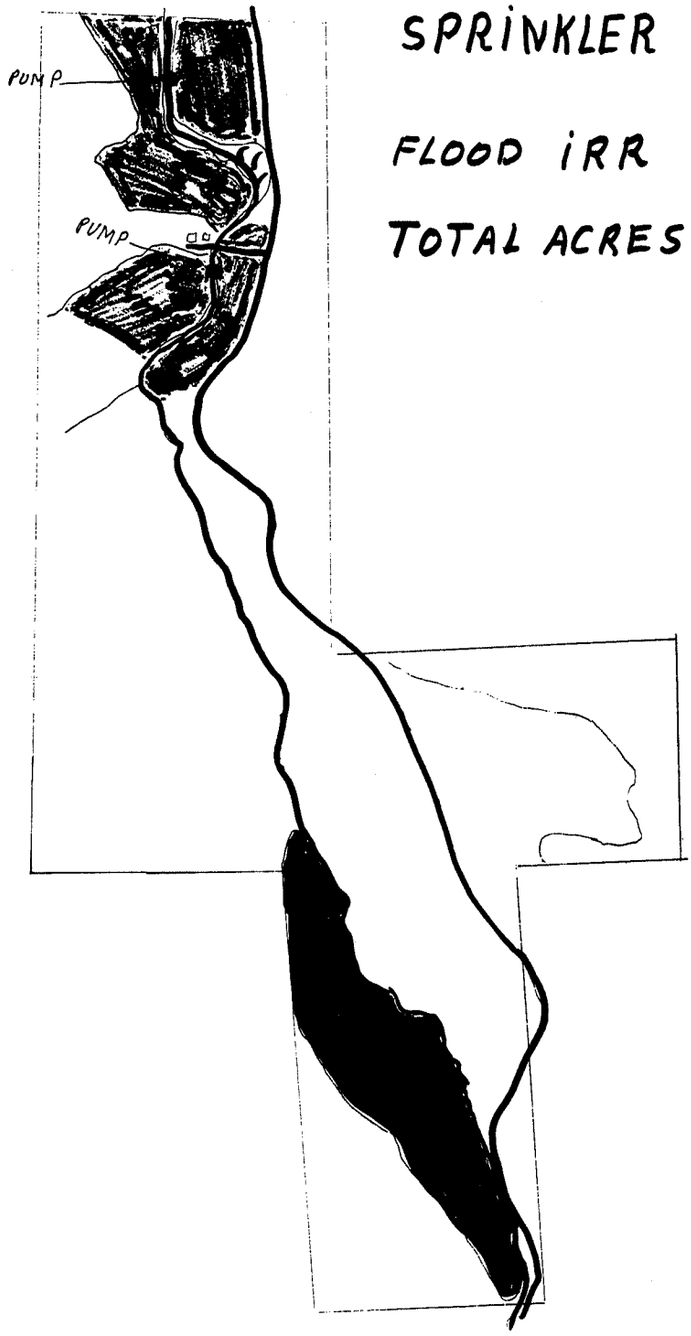
The dilemma, stemming from the inability of the Waltons themselves to know what lands were irrigated and what lands were water-logged, demonstrates sophistry, conjecture and speculation involved in regard to Defendants' claims. This colloquy between counsel for the Defendants Waltons and Mr. Bennett of the Soil Conservation Service conclusively demonstrates that it is impossible to make a finding in regard to either the irrigable or irrigated lands, for which Defendants Waltons are claiming water from No Name Creek:

> [COUNSEL FOR DEFENDANTS]: All right, [Mr. Bennett,] and did you assist him [Boyd Walton] in arriving at some acreages in connection with his irrigated fields?
>
> [MR. BENNETT]: Mr. Walton delineated on an aerial photo 8" to the mile, the areas that he was irrigating. I went out on his farm at a later date to see if I could authenticate these. In a few of them, because of the time of the year, I could not tell the exact boundaries of the irrigation system because they were a line drawn through a field and I couldn't tell the difference in the irrigation, many times because of sub-irrigation being the reason. The crops were very similar. 157/

As will be observed, Mr. Bennett, who purportedly determined the acreages for the Defendants Waltons, stated:

157/ T.R. Vol. XI, April 14, 1978, at p. 2199, lns. 3-12.

