10-1-1982

Excerpt of final argument

Wayne C. Lenhart
Court Reporter

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES,)
)
Plaintiff,)
)
v) No. C-3421
)
BOYD WALTON, JR., et ux., et al.,)
)
Defendants.)

CONSOLIDATED WITH

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v) No. C-3831
)
WILLIAM B. WALTON, et ux., et al.,)
)
Defendants.)

EXCERPT OF FINAL ARGUMENT

Spokane, October 1, 1982 - Honorable Robert J. McNichols

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THE COURT: All right, Mr. Price, thank you.

MR. MACK: Your Honor, --

THE COURT: Yes, sir.

MR. MACK: -- there were two areas of issues raised in memorandums and the proposed findings and conclusions filed with the Court that raised what the State believes to be statewide, not just No Name Creek Valley implications, and we also have state law implications, and on those the State would like today to give its views to Your Honor for just a few minutes.

THE COURT: All right.

MR. VEEDER: I object to it. I object to it all the way. There is not a thing in the world about anything but No Name Creek and Omak Creek and we, deadly enemy to the Indians is the State of Washington, and I object to their argument, I object to their presence here.

THE COURT: All right, your objection is on the record, Mr. Veeder. If the State of Washington has an interest here and wants to present it, I'm going to listen to it.

MR. MACK: Thank you.

MR. VEEDER: I would like to have just a moment of justice, I swear.

THE COURT: Well, we will give you a moment

in a moment.

MR. VEEDER: A very short moment.

THE COURT: Mr. Veeder, --

MR. VEEDER: Yes, sir.

THE COURT: If you would just relax, you will be able to make your presentation. Eventually I'm going to have to make the best decision I can make in this case. I might be right, I might be wrong, I might be part right or part wrong, but I don't think it's helpful to express your disgruntlement and to disrupt the proceedings and --

MR. VEEDER: By an interloper?

THE COURT: I know how you feel about this case, it's very obvious; I know how the other parties feel, but let's just relax and talk about the evidence. If the State of Washington, the Attorney General of the State of Washington comes in and thinks there is something that this Court should be aware of -- whether it should or should not is another question, but I'm going to give him the courtesy of listening to them.

So, if you would sit down, now, we will listen to them.

MR. MACK: Thank you, Your Honor.

MR. VEEDER: I want the objection very clear here, I want it understood that you are gravely prejudicing the Confederated Tribe by letting this interloper be here,

and I would like to have a ruling --

THE COURT: All right, your objection is noted, it's overruled, and I would appreciate it if you would sit down and let this gentleman speak.

MR. MACK: Thank you, Your Honor.

The State does not intend to suggest volumes of water to be allotted to rights that you are going to have to determine, but we do believe, most sincerely, as a party in this case, joined by the United States, and never dismissed, that there, that Your Honor is being asked, at least by some of the parties to this proceedings, in their proposed findings and conclusions, to enter findings and conclusions that would have serious adverse impacts, even beyond the No Name Creek Valley, and the Colville Reservation, and on those two issues we would like to give our views, and I will try to do that very briefly.

Just so you know where I'm going, Your Honor, one has to do with the so-called replacement fishery right which the 9th Circuit came up with in its, in its last and final Opinion, the one under which you are now working, and the second has to do with the extent of Mr. Walton's right.

Briefly, on the replacement of fishery right, Your Honor, the United States has asked that the priority date of that right be fixed as "time immemorial."

This is a new argument raised by the United States, as far as I know, to just, only appearing in the last memorandum filed, signed by both the Justice Department and the Department of Interior. That proposal would run counter to specifically what the 9th Circuit found in this case, the Walton case.

Specifically what the 9th Circuit has ruled in the Kittitas Reclamation District, and specifically against all western law, the 9th Circuit specifically found that, to the extent a replacement fishery right exists, that date of its establishment is the same as the date of establishment of all of the reserve rights on the Colville Reservation, namely 1872. In the Kittitas Reclamation District case the 9th Circuit pointed out, with regard to the Yakima Nation's fishery interest, and it's in the very, it's in the third paragraph of the decision, that that, their, that the Yakima fishery interest dates back to the day of the creation of the Yakima Reservation, and it is my understanding, or my office's understanding that similar assumptions have been made for all of the more extensive fishery rights found for Western Washington tribes, that those rights date from the date of a treaty creating the reservation, or an Executive Proclamation.

