No. 17-949

IN THE

Supreme Court of the United States

JOHN STURGEON, PETITIONER

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AND CENTRAL NEW YORK FAIR BUSINESS ASSOCATION AS AMICI CURIAE SUPPORTING PETITIONER

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Interest of the *Amici Curiae*

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. Central New York Fair Business Association (CNYFBA) is a member organization of CERA and is incorporated as a non-profit in Oneida, New York. CERF and CNYFBA are primarily writing this *amici curiae* brief to explain why the federal reserved rights doctrine cannot be valid if the structure of the Constitution was primarily intended to protect the individual rights of the people to self-governance at both the state and national level.[1]

CERF submits this *amici curiae* brief to add the perspective of its members that the Constitution should apply to all persons in the United States. CERF firmly believes that the United States government should be promoting the interests of all of its citizens on an equal basis. Accompanying this *amici curiae* brief is a motion to lodge two newly located historic documents CERF believes have never been seen by this Court. The memorandum "Embargo on the Upper Rio Grande"

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amici curiae*, CERF, its members or its parent CERA's members including Central New York Fair Business, or its counsel have made any monetary contribution to the preparation or submission of this brief.

explains how the federal reserved water rights doctrine was created through deliberate fraud by the United States. This is a comprehensive memorandum with many exhibits. The second memorandum "Federal Irrigation Water Rights" explains how all waters can be subjected to federal authority. Counsel will attempt to explain how the fraud perpetrated on the Rio Grande from December 1896 forward to expand the navigation servitude authority has resulted in allowing the Commerce Clause to confront the public trust doctrine authority of the State of Alaska and Mr. Sturgeon in this case. Both parties have consented by letter to the filing of this *amici curiae* brief.

Summary of the Argument

This case is all about the latest expansion of the federal reserved water rights doctrine established in *Winters v. United States*, 207 U.S. 564 (1908). The federal reserved waters rights doctrine was created, according to the documents located by CERF in a presidential library that accompany this brief, by the United States intentionally manipulating and intermixing the commercial authority of domestic law from the navigation servitude with the war power of embargo on the Rio Grande in December 1895. Not only did the United States deliberately not tell the truth to this Court in the Rio Grande Dam and Irrigation cases, the United States Department of Justice counseled the Reclamation Service to not tell anyone, including members of Congress, the truth of the situation. Almost 30 years after perpetrating the fraud, the attorney Ottamar Hamele, appointed as special counsel to the Rio Grande Commission in 1924 read his memorandum

on the "Embargo of the Upper Rio Grande" at the beginning of the discussions to form the Rio Grande Compact between the States of Colorado, New Mexico and Texas. The United States required all three States to accept the fact that the fraud had occurred and base their positions for the Compact upon it. With the three States as co-conspirators to the original fraud both the public trust responsibilities of the States and the ownership of the water became unsettled.

The Hamele Memorandum and the Ethelbert Ward Memorandum of 1930 titled "Federal Irrigation Water Rights" prove that the federal reserved water rights doctrine was not created for the benefit of the Indians. Neither document even mentions Indians or Indian tribes. One of many facts the attorney for CERF knows was left out of the Hamele memorandum was how Indians were directly and deliberately used to further the federal fraud on the Rio Grande. Native Americans were rounded up and separated from their families for several years from both the Mescalero Apache reservation and Isleta Pueblo and placed at the Leasburg and Elephant Butte dam sites of the Rio Grande Company. The Army of the United States guarded these Indians preventing them from going home and the Company from being able to construct the dams within the time allowed by the 1891 Act of Congress.[2] The "trust relationship" established over the Indians and the national interest to protect the navigation servitude that becomes the basis of the federal reserved rights doctrine in *United States v. Winans*, 198 U.S. 371 (1906) and *Winters* was nothing

[2] CERF has copies of the General Land Office Tract Book records from the Federal Center of the National Archives in Denver, Colorado that prove these facts.

but a deliberately constructed federal fabrication that this Court accepted as being in the national interest and made into law. The Ninth Circuit has just further expanded on this fabrication to claim the doctrine is based on the Commerce Clause.

