

No. 18-36030, 18-36078

United States Court of Appeals

FOR THE

Ninth Circuit

CROW INDIAN TRIBE; *et al.*,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Montana, Missoula Division

No. 9:17-CV-00089-DLC

District Judge Dana L. Christensen

**BRIEF OF *AMICUS CURIAE* DARREN EASTMAN IN SUPPORT OF
PLAINTIFFS-APPELLEES**

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Darren Eastman certifies that as *amicus*, he's not a publicly held corporation and doesn't own a parent corporation. *Amicus* is a private citizen of California, who owns no corporation.

Dated: February 19, 2018

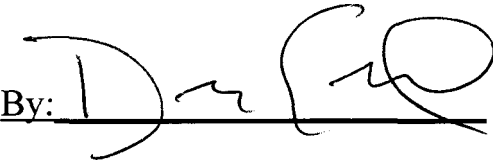
By: 
Darren Eastman, *Amicus Curiae*

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CERTIFICATE OF COMPLIANCE

Amicus certifies that this brief contains 2,293 words. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the stated word count does not include the Corporate Disclosure Statement, Table of Contents, Table of Authorities, and Certificates of Counsel.

Counsel also certifies that this document has been prepared using 14-point Times New Roman font in Microsoft Word Version 16.21 (190117).

Dated: February 19, 2019

By: 

Darren Eastman, *Amicus Curiae*

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INTERESTS OF *AMICUS*

Amicus is Darren Eastman, an affected California resident. Comes now on appeal, this Court's located in the same jurisdiction and state as *amicus*—who realized the need for California to oppose delisting the few remaining grizzlies in the Yellowstone ecosystem. The extinction of the brown bear in North America hangs in-balance, as does the religious expression and practice of Indian nations in Canada and the United States. *Amicus* is 3.5% Native American genetically.

California's state animal lies in jeopardy of extinction, with no state authorities taking notice. Reversal would violate *amicus* and others procedural rights under the *ESA*, as "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the U.S. and any other governmental instrumentality or agency ... who's alleged to be in violation of any provision of this chapter." 16 U.S.C. §1540(g). Appellants clearly violated the *ESA* by delisting the endangered grizzly.

SUMMARY OF ARGUMENT

Two bifurcated issues linked to the outcome of this case affecting California residents and Native Americans are presented—*in re* the correct decision of the District Court not to delist grizzlies from the *ESA*.

Part one explains how future reintroduction of California's state animal, the brown bear, is impossible if judgments reversed—natural migration and translocation could never occur as it previously did before 1848's Gold Rush, when bears were killed for recreation after centuries of following California's coastal salmon run.

Part two discusses the profound effect a reversed judgment would have for the conservation efforts and tribal religious practice of California's sovereign Indian nations; including abrogating treaties and depriving due process by four states—previously upheld in *United States v. Oregon*, 769 F.2d 1410 (9th Cir. 1981). Indians consider the grizzly a medicine being with magical powers, playing a major role in religious ceremonies. They're symbols of strength and wisdom often associated with healing and medicine. Native Americans believe bears capable of healing their wounds, with 9 distinct Bear spirits, and, 19 separate Indian legends existing alone.¹

We don't preclude Christians from owning crosses, Jews from the Star of David, or, Muslims from the call to prayer as freedom of religious expression—the grizzly's no different for Native Americans. Appellants disregarded the First Amendment, *American Indian Religious Freedom Act*, the *California Religious Freedom Act* and Executive Order 13007. The U.S. cannot violate religious freedom and abrogate Native American treaties, which call for exclusivity in fish & game management, and, the specific protection of the grizzly...which delisting violates.

I. Montana's Endangered Grizzlies Vital for California Reintroduction

No brown bears have existed in California since the last was shot in Tulare County, in 1922. The last brown bear identified in California occurred in *Sequoia National Park* in 1924—despite being featured on California's flag, since its 1953 state animal designation. The U.S.' largest omnivore thrived in the valleys and lower mountains of California in what's thought to be the largest numbers anywhere—until eradication in 1922.

