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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE SURFACE WATERS OF THE YAKIMA RIVER DRAINAGE BASIN, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 90.03, REVISED CODE OF WASHINGTON, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Plaintiff, vs. JAMES J. ACQUAVELLA, et al., Defendants.	NO. 77-2-0148-5 MEMORANDUM OPINION RE: OFF-RESERVATION INDIAN LAND

The United States (U.S.), on behalf of the Yakima Indian Nation, has filed water rights claims herein for eight parcels of land that are outside of the Yakima Indian Reservation. These parcels have never been part of the Reservation as they are located in the areas ceded to the U.S. by the Yakima Nation in the Treaty of 1855.

Three of these parcels have been specifically identified to date. They are parcel HA 355, located in Subbasin 9; parcel SS-18811, located in Subbasin 10; and parcel E-604, located in Subbasin 12. The other five parcels are located in the Wide Hollow Creek area west of Yakima, presumably in Subbasin 22, (Transcript, Evidentiary Hearing, Subbasin 10, Oct. 16, 1991, p. 24). The evidentiary hearing in Subbasin 9 had

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been completed by the Referee prior to the Court ordering that these parcels should be considered in the subbasin pathways rather than the Federal Indian pathway herein. Thus, the evidence concerning that claim has not been introduced but it appears that such evidence is contained in evidentiary documents pertaining to claims SS-18811 and E-604. (Transcript, p. 3-4).

The allotment SS-18811 in Subbasin 10, is held in trust by the U.S. in the name of Billy Peters (or Haup), or his widow and heirs, individuals, with an issuance date of May 25, 1950. The "Homestead Certificate" was issued pursuant to the Indian Homestead Act of July 4, 1884, now 43 U.S.C. § 190, for 160 acres, of which the U.S. claims 135.3 acres are "practicably irrigable." It is still held in trust by the U.S.

Similarly, Allotment E-604, in Subbasin 12, was issued by a "Homestead Certificate" under the Indian Homestead Act, supra, to Smith George, an individual Indian, for 160 acres, which was later reduced to 80 acres, and is still held in trust by the U.S. The "Homestead Certificate", commonly called a "Trust Patent", was issued August 16, 1895. Of the 80 acres presently still held in trust by the U.S., it is claimed that 25.1 acres thereof are "practicably irrigable". It appears that neither Allotment SS-19911 or Allotment E-604 have been irrigated to date.

At the evidentiary hearing on Allotment SS-18811, the U.S. indicated that the priority date for that allotment would be as of the date of the issuance of the trust patent, i.e., May 25, 1950. However,

in it's Post Trial Brief, the U.S. is requesting a priority date of June 9, 1855, the date of the Treaty of 1855. Similarly, in it's Reply to Exceptions re Allotment E-604, the U.S. is claiming the Treaty date, rather than the trust patent issuance date of August 16, 1895.

The Report of Referee Re Subbasin 10, which would include Allotment SS-18811, has not yet been received. However, the U.S. filed a Post Trial Brief in Support of Reserve Water Right for Off-Reservation Public Domain Allotment No. SS-18811, to which some of the Major Claimants have filed briefs in response thereto. In addition, the Supplemental Report of Referee Re Subbasin 12 has recommended approval of the U.S. claim for a water right for 25.1 "practicably irrigable" acres of Allotment E-604 with a priority date of June 9, 1855. To this recommendation, several of the Major Claimants (M.C.) have filed exceptions.

Three issues are raised concerning these allotments: (1) Are these off-reservation lands set aside in trust for individual Indian "homestead" lands or "reserved" lands; (2) Does the "practically irrigable acreage" (P.I.A.) doctrine apply to these allotments; and (3) What is the priority date of any water right that might apply to these lands?

STATUS OF THE LAND

It is the contention of the U.S. that these off-reservation allotments from the public domain under the Indian Homestead Act of 1884 are "reserved" lands and therefore an implied reservation of a water right applies. The M.C. maintain that the allotments are no different

than any other allotments under the homestead laws and therefore, there is no implied reservation of a water right. Inasmuch as we are dealing with federal doctrines, we must apply federal laws. There appear to be no cases directly on point or "on all fours" as to this issue.

The cornerstone of the U.S. position lies with the "Winters Doctrine". In Winters v. U.S., 207 U.S. 564 (1908), the Supreme Court held that when the U.S. creates an Indian Reservation, it also impliedly includes sufficient unappropriated waters to accomplish the purpose of the reservation, to-wit, to make the reservation habitable and capable of providing sustenance to the residents thereon. The "Doctrine" was strongly re-affirmed in Arizona v. California, 373 U.S. 546 (1963). Both of these cases dealt with large areas of land reserved for specific Indian tribes or nations.

