

7-7-1978

Supplemental written closing argument - State of Washington

Charles B. Roe Jr.

Senior Assistant Attorney General for the State of Washington

Laura E. Eckert

Assistant Attorney General for the State of Washington

Slade Gorton

Attorney General for the State of Washington

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/walton>

Recommended Citation

Roe, Charles B. Jr.; Eckert, Laura E.; and Gorton, Slade, "Supplemental written closing argument - State of Washington" (1978). *Confederate Colville Tribes v. Walton (Colville Tribes)*. 43. <https://digitalcommons.law.uidaho.edu/walton/43>

This Brief is brought to you for free and open access by the Hedden-Nicely at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Confederate Colville Tribes v. Walton (Colville Tribes) by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

1 portion of No Name Creek waters for the propagation of the Lahontan
2 trout, for the following reasons:

3
4 1. The principal aim of this litigation is to determine the
5 scope and extent of the rights reserved to the Colville
6 Indians by the federal government's establishment of the
7 Colville Indian Reservation. (As stated in our previous
8 brief, there is nothing which would indicate an intention
9 to reserve No Name Creek waters for Lahontan propagation
10 purposes.) The question of the scope and extent of the
11 water reservation, if any, is a separate question from
12 that of the possible effect of the use of that reserved
13 right on a threatened species. TVA v. Hill was concerned
14 with use, not quantification.

15
16 2. We note that the Endangered Species Act directs federal
17 agencies to insure the "continued existence of such endan-
18 gered species," 16 U.S.C. §1536. (Whether this mandate
19 would apply to a federal court engaged in its judicial
20 capacity is questionable.) The federal agencies involved
21 here are the BIA and the U.S. Fish and Wildlife Service.
22 By providing significant assistance to the Colville Irriga-
23 tion Project, the BIA may be in the ironic position of
24 contributing to the over-utilization of the No Name Creek
25 water resource, thus "harming or harrassing" the very
26 species the agency was also purporting to aid. The
27 plaintiff's acts constitute as much a 'harming' under the
28 terms of the Endangered Species Act as any 'harm' they
29 attempt to charge the defendants with.

1 3. Any reserved right for the benefit of Lahontans would have
2 as its date of priority the date of the fishes' introduc-
3 tion to the Colville Reservation with the official blessing
4 of the Secretary of the Interior (1975). Also, because
5 the Lahontans were only introduced officially as of that
6 date, any preexisting uses were presumably considered and
7 taken into account. Actions initiated after the introduc-
8 tion of the fish might conceivably be subject to the Act;
9 actions prior to that time would already have been included
10 in the 'critical habitat' determination. This is to be
11 contrasted with the Tellico dam case, where the snail
12 darter had always existed in the vicinity of the proposed
13 dam, and the TVA actions were taken in disregard of such
14 "existing circumstances."

15
16 4. There has been no official determination that the Omak
17 Lake and No Name Creek area is a "critical area" so
18 designated pursuant to 50 CFR § 17, Subpart F, and thus
19 subject to the Act's mandates. There is nothing to
20 indicate that the Lahontan habitat sought to be preserved
21 by the Act is that of Omak Lake, rather than the Nevada
22 lakes to which the species is indigenous.

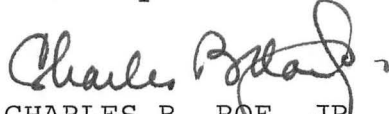
23
24 5. We also note that the use of hatchery propagation for
25 Lahontans belies the contention that No Name Creek waters
26 are 'necessary' to "preserve" the species.

27
28 In summary, the mere presence of a threatened species of fish in the
29 No Name Creek vicinity should not lead this court to automatically
30 conclude that all non-Indian water uses must cease. There are
31 significant distinguishing features in the Walton litigation which,

1 we believe, limit the applicability of the Endangered Species Act,
2 as compared to the TVA v. Hill situation. We urge the Court to
3 reject plaintiff's contentions in this regard.

4 Respectfully submitted,

5
6 SLADE GORTON
Attorney General

7
8 
9 CHARLES B. ROE, JR.
Senior Assistant Attorney General

10 
11 LAURA E. ECKERT
12 Assistant Attorney General
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33