

5-16-1973

Docket Entry 215 - Filed Additional Reply to Defendant's Statement of Issues

Follow this and additional works at: <https://digitalcommons.law.uw.edu/us-v-wash-70-9213>

Recommended Citation

Docket Entry 215 - Filed Additional Reply to Defendant's Statement of Issues (1973),
<https://digitalcommons.law.uw.edu/us-v-wash-70-9213/154>

This Reply is brought to you for free and open access by the Federal District Court Filings at UW Law Digital Commons. It has been accepted for inclusion in 70-cv-9213, U.S. v. Washington by an authorized administrator of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

FILED

MAY 16 8 14 AM '73

1 DAVID H. GETCHES
DOUGLAS R. NASH
2 NATIVE AMERICAN RIGHTS FUND
1506 Broadway
3 Boulder, Colorado 80302
Telephone (303) 447-8760

EDGAR SCOFIELD, CLERK
U.S. DISTRICT COURT
W.D. OF WASHINGTON
BY *[Signature]* DEPUTY CLERK

4 DAVID ALLEN
5 JOHN SENNHAUSER
MICHAEL TAYLOR
6 LEGAL SERVICES CENTER
104-1/2 Cherry Street
7 Seattle, Washington 98104
Telephone (206) 622-8125
8 Attorneys for Plaintiffs

10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON

13 UNITED STATES OF AMERICA,
14 et al,
15 Plaintiffs,
16 vs.
17 STATE OF WASHINGTON,
18 et al,
19 Defendants.

CIV. NO. 9213

ADDITIONAL REPLY TO
DEFENDANTS' STATEMENT
OF ISSUES

20 Plaintiffs Muckleshoot Indian Tribe, Squaxin Island Tribe
21 of Indians, Sauk-Suiattle Indian Tribe, Skokomish Indian Tribe,
22 and Stillaguamish Tribe of Indians add to the reply to defendants'
23 Statement of Issues given on behalf of the plaintiffs in this case
24 by plaintiffs' liaison counsel the following replies and comments:

25 1. In paragraph III, defendant Department of Fisheries
26 states "insofar as the Statement of Issues submitted by the
27 plaintiff tribe intervenors state general issues of law and fact
28 consistent with the Statement of Issues submitted by the United
29 States, this defendant agrees that such issues are issues in this
30 case." Although these plaintiffs agree for the most part with the
31 ultimate issues as formulated in the statement submitted by the
32 United States, there are slight differences, some of them reaching

215

1 the substance of the case that may not been seen as "consistent".
2 These plaintiff tribes wish to point out that the purpose of
3 each of the plaintiff tribes submitting different Statements of
4 Issues was to provide for a full explication of the issues expres-
5 sing as precisely as possible the theories of each of the
6 tribes. While those theories are quite close as between all the
7 plaintiffs, the plaintiffs ought not to be tied to absolute
8 consistency with the United States' position. If this were the
9 case, interventions by the several tribes which are now parties
10 to the case would have been unnecessary.

11 2. In the defendant Game's Statement of Issues, paragraph
12 (4) attempts again to raise the issue of whether or not the
13 Indian Claims Commission possesses exclusive jurisdiction to hear
14 and determine claims of off reservation treaty fishing rights.
15 This issue was originally raised in a purported affirmative
16 defense pleaded by the Department of Game in answer to the
17 complaint in this case. Shortly thereafter, in October, 1971,
18 these plaintiffs along with all the other plaintiffs in the case
19 moved to strike that affirmative defense. The extensive memoran-
20 dum in support of that motion filed October 13, 1971 points out
21 that there can really be no issue at all on this question.
22 Unfortunately, that motion still has not yet been decided by the
23 court. On January 5, 1973, this court heard arguments on the
24 motion and took it under advisement, apparently for a determina-
25 tion after a trial on the merits. Although these plaintiffs
26 would be content to have the issue determined after trial, if it
27 is going to be pressed now as an issue for trial, it would be
28 appropriate to reach a decision on the motion to strike. It should
29 be added that a motion for summary judgment based partly on the
30 same contention was denied by the court in its January 9, 1973,
31 order.

32 3. In paragraph (7) of defendant Game's Statement of
Issues, the question of whether the Muckleshoot Tribe is a proper

1 party plaintiff is raised. The issue, by the manner in which it is
2 expressed, assumes that "Congress and the court have expressly
3 recognized them as a non-treaty tribe". The Muckleshoot Tribe
4 strenuously objects to the manner in which this "issue" is stated.
5 It is sufficient to point out that neither any act of Congress,
6 nor court whose decision is binding on this court has made such a
7 determination.

