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Seattle Human Rights Commission Opposes Washington State's Petition for Certiorari on Ninth Circuit Culverts Opinion, and Seattle Times Endorsement of that Petition

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The Seattle Human Rights Commission writes in response to the Seattle Times recent editorial “The Supreme Court must clarify culvert ruling,” and seeks to correct inaccuracies regarding tribal treaty rights and the State’s obligation to not impair them. Washington’s tribal nations have lived and fished throughout our State since time immemorial, and their right to do so is protected by treaty. The Ninth Circuit Court of Appeals, in an exhaustive and well researched opinion, recognized that this right requires the removal of culverts that block fish passage. The State’s decision to seek Supreme Court review of that decision reflects revisionist and troubling effort to weaken treaty rights.

The Western Washington treaties, signed in the mid 1850s, protect the “right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the Territory.” In exchange for this protection, the tribes ceded vast territories upon which most of us reside. Subsequent federal courts have interpreted this protected right to assure tribes the right to take enough fish to earn a “moderate living” not exceeding 50% of the state fishery. And the courts have further explained that this right means more than the “right to dip one’s net into the water . . . and bring it out empty.”

Put otherwise, tribes have the right to take fish, and the right to expect fish for the taking. The State’s argument that the treaty negotiators did not contemplate that fish would be available, implies that the federal government lied in promising to protect tribal fishing. In requiring the State remove unsustainable barriers to fish passage, the tribes ask only to exercise these promised rights, not to exercise authority on nontribal land.

The Seattle Times makes other misleading statements. The federal government did not build these culverts nor approve their fish passage (or lack of it). It merely agreed that the culverts would pass floodwaters, and so agreed to subsidize the roads, as it is now subsidizing state culvert corrections. But the culverts are within the State’s jurisdiction, and it is the State’s obligation to remove them.

Most concerning is the racially tinged suggestion that treaty rights undermine democracy. The editorial quotes former Attorney General Rob McKenna in suggesting that tribes seek a situation wherein “the government elected by the people would no longer be sovereign, and since tribes are not accountable to them, that would be pretty shocking.” The Seattle Times supports this fear mongering with an irrelevant

comment about tribal casino profits. The message is clearly conveyed: rich and ambitious tribes seek to subvert Washington's democracy. But the tribes ask only for non-Indians to keep their promises, respect property rights, and follow the law - values essential to democracy. Tribal fishers struggling to make ends meet and hold onto their culture in a world of few fish deserve better than to be tarred as enemies of freedom

The Seattle Times editorial also suggests that anti-tribal sentiment is a thing of the past. But the State's arguments in this case are those it has relied on for more than a century, that Tribes have no rights greater than any citizen, and that treaty enforcement must yield to "state's rights." And the State's centuries old antipathy to tribal fishing fits easily with its modern claim that, treaties or no, it can block every stream and kill every fish if it chooses.

It is painfully ironic for the Seattle Times to argue that while "[f]ederal and state government mistreated tribes in the past, . . . judges cannot rewrite that dark chapter in our history." Unlike the Times, the judges of the Ninth Circuit examined the history closely, and applied existing law and precedent regarding interpretation of the Stevens treaties. It is the State that now asks the Supreme Court to rewrite history and hold that tribes gave up everything for nothing save the right to dip their nets into empty waters.

The Seattle Human Rights Commission thus firmly opposes Washington State's decision to seek Supreme Court review of the Ninth Circuit opinion affirming Washington's obligation to remove culverts that impede fish passage. Washington's litigation stance offends both the treaty rights of Washington's tribes, and their human rights, guaranteed in the United Nations Declaration on the Rights of Indigenous Peoples.