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Response to findings of fact, conclusions of law and memorandum in support submitted by Department of Justice - substitute findings proposed, if fishery issue is to be resolved - alignment of Department of Justice as adversary - tribes must not be bound by conduct of Department of Justice

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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

RESPONSE TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM IN SUPPORT SUBMITTED BY DEPARTMENT OF JUSTICE

SUBSTITUTE FINDINGS PROPOSED, IF FISHERY ISSUE IS TO BE RESOLVED

ALIGNMENT OF DEPARTMENT OF JUSTICE AS ADVERSARY

TRIBES MUST NOT BE BOUND
BY CONDUCT OF DEPARTMENT OF JUSTICE

There is being forced upon the Colville Confederated Tribes, over their strenuous objections, the unwanted, rejected and highly questionable representation by the Department of Justice in the case of United States v. Walton. Objective of the Department of Justice -- violation of the Tribes' rights -- is manifested from the background of the case of United States v. Walton. That case was initiated with the primary objective of seizing and taking from the Colville Confederated Tribes the jurisdiction, control, management and, indeed, title of the Tribes' rights to the use of water within the Colville Indian Reservation. Antecedent to the initiation of the case of United States v. Walton, the Department of Justice said this to Mr. Robert M. Sweeney, who

presently represents that Department here:

> It is the position of the United States [the Department of Justice purports to be the United States] that the Secretary of the Interior has the exclusive jurisdiction to [a] control and [b] administer the allocation of waters on tribal, allotted and formerly allotted lands of the Colville Reservation pursuant to the authority vested in the Secretary under 25 U.S.C. Sec. 381. 1/

In rejecting the Tribes' request for assistance against the State of Washington, which had intervened on behalf of the Defendants Waltons, the Department of Justice rationalized as follows:

> We have decided, however, not to intervene because the complaint filed on behalf of the Tribes does not, in our opinion, raised [sic] the issue which must be addressed to obtain a judicial determination in this controversy i.e. the authority of the Secretary of the Interior to determine the allocation of water on Indian Lands. 2/

It is a matter of record that the representatives of the Department of Justice have vigorously adhered to that erroneous concept. In clear violation of 25 U.S.C. 381, providing for a just and equal distribution of water "among the Indians" residing on the Colville Indian Reservation, the Justice Department has, in gross error, espoused the amendment of that Act by executive and judicial fiat to include non-Indians.

At all times, the Department of Justice has, in complete error, declared that the Secretary of Interior could allocate to the Defendants Waltons rights to the use of water. The Department's prayer for relief included this language:

> Wherefore, plaintiff [Justice Department] prays judgment against defendants as follows:
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> (1) that the Defendants... Walton be enjoined from diverting water from the aforementioned unnamed creek... in any amount of excess of that authorized by the Secretary of the Interior. 3/

1/ March 6, 1973 letter to Assistant United States Attorney, Spokane, from Assistant Attorney General, Land & Natural Resources Division, Department of Justice, Washington, D.C., at p. 1.

2/ Ibid., at p. 2.

3/ Complaint filed March 15, 1973, by the Department of Justice, p. 4.

Astounding aspect of that prayer for relief is that the Secretary of Interior has never promulgated rules and regulations pursuant to 25 U.S.C. 381. An additional astounding aspect in these proceedings is that the Department of Justice filed with this Court a statement that rules and regulations would be forthcoming in a short period of time -- that was in 1978.

The explicit language that the just and equal distribution of water must be "among the Indians" residing on the western reservations, coupled with fear of the power of the white man, who consistently disregards the law, has rendered the Secretary impotent. There have been no rules and regulations issued at this time.

Irrespective of the explicit language of 25 U.S.C. 381, the Department of Justice, in the Adair case, while simultaneously appearing in this Court purportedly on behalf of the Colville Confederated Tribes, took the following position:

> 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.' *** After the 'reasonable diligence' period, the non-Indian purchasers are subject to the doctrine of prior appropriation. 4/

The Tribes are necessarily appalled that the gross amorality of the Department of Justice can be forced upon them under the circumstances. The Tribes' consternation is underscored by this sequence: On June 6, 1980, the Court of Appeals for the Ninth Circuit adopted the Tribes' position in regard to 25 U.S.C. 381 — later withdrawn — and stated 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. *** The Allotment Act does not provide for the transfer of Indian water rights to non-Indian allotment purchasers. *** Therefore, Congress could not have intended to provide for the transfer of reserved rights. 5/

4/ United States v. Adair, 478 F.Supp. 336, 342 (U.S.D.C. Ore. 1979).