There is simply no foundation for the United

States arguing here that the somehow that fishery replacement right preexisted the date of the reservation. It's important that it not be found to preexist 1872, for a number of reasons. The 9th Circuit Opinion, as Your Honor knows, attempts to establish some equitable distribution of the waters in the No Name Creek Valley. If a right predates the 1872 date, of course, it would have a greater priority. Now, rights can be protected, according to two elements of water law; one is by the priority date, which is the general ruling in the West, and the other is by the type of use which is not the ruling in the West, and is really sort of a riparian law notion adopted under what is called the English Rule of Riparian Law, and never been the law in this state, or the other Western states, so my knowledge. But the United States, in effect, argues that that rule be adopted, that the use, namely fishery use, or fishery replacement use, be held to be preeminent to the other uses, namely irrigation, or whatever else is made of the use of the waters in the No Name Creek Valley. And the reason it would be preeminent is because it would have an earlier priority date, and as Your Honor is aware, the priority date system is the important system in the Western states; it establishes the basic precedence of rights.

What is this replacement fishery right.

Well, it is a right, apparently, although the 9th Circuit doesn't give us much indication on this, which was established in 1872, somewhere in the 1930's was moved from Kettle Falls, or wherever it was exercised, and held in suspension, and continues to be held in suspension until the Tribe decides it wants to place it in a certain area, where it could possibly be moved again to another area. The 9th Circuit has determined that this replacement fishery right, or at least part of it, has been moved by the Tribe somewhere since the 1930's, damming up the Columbia, period, and somewhere in the late 1960's it alighted in the No Name Creek Valley.

If the United States and the Tribe are correct about the nature of that right, when it was placed at the mouth of the creek in the No Name Creek Valley, in the 1970's, it would have effectively extinguished in the low flow period the rights of any irrigators, Indian or non-Indian, in No Name Creek Valley. Assume, Your Honor, that all the allotments in the valley were irrigated by Indians, starting in the 1920's, or 1910's. If the United States is correct, their rights in low flow period would be completely extinguished by the movement of this replacement fishery right, which would have an earlier priority date.

THE COURT: Well, what you're saying is, there

are, well, let me ask counsel a question; insofar as this decision is concerned, and the priority of the fishing right, wouldn't the Circuit in its opinion recognize -- does -- is there any difference between the parties in this case as to whether that right is vested as of the date the reservation was created, or some earlier date; the 9th Circuit said it was created, or existed --

MR. MACK: Yes, apparently the United States has read that differently, Your Honor.

THE COURT: I see.

MR. MACK: And maybe counsel can explain that later, but --

THE COURT: All right.

MR. MACK: -- which maybe they have another version of the decision, but the version we have indicates that these are all reserved rights, and that is important, Your Honor, for the final point I will make in this issue, because as Your Honor has understood, in, if there is a continuing jurisdiction here, in low flow periods, in the valley, and if there has to be reductions, the 9th Circuit opinion, and I think it can be fairly stated, is, is founded on the notion that there should be some pro-ratable reduction of reserved rights, and Your Honor has understood that throughout.

If the replacement fishery right is improperly

described, in Your Honor's opinion, it would upset that, that scheme completely, and you would not have a proratable share, so it is argued that if there is going to be any reduction, the replacement fishery right would have to share some proratable way with the existing irrigation rights, whether non-Indian or Indian, in the valley. And there is a state law analogous to this, when a right is, when a place of use, or point of diversion is changed in a state right, and this is true, in all of the Western states, as far as I know, it can retain an earlier priority date, but only if it does not adversely affect the existing rights in the new site, and if the United States' argument is bought here, it would allow this replacement fishery right to be transported, I suppose, around the reservation, and adversely affect existing rights, Indian and non-Indian, established in nonirrigable lands, for example, and we just don't, we just don't understand that.

