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## United States v. Washington, 827 F.3d 836 (9th Cir. 2016)

Gia Austin

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The court of appeals then discussed whether Bernardo violated the Plaintiffs' protected First Amendment right to free speech on a matter of public concern. Matters of public concern are those "relating to any matter of political, social, or other concern." The court of appeals found Bernardo had not committed such a violation because, as superintendent, he had an obligation to speak out on matters of public concern.

Next, the court of appeals analyzed the claim that Bernardo violated the Plaintiffs' Fourteenth Amendment equal protection rights by singling them out for unique reasons. To prevail on this claim, the complaint had to show the Defendants were motivated by bad faith or malicious intent to injure when they treated the Plaintiffs differently from others similarly situated and without a rational basis for doing so. However, the court of appeals found the Plaintiffs failed to explain how other developers and builders were similarly situated because they did not provide basic information, such as when other projects were located, and when they were built.

After the equal protection claim, the court of appeals examined the Plaintiffs' substantive due process claim under the Fourteenth Amendment. To assert a viable substantive claim, plaintiffs must prove deprivation of an established life, liberty, or property interest, and that the deprivation occurred through governmental action that shocks the conscience. The court of appeals found that it was unclear what deprivation occurred, and noted the Plaintiffs "oddly" claimed that by opposing the project, the Defendants deprived them of life and liberty. The court of appeals instead analyzed the claim as a deprivation of property.

Substantive due process claims regarding deprivation of property cases are only available in "horrendous situations." The court of appeals found that, at worst, the Defendants actions were "doggedly persistent," and this did not amount to "brutal, meaning, and harmful" conduct as is necessary in such a claim.

Finally, the court of appeals analyzed the Plaintiffs' claim that Bernardo intentionally interfered with a business expectation, opportunity, and advantage. Here, the court of appeals addressed whether Bernardo's actions directly attempted to interfere with business relations. The court of appeals granted Bernardo immunity for his actions under Massachusetts common law, where public officials who act in good faith and exercise judgment and discretion are not liable for errors in making decisions. Here, the court of appeals again stated that the Plaintiffs' complaint failed to state a plausible claim for bad faith or malice intent.

Accordingly, the court of appeals affirmed the order of the district court.

*Kole Kelley*

#### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**United States v. Washington**, 827 F.3d 836 (9th Cir. 2016) (holding: (i) the fishing clause in the Stevens Treaties guaranteed Indian tribes the right to off-reservation fishing, with an inferred promise that sustainable fish populations would be available for tribal harvest; (ii) the State violated the fishing clause by constructing and operating barrier culverts that interfered with fish migration;

and (iii) the permanent injunction appropriately ordered the State to correct barrier culverts).

In 1854 and 1855, multiple Pacific Northwest Indian tribes ("Tribes") entered into the Stevens Treaties ("Treaties"), in which, *inter alia*, tribes relinquished land known as the "Case Area" to what is now the State of Washington ("State") in exchange for a guaranteed right to off-reservation fishing. Pursuant to this "fishing clause," tribes had the right to take fish "at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." These Tribes rely on salmon fishing and engage in commercial salmon fishing, consume salmon to meet dietary needs, and use salmon in cultural and religious ceremonies. The Tribes and the State have long been in conflict over these fishing rights. This case stems from a United States suit brought on behalf of Tribes in 1970 to resolve these persistent conflicts.

When building roads over streams, State road builders historically constructed culverts under the roads to allow natural stream flow. However, these culverts interfere with salmon migration. The culverts prevent juvenile salmon from migrating to sea where they mature, prevent mature salmon from returning to their spawning grounds, and prevent young salmon from freely locating food and avoiding predators. As a result, salmon numbers diminished.