1950



SPRINKLER IRR ■

FLOOD IRR ■

TOTAL ACRES IRR--67

WALTON EXHIBIT: RRRR

> ... I could not tell the exact boundaries of the irrigation system because they were a line drawn through a field and I couldn't tell the difference in the irrigation many times because of sub-irrigation being the reason. 158/

An attempt was made by the Colville Confederated Tribes to obtain the aerial photograph referred to by Mr. Bennett.

When demand was made for the aerial photograph, upon which are lands for which water rights are being claimed by Defendants Waltons, this Court denied the Tribes the right to examine the basic document upon which the acreage was determined. 159/ To the Tribes' request, the Court entered this ruling: "Well, I'm going to deny your request." 160/ Thus it is that the Tribes were effectively denied the right to examine the obviously highly questionable, purely conjectural acreages tendered by Defendants Waltons in support of their claims. It would be a rank injustice, under those circumstances, to use the data offered by the Defendants, while simultaneously denying an opportunity for proper examination of the data relied upon and effectively denying the Tribes the opportunity to cross-examine with regard to the Walton acreages.

On that background, the Colville Confederated Tribes propose the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Surface Flow Of No Name Creek

Finding No. 1: In a state of nature, No Name Creek was a perennial stream rising on Colville Allotment 892. 161/ From its point of origin, No Name Creek proceeded southward entering Defendants Waltons' northern former Allotment 525 and entered former Allotments 2371 and 894. 162/

158/ Ibid.

159/ Ibid., at p. 2205, ln. 25; p. 2206, lns. 1-21.

160/ Ibid.

161/ See, Plate No. I, at p. 21, supra; Colville Confederated Tribes v. Walton, 460 F.Supp. 1320, 1324 (U.S.D.C. E.D. Wash. 1978).

162/ See, Plate No. I, at p. 21, supra.

Finding No. 2: No Name Creek leaves Walton Allotment 894 and enters Colville Allotments 901 and 903. Having traversed those allotments, No Name Creek then traverses tribal land, at which point it enters Omak Lake.

Finding No. 3: No Name Creek, as described above, rises and flows its entire length within the Colville Indian Reservation.

Finding No. 4: Colville Allotments 901 and 903, located immediately downstream from Defendants Waltons property, had been irrigated for more than a quarter of a century before purchased by the Defendants Waltons.

Finding No. 5: Extensive testimony was offered by Defendants Waltons' witness Charles D. Hampton, who was personally acquainted with the irrigation on Colville Allotments 901 and 903 from "about 1920." 163/ For a period in excess of eight (8) years, Defendants' witness Hampton was intimately acquainted with the water use on Colville Allotments 901 and 903, testifying that, during that period, there were from 30 to 40 acres of land being irrigated.

Finding No. 6: Colville Allotments 901 and 903 were owned by the Colville Timentwa family at all times down to date. 164/ For a period of 20 years, the Timentwa family operated an irrigation system using No Name Creek water to irrigate 30 or 40 acres of land in Allotments 901 and 903. That land produced three (3) cuttings of alfalfa each irrigation season and, after the third cutting, the Timentwas pastured their livestock. During this long period of time, antecedent to the acquisition of the former allotments by the Defendants Waltons, the Timentwas operated an orchard, gardens and bush-berries. 165/ In great and specific detail, Mary Ann Timentwa, who did the actual irrigating of the lands in Allotments 901 and 903, described the system

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163/ Testimony of Charles D. Hampton, Vol. X, p. 2060, ln. 21; p. 2062, ln. 23.

164/ Testimony of Mary Ann Timentwa Sampson, Vol. II, p. 330, lns. 1-20 - p. 331, lns. 1-20; pp. 316-25; p. 343, ln. 1 - p. 344, ln. 2.