While the Rehnquist Court actively looked for a solution to the grossly expanding federal authority, only since *Carcieri v. Salazar*, 555 U.S. 379 (2008) has this Court begun to look closer at the federal political interests presented as legal arguments. The Departments of Justice and Interior have deliberately punished this Court for attempting to reel in one small aspect of their plenary authority in defining the term Indian under the Indian Reorganization Act. The Departments are trying to intimidate this Court into backing down because they know that their plenary authority is all based on keeping the Indians wards of the national government. Lots of time has passed and this one body of law has grown many heads or legal doctrines. All of these legal doctrines are from one common source—the fact that this Court has not enforced that all people are equal citizens. This Court does not need a Herculean effort to defeat this hydra. This Court just needs to believe that the Constitution is still relevant and choose to apply it with the Civil War Amendments against the monstrous fraud of the federal reserved water rights doctrine.

ARGUMENT

This Court this term has already balked at challenging the taking of lands into trust for Indians in New York State, an original colony, and allowing those lands to be treated as federal "Indian country" territory where no federal territory has ever existed under the

Constitution. While CERF and CNYFBA greatly appreciated the dissent of Justice Thomas to this result, the necessity of correcting its prior opinions allowing the plenary authority over Indians was not accepted by enough Justices to grant the petition to hear the case. CERF does believe that it is easier to articulate the concerns against plenary authority over Indians as wards in a water case than in a land case. The reason for this is the way the public trust doctrine was defined as a matter of separation of powers in *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845) and other old water cases. Because of the large waterways and extensive coastline in the Eastern states the division of authority over the waterways was considered and defined long before our Civil War. The early water decisions were also some of the earliest Commerce Clause decisions. This case is the result of the Ninth Circuit choosing to ignore the old water law cases and further expand the fraudulently made federal reserved water rights doctrine.

I. THE FRAUDULENT DOCTRINE OF FEDERAL RESERVED WATER RIGHTS.

A. The Fraud on the Rio Grande

After the Civil War, Congress changed federal Indian policy. The 1871 policy ended treaty making with the Indian tribes. This formally ended the assimilation policy of the Northwest Ordinance and began a much harsher direct war power policy toward the Indians. See 25 U.S.C. § 71, 1 Rev. Stat. § 441 and § 442. *See also U.S. v. Lara*, 541 U.S. 193, 201 (2004). The separate racial classification of "Indian" from *Dred Scott* v. Sandford, 60 U.S. 393 (1857) was deliberately preserved in the Indian Policy of 1871 as codified in the

Revised Statutes of the Reconstruction era. The Indian policy of 1871 was based on all Indians and Indian tribes as a race being potential belligerents against the authority of the United States. This change happened because so many Indian tribes raised hostilities during the Civil War. Many Indian tribes formed alliances with the Confederate States. *See Holden v. Joy*, 112 U.S. 94 (1872). This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War and to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. This was exactly what Secretary of War Edwin Stanton argued for to forever prevent another civil war. Under the 1871 policy even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only Congress could change his status and grant citizenship *See Elk v. Wilkins*, 112 U.S. 94 (1884).

By the 1880's senior members of Congress were intentionally going around the 1871 Indian policy and trying to fulfill the promises that had been made to friendly Indian tribes under the original assimilation policy. *See Nebraska v. Parker*, 136 S.Ct. 1072 (2016). This attempt to return to the assimilation policy was incorporated into the Dawes or General Allotment Act of 1887. At the same time, many other members of Congress were more than hesitating to relinquish the essentially unlimited authority they possessed over Indians from the 1871 policy. This was the creation of the schizophrenic federal Indian policy that still exists today.

It was not only Congress that was beginning to

relish this virtually unlimited authority over the Indians and explore new possibilities of applying it. According to the historical documents from the Rio Grande, multiple federal attorneys in the Departments of State, Interior and War were also seeing the possibilities. Whether it was the attorney bureaucrats or their Secretary bosses that wanted to expand this power, federal officials at the upper levels were beginning to understand that the application of this power over the Indians could be used and developed for other purposes.

The Memorandum titled "The Embargo on the Upper Rio Grande" by Ottamar Hamele is a confession explaining what the United States did on the Rio Grande to cheat the Rio Grande Dam and Irrigation Company out of the right of way it had been granted under the statute of March 3, 1891, 26 Stat. 1095, to build the Elephant Butte Dam on February 1, 1895. The memorandum explains step by step how the Mexican complaints were denied but then apparently applied on moral grounds.[3] The result was a letter from the Secretary of the Interior dated December 5, 1896 to the General Land Office declaring an embargo and suspending all further applications for rights of way in Colorado and New Mexico. While the Secretaries of State, Interior and War all are named in this Memorandum as well as the Attorney General, no mention is made of any contact or decision of the President or any member of Congress to authorize the suspension of the Congressional statute of March 3,

[3] The Hamele Memorandum has no page numbers. It is divided into sections by captions explaining the various actions that were taken. The section relating to the above statement is "Agreement of May 6, 1896."

