

FILED
5 AUG 02 2016
WASHINGTON STATE
SUPREME COURT

FILED

JUL 27 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 93445-2

33438-4

SUPREME COURT

STATE OF WASHINGTON

COURT OF APPEALS NO.: 295664

STATE OF WASHINGTON,

Plaintiff/Respondent

v.

JOSEPH P. SULLIVAN,

Defendant/Petitioner

MOTION FOR DISCRETIONARY REVIEW OF
COMMISSIONER RULING

David R. Hearrean
WSBA#17864
Attorney for Appellant
PO Box 55
Wilbur, WA 99185
(509) 324-7840
davidhearrean@gmail.com

A. IDENTITY OF PETITIONER

The appellant, JOSEPH P. SULLIVAN, by and through his attorney asks this court to accept review of the Court of Appeals decision as designated in Part B of this motion.

B. COURT OF APPEALS DECISION

The appellant requests that this court review the entire decision of the Court of Appeals Commissioner Ruling denying appellant's motion for an entry of an order remanding to Superior Court to supplement the record and direct that additional evidence (See Appendix A-1 through A-12) on the merits of the case be taken and initiate other remedy if necessary pursuant to this court's authority under RAP 1.2, RAP 18.8 and RAP 9.11 so that ends of justice might be served and also review the June 22, 2016 Order Denying Motion to Modify the Commissioner's Ruling of March 30, 2016. Copies of the decisions are in the Appendix at pages B-1 through B-4 and C-1.

C. ISSUES PRESENTED FOR REVIEW

1. Should the Supreme Court exercise revisory jurisdiction and find that the Honorable Commissioner committed error by not

remanding to Superior Court to supplement the record and direct that additional evidence (See Appendix A-1 through A-12) on the merits of the case be taken and initiate other remedy if necessary pursuant to this court's authority under RAP 1.2, RAP 18.8 and RAP 9.11 so that ends of justice **might** be served.

2. Should the Supreme Court grant review of the Commissioner's ruling that additional facts regarding the work orders are not needed to fairly resolve the issues on review and would probably not change the decision being reviewed.

D. STATEMENT OF THE CASE

On April 24, 2014 after numerous media announcements to the public that fishing at the Grand Coulee Dam was now open after closure since 9-11 (See D33,35,36,38,40 and 41; CP 13-26); Mr. Sullivan went fishing in the area. One of the major issues on the merits (RP 672-679)ⁱ was that the officer who arrested Mr. Sullivan for trespassing testified under oath that several no trespassing signs (RP 251-254, 471-477; P61,45,50-54) existed at the time all the way from the parking lot to the bank.ⁱⁱ See Appendix D-2. Mr. Sullivan testified that there were no such signs as he walked to the bank to fish. (2-11-15 3.5 Hrg RP 21). Several pictures (P45, 50-54) were in

fact admitted to the jury by the prosecutor that this same officer testified he personally took on that same date (4-24-14) of these no trespassing signs. (See D-2) . However, Mr. Sullivan and many others testified that those signs were not placed at the locations until after the April 24, 2014 incident. (Also see RP 559, 567-569, 578, 671-678,738-740). In fact, one picture taken by one of these witnesses just a few weeks after this incident clearly showed the same sign but now it is blank as Mr. Sullivan claimed under oath. (See D-1). (See also D 64)ⁱⁱⁱ. Additionally, this same officer's (Higgs) credibility was at issue since only he testified that Mr. Sullivan hit him in the thigh causing a small bruise. (RP 259-261). Mr. Sullivan who is a retired disabled veteran (RP 18-21) with no prior criminal history (RP 761) testified that he never hit the officer in the leg. (RP 750, 1118; See also RP 687-689). Additionally, several portions of the video appeared to be manipulated and the strongly disputed assault was not shown on any video. (RP 1017-1018, 1029). As a result, on April 22, 2015, Mr. Sullivan was found guilty by jury of Resisting Arrest and Third Degree Assault. Unfortunately, several months after this verdict, the United States Bureau of Reclamation (USBR) agency that is in charge of Grand Coulee Dam sent the defense