165/ Ibid., at p. 320, lns. 13-22.

utilized in the early 1920s through the early 1940s, long prior to the time when Defendants Waltons occupied their property. 166/

Finding No. 7: The natural flow of No Name Creek in the early 1920s, when the Timentwa family was operating the 40 acres on Colville Allotments 901 and 903, was approximately one-half (.5) cubic foot per second, which quantity of water sufficied to meet the water requirements for the 40 acres of land operated by the Timentwas. 167/

Finding No. 8: Throughout the entire period when the Colville Timentwa family farmed Allotments 901 and 903, the non-Indian Wham family, who first acquired the lands, did not intend to appropriate and did not at any time interfere with the approximately one-half (.5) second foot of water, the natural flow of No Name Creek, or prevent the flow from reaching Allotments 901 and 903. 168/ Rather than interfering with the utilization by the Colville Timentwa family of the full natural flow of No Name Creek, the non-Indian Whams were friends of the Timentwas and assisted them in tilling the land and developing the irrigation on that land. 169/

Finding No. 9: It is found as a fact that title to Colville Allotment 2371 was acquired by the non-Indian Whams on March 31, 1921; Allotment 894 was acquired by the non-Indian Whams from the Colville allottees on May 5, 1923; and title to Colville Allotment 525 passed out of Indian ownership on August 10, 1925, and vested in the non-Indian Whams. 170/

166/ Ibid., at pp. 319, et seq.

167/ Testimony of Thomas Michael Watson, Vol. III, p. 579, lns. 6 - p. 581, ln. 19; Vol. VI, p. 1176, ln. 15 - p. 1183, ln. 23. See, pp. 49, et seq., supra, testimony of Mary Ann Timentwa Sampson; colloquy between counsel for Defendants and Colville witness Thomas M. Watson.

168/ T.R. Vol. II, February 8, 1978, p. 324, lns. 8-24.

169/ Ibid., at p. 326.

170/ See, pp. 47, et seq., supra. See, Colville Confederated Tribes v. Walton, 460 F.Supp. 1320, 1334 (U.S.D.C. E.D. Wash. 1978).

Finding No. 10: This Court reaffirms its earlier finding that, prior to the time when the Colville allottees transferred their lands to the non-Indian Whams, who held title to the lands for approximately 20 years, the Colville allottees had not used any water from No Name Creek.

Finding No. 11: The non-Indian Whams appear to have used significant quantities of water to irrigate their gardens and possibly some few fruit trees. There is no evidence in the record as to the quantity of water used by the non-Indian Whams. What is found, however, is that there was no intent demonstrated by the non-Indian Whams to establish a designed project that would evidence an intent to appropriate rights to the use of water from No Name Creek. The Whams and their immediate successors, who owned the land until 1946, did not attempt to appropriate any No Name Creek rights to water.

Finding No. 12: This Court finds no intent to appropriate rights to the use of water by the non-Indian Whams of the character that would give rise to a water right under the laws respecting appropriation. In that connection, reference is made to the fact that, in 1917, prior to the acquisition by the non-Indian Whams in the early 1920s of the lands now occupied by the Defendants Waltons, the state law required filing with the state before diverting and appropriating water. There was no evidence of an attempt to comply with state law by the non-Indian Whams or their immediate successors.

Finding No. 13: In the early 1940s, the Court finds that the non-Indian Whams sold their land to another non-Indian, who did not use No Name Creek water, and who sold the lands to an Indian who was not a member of the Colville Confederated Tribes, who may have diverted some unknown quantity of water. 171/

Finding No. 14: In July of 1948, the Defendants Waltons acquired the property that they now occupy. Though the quantity of water diverted and used is undisclosed, there is some evidence that a small acreage of land in the

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171/ Ibid., at p. 1324.

upper reaches of former Colville Allotment 525 had been irrigated by the immediate predecessor of Defendants Waltons. There appears to have been approximately 12 acres of land irrigated from a spring that was not part of No Name Creek. The remaining 20 acres might have been located in the northeast corner of Allotment 525, but the evidence offered by the Defendants Waltons is contradictory. 172/