1891, 26 Stat. 1095. The claimed justification for the embargo is to negotiate a future water treaty with Mexico. When the treaty negotiations faltered, the Secretary of State questioned whether the Rio Grande was a navigable river and requests another Attorney General's opinion on the subject. Even with the change of presidential administration the opinion is issued assuming the Rio Grande is a navigable river at Elephant Butte despite all of the upstream diversions of water that had already greatly depleted its flow. As described in the section entitled "Litigation with the Rio Grande Dam and Irrigation Company" twice the trial court and the Territorial Supreme Court dismissed the federal complaint finding that the Rio Grande was not navigable. Twice, the United States Supreme Court reversed requiring that more evidence be taken in the case to give the United States additional opportunities to stop the construction. Finally, the United States changed its position and argued that the right of way to build the dam had only been granted for 5 years and that time had expired. This argument was finally accepted and ended the possibility of the construction of the storage dam by the Company.

As the Hamele memorandum explains just a few years later the United States announced it would build a larger water storage dam at Engle, New Mexico attached to the Elephant Butte bluff. Only this federal reclamation project now came attached with all the changes in federal law deliberately manufactured by the United States. Most notably, that the United States claimed actual ownership of all of the unappropriated water of the Rio Grande for its project as detailed in the memorandum and its attachments. Lastly, although nicely stated, the end of the Hamele memorandum explains that the Rio Grande Compact Commission was

convened and agreed to by the three States as the only means by which the United States would finally release the embargo order on the Rio Grande. The States had no choice but to accept the terms of the United States as to how their rights had been altered by the fraud and could potentially lose their water rights if they opposed the de facto fraud of the United States.

Although, the facts are a bit different in this case from Alaska the exact same pattern was used. The federal government got involved in protecting the area in Alaska promising that all it was bringing was a greater level of certainty that would further protect all interests. Then some federal bureaucrat or group of them started making noise about the hovercraft business. There was no evidence that any harm was occurring that required federal attention. This was another opportunity to assert greater federal control and further expand the navigation servitude doctrine that caught the attention of the federal attorneys. This business owner has no idea and has no right to find out why his business has been targeted any more than the owners of the Rio Grande Company did. Nothing has changed. This problem just gets more common as the federal government gains more authority to disrupt justifiable expectations. If the National Park Service wins it could change its mind tomorrow and allow hovercraft operations, only it would set all of the rules just like on the Rio Grande.

B. The Abuse of the Navigation Servitude

While the admitted to facts regarding the embargo on the Rio Grande are revealing they do not explain how the federal attorneys turned the navigation argument that failed in the Rio Grande dam cases into the completely unaccountable power it has become

today to create the present case. It requires a reading of the second memorandum on Federal Irrigation Water Rights to see just how abusive the navigation doctrine became by being combined with the war power to issue the embargo on the Rio Grande. While counsel could contest the various points made in this memorandum, for purposes of this case at the petition stage counsel will not do so but will allow the written memorandum to speak for itself. It is more important that this Court realize what the claimed federal authority really is. Counsel reminds this Court that this is a Memorandum dated January 22, 1930 and that the United States undoubtedly claims more than this today. The reasoning in the 1930 memorandum is more detailed than the reasoning applied by the Ninth Circuit. The difference is that the 1930 memorandum tries to justify or interpret how separate constitutional powers were combined from the fraud on the Rio Grande to claim ownership of all water while the Ninth Circuit erroneously assumes that the Commerce power always included these other constitutional powers.

Attorney Ethelbert Ward states that the federal reserved water rights doctrine was established when this Court opined that "Although this power of changing the common law rule as to the stream within its domain undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress, a State by its legislation cannot destroy the right of the United States, as the owner of lands bordering on streams, to the continued flow of its water so far at least as may be necessary for the beneficial uses of the government property…" U.S. v. Rio Grande Dam and Irrigation Co., 174 U.S. 690, 703 (1899). See Memorandum titled "Federal Irrigation Water Rights" by Ethelbert Ward,

dated January 22, 1930, bottom of p. 3. As made clear by the exhibits to the Embargo of the Upper Rio Grande memorandum, the recognition by this Court of the rights of the United States as the owner of lands bordering on streams was immediately put into effect against the Territory of New Mexico. A claim to all of the waters of the Rio Grande within the Territory was made and filed to the State Engineer.