The second -- the second point I would like to make has to do with an issue that really is a state law issue, whether all of the counsel in this room would want to acknowledge that or not, and that is this whole question of reasonable diligence, and due diligence, and the terms, the 9th Circuit used the term reasonable diligence. A lost of cases report, reported used the term due diligence. They are understood, I think, to

be, to be comparable. It is not unusual, in this area of the law, for a federal court to look to the state law for leader, for guidance on this. In fact, that is what Judge Swallenback (phonetic), later to be Labor Secretary, in the Big Bend Transit case, he looked to state law on the question of reasonable due diligence. In fact, he had no choice. This Court has no choice, there is no federal law on that matter, except federal common law, which borrows from the state law, state territorial law. And in that respect, the state understandings, and no just Washington, but the other western states, that this concept are crucial to what, to what this Court has to do.

I might add there are similar concepts established in Washington State statute for relinquishments in Chapter 90.14 R.C.W. There are discussions of the factors which go into take, and which have to be taken into account as to whether an appropriator has properly continued to make appropriations of water, and there are just a few points in this area and then I will sit down, that I would like to make, Your Honor.

One is that the law is clear that the application of the due diligence standard, is case specific, it depends on the particular facts of each case. What does that mean? That means, really, two things; one is

that the fact finder, the District Court, Your Honor in this case, has considerable discretion under the law in weighing all of the variety of factors which go into reasonable diligence. Any court in western states water law, either federal or state court has this considerable discretion, because of the great variety of factors, and because those factors must be weighed not only against the law, but against the particular facts and the particular case.

And the second implication is that, is that of the variety of factors, and I would just like to mention a few of them, and then complete this, Your Honor.

All of the factors that you will find in court discussions of reasonable diligence tests have really two basic elements. One is that the appropriator has shown good faith in continuing to perfect his appropriations, and the second, which is also important, is that if the appropriator was inhibited or deterred from perfecting his appropriations, was the inhibition or the deterrence created by circumstances beyond his control. If so, he is not to be penalized for delay in the appropriation.

Some of the relevant factors in western water law, in the law of this state, that would be relevant to the facts as the State has read them in the record

in this case, would be, would be the following, I would submit. One is the dates on which water was first used by the non-Indians in the No Name Creek Valley. The record indicates that the properties first passed out of Indian ownership in the mid-1920's, early in mid-1920's, and that Mr. Walton came on the property in the late 1940's. I will explain later why those dates are important.

Second, there are circumstances in this valley that are of importance, and that the record supports. One is, the general Depression, not only across the country, known as the Great Depression, but the depression in the agricultural industry, in all of the West, which actually predated the onset of the Great Depression to the stock, the stock market crash. There is evidence in this record, Mr. Hampson talked about it, about the general economic depression in the agriculture industry.

Now, the usual rule on reasonable diligence is that if an appropriator said look, I couldn't appropriate that water a year after I got my permit, or the year after I moved on the property, and the reason is because the bank wouldn't give me the money, I just had troubles. If the bank wouldn't give them the money because the appropriator himself was in bad financial situation, normally that doesn't wash with the courts, that doesn't get him anywhere, but where there is general economic problems,

courts will look to that, as a factor beyond the control of the appropriator, limiting his ability to perfect the right, and there is no question but in all of North Central Washington, and there is evidence specifically for this valley, for this county, that the general economic depression which began in the late 1920's, middle and late 1920's, added adverse affects, and I might add, continued into the 1930's.

In other words, it began shortly after these properties came out of Indian ownership, and it continued for about a decade and a half.

Along with that, Your Honor, there is evidence in the record, and it is relevant, and it is the sort of thing courts look at in applying reasonable diligence, on climatic conditions in this area, and I would point Your Honor to the evidence about the drought conditions in North Central Washington, and in this area, beginning in the late 1920's and continuing through the 1930's. It is, at least for those of us raised in this state, common knowledge, but there is also evidence in the record on that, and Mr. Price has pointed to the weather data, which confirmed this. This resulted in a number of things. Number one, low or absolutely non-existent surface water flows in parts of North Central Washington; that is an immediate effect; and a lagged effect of diminished ground

water availability, and when I saw lagged, lagged by a matter of months and years, so that the drought conditions immediately adversely affected surface waters, and we can assume the No Name Creek Valley, after a year or two, adversely affected ground water conditions.