Finding No. 15: The evidence supports the finding that Defendants Waltons did not believe that they acquired any rights to the use of water in No Name Creek when the property was purchased. The evidence discloses that Defendants Waltons were not told by anyone that they did acquire a right to the use of water. Thus confronted, as this Court earlier found, the Defendants Waltons immediately filed to make an appropriation pursuant to state law in August 1948. In 1950, a water rights certificate was issued to Wilson Walton for one (1) cubic foot of water for use on 65 acres of land. 173/

Finding No. 16: As distinquished from the humane approach of the non-Indian Whams to the Colvilles, Defendants Waltons immediately created conflicts with the Colville Confederated Tribes. The evidence discloses that Defendants Waltons not only monopolized the entire flow of No Name Creek, but likewise polluted the stream causing the Tribes irreparable and continuing damage. The conflict with the non-Indian Defendants is continuing due to the monopolization by the Defendants of the flow of No Name Creek and the pollution of it in disregard of the water rights and needs of the Colvilles. The Defendants Waltons completely dry up No Name Creek causing the Tribes continuing, irreparable damage. The pollution of the stream by Defendants Waltons has made it impossible for the Tribes to maintain Omache Lodge, which was established by

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172/ See, pp. 51, et seq., supra.

173/ Colville Confederated Tribes v. Walton, 460 F.Supp. 1320, 1334-35 (U.S.D.C. E.D. Wash. 1978).

the Colvilles for the purpose of maintaining a recreational center at Omak Lake. 174/

Finding No. 17: Pollution created by the Defendants Waltons destroyed the eggs that had been planted in No Name Creek for the purpose of propogating the Lahontan Cutthroat Trout, planted in Omak Lake in 1968 by the Colville Confederated Tribes. The continued pollution and monopolization of the waters of No Name Creek by the Defendants Waltons, in clear disregard of the rights of the Colville Confederated Tribes, not only has generated serious conflicts between the Defendants Waltons and the Tribes, but likewise annually threatens the Lahontan Cutthroat Trout that migrate up No Name Creek for spawning. 175/

Finding No. 18: At all times relevant here, the lands within former Colville Allotments 894, 2371 and 525 are saturated and waterlogged to a point that renders them non-irrigable. The physical phenomenon creating the high water table and resulting in ponding on the surface of large quantities of water at all times within the Walton properties is geological formations that make it impossible to drain the lands of the Defendants and make them irrigable. At the extreme south end of the Walton properties, the groundwater is impounded by granitic bedrock that rises upon land surface. At that point, all of the groundwaters in the No Name Creek basin surface in the area of the Defendants Waltons' property. The lands, moreover, are very poorly permeable, with the result that the water table is at or above the surface of the land. Wells that have been drilled on the Walton property disclose that the groundwater levels are above the land surface, thus explaining both the

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174/ Testimony of Mel Tonasket, Vol. II, p. 212, ln. 9 - p. 215, ln. 25; p. 251, ln. 12 - p. 253, ln. 7; p. 222, ln. 21 - p. 223, ln. 8; p. 222, lns. 17, et seq.; p. 224; pp. 225-29, ln. 8. See, Colville Exhibit No. 2-13.

175/ Testimony of Dr. David Koch, Vol. VIII, p. 1692, ln. 19 - p. 1693, ln. 18; p. 1720, ln. 17 - p. 1721, ln. 2; p. 1687, ln. 1 - p. 1688, ln. 7; pp. 1691, et seq. See, testimony of Mel Tonasket, Vol. II, p. 125, lns. 15-25; p. 258, ln. 9 - p. 259, ln. 22; testimony of Charles P. Corke, p. 354, ln. 25 - p. 355, ln. 4.

watterlogging of the Walton lands and the ponding of water on the surface. 176/

Finding No. 19: Each of the separate, former Allotments, 2371, 894 and 525, presents different factual circumstances with legal consequences flowing from them:

A. Former Allotment No. 2371. Title to Allotment 2371 passed out of Colville Indian ownership on March 21, 1921, and became vested in the non-Indian Whams. The land in that allotment is waterlogged and water cannot be applied beneficially to it. There was no evidence in the record offered by the Defendants Waltons that any of the lands in former Allotment 2371 had been irrigated prior to 1974. A period of 43 years had elapsed before there was any effort to irrigate those lands and the evidence discloses that water cannot be beneficially applied to them due to their water-logged characteristics.