¹ Native American Bear Mythology <http://www.native-languages.org/legends-bear.htm>

Despite numerous conservation attempts, no brown bears have been identified in California since 1922. Biologists estimate 86 species of brown bear once existed in North America, with only 1 remaining. The extremely limited numbers of brown bears in the jurisdiction of the complaint are why only even a few are in California zoo captivity. Accordingly, bears don't understand borders, with historical migration causing California's once thriving population. Bears remember locations of food sources across hundreds of miles of territory.

Reversal would cause not even one brown bear to ever migrate to California during *amicus*' lifetime. Dr. David Mattson estimated in 2016 that somewhere between 46,500 and 72,200 grizzly bears once occupied 763,700 square miles of the western U.S. in their benchmark year of 1800, with the largest historical populations in Montana (9,300), California (6,900), Wyoming (5,400), and Colorado (5,300).² Mattson states Yellowstone's grizzly populations are currently threatened by the loss of white bark pine.

Perceptible harm will be caused to *amicus*, Native Americans and many other enthusiasts and researchers upon reversal, as they'll be unable to observe, engage in religious practice with brown bears. *Japan Whaling Assn. v. American Cetacean Society*, 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986). Bear enthusiasts, scientists and Native Americans are concretely affected by delisting since the proposal affects those remaining in the Yellowstone ecosystem. *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987). Under Article III, Congress established courts to adjudicate cases and controversies for

² Extirpations of Grizzly Bears in the Contiguous United States of America, 1850-2000. *Conservation Biology*. David J. Mattson & Troy Merrill. <https://pubs.er.usgs.gov/publication/1016173>

claims of infringement of individual rights whether by unlawful action of private persons, or, by the exertion of unauthorized administrative power. *Stark v. Wickard*, 321 U.S. 288, 309-310, (1944). Unauthorized administrative power's evident here. Further, public rights legislatively pronounced to belong to each individual forming part of the public are at-risk, especially for California, Idaho, Montana and Wyoming residents. *Sierra Club v. Morton*, 405 U.S. 727, 740-741 (1972).

Most scholars agree there's less than 1,000 grizzlies left in the lower-48 states, with most concentrated in the Yellowstone ecosystem. The *ESA* and three decades of enforcement saved the species from extinction, while proving how difficult restoring the population is. Illegal hunting still poses a reproductive threat, with abandoned cubs observed each year. Delisting from the *ESA* will ensure certain extinction—against the interests of the DOI, who's tasked by statute to *save them*.

A. Saproxylic Insects and Endangered Bird Reintroduction

Another problem California's faced from not having brown bears is the corresponding decline of saproxylic insects and birds, especially endangered woodpeckers. Feeding and marking activities of brown bears can damage trees, as well as sapwood foraging—allowing insects and birds to establish breeding and feeding sites inside them; which typically doesn't occur in perfectly healthy trees. University biologists proved this between 2008-2011 by observing 278 brown bear-wounded silver firs in the Bieszczady Mountains of Poland. Trees with the oldest bear-wounds (5+

years) had the highest probability of occurrence of saproxylic insects and woodpeckers. 43% hosted insects and 33% of them hosted woodpeckers.³

All woodpeckers are protected under the *Migratory Bird Treaty Act of 1918*, with 2 California woodpeckers (the Gila woodpecker and Gilded northern flicker) listed on the *ESA*.⁴ Reintroduction of brown bears in California will increase reintroduction of saproxylic insects and endangered birds. Brown bears have historically been attracted to the state's vast coastal areas, in-addition to their traditional mountainous ranges; no coastal regions exist in Idaho, Montana or Wyoming—where the nations few remaining bears currently live.