5/ See, withdrawn June 6, 1980 Opinion of the Court of Appeals for the Ninth Circuit in these proceedings.

In support of that conclusion, which is eminently correct, the Court of Appeals, in a footnote, said this:

> 25 U.S.C. §381 (1976). This provision implies that water rights were held in federal trust and not allotted. 6/

A year later, June 1, 1981, citing exactly the same authorities, the Court of Appeals withdrew its first opinion, reversed itself and stated that:

> Upon careful consideration, we conclude this principle supports the proposition that an Indian allottee may sell his right to reserved water. 7/

As stressed by the Tribes' in their September 14, 1982 Analysis, the Court of Appeals gratuitously undertook, without evidence before it, to declare, in gross error, that waters in short supply can be allocated on the basis of irrigable acreage in the watershed. 8/ The Court of Appeals stated:

> This follows from the provision for an equal and just distribution [see, 25 U.S.C. 381] of water needed for irrigation. 9/

Not only is it grossly improper to disregard the explicit language of 25 U.S.C. 381, but the Tribes have offered unchallenged evidence into the record factually disclosing that the allocation of water on the basis of irrigable acreage is disastrous.

In view of the adoption -- almost verbatim -- by the Court of Appeals of the position taken by the Department of Justice in Adair and elsewhere throughout western United States, the impropriety of the Department of Justice appearing on behalf of the Colville Confederated Tribes is manifest beyond serious question. Most assuredly, in the appeals that are being generated here, the Tribes must be free to present their position to the Court of Appeals and bring to the attention of that Court the magnitude of the error expressed by it when, contrary to the express language of 25 U.S.C.

6/ Ibid., at note 13.

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

8/ Ibid., at p. 51.

9/ Ibid.

381, it declared that Congress had authorized by that statute the transfer of Indian rights to non-Indians. 10/

This Court is deeply involved in the conflicts of interest giving rise to the gravely erroneous conclusions of the Court of Appeals. The on-going issues in the case of Kittitas v. Sunnyside in the Southern Division exemplifies the all-encompassing conflicts of interest of the Department of Justice seeking to represent interests that are diametrically opposed one to the other.

In an historic understatement, the Court of Appeals for the Ninth Circuit in Adsit said this:

> The United States and the Tribes argue that conflicts among these interests would prevent the United States from representing them adequately. When the United States is faced with such a conflict, its representation of Indians is inadequate. 11/

Here, the representation by the Department of Justice is not only inadequate, it is immoral.

Accordingly, the Colville Confederated Tribes pray this Court to grant an order declaring that the Department of Justice does not and cannot represent the Tribes in these proceedings and that the Department's actions do not bind the Tribes.

TRIBES REJECT PRORATION OF FISHERY RIGHT --
JUSTICE DEPARTMENT RAISES NO OBJECTION TO IT

In keeping with the aggressive efforts to force proration of short supplies of water upon the Indian tribes with the non-Indians, the Department of Justice apparently accepts that concept in regard to the rights of fishery. Reference respecting the issue is made to the Tribes' Motion for Clarification, dated April 2, 1982, in which the Tribes interposed strenuous objection to this Court's decision to force proration upon the Tribes in regard to their

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10/ See, September 14, 1982 Colville Confederated Tribes' Factual And Legal Analysis And Proposed Findings Of Fact And Conclusions Of Law, at p. 14, testimony of Charles P. Corke, General Hydrologist & Engineer for the Bureau of Indian Affairs, Department of Interior.

11/ Northern Cheyenne Tribe v. Adsit, et al., 668 F.2d 1080, 1089 (CA 9, 1982), cert. pending. The issue of conflicts of interest does not appear to be presented to the Supreme Court

rights of fishery.