This memorandum on Federal Irrigation Water Rights goes much further than just asserting these rights within federal irrigation projects. The first sentence "The United States is the owner of the unappropriated waters in the non-navigable streams in the public land States of the arid West." sets the stage. As just stated above, the United States claimed all of the unappropriated waters of the Rio Grande even though they had argued in this Court that the Rio Grande was a navigable river. But to claim all of the unappropriated waters according to this analysis the United States also had to be claiming that the Rio Grande was non-navigable. The Ward memorandum explains how the United States can use either argument navigable or non-navigable to gain the same results on federal reserved rights. The reason is stated just before the quote from the Rio Grande dam case on p.3. "Even in the States where the appropriation system prevails, the United States continues to hold its land and waters as a riparian proprietor at common law."

In other words, the lawyers for the United States have determined that their interpretation of the law is not subject to challenge in any court of law or by Congress because they have the absolute right to treat the public land states as being continuously under the territorial war powers. If the territorial war powers can

be asserted against any State simply by saying it is for the Indians what is the difference in saying that the same power exists in a slightly different analysis?

This Court was absolutely complicit in allowing the general reserved rights doctrine established in *Dred Scott v. Sandford*, to remove the future state interests of New Mexico. Just like Congress and the line of Presidents from Ohio that had learned how Edwin Stanton had reserved great powers to the United States through the 1871 Indian Policy, this Court played along with the new federal game of asserting the retained war powers as domestic law. As stated in the Summary of the Argument section of the brief, Indians were literally kidnapped off of two reservations and forced to live at the two dam sites to prevent construction by the Rio Grande Company. Using the Indians was the means to this unlimited power. Of course, it did not take the United States or this Court long to expand federal power into other newly discovered reserved federal ownership rights through Indian treaties or claims to unmentioned water rights vesting when Indian reservations were established. The Ward memorandum sets out in exacting detail how every law and decision by this Court through 1930 can be interpreted by the federal attorneys to further this federal interest. "The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied, and could not be. United States v. Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. Winters v. United States, 207 U.S. 564, 577 (1908)." Ward Memorandum at p.8. The Ward memorandum then

continues into how Section 8 of the Reclamation Act also does not change any of the federal reserved water rights.

This Court knowingly and deliberately broke the rule of law as requested by the federal attorneys in the Rio Grande Dam cases. No longer did Congress exclusively exercise plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories become States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). From 1897 forward, any Secretary wielded even greater territorial war powers than Congress because they were completely unaccountable to the people or companies they harmed by altering legal processes. It was highly unlikely that anyone would ever find out how their justifiable expectations to a government process were altered because the information from the federal attorneys was and is privileged unless the documents have been placed into the public record in the National Archives. This was an unforeseen accident that these two memoranda after almost 100 years have now been found in released public files and can be used to question the very basis of the federal reserved rights doctrine.

As the Sturgeon facts make clear, Congress specifically did not authorize the National Park Service to claim these same federal reserved rights on the waterways in Alaska where the plaintiff operates his hovercraft. Again, the federal attorneys' position is to present this latest expansion of the federal reserved rights doctrine to this Court and receive its tacit approval.

II. IS THIS COURT WILLING TO STEP UP TO IMPOSE ANY LIMIT ON FEDERAL AUTHORITY?

The law we inherited from Great Britain completely separated the war powers from the domestic law. Either an area was under military jurisdiction or it was under civil jurisdiction. This was the most direct way to prevent the government authority to wage war from influencing or affecting the domestic authority to promote self-governance. All of the Colonies prior to the Revolutionary War were classified as British territories under military jurisdiction. Your individual status was determined by where and to whom you were born as designated by British law. Under British law today there is still no legal means to judicially transition those born under the territorial military status of a Colony to becoming equal in status to those born within the British Isles. British law establishes different types of British citizenship depending on where and to whom you were born. But Britain has also expanded the role of its domestic courts to hear both civil and military crimes. By placing the same judges and tribunals to decide the distinct types of law, the courts and the people are constantly reminded of the differences between military and civil statutes and the need to keep them separated. Great Britain and most of her former colonies have managed to preserve their individual rights as their system of governance has designated by keeping the war powers and domestic powers separated. Britain has found a workable separation of powers balance that has preserved individual liberty under their system. This Court must correct the prior law and find a way to separate the war powers from the domestic law again.