This also is relevant because this occurred in the 1920's and 1930's, and I, also, then there is evidence in the record, this second phase of this hearing, besides drought, oversupply or water can adversely affect an appropriator's ability to appropriate, and as is common knowledge, and is, as there is evidence in the record, the 1948 severe flooding, including in this area, including this area, adversely affected water delivery systems and the ability of people to appropriate water.

The final important factor, Your Honor, is the, are the conditions created in the early and mid-1940's by World War II. There are a lot of reported cases, not many in this state, if any, but a lot of cases in the West, which look to war conditions as, as the type of factor which runs in favor of an appropriator who is late in making his appropriations, and there is no question but that the period of the early and mid-1940's was a period which inhibited and deterred a great number of people from proceeding, although they wished to do so, in good faith, the appropriation of waters.

All of those taken together, Your Honor, are factors in determining what a period of reasonable diligence is. In some cases it may be a matter of a year or two. Under the State permit scheme, normally it's three years, but it can also be extended to decades under the State permit scheme, some permittees have been allowed decades to appropriate their water right because of just these sorts of factors, and there have been court cases which have allowed it.

Before I, before I finish, I will add one final note, and that is that there has been some question about the four acre foot figure, and Mr. Price has referred to some evidence. The exhibit he was referring to, which is a circular by the Washington State University, and I recall it being placed in the record by one of the parties adverse to us, because I can recall cross-examining this witness on it, has Exhibit No. 36-2. It does refer to water duties, and there was testimony from that document on appropriate water duties, and I believe it was admitted in evidence.

So, in conclusion, Your Honor, the State's primary interest here is, with due respect to the Court, and, with greatest respect for the Court, that the Court not be misled by some of the arguments, filed, and memorandums with the court, and some proposed findings into making

rulings on primarily these two issues, reasonable diligence, and replacement fishing rights, that would have, we consider, serious and adverse affects even beyond this reservation.

Thank you, Your Honor.

THE COURT: All right, thank you, Counsel. I think maybe we're going to have to give Mr. Lenhart time to rest his hands, so we will take about ten minutes.

THE BAILIFF: Please rise; --

(A recess taken at this time.)

MR. MACK: Your Honor, if I might add just two sentences.

THE COURT: All right.

MR. MACK: It has to do with the transferability of the right of appellee to a non-Indian. The argument of the United States, as I understand it, and the papers they have filed, is that unless the water rights are expressly stated in the documents, involved in the transfer, that somehow the water rights are not transferred. We would suggest that the, number one, that is contrary to all other notions in the Western Washington law, that the water right being a property right, is transferred, unless there is express reservation of it in the document, and the evidence here is that there was never an express reservation of the water rights, and the documents indicate transfer.

We would also point out that the, that argument of the United States here is contrary to the underlying basis and notions in the Winters case, and similar cases, where the idea was adopted that there, that water being necessary for irrigation of western lands, that there is necessarily the implication of the existence of water rights in these lands, and since there has been no express reservation in any of the transfers, we would argue that in fact whatever rights did exist, reserve

rights were transferred out.

Thank you, Your Honor.

THE COURT: All right, thank you, Counsel.

Mr. Veeder, or Mr. Sweeney, which one of you --

MR. SWEENEY: I guess it's my --

MR. VEEDER: Your Honor, I would like to ask a question.

THE COURT: All right.

MR. VEEDER: Was the Court notified that Mr. Mack for the State of Washington was going to be here today?

THE COURT: I wasn't notified, although they are still technically part of the lawsuit.

MR. VEEDER: I believe that this has been an outrage, and I want the record to show it.

THE COURT: All right.

MR. PRICE: Your Honor, . . .