work orders (See Appendix A-1 and A-2) showing that the no trespassing signs were not even ordered by the Dam until April 30, 2014 and not installed in the area until several months after the April 24, 2014 incident which seriously questions the officer's sworn testimony (See RP 251-254 and P 61 where the officer used blue to demonstrate that there were numerous no trespassing signs in a straight line to the bank where Appellant was fishing). It should be noted that in October 2014 the USBR denied the Appellant's FOIA request for the no trespassing sign information. (See Appendix A-3 through A-12- Note that DaVee Greer is Appellant's defense staff private investigator). Additionally, the prosecutor repeatedly represented to the defense and court that the defense had everything and there was nothing else. (3-31-15 Hrg RP 11).^{iv} After the defense made repeated requests for such information and told it did not exist (CP 70), the defense relied upon such representation by the deputy prosecutor who is held to a high standard. This same prosecutor repeated after this representation that regarding the Dam employees who put up the signs (no trespassing), "We're not anticipating calling them. So we just didn't see a need to force them into an interview." (3-31-15 Hrg RP 11).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) THE SUPREME COURT SHOULD EXERCISE REVISORY JURISDICTION AND FIND THAT THE HONORABLE COMMISSIONER COMMITTED ERROR AND REMAND TO SUPERIOR COURT TO SUPPLEMENT THE RECORD AND DIRECT THAT ADDITIONAL EVIDENCE (SEE APPENDIX A-1 THROUGH A-12) ON THE MERITS OF THE CASE BE TAKEN AND INITIATE OTHER REMEDY IF NECESSARY PURSUANT TO THIS COURT'S AUTHORITY UNDER RAP 1.2, RAP 18.8 AND RAP 9.11 SO THAT ENDS OF JUSTICE MIGHT BE SERVED.

According to RAP 9.11- ADDITIONAL EVIDENCE ON REVIEW:

(a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be

inequitable to decide the case solely on the evidence already taken in the trial court.

(b) Where Taken. The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

First, the no trespassing sign is a major issue presented throughout this jury trial especially considering the resisting arrest charge and the jury instructions including the special verdict form. (See Appendix E-6) (CP 339,330,327,326,324,323; RP 578; RP 672-679; RP 708,739-740 also refer to same above). Thus, Mr. Sullivan claims that this proof of when these no trespassing signs were ordered and placed at the Dam is additional proof of facts that is needed to fairly resolve the issues on review. Even the trial court judge believed that the presence of these signs were crucial. (RP 682). The officer's testimony regarding the pictures of the no trespassing signs which were not dated appear to be in direct conflict with the additional evidence that these signs were not even ordered until several days after the April 24, 2014 incident. (See Appendix A-1 and A-2). Second, Appellant firmly believes that this new additional information if verified by the trial court contradicts

the officer's testimony; thus, this new evidence seriously questions the officer's credibility and would probably change the decision being reviewed. Third, the representation by the prosecutor and the defense justifiable reliance on such representation that there is no other discovery from the Dam regarding the signs plus the USBR denial of the FOIA request submitted in October 2014 by the defense regarding the signs is equitable to excuse Mr. Sullivan's failure to present the sign evidence to the trial court. (See Appendix A-1 through A-12). Fourth, the remedy available to the Appellant through post judgment motions in the trial court is inadequate or unnecessarily expensive without this court allowing this case to be remanded to the trial court in order to enter testimony and additional evidence to supplement the record which would possibly result in either a dismissal or final resolution. Fifth, the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive since this new information changes the facts and would support the Appellant's arguments that this case should be dismissed. Sixth, it would be inequitable to decide this case solely on the evidence already taken in the trial court since the prosecutor argued and presented jury instructions to the trial court alleging Mr.

Sullivan ignored the no trespassing signs located as the officer swore. Additionally, the prosecution was allowed by the trial court to present and argue jury instructions on trespassing and also present a special verdict form regarding trespassing which makes the location and dates of these no trespassing signs a major issue. The next question is whether such records are "likely to contain evidence material to the defense." State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993); Diemel, 81 Wn.App. at 465. In this context, material evidence includes evidence favorable to the accused and relevant to guilt or punishment. Knutson, 121 Wn.2d at 772; quoting, Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987). See also, Kyles v. Whitley, 514 U.S. 419 (1995); Brady v. Maryland, 373 U.S. 83 (1963). Mr. Sullivan argues that the time and area of placement of the "no trespassing" signs is very material to this case as to trespassing jury instructions and credibility of the police officer who testified under oath that the signs were always there.(See Appendix E-1 through E-6). Finally, the appellant believes that the court of appeals committed an obvious error which would render further proceedings useless and substantially alters the status quo when it based its decision on what is believed

to be what the evidence of the work orders show when the commissioner claimed “the work order does not prove that signs were *not* present on the date in question; the order may have been for replacement signs.” Thus, Mr. Sullivan is not given the due process right to present evidence and take testimony on what this evidence does prove instead of guessing what the work orders show. Thus, it would be inequitable to decide this case solely on the officer’s disputed testimony already taken in the trial court. *Spokane Airports v. RMA, Inc.* (2009) 149 Wash.App. 930, 206 P.3d 364, review denied 167 Wash.2d 1017, 224 P.3d 773. Therefore, Mr. Sullivan respectfully asks this court to grant this motion to modify this decision and remand and supplement the record with this vital evidence in order to correct a major injustice and to serve the ends of justice. Finally the Washington State Supreme Court has recognized that some of the RAP 9.11(a) criteria may be waived to serve the ends of justice (RAP 1.2, 18.8). *In re Detention of Brooks*, 94 Wash.App. 716, 722-24 (1994), *rev. granted*, 138 Wn.2d 1021, *aff’d/rev’d* 145 Wn.2d 275, *Sears v. Grange Ins. Ass’n*, 111 Wash.2d 636, 640, 762 P.2d 1141 (1988), *Washington Fed’n of State Employees, Council 28, AFL–CIO v.*