This Court, in its March 23, 1982 Order, under the heading "Method for Pro Rata Water Distribution," said this -- in plain and serious error:

> Although the Ninth Circuit did not specify if water for the Lahontan Cutthroat Trout Fishery is subject to pro rata reduction in the same manner as the irrigation water, my study of the circuit opinion leads me to conclude that the fishery water is subject to a rateable reduction. 12/

Following that statement, this Court set up a hypothetical allocation between the Tribes and the Defendants Waltons. This Court then stated:

> Since the Ninth Circuit held that water reserved to the Tribe for one purpose may be put to other purposes, the Tribe may apportion the 712.5 acre feet for whatever uses it desires. Thus, there would be sufficient water available for operation of the fishery should the Tribe elect to operate it. The Tribe's contention that proration of fishery water would force closure of the fishery is baseless. 13/

By their Motion For Clarification And For Other Relief, dated April 2, 1982, the Tribes preserved their objection to the proration of their rights of fishery. There, the Tribes requested that the matter be disposed of on appeal by reason of the confiscatory nature of the ruling.

The Court of Appeals with specific terminology established the Tribes' rights in these words:

> The right to water to establish and maintain the Omak Lake Fishery includes the right to sufficient water to permit natural spawning of the trout. When the Tribe has a vested property right in reserved water, it may use it in any lawful manner. As a result, subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water. 14/

The principle of law is well stated by the Court of Appeals that the Tribes' property rights may not be confiscated for the benefit of Defendants

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12/ See, March 23, 1982 Order, at p. 3, lns. 26-30.

13/ Ibid., at p. 4, lns. 4-11. (Emphasis supplied).

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

Waltons. This is a direct quote from that decision:

> 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. 15/

Congress, most assuredly, has not declared that the Tribes' rights could be seized for the Defendants Waltons or that the Tribes would be forced to utilize their agricultural water to maintain the fishery.

This Court's finding is clearly erroneous, when it declares that:

> The Tribe's contention that proration of fishery water would force closure of the fishery is baseless. 16/

There is not a scintilla of evidence in the record to support such a conclusion. To the contrary, the evidence is explicit that the Defendants Waltons, in total disregard of the Tribes' rights of fishery, have not only seized the water and destroyed eggs that have been planted in the fishery, but have likewise, by inducing filth into the stream, brought about the destruction of the Lahontan Cutthroat Trout eggs in the bed of No Name Creek within the fishery. 17/

Filth from the Defendants Waltons' cattle and monopolization of all of the waters of No Name Creek in disregard of the Tribes' rights is the hallmark of the arrogant disregard by the Defendants of the Tribes' rights.

The declaration by this Court that the Tribes' assertions are baseless is contrary to fact on two scores: (1) Quantity of water and (2) temperature of water. When the Defendants Waltons purposely dried up the fishery, these events transpired, as testified to on May 7, 1982, by Dr. David Koch:

> Q ' What has been your experience during this period of the operation of the Lahontan Cutthroat Trout Fishery in regard to the quantity of water required... and... the temperature...?

15/ Ibid., at p. 50.

16/ March 23, 1982 Order, at p. 4, lns. 4-11.

17/ See, Testimony of Dr. David Koch, Vol. VIII, at p. 1661, lns. 2-14; p. 1742, lns. 7-17; pp. 1673, et seq.; p. 1681; p. 1686, ln. 12; p. 1692, ln. 19 - p. 1693, ln. 18; p. 1720, ln. 17; p. 1721, ln. 2.

> A Well, we have conducted egg incubating experiments in the gravels of No Name Creek; one that was prior to the renovation of the artificial spawning channel that was in place and working, and one which was in 1979, and in both events when these experiments were conducted the temperatures, ten days approximately after the initiation of the experiments, Mr. Walton began irrigating upstream and diverted the water, and our temperatures exceeded 60 degrees.
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> In both cases, in a matter of two days we just about eliminated our eggs that were incubating in the test.
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> Q Did it eliminate all the eggs?
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> A On the first occasion, yes, it did. On the second occasion, the temperatures exceeded 60 degrees for three days on those ten-day periods, and there was approximately, and I am recollecting now, approximately 20 to 25 percent survival of those eggs at that time. 18/

If this Court intends, under the circumstances, to allocate rights to the use of water for the Colville Lahontan Cutthroat Trout Fishery, antecedent to the Tribes having an opportunity to have the matter reviewed by the Court of Appeals as to the reduction of their rights by proration with the Defendants Waltons, the Tribes have no other alternative but to suggest findings at this time. It is observed that the Department of Justice, in its findings, refers only to volume. That is error. As stated above, the issue of temperature is as important as volume of water -- rate of flow.