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THE COURT: All right, Mr. Price. You didn't get to say much.

MR. PRICE: Thank you, Your Honor.

The Circuit not only said otherwise, the Circuit specifically said why it said otherwise. The District Court, quoting on page 2635, the District Court's holding that an Indian allottee may convey only a right to the water which he or she has actually appropriated (reading inaudibly) of actual appropriation reduces the value of the allottee's right to reserve water. We think this type of restriction, or transferability is a, can't say the word, diminution of Indian rights that must be supported by a clear inference of Congressional intent. The 9th Circuit took just the opposite tack from Mr. Veeder and said unless Congress indicated it wanted to deprive the allottee, it had to say so, it didn't say that, therefore the allottee gets his right and he may be transferred. The 9th Circuit has spoken to that, and specifically addressed that question. I think we have to abide by it.

Mr. Veeder says nothing before us or in the record tells us that the fishery amount is to be ratably apportioned. I may be seeing things in the opinion, but again, I quote, from page 2633 regarding the fishery,

the measurement used --

MR. VEEDER: What, what are you looking at?

MR. PRICE: The 9th Circuit decision, Mr. Veeder, page 2633, "The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes . . ." The 9th Circuit has taken the position the fishery is a related purpose for the creation of this reservation, it talks about the amount of water necessary, and then, you read that in conjunction with page 2636, where the 9th Circuit held that Ahtanum, a case in which Mr. Veeder was instrumental in, instrumentally involved, and in which the 9th Circuit wants to hold for different purposes than he does, "Ahtanum held that non-Indian purchasers of allotted lands are entitled to participate ratably," they quote participate ratably, "with Indian allottees in the use of reserved water." They did not say in use of irrigation water. They said they participate ratably in the use of reserved water. Waters were reserved for this reservation for agricultural, agricultural and replacement fishery, according to the 9th Circuit, we have to abide by that, the fishery will be prorated the same as any other water.

Taking you back to page 2633 of the 9th Circuit decision now --

MR. VEEDER: If Your Honor can follow the *slip*

opinion -- I can't.

MR. PRICE: Counsel, I didn't interrupt your argument, even though it was --

THE COURT: I don't have it in front of me anyway.

MR. PRICE: At page 2633, Your Honor, and speaking to the fishery issue, we, I agree, must follow the 9th Circuit; the 9th Circuit said we can quantify the water right, but it said we are still entitled to find the amount that is sufficient, and the amount that is necessary in order to meet that reserve purpose. This case, replacement fishery. And at the bottom of page 2633, I quote, same language, "The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes. . ." Necessary. The record establishes the fishery is not necessary in order to establish or maintain the propagation of an endangered species. I think an appropriate interpretation within this Court's jurisdiction is to find that yes, they do have a water right to that extent that it's necessary, and if someday it becomes necessary, then yes, they may exercise it and it could be used to calculate their pro-rata portion. Until it becomes necessary, as established by the 9th Circuit, it may not be used to calculate the prorata share.

Mr. Veeder says that there is no case that

says 25, over a period of 25 years would substantiate a reasonable diligence, or reasonable diligence in the appropriation of water. The Big Bend case specifically cites In Re Alcoa Creek, 129 Washington 9, a 1924 case, I would like to quote briefly from page 5 of our memorandum of authorities. In Alcoa Creek, one of the key questions is whether preferential water rights where certain of the parties would be limited to irrigation of only the 12 original acres of land put to irrigation, or whether the preferential right would extend to nearly 340 acres subsequently developed between 1877 and 1908, a 31-year period. In ruling in favor of the expanded claim on the basis of due diligence having been exhibited and developing a water right, the court held, "The doctrine of common sense applies in making the appropriation (reading inaudibly) is an important factor. All the appropriated water need not be used at once. Reasonable diligence in making beneficial use is all that is required." We go on to quote from that case, they're setting out the factors that could be considered, such as the lands in question are sparsely settled, located from any trade center, the creek is small, water is sufficient for all purposes, area is developed slowly, but all, under all of these adverse conditions, some irrigation has been carried on from an early date by means of the Houser Ditch.

