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Response of the United States to the defendants' and states' final arguments

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiffs, v. BOYD WALTON, JR., et ux., et al., Defendants, STATE OF WASHINGTON, Defendant/Intervenor.

CIVIL NO. 3421

RESPONSE OF THE UNITED STATES TO THE DEFENDANTS' AND STATES' FINAL ARGUMENTS

UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM BOYD WALTON, et ux., et al., and THE STATE OF WASHINGTON, Defendants.

CIVIL NO. 3831

FILED IN THE
U. S. DISTRICT COURT
Eastern District of Washington
OCT 26 1982
J. R. FALLQUIST, Clerk
Deputy

The United States of America, plaintiff in Civil No. 3831, submits the following memorandum to set forth its position upon certain issues raised in final argument before this court on October 1, 1982.

I

RESERVED RIGHTS FOR FISHING PURPOSES, AS RIGHTS OWNED BENEFICIALLY BY A TRIBE AS AN ENTITY, ARE NOT SUBJECT TO A PRO RATA DIVISION AMONG INDIVIDUALS UPON ALLOTMENT OF THE RESERVATION.

Counsel for the defendant Walton appears to suggest that individual allottees, upon allotment, acquire a proportionate share of water reserved for fishing purposes. Excerpt of Final Argument, October 1, 1982, 19-21 (hereinafter "Final Argument"). This proposition is contrary to law. Fishing rights are tribally-owned property rights; they are not held by individuals. This court specifically so held in United States v. Washington, 520 F.2d 676, 688, 691 (9th Cir. 1975). See also Washington v. Fishing Vessel

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Ass'n., 443 U.S. 658 (1979); Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974); Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), cert. denied, 369 U.S. 818 (1962).

The tribal fishing right does not depend on land ownership. Rather, it may be retained on lands ceded by a tribe, see, e.g., Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); Kennedy v. Becker, 24 U.S. 556 (1916); United States v. Winans, 198 U.S. 371 (1905); or on lands subject to allotment, see, e.g., United States v. Washington, supra; Washington v. Fishing Vessel Ass'n., supra; Whitefoot v. United States, supra.

Collective tribal ownership of fishing rights mandates similar tribal ownership of all water rights necessary to effectuate the fishing rights. United States v. Anderson, Civil No. 3643 (E.D. Wash. July 23, 1979); see also United States v. Washington, Phase II, 506 F.Supp. 187 (W.D. Wash. 1980), appeal pending.

As a tribal right not contingent on land ownership, the right to water for fishing purposes did not pass to individual tribal members along with land title. Tribal membership, not land ownership, entitles an individual to share in the tribal fishing right and its related water right. It follows that individual allottees who are tribal members retain full rights to exercise the tribe's fishing rights, as do tribal members residing off the reservation. It also follows that Walton's claim to a proportionate share of the water reserved to the Tribe for fishing purposes, based on his status as successor-in-interest to an allottee, is without merit.

II

THE CORRECT PRIORITY DATE FOR THE TRIBES' FISHING WATER RIGHT IS TIME IMMEMORIAL

A bedrock principle of Indian law is that a tribe retains all those rights held aboriginally that are not expressly removed

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by the federal government or granted away through treaty. See, e.g., United States v. Winans, 198 U.S. 371, 381 (1905); see also United States v. Wheeler, 435 U.S. 313 (1978). Treaties or agreements in large part served to confirm the Indians' preexisting rights. See Winters v. United States, 207 U.S. 564, 576 (1908).

This axiom creates a distinction between those aboriginal rights a tribe has reserved to itself, and those rights reserved by the federal government -- motivated by whatever purposes of its own -- for the Tribe. See generally Felix Cohen's Handbook of Indian Law, 590-591 (1982). Federally reserved water rights have as their priority date the date of the treaty, executive order or other federal action reserving the right. Aboriginal rights, in contrast, have a priority date of time immemorial. United States v. Adair, 478 F. Supp. 336, 350 (D. Or. 1979), appeal pending (hereinafter "Adair"). See also Menominee Tribe v. United States, 391 U.S. 404, 406 (1968).

The Ninth Circuit opinion in Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) (hereinafter "Walton"), did not directly address the question of the priority date for the Tribes' fishery water rights. Rather, the opinion examined whether such a right existed, and found in the affirmative. Id. at 48. It is therefore important that the district court, in determining the amount of water to which the Tribes are entitled for their No Name Creek fishery, also clarify that the fishery water right, as an aboriginal right, has a priority date of time immemorial.