B. Former Allotment No. 894. Title to Allotment 894 passed out of Indian ownership and became vested in the non-Indian Whams on August 25, 1925. None of Allotment 894 was irrigated and there was no intention to irrigate the land until August of 1948, when a filing was made by the Defendants Waltons with the State of Washington.

(1) A small tract of wetland, totalling approximately 12 acres of land, was irrigated from a spring in 1948. There is no evidence as to the quantity of water applied to the 12 acres of land. It is clear that land, which was irrigated by reason of the high water table, was saturated and water could not be beneficially applied to it.

176/ See, pp. 25, et seq., supra. See, Plate No. II, "General Distribution Of Aquifer And Non-Aquifer Materials," at p. 26, supra. Plate No. III, at p. 28, supra, is a cross-section of the Walton property disclosing the high water table and graphically displaying the reason for the waterlogging of most of the lands of the Defendants Waltons.

(2) There is no evidence in the record as to the quantity of water actually diverted and applied to a beneficial use on former Allotment 894.

C. Former Allotment No. 525. Title to former Allotment 525 passed out of Indian ownership on August 10, 1925, and vested in the non-Indian Whams. A large preponderance of the lands in former Allotment 525 is non-irrigable by reason of the high water table. Such small areas of land that might be irrigated during certain periods of the year would not have a full water requirement.

There is no substantial evidence in the record as to the amount of water diverted and beneficially applied on former Allotment 525.

Finding No. 20: Defendants Waltons did not pump and use groundwater from the No Name Creek Groundwater Basin until mid-summer, 1975. That groundwater was pumped from a well situated immediately south of the south line of Colville Allotment 892. It is evident that Defendants Waltons are pumping groundwater out from under Colville Allotment 892. The first groundwater was used by the Defendants Waltons a half century -- 50 years -- after Allotment 525 had passed out of Indian ownership.

Finding No. 21: There is no evidence in the record as to the "amount" of groundwater pumped by Defendants Waltons after 1975 that was applied to a beneficial use. There is no evidence as to the place where the groundwaters that had been pumped were applied or whether the waters were applied to irrigable lands.

Seizure Of Colville Pumped Waters By Defendants Waltons

Finding No. 22: The Colville Confederated Tribes, prior to the time when Defendants Waltons drilled their well in 1975, commenced the construction of an irrigation system to irrigate lands in Colville Allotments 892 and 526. By that irrigation system, the Tribes likewise intended to augment the water

supply for Colville Allotments 901 and 903 and to provide water for the Colville Lahontan Cutthroat Trout Fishery.

Finding No. 23: Wells were drilled on Allotments 892 and 526. Water was pumped from the Colville wells to irrigate lands on Allotments 892 and 526.

Finding No. 24: Water was likewise pumped from the wells on Allotments 892 and 526 and released into the natural channel of No Name Creek for use on Allotments 901 and 903 and for use in the Colville Lahontan Cutthroat Trout Fishery, all of which are located downstream from the lands of Defendants Waltons.

Finding No. 25: The Colville Confederated Tribes used the natural channel of No Name Creek to deliver the water pumped from the Colville wells to augment the supply of water for Colville Allotments 901 and 903 and to augment the water in No Name Creek for the Colville Lahontan Cutthroat Trout Fishery.