Defining and limiting the authority to wage war was seen by the Framers as one of the most difficult problems in designing the structure of the Constitution. One of the most prominent members of the Constitutional Convention, George Mason of Virginia, refused to sign the finished Constitution because he did not believe the document contained enough restriction on the federal authority to wage war given the slavery and Indian situations. These groups were situations because they were not "white." The authority to classify slaves as 3/5ths human and Indians not taxed as separate required treating them as potential enemies using military authority. These clauses also deliberately intermix the authority to wage war and the civil authority in order to create an opportunity for all people to become equal. From the beginning our Framers rejected the old British absolute classifications of an individuals status being decided at birth and attempted to create something new. Every person was to be allowed to employ their own talents to achieve whatever they made possible through their own work no matter whether they were born a slave, an Indian or an aristocrat. Even as slavery became the main cause of the Civil War the quest for equal protection or equal justice under the law grew as a principle and became the backbone of the Civil War Amendments.

The Framers of our Constitution because of this distinction in fundamental rights between the application of domestic and territorial law specifically required that Congress "dispose of the territories." Property Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States was defined by this Court as allowing the United States to retain territorial land only on a temporary basis in a case that determined that States owned the

bed and banks of a navigable waterway. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). The specific requirements set in that case became known as the American public trust doctrine. The public trust doctrine was meant to prevent the United States from being able to use the territorial war powers as permanent domestic law against the States and individuals. The main concept was that the federal government could exercise plenary power over a territory but that upon the formal creation of the territory by Congress certain powers and ownership over the water would vest in the future state. This insured that all States would be admitted on an equal footing with the existing states. Before the Civil War Amendments and the end of slavery this was the only way to enforce the Framer's view that all people had to be equal before the law.

The majority of the Framers believed that this deliberate intermixing of war and civil authorities was acceptable because they had designed a national government that made permanent the civil liberties and would require all "war or emergency" designations to be "temporary." They specifically applied this temporary versus permanent restriction in the Property Clause, Art. IV, Sec. 3, Cl. 2., to limit the federal authority to keep an area indefinitely under military jurisdiction by requiring the Congress to dispose of the territory. The Framers had also learned from British experience that government ownership of real property created jurisdictional issues and deliberately created the separate Enclave Clause for this reason. Similarly, they understood from British law that government ownership also implicated commercial activities that touched upon or used government property and separated commerce from the ownership

interests. These and other specific separation of power and checks and balances constraints were built into the Constitutional structure to prevent the war powers from being used as domestic authority. The Framers thought they had created a limited national government subject to a written statement of its authorities. In a separate Bill of Rights they imposed even more limitations on the national government and specifically reserved to the States and primarily the people all those powers not specifically conferred to the national government.

Today all of the constitutional constraints on government power are irrelevant because this Court has failed to enforce them for more than a hundred years. The attorneys for CERF and CNYFBA know the constitutional constraints have all failed because this Court will not protect the justifiable expectations of people to what they believed was their government. When the United States is allowed to reclassify the ground you are occupying or using exactly as described in the Hamele and Ward memoranda from being under domestic law to being under territorial war law, then you lose all of your rights in that area without ever knowing what even hit you. This is what has happened to Mr. Sturgeon. He has been blindsided by this asserted federal authority that claims the federal government can change the underlying basis of what law applies to the waterways. There are now enough people that feel that they have lost their rights and their government that Donald Trump, a total Washington outsider, was elected President of the United States.

The fact that the Ninth Circuit is now forcing the last frontier, Alaska, to succumb to the federal reserved power just like this Court did against New Mexico

more than 100 years ago will either end this fight or cause people to revolt. The people are very frustrated because there has been no explanation given as to what happened for them to lose their government. No wonder since the documents detailing the major changes have been deliberately removed from public view just like these two memoranda as to what really happened on the Rio Grande to create the federal reserved rights doctrine. Counsel for CERF was not searching for New Mexico water documents when she found these. What she was searching for were documents from federal attorney William H. Veeder, the greatest champion of the federal reserved rights doctrine and attorney for the United States intervention on behalf of the Indian tribes on the Colorado River. Counsel found several memoranda written by Veeder that make these memoranda on how the Rio Grande Dam cases were used appear very tame by comparison. Frankly, the Veeder memoranda are so inflammatory that counsel would hesitate to introduce them into any ongoing case.