Almost an identical factual pattern in the Walton case.

The law, as I understand it, by the 9th Circuit, weighs in favor of a ruling in favor of due diligence for the Waltons, through their predecessors, in their own use.

With respect to Mr. Veeder's wanting to zero in on 55-acre statement by Mr. Wilson Walton, he still does not recognize and refuses to recognize that Mr. Walton was talking 55, the same acreage that he talked about as 65 acres, in the 1982 trial. A difference of 10 acres, I can't explain that, whether somebody can be 10 acres off or on, in five years difference, I don't know. I recognize that the Tribe has increased their fishery claim over 100 acre feet of water from the 1978 claim of 220 or 30-some, now to 360. I see no reason for me to allege that they are purging themselves or anything else. They found that apparently was appropriate for testimony at the later hearing and they put it on.

In any event, Mr. Walton, Wilson Walton, that is why I thought it was important that Your Honor have the opportunity to view him personally, and his testimony, so that you could judge for yourself his credibility, indicated that 65 acres was the part he was putting under sprinkler irrigation, and that Mr. Veeder refused to recognize that there was an additional 90 acres that was being

flood irrigated from time to time, both through surface flows of the creek diversions, and surface flows from beaver dams and springs occurring on the property. The 155 acres is substantiated.

Mr. Veeder's claim of a change of use in 1965 because of a well, I find nonpersuasive, it's the amount of land that is under irrigation, not how you obtain the water. As the, Mr., both Waltons testified, this streamflow in No Name Creek decreased from a period of time that they purchased the property, as years went by, and as the streamflow decreased, they found it appropriate to go to ground water; the same water, it's all the same water, and the same aquifer, whether it's underground or whether it's forced to the surface and springs to generate the No Name Creek, we're talking about all the same aquifer water. Obviously their change of use does not detract from their right, it's the amount of irri-, acreage they had under irrigation that is appropriate in quantifying the water rights in this case.

An issue which has not been addressed orally at this point, and it's one that I want to make clear, is that Exhibit WWWW, or four W's, the Soil Conservation survey, at the first 1982 hearing we asked that it be admitted for the purposes of showing that it was a document that Mr. Walton had carried through on some activity or

action. As a result of the testimony of both Mr. Blomdahl and Mr. Bennett, to the accuracy of the document, the fact that it represented an accurate representation of official United States document, we are opposed, and did not intend to have that exhibit limited to any purpose, it should be admitted for all purposes, and there is substantiation in its identification for that.

In terms of whether or not this Court should utilize and rely on the four acre foot water duty figure, I think it's important for the Court to recognize, as I had to learn and recognize from the testimony of the witness of the first trial, water duty relates to the need of the water by the crop; doesn't have anything to do with the land. Land doesn't need water; crops need water. In order to grow an alfalfa and pasture crops in No Name Creek Valley, Judge Neill found that it took four acre feet of water to grow that crop. The crop is the same crop whether it's on Allotment 526, 892, Tribal allotments or Walton allotments, it's the same alfalfa crop, it is appropriate for this Court to accept that figure, if it's good for crop on the Indian lands, it is the same crop on the Walton land, and they're entitled, and this Court should have confidence in that figure. And I should point out candidly, that we argued to this Court, to Judge Neill, that that figure was high, because

Mr. Walton is a better irrigator, he is a better conservative of water, and he can, and we put on evidence, utilize water and grow an alfalfa crop with 3.5 acre feet of water in that same No Name Creek Valley. That was not accepted by the Court. The Court went to four acre feet based on testimony of the Tribe that more water was necessary because of the arid region and dryness of the area. We still maintain the 3.5 acre feet would work, but in terms of what the Court has adopted, what is good for their alfalfa crop is good for our alfalfa crop, and in terms of comparing acreages ratably, we would have to use the same figure.