On that background, the Tribes request the entry of these findings. Not only is it essential that the Tribes have an adjudication as to the volume to which they are entitled for the Colville Lahontan Cutthroat Trout Fishery, but it is likewise essential that the finding be on the basis of rate of flow. The following findings are proposed:

1. The Colville Confederated Tribes traditionally relied upon fishing as a primary source of food. Fishing was likewise of religious importance to them.

2. The principal, historic fishing on the Columbia River has been destroyed and the Indians have established replacement

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18/ See, T.R., May 7, 1982, at p. 578, ln. 2 - p. 579, ln. 1.

fishing grounds in No Name Creek by the introduction into that stream and into Omak Lake of the Lahontan Cutthroat Trout, a non-indigenous fish.

3. To maintain the Colville Lahontan Cutthroat Trout Fishery, the Court finds that it is essential to maintain temperatures in that fishery below 58 degrees, which is the spawning temperature requirement.

4. To maintain the spawning temperature, the Court finds that there must be maintained in No Name Creek at the fishery one and one-half (1.5) cubic feet of flow per second of time from May 1st to June 1st of each spawning season, for a total of 92.2 acre-feet.

5. The Court likewise findings that, for a period from June 1st to July 15th of each spawning season, it is necessary that the rate of flow be maintained at two (2) cubic feet of water per second, for a total in volume of 178.5 acre-feet.

6. The Court additionally finds that, from July 15th to October 1st of each spawning season, the rate of flow must be one-half (.5) cubic feet per second, for a total of 76.4 acre-feet, with an aggregate total of 347.1 acre-feet annually for 153 days.

CONCLUSION OF LAW

This Court concludes, as a matter of law, that:

The Colville Confederated Tribes have prior and paramount rights residing in them to maintain the Colville Lahontan Cutthroat Trout Fishery at the flow rate set forth above, for a total of 347.1 acre-feet of water throughout the spawning season.

The Tribes reiterate that they would prefer to have a ruling from the Court of

Appeals prior to any attempt finally to decree that right. However, if this Court intends to proceed to final adjudication respecting that right, antecedent to the ruling on the prorating issue, the Tribes request the adoption of the Findings of Fact and Conclusion of Law, as set forth above.

THE TRIBES REJECT ALL OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE DEPARTMENT OF JUSTICE AND THE PRINCIPLES EXPRESSED IN THE MEMORANDUM IN SUPPORT

The Colville Confederated Tribes request this Court to reject the proposed Findings of Fact and Conclusions of Law submitted by the Department of Justice.

It is error for the Department of Justice to state that:

> At the 1978 trial, the parties stipulated that by 1978 approximately 102 acres had been placed under irrigation by the Defendants. 19/

The Colville Confederated Tribes have never agreed that the Defendants Waltons were irrigating 102 acres.

On November 7, 1978, the Colville Confederated Tribes filed their Motion to Amend Findings. There, among other things, the Tribes state:

> In error, this Court finds that the '*** Waltons are presently irrigating 105 acres.' (Memorandum Opinion, page 3, lns. 16-18) There is no evidence to support the finding. 20/

The Tribes stress that the only data available disclose that there were a maximum of 69 acres that were irrigated in 1978. Additionally, the Tribes have always stressed that the Defendants Waltons wasted huge quantities of water and that the Defendants unconscionably waste water on their water-logged property.

Additionally, the Colville Confederated Tribes, in their Motion to Amend Findings, declared that:

> The Colville Confederated Tribes disagree that they stipulated to the facts as presented in the Appendix to Memorandum Opinion. Moreover, until

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19/ Department of Justice Findings, p. 4, para. XI, lns. 20-22.