This priority date is dictated by recent case law. United States v. Adair, 478 F. Supp. 336 (D. Or. 1979), appeal pending, decreed an immemorial priority date for water used for fishing and hunting purposes by the Klamath Tribe. The Tribe had aboriginally hunted and fished within the borders of the area set aside in 1864 as the Klamath Indian Reservation. In discussing the Tribe's water rights, the court reasoned as follows:

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> The principal purpose of the Treaty was to provide an area for the exclusive occupation of the Indians so that they could continue to be self-sufficient. The Treaty provided two ways for the Indians to be self-sufficient.
>
> First, it ensured that the Indians could continue their traditional way of life which included hunting, fishing, trapping, and gathering. Article I of the Treaty secured to the Indians their right to pursue their traditional way of life.
>
> Second, it encouraged the Indians to adopt agriculture. . . .
>
> When, by treaty, the government withdraws land from the public domain and reserves it for a federal purpose, the government impliedly reserves unappropriated water to the extent needed to fulfill the purposes of the reservation. (Citations omitted). Here, the government reserved land from the public domain and created the Klamath Reservation to preserve Indian hunting and fishing rights and to encourage agriculture.

Id. at 345 (emphasis added). The court then held that the aboriginal origin of the hunting and fishing right the Indians reserved to themselves in the treaty, dictated a priority date of time immemorial. Id. at 350.

It should be emphasized that the basis for the immemorial priority date for water necessary to preserve hunting and fishing rights for the Klamath Tribe is the fact that these were "rights which they had exercised for more than a thousand years." Id. at 350. Accordingly, the proper focus of judicial inquiry is on the historical uses of water of the tribe[s] involved in a water adjudication, as well as the specific purposes for which the reservation was created. With these principles in hand, we turn to the Colville Tribes.

Like the Klamath Tribe in Adair, the Colville Tribes aboriginally occupied the lands eventually set aside as their reservation. 4 Ind. Cl. Comm. at 187-189 and 196-199 (1956). Also as in Adair, the Colville Tribes have from time immemorial

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hunted and fished within their reservation lands. Long prior to the establishment of the Colville Reservation, these bands relied on salmon and trout fishing along the Columbia River and its tributaries as a means of subsistence. 4 Ind. Cl. Comm. at 157-58. The Ninth Circuit Walton opinion observes that the Colvilles "traditionally fished for both salmon and trout" and that "[l]ike other Pacific Northwest Indians, fishing was of economic and religious importance to them." Walton, 647 F.2d at 48. Finally, and again like the Adair court, the Ninth Circuit also held that "preservation of the Tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation." Id. at 48.

Under the Court of Appeals' analysis, the setting aside of the Colville Reservation is properly viewed as, in part, a formal recognition by the federal government of the Tribes' traditional aboriginal fishing practices. Through the creation of the reservation, the Tribes guaranteed that such aboriginal fishing practices might continue along the streams appurtenant to the reservation. See 4 Ind. Cl. Comm. at 190. This analysis, together with the principles set forth in Adair,[1/] suggests that the reserved rights doctrine here confirms the Tribes' immemorial use of water, rather than creates a new, inferior priority to water which dates from the establishment of the reservation.[2/] Thus,

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1/ The only difference between Adair and Walton is that the former case involved a reservation created by treaty, whereas the Colville Reservation was established by Executive Order. This distinction is insignificant, however, because the Winters doctrine applies to both Executive Order and treaty reservations. Arizona v. California, 373 U.S. 546, 599-600 (1963).

2/ This application of the Winters doctrine was implicit in United States v. Gila Valley Irrigation District, Globe Equity No. 59 (D. Ariz. 1935), which involved rights to water for agricultural purposes claimed by the United States on behalf of the Pima-Maricopa Indian Tribes of the Gila River Reservation. The reservation had been created by statutes and Executive orders out of the aboriginal homeland of the Tribes in part to enable the Tribes to preserve their agricultural way of life. See Gila River Pima-Maricopa Indian Community, et al. v. United States, ______ Ct. Cl. ______, No. 236-C (Decided June 30, 1982), Slip op. at 14-15. By stipulated decree, the reservation was adjudicated a priority date of time immemorial for agricultural water use.

the Confederated Colville Tribes are entitled to an immemorial priority to water needed for maintenance of the No Name Creek fishery.

III

INCHOATE RESERVED WATER RIGHTS CAN ONLY BE PERFECTED BY THE ORIGINAL NON-INDIAN PURCHASER OF AN INDIAN ALLOTMENT, THROUGH THE DILIGENT APPLICATION OF WATER WITHIN A REASONABLE TIME AFTER THE PURCHASE

The Hearing Memorandum of the United States of America, filed in this proceeding on May 5, 1982 (hereinafter "United States Memorandum"), contains a detailed analysis of the proper standards for determining due diligence in the perfection of reserved water rights by the original non-Indian purchaser of an Indian allotment. Its most important points can be briefly recapitulated as follows.