State, 99 Wash.2d 878, 884–85, 665 P.2d 1337 (1983). Thus, the Supreme Court should exercise revisory jurisdiction and find that the Honorable Commissioner committed error. Appellant asks this court to also remand to Superior Court to supplement the record and direct that additional evidence (See Appendix A-1 through A-12) on the merits of the case be taken and initiate other remedy if necessary pursuant to this court's authority under RAP 1.2, RAP 18.8 and RAP 9.11 so that ends of justice might be served.

(2) The Supreme Court Should Grant Review Of The Commissioner's Ruling That Additional Facts Regarding The Work Orders Are Not Needed To Fairly Resolve The Issues On Review And Would Probably Not Change The Decision Being Reviewed.

Additionally, Appellant claims that the commissioner committed probable error which substantially alters the status quo when she found as another basis for the denial that "When Mr. Sullivan refused to produce identification and, instead, asked "why," the officer also had probable cause to arrest him for obstructing. Under Washington law, "[a] person cannot be punished for refusing to speak." *State v. Williams*, 171 Wash.2d 474, 484, 251 P.3d 877 (2011) (citing *State v. Contreras*, 92

Wash.App. 307, 316, 966 P.2d 915 (1998) (“[m]ere refusal to answer questions is not sufficient grounds to arrest for obstruction of a police officer.”)); accord *State v. Hoffman*, 35 Wash.App. 13, 15–17, 664 P.2d 1259 (1983) (obstruction arrest not lawful where defendant refused to provide identification to police officer).

The Commissioner also found that the work order does not prove that signs were *not* present on the date in question and the order may have been for replacement signs. However, Mr. Sullivan argues that this finding is not for the Court Commissioner to decide. It is for the trial court to determine with facts and evidence and whether further issues remain. This fair factual determination is what Mr. Sullivan was asking since this newly discovered evidence is clearly material and there is no harm to allowing a factual finding to be determined regarding the work orders. However, the Commissioner simply concludes without further hearing on facts that the work orders are not for replacement signs. Appellant claims that this is obvious error which renders further proceedings useless. Additionally, the Commissioner ruled that “*Mr. Sullivan’s conviction for resisting arrest is not dependent upon whether the area was posted “no trespassing” because the officer told him he*

was in a restricted area and should not be there. And, when Mr. Sullivan did not leave and did not produce identification, the officer arrested him for trespass. As defined in the jury instructions, "[a] person commits the crime of resisting arrest when he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him." CP at 323. See Appendix A-1 through A-4. However, the Commissioner failed to consider that there were numerous jury instructions that clearly involved the placement of the signs and where and what was stated. First, the witnesses' credibility was one major portion of this case and there was a specific jury instruction regarding this issue. See Appendix E-1. These individuals testified about no signs in the area and even took pictures. See D-1. Additionally, the court presented several jury instructions about the charge of resisting arrest and the defense of the lawfulness of the arrest as a major issue. See Appendix E-2 through E-4. Next, another jury instruction was given to the jury that clearly made material the presence of "no trespassing" signs and what Mr. Sullivan reasonably believed. See Appendix E-5. Thus, credibility of these witnesses was only one major part of this case and what Mr. Sullivan saw or knew was just another major

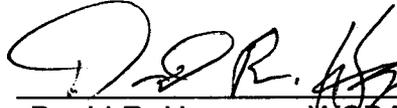
issue which these work orders would clarify. Finally, the jury was required to make a verdict of whether or not the officer had probable cause to arrest for criminal trespass in which the placement and wording of the signs would play a major role in such decision. See Appendix E-6. Therefore, Appellant claims that this is proof that the Honorable Commissioner has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by the Supreme Court as stated in RAP 13.5(b)(3). Mr. Sullivan claims that our judicial system depends on the truth and should answer and seek out the truthfulness no matter the cost. Thus, the Supreme Court should grant review of the Commissioner's ruling and find that additional facts regarding the work orders are needed to fairly resolve the issues on review and would probably change the decision being reviewed.

F. CONCLUSION

Based upon the foregoing points and authorities, the appellant, respectfully requests this court accept review of the Court of Appeals Commissioner's decision.