III. THIS COURT CONTINUES TO AVOID ITS CONSTITUTIONAL ROLE

For more than 20 years the Citizens Equal Rights Foundation (CERF) has been presenting *amici curiae* briefs to this Court requesting that this Court reexamine its prior cases granting plenary authority to the Congress and Executive branch over Indians under current federal Indian policy. Two terms ago, in several opinions this Court called into question the continuing plenary authority. One of those cases was the earlier version of this case, *Sturgeon v. Frost,*136 S. Ct 1061 (2016). The Chief Justice himself warned the Ninth

Circuit Court of Appeals in the unanimous opinion that further expanding the federal reserved water rights doctrine would have great implications but did not articulate what those implications would be. The Ninth Circuit upon rehearing chose to ignore the warning and has greatly expanded the federal reserved water rights doctrine to now include full plenary authority under the Commerce Clause. Now this Court must either capitulate to this end of the state public trust doctrine over water as the Ninth Circuit has defined it or confront the claimed federal plenary authority over Indians that has expanded to this point. There is no place left in the Ninth Circuit decision for any claim of state sovereignty over water in Alaska if the reasoning of the Ninth Circuit stands.

Ultimately the question is one of separation of powers that depends on how this Court defines the concept of judicial review. Since the Civil War this Court has allowed federal attorneys to define the Constitution and spoon feed to the Justices the legal result they want in a decision. This Court has allowed lawyers representing the United States to define what is good or bad for the national government instead of this Court deciding what is best for preserving self-government and the rights of the people. This Court needs to be like an architectural board deliberately and carefully protecting the structure of the Constitution that literally keeps our civil rights and liberties intact. The utter failure of this Court has allowed a steady increase of federal authority across anything a federal attorney can claim as a federal interest. Former Justice Sandra Day O'Connor described this as the loss of individual liberty. There is no personal liberty when the Supreme Court always accepts that the federal government has an interest in any and all commercial

activities. Very few things that any person owns or does today are not products or services in commerce.

What counsel for CERF and CNYFBA really do not understand is why the liberals that say they respect civil rights and civil liberties cannot see that as long as the unlimited federal reserved rights doctrine is law that it can be used against any unsuspecting person to take away all of their rights without any notice or slightest warning. The owners of the Rio Grande Company were completely blindsided by the attack of the federal government when they believed and had been told they had received all the federal permission they needed to legally build the Elephant Butte dam. Counsel for CERF was blindsided when she was attacked for writing a new federalism argument through a federal demonstration project that allowed the State of New Mexico to use the Indian Child Welfare Act as the main guideline for all domestic relations law in New Mexico. Any property owner can be blindsided if a federal bureaucrat sees something of federal interest on their property. Or in this case, if an asserted federal interest is used to deliberately stop a successful business just because a federal bureaucrat represented by federal attorneys claims he has the authority to do so on navigable water in Alaska.

The ultimate blindside happened to persons of Japanese ancestry after the attack on Pearl Harbor. The 1871 Indian policy was copied by the United States military to figure out how to legally detain and remove persons of Japanese descent during World War II. It was no accident that the Japanese Relocation centers and detainment camps were located on current and former federal Indian reservations. As the Japanese found out, any person can be reclassified using the same federal authority to change a land or water

classification. Many cases filed by Japanese citizens challenged their treatment during the war. This Court upheld the military authority applied through the civil criminal laws against the Japanese citizens because of their race until the end of 1944 when it finally granted a *habeas corpus* petition. *See generally Ex Parte Mitsuye Endo*, 323 U.S. 283 (1944). We don't want to remember how the 1871 Indian policy was justified and upheld in principle in *Hirabayashi v. United States*, 320 U.S. 81 (1943) and *Korematsu v. United States*, 323 U.S. 214 (1944). Nothing has changed.

This thinking is as crazy as believing that the federal Indian policy of 1871 that still underlies current federal Indian policy was defined and designed to help the Indians. As William Veeder himself found out, nothing is further from the truth.

This Court with the Civil War Amendments has had the ability to restore the rule of law and forever end the federal reserved rights doctrine by making all people equal before the law. This Court has just not had the inclination to do so.

Conclusion

This Court should accept the petition and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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