8 4. On page 6 of defendant Game's Statement of Issues in
9 Response to Plaintiffs' Statement of Issues, an objection is raised
10 to the fact that these plaintiff tribes refer in their Statement
11 of Issues to "the purposes of the treaties". These plaintiff
12 tribes wish to point out that framing the issues in this manner
13 is essential to their theory of this case. It is and
14 will be the contention of the plaintiff tribes that a determination
15 of the purposes which the Indians and the United States had for
16 the treaties determines the extent of the reserved fishing right,
17 and thereby places limitations upon the regulatory power of the
18 state over Indian off reservation fishing. Therefore, rather than
19 being "not a proper subject of judicial inquiry," plaintiffs
20 believe that a decision on this issue is at the very heart of the
21 case.

22 5. In the Department of Game's final objection to the
23 Statement of Issues by these plaintiffs, it is asserted that
24 issue 4(b) is "overbroad". That issue asks "do state statutes,
25 regulations, policies and enforcement practices as applied to
26 Indians exercising off reservation fishing rights secured to the
27 plaintiff tribes by the treaties violate the Constitution?"
28 Emphasis should be placed upon the words "as applied" in the
29 statement of that issue. Thus, the statutes, regulations, policies,
30 and enforcement practices of the state have to be viewed, not
31 simply as they appear on their face, but as they have been applied
32 to Indians in order to determine their constitutionality.

1 6. The defendant State of Washington's Response to
2 Proposed Statements of Issues objects to Section 7(c) of the
3 plaintiffs' Makah, Lummi, Quinault, and Quileute Tribes "insofar
4 as it purports to encompass environmental protection". These
5 plaintiff tribes only wish to add that in their view, environmental
6 protection can not be cleanly segregated from the manner in which
7 the State of Washington has dealt with the fishery resource. Of
8 course, if questions of the manner in which the state has dealt
9 with environmental protection other than as it relates to the
10 fisheries in which plaintiffs claim a right, it would be an
11 improper issue.

12 Finally, these plaintiff tribes wish to express some agree-
13 ment with the Department of Game when it opines that this case
14 would be easier if all the party plaintiffs joined in one Statement
15 of Issues. Of course, this is also true of the four varying
16 positions taken by the State of Washington, its Department of
17 Game, its Department of Fisheries and the Reefnetters
18 Association. These plaintiffs would have no objection to an
19 attempt to hone down a composite plaintiffs' Statement of Issues
20 if the defendants were to do the same thing with their issues.
21 Furthermore, if a joint Statement of Issues would facilitate
22 counsels' preparation and the court's determination of this case,
23 these plaintiffs would do everything possible to cooperate in that
24 task.

25 Respectfully submitted,
26 DAVID H. GETCHES
27 DOUGLAS R. NASH
28 NATIVE AMERICAN RIGHTS FUND
29 1506 Broadway
30 Boulder, Colorado 80302
31 Telephone (303) 447-8760
32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

DAVID ALLEN
JOHN SENNHAUSER
MICHAEL TAYLOR
LEGAL SERVICES CENTER
104 1/2 Cherry Street
Seattle, Washington 98104
Telephone (206) 622-8125

By 
David H. Getches, Esq.

Attorneys for Plaintiffs Muckleshoot
Indian Tribe, Squaxin Island Tribe of
Indians, Sauk-Suiattle Indian Tribe,
Skokomish Indian Tribe and
Stillaguamish Tribe of Indians

Dated: 14 May 1973

Director
John E. Echohawk

Attorneys
Joseph J. Brecher
Thomas W. Fredericks
David H. Getches
Roy S. Haber
Daniel H. Israel
Yvonne T. Knight
Scott E. Little
Douglas R. Nash
Robert S. Pelcyger
Thomas L. Smithson
Charles F. Wilkinson

Assistant to the Director
Joan L. Carpenter

Native American Rights Fund
1506 Broadway • Boulder, Colorado 80302 • (303) 447-8760

Of Counsel
Reid Peyton Chambers
Vine Deloria, Jr.
Thomas N. Tureen

Washington Office
1712 N Street, N.W.
Washington, D.C. 20036
(202) 785-4166

Staff Attorney
L. Graeme Bell III

May 14, 1973

Mr. Charles Schaaf, Clerk
United States District Court
Western District of Washington
United States Courthouse
11th & A Streets
Tacoma, Washington 98402

RE: U.S. v. Washington
Civil No. 9213

Dear Mr. Schaaf:

Please find enclosed the original and one copy of
Additional Reply to Defendants' Statement of Issues in the
above named case. Please file the original and return the
conformed copy to us in the enclosed envelope for our files.

Thank you very much.

Sincerely,

David H. Getches

David H. Getches

*done
5-16-73
CW*

DHG:ea

cc: Honorable George H. Boldt
United States District Judge