In 2001, the Tribes filed a request for determination with the United States District Court for the Western District of Washington ("district court"), which sought to impose a duty upon the State to abstain from constructing culverts that degraded fish habitat and reduced adult fish populations. The United States joined the Tribes' request for determination and sought declaration from the district court that the fishing clause in the Treaties imposed a duty upon the State to abstain from constructing or maintaining culverts that interfered with the fishery resource in way that "deprive[d] the Tribes of a moderate living from the fishery." Additionally, both the Tribes and the United States individually sought a permanent injunction from the district court requiring that the State open culverts that interfered with salmon migration, and requiring the State to remedy culverts that substantially reduced fish migration, respectively.

The district court ruled against the State on two grounds: (i) that the fishing clause imposed a duty upon the State to abstain from constructing or operating culverts that interfered with fish migration in a manner that reduced salmon that would "otherwise be available for Tribal harvest"; and (ii) that the State operated culverts that violated this duty.

In 2013, after failed settlement efforts, the district court issued a Memorandum of Decision, in which it found that the Treaties purported to assure Tribes that they would forever have an adequate salmon supply. The district court reasoned that culverts, in part, degraded salmon habitat by inhibiting the free migration of adult and juvenile salmon, which resulted in reduced Tribal harvests that prevented tribal members from earning a living and caused "cultural and social harm to the Tribes in addition to economic harm." On the same day, the district court issued a permanent injunction ordering the State, in consultation with the United States and Tribes, to compile a list of state-owned barrier culverts within the Case Area and required the State to correct all listed culverts in a manner that provided fish passage. The State appealed.

On review in the United States Court of Appeals for the Ninth Circuit, the

State contended that the Treaties did not impose a duty on the State to abstain from constructing barrier culverts, and objected to the scope of the district court's injunction

First, the court of appeals determined the State's duties under the Treaties. The court of appeals found that the State misconstrued the Treaties by characterizing their primary purpose as "opening up the region to settlement"; the court of appeals instead deemed the primary purpose as establishing a reliable means to sustain tribal livelihoods once the Treaties took effect. The court of appeals, relying on United States Supreme Court precedent, construed treaties between tribes and the United States in favor of the tribes. Along that vein, the court of appeals reasoned the Tribes understood that the Treaties would provide not only access to usual and accustomed fishing places, but also to sustainable salmon populations; thus, regardless of explicit language, the court of appeals would infer that promise.

The court of appeals then reviewed the facts presented to the district court regarding the State's culverts and recognized their effects within the Case Area as "block[ing] approximately 1,000 linear miles of streams suitable for salmon habitat." Therefore, the culverts precluded sufficient salmon populations that would maintain a moderate living for the Tribes. The court of appeals further reasoned that replacing or modifying culverts to increase salmon migration would render more mature salmon available for Tribal harvest.

Next, the court of appeals addressed the appropriateness of the district court's injunction and rejected the State's contentions. The State contended that the Tribes did not provide sufficient evidence that the culverts significantly caused the salmon's decline. However, the court of appeals determined that the Tribes had presented extensive evidence. Specifically, the Tribes presented a report prepared by state agencies, which acknowledged culverts as a type of barrier to fish migration and as "correctable obstacles." The State also contended that the district court's injunction ordered the State to correct almost all state-owned barrier culverts without evidence that such corrections would improve salmon migrations. However, the court of appeals reiterated that the State's own evidence illustrated that once salmon habitat is accessible by unblocking barrier culverts, "hundreds of thousands of adult salmon" would be available to Tribes.

Accordingly, the court of appeals affirmed the district court's holdings and concluded that the district court did not abuse its discretion by issuing the permanent injunction.

*Gia Austin*

**Idaho Conservation League v. Bonneville Power Admin., 826 F.3d 1173 (9th Cir. 2016)** (holding that three federal agencies managing a dam did not violate the requirements of NEPA when they decided to fluctuate the level of a reservoir without filing an environmental impact statement, because that decision was within the range of action originally available when the dam was first operational, and therefore, was not a major federal action).

The National Environmental Policy Act ("NEPA") requires that federal agencies prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." An