II. Effect Upon Native American Religious Freedom and Practice

Secondly, the defendants proposed actions affect both the conservation and religious practices of California's 109 federally recognized Indian tribes, with 78 entities petitioning for recognition. Tribes in California currently have nearly 100 separate reservations throughout the state.^{5 6} The Bear Dance's performed to bring back the ghosts of ancestors; spirits of whom then join to help bears relax and properly hibernate. The Circle of Life Dance brings warmth for hibernating bears.⁷ The songs of the Ute Bear Dance show respect for the spirit of the bear, which makes one

³ Brown Bears as Ecological Engineers: The Prospective Role of Trees Damaged by Bears in Forest Ecosystems. E. Zyśk-Gorczyńska, Z. Jakubiec & A. Wuczyński.

Canadian Journal of Zoology. 2015, 93:133-141, <https://doi.org/10.1139/cjz-2014-0139>

⁴ *Threatened and Endangered Birds*. California Department of Fish and Wildlife.

http://www.dfg.ca.gov/wildlife/nongame/t_e_spp/bird.html

⁵ *California Tribal Communities*. The Judicial Branch of California. <http://www.courts.ca.gov/3066.htm>

⁶ See <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#ca> for California's federally recognized tribal listing.

⁷ Why Grizzly Bears are Important for Native Americans <https://www.unitedindians.com/why-are-grizzly-bears-important-for-native-americans.html>

strong ⁸ and just some examples. Native Americans have all expressed heightened importance towards protecting the bear and their continued integration into regular religious practices.

A. Violation of Due Process and Treaties

The deprivation of due process that reversal would cause to Indian populations is obvious and unnecessary; a state cannot exercise wrongful authority over a protected species critical to both the conservation and religious practice of sovereign Indian nations inside the U.S. Such a conflict arose between the *Mescalero* tribe and New Mexico's Department of Game in *New Mexico v. Mescalero Apache Tribe* 630 F.2d 724 (1980). The *Mescalero* claimed sole right to control access to wildlife on the reservation and intentionally disregarded state game and fishing regulations. The Tenth Circuit upheld the *Mescalero* Indians rights—states have no control over wildlife found on Indian lands...which comprise much of California, Idaho, Montana and Wyoming. Some Indian treaty rights extend to land outside reservations, again limiting the state controlling their access to wildlife.

In *Fond du Lac Band v. Carlson*, 68 F.3d 253 (8th Cir. 1995), Chippewa Indians sought injunctive relief against Minnesota to prevent enforcement of the state's fish and game laws—which was granted because 1837 and 1854 treaties signed with the U.S. provided exemption, just as in this case. Attempts to nullify Indian treaties by enforcement of fish and game laws (because such treaties preceded their admission to statehood) was overruled in *Mille Lacs Band v. Minnesota*, 53 U.S. 172 (1999). Given no dynamic differs *in re* this matter, it's uncertain why Oregon, Idaho, Montana

⁸ Southern Ute Indian Tribe Bear Dance <https://www.southernute-nsn.gov/culture/bear-dance/>

and Wyoming willfully ignored precedent by attempting to delist grizzlies. In *United States v. Oregon*, it was made clear to Oregon, Washington (and intervening Idaho) by the Ninth Circuit (and then certiorari denial) that Indian treaties take precedent over states' fish and game authority.

Antoine v. Washington, 420 U.S. 194 (1975) stated that even on lands ceded to the state, the Supremacy Clause precludes the application of state fish and game laws upon tribes. Congress showed no intent to subject them to state jurisdiction for hunting—while the state can regulate non-Indians in a ceded area, Indians must be exempted from such regulations. Even tribes no longer recognized by the government retain historical fish and game rights. *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

The case precedents for compliance with Indian nations are clearly detailed in the *Indian Affairs Manual*, **Part 56: Fish, Wildlife and Recreation Authority and Responsibilities #16-64**, issued on 2/13/17...which replaced **#99-06** from 10/25/99.⁹ Appellants committing the same wrongful act after previous reversal across cases in multiple decades (in the hope of a different outcome) itself raises alarm.