I, at the start of this case, wanted to maintain to this Court, and I wanted to convince myself that this was a tremendously important case, probably the most important issue remaining unresolved in Indian law. That, I have seen the light of day, is not the case. My client has maintained to me throughout that, "Dick, if you lawyers would go home and if the Court would just go away, you know good and well the Tribe and the allottees and I would be out there irrigating just fine, getting along just fine, and we will. When this case is over, the lawyers go home with their money, the Court will get out of it, go on to other cases," he says, "you know, we will be out there irrigating and farming and nobody

will worry about this anymore and we will get along, we will exist, just like we did before."

THE COURT: Anyone want to so move?

MR. PRICE: And in truth, that will happen. I don't think Your Honor has to sweat blood that somehow what you pen on the paper is going to be so important that it's going to shake the earth, or change mankind.

THE COURT: I don't know that I attach that much significance to the Court at this level.

MR. PRICE: I think what Your Honor's pen can do is establish some quantities, identify some quantities for both parties, that those parties will have to go out and live with, they will be sustained on appeal or modified to a certain extent, the parties will live with it, with the amounts they get, and they will act accordingly, so I, the reason I want to raise that, is, I, I don't think this is the issue of all issues in Indian law. I think it's, may come down to just a straightforward issue of what was practicable for a farmer to do at that time, in that era, what was done, what is an appropriate irrigable acreage for both of the respective parties, and let it go at that.

THE COURT: Well, I do think what I have to do, Mr. Price, is, is not to just do something without a great deal of thought, and just pass the buck to the

Circuit, I think I have the obligation to do, as within my ability, to resolve the legal and factual questions here, and to delineate my reasons so that at least the Circuit, whatever they do with it, can say, well, this is what he did, and free to criticize as they see fit, or modify it, or reverse it, or affirm it.

MR. PRICE: I agree.

THE COURT: Let me ask you one question.

MR. PRICE: (Inaudible.)

THE COURT: Would you like to respond to Mr. Veeder's position with respect to the alleged saturated lands as being included as irrigable acres?

MR. PRICE: Yes, I made a notation of that and forgot to speak to it, and I thought it was important that Mr. Veeder said that even though he maybe wasn't enamored with our witness, Mr. Blomdahl, but that he did put stock in the fact that you don't irrigate land that is under water, that is waterlogged, and I think that is important, because Mr. Blomdahl was a representative of the agency which performed the study as to the number of irrigable acres on Walton's land, and if you accept Mr. Blomdahl's testimony, as Mr. Veeder does, that means that the Soil Conservation Service does not classify water-logged lands as irrigable lands. As you will note in Exhibit WWWW, that in fact they segregated out of the

total 360 acres 175 acres which were not appropriate for irrigation, and it was within those lands, we assume, would have been alkaline lands, waterlogged lands, soil types that were not appropriate, whatever; they did find 185 acres that were suitable. If the Waltons were to claim lands that were subirrigated on their property, we would be claiming a total of 180, not 175. So I think the record is very well documented that even though there are some lands that because they are waterlogged or not appropriate, those are not included within our claim of irrigable acreage, and that's substantiated by the Bureau of Indian Affairs study also that found 170 acres of land were irrigable, and I'm assuming that the Bureau of Indian Affairs, like the Soil Conservation study, does not include lands that have standing water or waterlogged as irrigable acreage.

THE COURT: All right, thank you, Mr. Price.

MR. PRICE: Thank you.

THE COURT: Mr. Sweeney, anything further from the government?

MR. SWEENEY: No, Your Honor.

THE COURT: Mr. Veeder, any comments you wish to make?

MR. VEEDER: I have this, Your Honor, I make it in the form of a motion.

THE COURT: All right.

MR. VEEDER: I move this Court, because it's being misled, to have an on-the-ground inspection and investigation of the lands claimed to be irrigable and irrigated by the Defendant Waltons. I petition this Court to go with us up on the Walton property and eyewitness it yourself in regard to the saturated character of the land that is called irrigable.

THE COURT: You think that would be safe with you people together out there?

MR. VEEDER: What?

THE COURT: I was kidding.

MR. VEEDER: I didn't hear.

THE COURT: I say you think I would be safe with you people out there?

