

USET SPF Action Alert: Culverts Case - Tribal Supreme Court Project Needs Your Assistance September 13, 2017

Dear USET SPF Board of Directors and DC Tribal Reps,

Please see below for a request from the Tribal Supreme Court Project regarding an upcoming case that concerns the state of Washington's attempt to override Tribal treaty rights. First, Washington argues that it can destroy tribal rights directly, even if not allowed to do so indirectly. While no fewer than seven Supreme Court decisions culminated in the holding in Washington v. Passenger Fishing Vessel that the treaty right of taking fish secures to the western Washington Tribes a right to take up to fifty percent of the harvestable catch in the treaty area, Washington has taken the position in this litigation that it is entirely free to destroy the fisheries that are the subject of the treaty right. This radical view of State power to eradicate Tribal rights is of great concern to Tribes everywhere. Second, Washington likewise argues for a radical view of the Supreme Court's holding in the City of Sherrill case, such that all Tribal rights are subject to defeasance by the mere passage of time.

The state of Idaho is leading an amicus brief supporting Washington's argument. **Tribal Nations are being urged to contact their state attorneys general and urge them to avoid signing onto the brief.**

For more information, please see the below communication from the Native American Rights Fund.

Thank you,

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The Tribal Supreme Court Project needs your help as we work to preserve an important Tribal victory.

On August 18, the State of Washington filed a petition for writ of certiorari in the culverts subproceeding of *United States v. Washington* (the Petition and Appendix with decisions are attached). Washington challenges the Ninth Circuit's holding that the treaty right of taking fish secured to the western Washington tribes imposes on the State a duty to make feasible repairs to its road culverts to allow for the safe passage of salmon back to their spawning grounds. 853 F.3d 946 (9th Cir. 2017).

The case is significant not only to Tribes with treaty fishing and hunting rights, but to all Tribes for at least two principal reasons: First, Washington argues that it can destroy tribal rights directly, even if not allowed to do so indirectly. While no fewer than seven Supreme Court decisions culminated in the holding in *Washington v. Passenger Fishing Vessel* that the treaty right of taking fish secures to the western Washington Tribes a right to take up to fifty percent of the harvestable catch in the treaty area, Washington has taken the position in this litigation that it is entirely free to destroy the fisheries that are the subject of the treaty right. This radical view of State power to eradicate Tribal rights is of great concern to Tribes everywhere. Second, Washington likewise argues for a radical view of the Supreme Court's holding in the *City of Sherrill* case, such that all Tribal rights are subject to defeasance by the mere passage of time.

The State of Idaho is taking the lead on an amicus brief in support of Washington's cert petition, and we need your help in discouraging states from joining Idaho's amicus brief. That brief is due on September 20th, and Idaho is asking States to sign on to it by September 14th. The brief promises to be as threatening to core Tribal rights as is Washington's litigation position, and Idaho is hoping to get at least twenty States to join it. If you have good connections with any state's Attorney General, Solicitor General, or any relevant member of their staff, it would be a tremendous help if you could urge them not to sign the Idaho brief. Depending on the particulars of the State, potential arguments for not joining Idaho's amicus brief could include (and this list is of course not meant to be exhaustive):

- The State of Washington's view of its obligations to Tribes is decidedly destructive and hostile and should not be endorsed. Washington's position in the culverts cases is predicated, as the Ninth Circuit pointedly noted, on the view that it enjoys the right to destroy the fisheries that are the subject of the Tribes' treaty right. Pet. App. 87a-88a; Pet. App. 8a ("The State has fought the proceeding tooth and nail. The State contended, and continues to contend, that it can block every salmon-bearing stream into Puget Sound without violating the Treaties.").

- Washington and Idaho's position shows a deep-seated disrespect for the permanence of Tribal rights. Idaho will emphasize in its brief, as has Washington throughout, the view that the Supreme Court's holding in the *City of Sherrill* case applies broadly to Tribal cases, such that the vindication of Tribal rights can be defeated by the mere passage of time. But, as Judge Fletcher well explained for the Ninth Circuit, *City of Sherrill* has to do with a far more limited set of circumstances. Pet. App. 12a-13a.. This position is particularly misplaced here because “[f]or more than 100 years, the State of Washington deliberately and systematically prevented the Tribes from engaging in the off-reservation fishing promised under the Treaties. The State eventually came to employ surveillance planes, high powered boats, tear gas, billy clubs and guns against tribal members engaged in off-reservation fishing.” Pet. App. 7a.
- The Ninth Circuit's decision does not open the floodgates of litigation. While Washington and Idaho are claiming that untold numbers of suits will follow unless the Ninth Circuit's decision is reversed, Judge Fletcher again carefully explained the exaggerated nature of these claims. Pet. App. 11a-12a. There exists no need to strain the relations between the State and the Tribes based on the unsubstantiated scare tactics of other states.
- The State of Washington exaggerates how much complying with the Ninth Circuit's decision will cost. Washington's arguments in favor of a cert grant rely heavily on its claim that fixing the culverts that are the subject of the dispute will cost it \$1.88 billion. The Ninth Circuit and the district court both debunked this claim, carefully explaining how Washington's cost estimates are grossly inflated. Pet. App. 118a-120a. Washington's continued assertion of its exaggerated cost figures, without any regard for the courts' discussion of the actual facts, shows a tremendous disrespect not only for the tribes but for the judiciary, and we hope and trust that the State will not endorse this approach to litigation involving Tribal rights.
- This case does not pit Tribal interests against non-Indian interests. Non-Indian fishermen filed a brief in the Ninth Circuit supporting the Tribes and support the Circuit's decision, which would have the effect of increasing the availability of a precious resource shared by Tribal and non-Indian fishermen alike.

Thank you for any assistance that you can provide. Please feel free to direct any questions or updates to Joel West Williams at williams@narf.org.

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