Finding No. 26: The water levels in the No Name Creek Groundwater Basin, out of which the Tribes pumped water for use on Colville Allotments 892, 526, 901 and 903 and for the Lahontan Cutthroat Trout Fishery, would not naturally enter the surface flow of No Name Creek. It is found that the water would not naturally be in the stream and available for use by the Defendants Waltons were it not pumped into the stream by the Colville Confederated Tribes.

Finding No. 27: By adding to and mingling with the natural flow of No Name Creek, the Colville Confederated Tribes to their benefit have been able greatly to increase the irrigated acreages on Allotments 901 and 903. The only means of delivering that water to Allotments 901 and 903 is the natural channel of No Name Creek.

Finding No. 28: It would be impossible to maintain the Colville Lahontan Cutthroat Trout Fishery were it not for the water pumped into the natural channel of No Name Creek and delivered down that stream to the fishery by the Colville Confederated Tribes.

Finding No. 29: It is admitted by all parties that the Defendants Waltons have consistently taken and diverted the water pumped into No Name Creek or large quantities of it for their own benefit and use. By that conduct, the Defendants Waltons have in the past and are at the present time causing the Colville Confederated Tribes irreparable and continuing damage.

Finding No. 30: This Court, in its July 19, 1979 Order, declared that the Defendants Waltons could not interfere with the delivery of pumped water down No Name Creek for use on Colville Allotments 901 and 903 and for the Lahontan Cutthroat Trout Fishery. In disregard of that Order, the Defendants Waltons have continued without right to divert and utilize the waters pumped into the No Name Creek channel by the Colville Confederated Tribes, all as found above.

Special And Separate Findings

Finding No. 31: Although there is no evidence in the record upon which findings can be made respecting the rights to the use of water claimed by the Defendants Waltons on former Allotments 2371, 894 and 525, the mandate of the Court of Appeals requires the allocation of water among Colville Allotments 892, 901 and 903, and the irrigable acres, title to which resides in the Tribes and their members. That allocation would be required even though the Defendants Waltons are not entitled to any water.

Finding No. 32: This Court finds, upon the evidence in the record as a whole and supported by administrative practices and based upon the law, which governs, that the apportionment of the short supply of water in No Name Creek cannot be properly conducted predicated upon the sole criterion of irrigable acreage. An effort to make an allocation on that basis would result in a grave injustice among the Indian water users within the Colville Irrigation Project, who are entitled to a just and equal share of the available water supply.

Finding No. 33: The Court finds that among the criteria, which must be considered in addition to irrigable acreage in making an allocation among the irrigable acres, are water supply, the area within the drainage where it is available for use, the crops involved, the quantities of water actually required by the crops, the soil conditions, the methods of conveyances and related physical features, all of which require consideration in determining how the waters are to be allocated among the irrigable acres. It is equally important, in making an allocation, to ascertain the quantity of water that can be delivered under careful management and without wastage. 177/

Finding No. 34: Accordingly, this Court finds that it is essential that the Court of Appeals amend its opinion to allow for a proper allocation of water based upon numerous factors, not only irrigable acreage.

CONCLUSIONS OF LAW

Conclusion No. 1: The burden of proof resided with Defendants Waltons pursuant to the mandate of the Court of Appeals: It is the obligation of the Defendants Waltons to offer evidence as to the quantity of water appropriated by the Colville allottees antecedent to the transfer of their lands in the early 1920s to the non-Indian Whams.

Conclusion No. 2: This Court found, in its October 25, 1978 Opinion, that the Colville allottees had not used any water from No Name Creek or elsewhere on former Allotments 2371, 894 and 525 or that any water had been beneficially applied to the lands in those allotments.

Conclusion No. 3: The Colville Confederated Tribes are entitled to have judgment entered for them against the Defendants Waltons predicated upon the opinion of the Court of Appeals that the Defendants are not entitled to any rights to the use of water in No Name Creek by reason of the nonexistence

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177/ See, "tea cup" theory at pp. 14, et seq., supra; see, pp. 19, et seq., supra.

of water used by the Colville allottees prior to the transfer of their property to non-Indians.