MR. VEEDER: You certainly would, I'd see you were taken care of. What I'm saying is that justice cries out, now, after the last statement by Counsel, that you go on the land, and we will take you, personally, on wet land that is called irrigable, and justice cries out that you look at it yourself, and I will, I will come across the country any way, any moment you say you can go up there. I petition this Court to do that. I want you to see it.

THE COURT: What do you gentlemen say to that?

MR. SWEENEY: I have no objection, the government, as everyone else has seen the property, I guess, I think it might be helpful for you to look at it.

THE COURT: What do you think, Mr. Price?

MR. PRICE: It might depend on the time of year, we have no objection, in terms --

MR. VEEDER: Why not --

MR. PRICE: Mr. Veeder --

MR. VEEDER: -- now?

MR. PRICE: -- I don't have to respond to you.

THE COURT: Okay, Mr. Lenhart can only write down what one of you say at a time. Go ahead.

MR. PRICE: I think the, I don't know how much help it will be to the Court in terms of the state of the record upon which we have to go up on appeal, Your Honor. The testimony of Mr. Blomdahl and Mr. Bennett as to the acreages involved were based on on-site inspection by their personnel, the Bureau of Indian Affairs study was done by on-site inspection of their personnel. Those are the facts we have to rely upon in this regard, and I don't know that your looking at what lands or what lands they classify or didn't classify will assist this Court in supplementing this record.

THE COURT: Well, normally going to look at the property or whatever is involved in litigation is

normally done for the purpose of being better able to understand the testimony of the witnesses, and get oriented, so that the trial flows smoothly, but I will give that some thought.

MR. VEEDER: Let me put this one more thought in. They're confusing "irrigable lands," say, with lands that need to have water rights adjudicated on it, and if you will go out, I will assure Your Honor you will see land that is waterlogged today that they're, for which they're claiming four acre feet of water, and I think you should do it, I think justice is the thing that is to be accomplished there.

THE COURT: Well, that's the bottom line, I think. The question we always have, people have different ideas of what justice is. Well, I will give that some thought, Mr. Veeder, and if it's done, it will be done at a time --

MR. VEEDER: It's not too late in the year. In fact, it's very much to their advantage at this time.

THE COURT: I have to look at my own time, it gets a little tight around the edges sometimes. Let's see, what would it take to drive up there and look at it.

MR. PRICE: Takes three hours, three hours to get to Omak, Your Honor.

MR. VEEDER: You can get up there and back in a day.

MR. PRICE: Your Honor, what we, while you're considering that, we've got concerns about the Tribe, or Mr. Veeder or their experts being along to point out their views on it. If Your Honor wants to look at it, we have no objection to you going on there, with whomever you want. If you want to select a master, or somebody, that is perfectly acceptable, but --

THE COURT: Well, the previous water master probably has a pretty good grasp on it.

MR. PRICE: Well, the previous water master was threatened off the land by Mr. Veeder.

MR. VEEDER: Oh, that is a consummate lie, and he should be ashamed that he would stand here like a damn liar.

THE COURT: Uh, uh, let's not get into that.

MR. VEEDER: That is a consummate damned lie.

MR. PRICE: I have an affidavit, Mr. Veeder.

THE COURT: All right, gentlemen, I guess that's the argument. I don't particularly relish the task of having to try to resolve this problem, but I guess that is what we're here for, so I will do it, and I will let you know whether I think there is something to be gained by going up to the property, and if so, how it would be

done. If you want an opportunity, Mr. Veeder, to respond to the comments of the State, you can do that. I would keep it brief. I don't know that there is anything significantly new -- largely the argument that Mr. Price has made.

MR. VEEDER: I will have Len run it off as fast as he can, and I will --

THE COURT: All right.

MR. SWEENEY: Does that apply to the government, too?

THE COURT: If you like.

I don't know if it's going to mean a great deal, but if it will make you feel better, at least we can do that. Okay?

THE BAILIFF: Please rise; --

THE COURT: Thank you.

MR. PRICE: Thank you, Your Honor.

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C E R T I F I C A T E

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

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

Wayne C. Lenhart

WAYNE C. LENHART
Official Court Reporter