From this premise, the U.S. postulates that the allotment of land from the public domain to an individual Indian under the Indian Homestead Act of 1844 constitutes a "reservation". The Indian Homestead Act, 43 U.S.C. § 190, reads as follows:

> "Such Indians as may have been located on public lands prior to July 4, 1884, or as may, under the direction of the Secretary of the Interior, or otherwise, thereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States. No fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of legal effect, and declare that the United States does and will hold the land thus entered for a period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State where such land is located, and that at the expiration of said period the United States will convey the

same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

In United States v. Jackson, 280 U.S. 183, the 9th Circuit Court of Appeals certified the following question to the U.S. Supreme Court: "Could the trust period and the restriction of alienation in an Indian homestead patent issued under the Act of July 4, 1884 -- be extended by executive orders?" The Supreme Court answered in the affirmative. That extension of the trust status and alienation restriction has occurred herein. As noted, the trust patent for allotment E-604 was issued August 16, 1895 and the trust patent for Allotment SS-18811 was issued May 25, 1950 and both remain in effect. No patents in fee have been issued and the allotments are still held in trust by the U.S.

In construing the Act of July 4, 1884, U.S. v. Jackson, supra, 74 L.Ed. 361, 364, the Court pointed out that:

> "We have had frequent occasion to point out the duty of the United States to protect its wards, the Indians, and the consequent broad extent of its power over them and their affairs. (Cites omitted). There is nothing in the Act of 1884 which indicates any disposition on the part of the United States to dispossess itself of its power and duties as guardian, or so to change the status of its wards as to leave them no longer subject to manifestations of its protection. On the contrary the provisions of the act leave no doubt that it is an act done by the United States in its capacity as guardian, and that the rights conferred by the act upon the Indians were so conferred principally because they were wards of the government. This is shown by the provisions exempting Indians from the payment of the usual fees, and by the provision respecting the form of the trust patent, and the restrictions on alienation."

Thus, we see that the lands withdrawn from the public domain, pursuant to the Act of 1884, are lands held in trust by the United

States for the specific protection and benefit of its Indian wards.

In Cappaert v. United States, 48 L.Ed.2d 523, 534, the Court stated:

> "This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water than unappropriated to the extent needed to accomplish the purpose of the reservation. ..... The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams." (Emphasis added).

Similarly, in United States v. City and County of Denver, 656 P.2d 1, we find:

> "The lands owned by the federal government are generally classified as either "public domain" or "reserved" lands. The public domain includes land open to settlement, public sale, or other disposition under the federal public land laws, and which are not exclusively dedicated to any specific governmental or public purpose. .....Reserved lands are those that have been expressly withdrawn from the public domain by statute, executive order or treaty, and are dedicated to a specific federal purpose." (Emphasis added).

In view of the fact that these withdrawals of land from the public domain by the U.S. are for the specific benefit and protection of its Indian wards and are held in trust for them, the lands withdrawn are clearly "reserved" lands.

PRACTICALLY IRRIGABLE ACREAGE

The purpose of the lands reserved under the Indian Homestead Act of 1884 was to provide for and assist the Indian wards of the government to become more independent and self-sustaining. To do this, it would be necessary for them to have the essential elements of a productive life. In the Yakima River Basin, the most essential element is water.

In Arizona v. California, 10 L.Ed. 2d 542, 578, it is stated:

> "It can be said without overstatement that when the Indians were put on these reservations they were not considered to be in the most desirable areas of the nation .... most of the lands were of the desert kind .... hot, scorching sands ... and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised. ....We follow it (Winters v. United States, supra) now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian reservations were created. ...We also agree that enough water was reserved to irrigate all of the practically irrigable acreage on the reservations .... The only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."

Thus it is herein. The evidence shows the lands are principally sand and sagebrush - it is only through the application of water that such lands can become sufficiently productive to sustain life. Therefore, the reserved water right is for all of the "practically irrigable acreage" of each allotment.

PRIORITY DATE

The U.S. stated at the evidentiary hearings that the priority dates for each allotment would be as of the date the allotment was withdrawn from the public domain. In the Post-Trial brief, however, the U.S. maintained the priority date should be that of the date of the creation of the Yakima Indian Reservation by the Treaty of 1855.

The short answer to this issue is found in both Cappaert v. United States, supra, and Arizona v. California, supra. In each case, the U.S. Supreme Court held that the U.S. reserved the water rights effective upon withdrawal and the right vests as of the date of the reservation of the lands reserved. Therefore, the priority date for allotment E-604

for theirrigation of 25.1 practically irrigable acres is August 16, 1895. The priority date for allotment SS-18811 for the irrigation of 135.3 practically irrigable acres is May 25, 1950.

The United States will prepare an appropriate order in accordance herewith.

Dated this 12th day of November, 1992

Walter Stauffacher
Judge