The *American Indian Religious Freedom Act* clearly protects the grizzly under freedom to worship for ceremonial and traditional rites; with the usage and possession of bear objects considered sacred. All Indian tribes regard the grizzly as sacred—performing regular ceremonies oriented towards them continuously for thousands of years. The lands of Indian nations both inside the Yellowstone ecosystem and previous ranges (like

⁹*Fish, Wildlife & Recreation Program and the Bureau of Indian Affairs*. #16-64, 2017.
<https://www.bia.gov/sites/bia.gov/files/assets/public/raca/manual/pdf/idc2-060922.pdf>

California) are considered protected religious sites. Reversal would cause interference, thus preventing free exercise of Indian religion.

Executive Order 13007 instructed federal agencies to evaluate policies regarding Native American sacred sites. Land managers were ordered to: “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.” The DOI produced a compliance manual, *Departmental Responsibilities for Protecting & Accommodating Access to Indian Sacred Sites*.¹⁰ Delisting the grizzly from the *ESA* violates both these guidelines and Executive Order 13007.

Desperate impact and irreparable harm from delisting violates the *Piikani Nation Grizzly Treaty of Solidarity*—the first signed between sovereign Indian nations in Canada and the United States in 152 years, and, is also signed by California Indian nations.¹¹ **Article VI (Hunting)** states, “Understanding that the GRIZZLY is an ancestor, a grandparent, and a relative, no hunting of the GRIZZLY – be that categorized as sport or trophy hunting – will be permitted or licensed on any lands our NATIONS hold jurisdiction over. The GRIZZLY will enjoy full protections on all tribal lands.” **Article VII (Management)** clearly identifies the legal right of Indian nations, “to not adopt state, provincial or federal plans, as all are *infringements of [our] sovereignty*” and states, “Recognizing that our collective objective is to see the GRIZZLY returned to areas of biologically suitable habitat on tribal lands within the Grizzly’s historic range pre-colonial contact, and for linkage zones to be established between the

¹⁰ <https://sacredland.org/wp-content/uploads/2017/07/DOI.pdf>

¹¹ *Piikani Nation Grizzly Treaty of Solidarity*. <https://www.piikaninationtreaty.com/the-treaty>

existing, fragmented populations, GRIZZLY management plans for our NATIONS will be formulated from a cultural foundation, while accommodating the “best available science.” WE, collectively, recognize that our ancestors practiced the “best available science” in their stewardship of the land, as they lived in balance with our Mother Earth when the biomass was at its height. ***Our NATIONS will not adopt state, provincial or federal plans, as all are infringements of our sovereignty.*** WE, collectively, will formulate vocational and educational programs for our people, so that on our lands, they will be the leaders of our culturally compatible GRIZZLY management programs. Upon the signing of this TREATY, any management removal of a GRIZZLY will be undertaken with ceremony, and such parts of the GRIZZLY that have always been kept in sacred bundles or used for traditional healing practices will be provided to such persons qualified. No GRIZZLY will be removed from the population before all other options have been exhausted.”

Both endangered animals and Native Americans deserve due process. Existing statutes and treaties must be honored. The Supreme Court has described the obligation of the U.S. to tribes as that of a guardian to his wards. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Religious expression and freedoms guaranteed for all religions, not *some*.

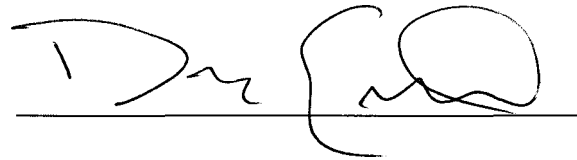
CONCLUSION

Although *amicus* offers no recommendation on the ultimate outcome of this case, based on the analysis above, it's believed the District Court correctly found appellants delisting of the brown bear from the *ESA* unlawful.

Dated: February 19, 2019

Respectfully submitted,

DARREN EASTMAN

A handwritten signature in black ink, appearing to read 'Darren Eastman', is written over a horizontal line.

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FOR THE NINTH CIRCUIT

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