Conclusion No. 4: The burden of proof resides with the Defendants to prove by a preponderance of evidence the irrigable acreage to which water could be diverted and beneficially applied. The Defendants Waltons failed to offer any evidence upon which findings could be made as to the number of irrigable acres to which No Name Creek water could be beneficially applied, either from No Name Creek or from the groundwater basin of that stream.

Conclusion No. 5: The undisputed evidence is that Waltons' lands, due to geological phenomena and soil conditions, are subjected to a high water table, resulting in the Defendants' lands being saturated and, in many places, having water ponded on them. That fact renders the lands non-irrigable. Some lands might be irrigated for short periods of time. Defendants did not prove which lands could be irrigated for a short period of time or the amount of water required for those lands.

Conclusion No. 6: The Colville Confederated Tribes are entitled to judgment in their favor declaring that Defendants Waltons offered no evidence to prove the irrigable acres upon which No Name Creek water could be beneficially applied.

Conclusion No. 7: The Defendants Waltons, pursuant to the remand of the Court of Appeals, were required to prove the "amount" of water actually diverted and beneficially applied to irrigable lands. The Defendants failed to offer evidence on the subject either as to the "amount" required or the quantity of water actually diverted and applied beneficially to any of their lands.

Conclusion No. 8: Accordingly, the Colville Confederated Tribes are entitled to have judgment entered on the ground that the Defendants Waltons failed to prove the "amount" of water diverted and applied to a beneficial use. The Defendants violated the remand of the Court of Appeals.

Conclusion No. 9: It is concluded as a matter of law that there has been a complete failure on the part of the Defendants Waltons to prove any of the elements required to establish an appropriation of rights to the use of water in No Name Creek, either by the non-Indian Whams, the predecessors in interest of the Waltons, or by the Defendants Waltons. Additionally, it is concluded as a matter of law that the Defendants Waltons failed totally to prove the diversion and application of any "amount" of water by the non-Indian Whams, by their successors in interest or by the Defendants Waltons themselves. Therefore, none of the elements of an appropriation has been established.

Conclusion No. 10: The Colville Confederated Tribes proved conclusively that the Colville Timentwa family utilized all of the water of No Name Creek to irrigate the lands on Allotments 901 and 903. It was likewise proved conclusively that, for a period in excess of 20 years, the non-Indian Whams, who owned former Allotments 2371, 894 and 525 throughout the 20-year-period and who were the successors in interest of the Colville allottees, did not intend to appropriate and did not appropriate any rights to the use of water in No Name Creek.

Conclusion No. 11: There was no proof as to the quantity of water used by the non-Indian Whams during the 20-year-period when they occupied the lands. Accordingly, this Court declares, as a matter of law, that reasonable diligence, as required by the law and by the Court of Appeals, has not been proved by the Defendants Waltons as to the use of water by the non-Indian Whams or by their successors in interest or by the Defendants Waltons.

Conclusion No. 12: It is concluded as a matter of law that there has been a complete failure to prove reasonable diligence in regard to the entire period of time since title passed out of the Colville allottees to non-Indians. It is clear beyond question, as a matter of law, that there has been a total failure to prove reasonable diligence in the diversion and application of water to a beneficial use, all as required by the Court of Appeals.

Conclusion No. 13: Judgment should be entered in favor of the Colville Confederated Tribes quieting their title in and to all of the rights to the use of water as against the Defendants Waltons.

Conclusion No. 14: It is likewise concluded, as a matter of law, that the Defendants Waltons have no right to divert and convert to their own use water pumped into the natural channel of No Name Creek by the Colville Confederated Tribes for use on Colville Allotments 901 and 903 and for the Colville Lahontan Cutthroat Trout Fishery. The Colville Confederated Tribes are entitled to an injunction against the Defendants Waltons for the violation of their right to use the channel of No Name Creek to deliver water to the above-mentioned allotments, for the fishery and for any other beneficial use.

RESPECTFULLY SUBMITTED THIS 13 DAY OF SEPTEMBER 1982.

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