Once title to an Indian allotment has passed to a non-Indian, the non-Indian, "under no competitive disability vis-a-vis other water users," Walton at 51, becomes subject to general state law principles in regard to his or her perfection of the right to a water appropriation. United States Hearing Memorandum, 14-15.

State law requires that in making an appropriation, an intended claim must be pursued with "reasonable diligence." One might summarize the meaning of "due diligence" as: the standard used to measure the time required to implement an intention or plan to appropriate water. The measurement of "reasonable" or "due diligence" is relative, reflecting the scale and complexity of a proposed project, any natural or climatic difficulties, and the state of irrigation technology at the time of the appropriation. United States Hearing Memorandum, 16, 19-20, 22.

While the calculus of "due diligence," then, is a complex one, state laws have codified these principles into specific time limits for completion of an appropriation -- most

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commonly, three to five years, but occasionally as long as twelve years -- which serve to frame our general expectations as to due diligence.[3/] United States Hearing Memorandum, 17.

These statutory time limits, like the more general concept of a "reasonable period of time," may be subject to extension, due to acts of God, unforeseen natural difficulties, and the like. They are <u>not</u> postponed, however, by circumstances purely personal to the appropriator, such as ill health or financial difficulties. United States Hearing Memorandum, 18, 20, 22, 23.

Certain statements regarding due diligence made by counsel for the defendant and for the State of Washington at the Final Argument (October 1, 1982), require that three specific points be clarified in greater detail.

(a) Only the <u>initial</u> successor-in-interest to an Indian allotment can perfect reserved rights, through due diligence.

It is important to make clear that only the original non-Indian purchaser of an Indian allotment may perfect any inchoate reserved rights to water. The Ninth Circuit's entire discussion of rights of "the non-Indian purchaser" is in the context of the initial passage of title from Indian to non-Indian hands; any reserved right thus acquired must be "maintained by continued use" or "it is lost." <u>Walton</u> at 51. Any other principle would magnify uncertainty in western water law and "withhold the application of the water to a beneficial use, which is against the policy recognized in the development of arid lands." <u>United States</u> v. <u>Hibner</u>, 27 F.2d 909 (D. Idaho 1928). <u>See</u> <u>also</u> <u>United States</u> v. <u>Adair</u>, 478 F. Supp. 336, 349 (D. Or. 1979), <u>appeal pending</u> ("once land passes out of Indian ownership, all subsequent conveyances are subject to the doctrine of prior appropriation").

3/ Statutes also specify a maximum period by which work must begin, usually within one or two years after a permit is issued. United States Hearing Memorandum, 17.

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The Whams were the original non-Indian purchasers of the Indian allotments that are the subject of this litigation. Hence, only the Whams' water appropriation is at issue. Any of the defendants' submissions regarding subsequent sucessors-in-interest are not pertinent in establishing the amount of water with a reservation priority date.[4/]

(b) Intent is a vital element of appropriation, and the boundary of "due diligence."

Counsel for the defendant is correct in calling attention (Final Argument, 22), to the principle that in water law "[t]he doctrine of common sense applies. In making the appropriation intention is an important factor." In Re Alpowa Creek, 129 Wash. 9, 15, 224 Pac. 29 (1924). Indeed, the concept of "reasonable diligence" is incoherent without the element of intent as the framework. The two concepts must be combined in order to define appropriation. See In Re Alpowa Creek, supra, at 13 ("[a]n appropriation of water consists of an intention to appropriate followed by a reasonable diligence in applying the water to a beneficial use"); Offield v. Ish, 21 Wash. 277, 57 Pac. 809 (1899) ("[a]ppropriation 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"); see also United States v. Big Bend Transit Co., 42 F. Supp. 459, 469 (E.D. Wash. 1941), citing In Re Alpowa Creek, supra, at 15.

State law commonly measures appropriative intent by the submission of a plan to the state with a permit application, or by the posting of an appropriative notice plan. United States

4/ The water usage of subsequent owners is relevant, however, in that a reserved right perfected by the original purchaser may be lost through non-use by a subsequent owner. Walton at 51.

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Hearing Memorandum, 18-20. The intented plan must be concrete and workable, not "remote, speculative and fanciful." Thorp v. McBride, 75 Wash. 466, 135 Pac. 228 (1913).