20/ November 7, 1978, "Motion To Amend Findings...." at p. 7, lns. 27-29.

> this Court acts upon the objections to the findings it is impossible to state with certainty the facts to which the Colvilles can stipulate. 21/

Although those objections were specific and definitive, this Court disregarded the objections, to which reference is made and many others, with the result that confusion exists -- for example, that "The allotments now owned by the Waltons passed out of Indian ownership in 1942." Other objections were made in regard to the declaration that there were 32 acres of land irrigated at the time title passed to the Defendants Waltons.

It is important that the Department of Justice, in serious error, is forcing upon the Tribes not only rejected representation, but likewise totally inadequate representation, all as set forth in these comments.

Additionally, it is error for the Department of Justice to request this Court to find that:

> The testimony introduced at trial, although speculative suggested that approximately 105 acres are currently irrigated by the Waltons. 22/

Further, it is error to state that:

> The testimony introduced at trial reasonably establishes that approximately 155 to 170 acres contained in former allotment Nos. 525, 3371 and 894 can be irrigated to some extent. 23/

As set forth in the Tribes' Response to the Defendants Waltons' Post-Hearing Memorandum, the Defendants Waltons, through gross misrepresentation, asserted that they had irrigated 155 acres. 24/

It is also to be observed that the Department of Justice prepared a soil survey utilizing the services of one Harvey from the Bureau of Indian Affairs. The evidence offered in the record by the Colville Confederated Tribes, all as reviewed in the Tribes' Response to the Defendants Waltons, filed simultaneously with this Response to the Department of Justice, proves

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21/ Ibid., at p. 8, lns. 11-14.

22/ Department of Justice Findings, p. 5, para. XII, lns. 1-2.

23/ Ibid., at p. 5, para. XIII, lns. 6-8.

24/ See, Tribes' Response To Defendants Waltons' Post-Hearing Memorandum, dated September 23, 1982, at pp. 5, et seq.; pp. 8, et seq.

conclusively that the vast preponderance of the lands in Allotments 2371, 894 and 525 is waterlogged and is not irrigable. 25/

It is unconscionable to saddle the Colville Confederated Tribes not only with the obligation of defending themselves against the State of Washington, which has been forced out of the litigation, and the Defendants Waltons, but likewise to be irreparably damaged by the Department of Justice in these proceedings.

It is stated in Conclusion of Law III, filed by the Department of Justice, as follows:

> Assuming the initial conveyances of former allotments 525, 894 and 2371 included the allottees' reserved water rights, the Defendants carried the burden of proving (1) the amount of water applied with reasonable diligence to irrigate the former allotments by the original non-Indian purchaser and (2) the amount of such water maintained in continuous use up to 1948, the year the Defendants acquired the former allotments. 26/

The Tribes have been informally advised that the word "carried" is an error. The fact remains that the use of the word "carried" in this context constitutes a threat to the Tribes and the Department of Justice should file a correction with this Court.

As in Adair, the Department of Justice, contrary to the law as perceived by the Tribes, supports the concept that Indian allottee's rights are transferable. That conclusion is manifestly the result of the conflicts of interest that pervade all of the Justice Department's activities. The Department of Justice simultaneously purports to represent the Secretary of Interior, who administers largely non-Indian irrigation projects on Indian reservations. Thus it is to the great advantage of the Department of Justice and the Department of Interior to espouse the misconstruction of 25 U.S.C. 381 and award, illegally, rights to non-Indians, all as reviewed above.

25/ Ibid., at pp. 10, et seq.

26/ Department of Justice Findings, at p. 7, para. III, lns. 1-7.

CONCLUSION

If the Colville Confederated Tribes are to be protected against grave losses stemming from the conduct of the Department of Justice, it is imperative that the Tribes' Motion to have the Department of Justice aligned as an adversary be granted. 27/

Additionally, if the Court acts in regard to the Colville Lahontan Cutthroat Trout Fishery, it is requested that it adopt the findings and conclusions, as prepared by the Tribes.

RESPECTFULLY SUBMITTED THIS 23rd DAY OF SEPTEMBER 1982.

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27/ See, Tribes' Motion to Align the United States as an Adversary, March 8, 1982.