These proceedings to date are devoid of any evidence of the Whams' intent to appropriate a greater amount of water than they actually used. Yet it is indisputable that only with evidence of such intent, supported by a valid justification for their failure to appropriate, could the concept of "due diligence" have resulted in a higher measure of water for the Whams than that actually appropriated. Such intent might have been established by a water diversion notice, a known irrigation plan or testimony of neighbors or family members. No such evidence exists in the record. Because the defendants cannot show that the Whams met this threshold requirement of establishing an intention to appropriate additional water, the Waltons cannot now be heard to invoke the factors mitigating the "due diligence" requirement.

(c) Factors such as world wars, the Great Depression, prolonged drought or excessive precipitation do not significantly affect the standard of due diligence applied to a small private appropriation.

The absence of any evidence of the Whams' intent to appropriate additional water makes it unnecessary to consider the legitimacy of any "inhibiting" factors. Yet even were we to assume some frustrated intent to appropriate, it is plain that no legally cognizable "inhibiting" factors were present. Hence, the Whams cannot be said to have applied "due diligence" to the perfection of any additional water rights they may have desired.

Counsel for the State of Washington has depicted the period from about 1925 to 1950 as an uninterrupted series of catastrophes which excuse any failure successfully to appropriate water. Allegedly they include an Agricultural Depression, the

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Great Depression, drought conditions, World War II, and then a period of excessive rain. Final Argument, 12-14. This logic ends in the proposition that no one in the west for a quarter of a century could be held to have lost a water appropriation through lack of due diligence - a notion that is plainly contradicted by the case law. See, e.g., Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 Pac. 41, 45 (1926); State v. Icicle Irrigation District, 159 Wash. 524, 294 Pac. 245 (1930); Maricopa County v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931), modified and reh. denied, 39 Ariz. 367, 7 P.2d 254 (1932); Morse v. Gold Beach Water Light & Power Co., 160 Or. 301, 84 P.2d 113 (1938).

Washington state law contains no room for "justifications" of delay as generalized and vague as those enumerated above. Specific factors which do affect the reasonable diligence standard include concrete matters "incidental to the enterprise itself," Grant Realty Co. v. Ham, Yearsly, & Ryrie, 96 Wash. 616, 165 Pac. 495 (1917), for example, time spent in litigation regarding one's title to the land or water at issue, id.; federal government delays regarding a water project application, United States v. Big Ben Transit Co., 42 F. Supp. 459 (E.D. Wash. 1941); "natural" constraints, In Re Alpowa Creek, supra; or the length of season in which construction is possible, Pleasant Valley Irrigation & Power Co. v. Okanogan Power & Irrigation Co., 98 Wash. 401, 167 Pac. 1122 (1917).

These factors cannot absolve a complete delay of so long a time span as 25 years for a private, relatively small appropriation. In a case in which a Washington court allowed a comparable period for perfecting an appropriation, it was only upon a strong showing of initial appropriative intent coupled with continuous, steady progress over a thirty-year period. In Re Alpowa Creek, supra.

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The laws of other western states are in general accord with those of Washington. It should be noted that a rare court has mentioned factors such as labor strikes, wars, or economic depression as factors effecting due diligence. Even these cases, however, only concern projects of a scale so massive that their progress is genuinely contingent on broad social and economic trends. See Colorado River Water Conservation District v. Twin Lakes Reservoir & Canal Co., 181 Colo. 53, 506 P.2d 1226 (1973); see also Clark, 5 Waters & Water Rights § 409.3 n. 8.

In sum, only the activities to appropriate water by the initial non-Indian purchasers, the Whams, may be considered in the perfection of reserved rights. The action of the defendant Waltons, remote successors-in-interest, are irrelevant in this regard. Because there is no evidence that the Whams intended to appropriate water in addition to that which they put to use, only the amount they actually used could have enjoyed a reservation priority date. Standards mitigating "due diligence" are irrelevant to the Whams or their successors to the lands involved. Even if one assumed an intention to appropriate additional water, however, the circumstances do not justify any failure or delay on their part in making the appropriation.

Respectfully submitted,

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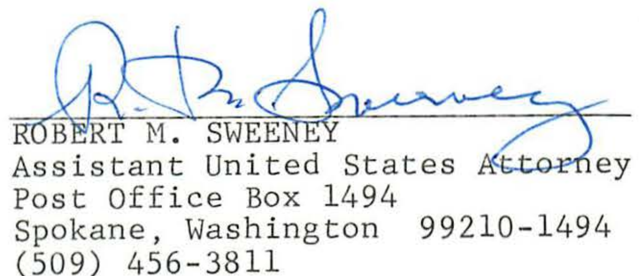

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