DATED this 22nd day of July, 2016.

Respectfully submitted:


David R. Hearrean WSBA #17864
Attorney for Appellant

ⁱ The trial court judge expressed how crucial the presence of these signs. "So the presence of the signs is really fairly crucial on that point. Because if it's not signed and it's apparently open to the public, it would not be criminal trespass, right?" (RP 682).

ⁱⁱ However, the prosecutor's own witness testified that he did not see those no trespassing signs down to the bank. This witness made it clear he only saw what signs were on the road (P 51 and 54) and never saw P 45, 52 or 53. (RP 567-569). This same witness who took the D-1 picture was accused by the prosecutor to being part of a conspiracy which had nothing to do with Mr. Sullivan, thus; everything included the picture was discredited as an openly questionable act against the government.

ⁱⁱⁱ Interestingly, the Officer's pictures (P 45, 50-54)(D-2) were not dated and only his sworn testimony verified the date and location of the 'no trespassing' signs that Mr. Sullivan testified did not exist at the time; however, the defense picture (D 64) of the testified blank sign in the same area was time stamped May 7, 2014.

^{iv} Pros: "They provided everything that was necessary. There's nothing else that exists. We have what we have." "So despite repeated requests by the defense, I have nothing to turn over."

GRAND COULEE POWER OFFICE

Work Order Desc: LEFT BANK FISHING ACCESS- PURCHASE AND INSTALL SIGNS FOR PARK FENCE & LEFT BANK
Long Description: Completed, 02/05/15

Location: CD-RES-RUFUS - RUFUS WOODS LAKE Asset: LAKE, RUFUS WOODS, RWL FBMS Work Order: R2960826 WBS Element: RA.52221821.1300001 Fund: 15XR0680A5 Supervisor: CUNNINGHAM, ROBERT Lead Craft: CD-HYMECH Reference: Reported By: WICKERHAM, BILLY On Behalf Of: WICKERHAM, BILLY Reported Date: 04/30/2014 Classification: Description:	Lead: MILEY, BILL Crew ID: IASUPTGI Target Start: 04/30/2014 Target Finish: 05/29/2014 Scheduled Start: Scheduled Finish:	WO Priority: 2 Asset Priority: 2 Calc Priority: 4 Work Type: MOD Sub Work Type: NONE Status: COMP Outage Required? N PM Num: <u>PM Compliance Range</u>
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Child Work Order Information

WO#	Work Order Description	Asset	Asset Description	Status
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Safety Plan Information

Safety Plan:

Job Plan

Job Plan Long Desc:

Sequence	Op	Description	Complete
10		PURCHASE OR MAKE SIGNS	<input type="checkbox"/>
20		INSTALL SIGNS ALONG PARK FENCE Install restricted access signs along park fence- Lower VAC Park.	<input type="checkbox"/>
30		INSTALL SIGNS ALONG LEFT BANK BELOW LOWER VAC PARK No access beyond this point signs, approx. 2ft. x 3 ft., every 50 ft. if possible. Install from edge of access gate to water line. Anchor poles to rip rap- 2 in. x 8 ft. tall.	<input type="checkbox"/>

Labor

Op	Craft	Labor Code	Quantity	Est. Hours
	CD-HYMECH		2	40

Materials

Item	Description	Qty	Default Bin	Storeroom
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Tools

Item	Description	Qty	Storeroom
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GRAND COULEE POWER OFFICE

Work Log

<u>Created by</u>	<u>Date</u>	<u>Type</u>	<u>Summary / Details</u>
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Remarks

Lead Signature: _____

Date: _____

Lead Print Name: _____

Supervisor Signature: _____

Date: _____

Supervisor Print Name: _____

Total Time Charged: _____



DaVee Greer <davee@traceandassociatesllc.com>

FOIA Request at Grand Coulee Dam

2 messages

DaVee <davee@traceandassociatesllc.com>
To: bor_foia@usbr.gov

Tue, Sep 9, 2014 at 3:13 PM

Good Afternoon,

Could you please tell me the procedure to request work orders for signage that was put up on the West bank below Grand Coulee?

These signs were put up to designate off limits fishing area's.

The dates I am looking for are between April 1, 2014 thru July 30, 2014.

Thank you for your help. I look forward to hearing from you.

Sincerely,

DaVee Greer

Managing Member

Trace & Associates, LLC

509-670-1120

509-888-3500

davee@traceandassociatesllc.com

<http://www.traceandassociatesllc.com>**CONFIDENTIALITY NOTICE**

The contents of this e-mail and any attachments are intended solely for the addressee(s) and may contain confidential and/or legally privileged information. If you are not the intended recipient of this message or an employee or agent responsible for delivering it to the intended recipient, or if this message has been addressed to you in error, please immediately alert the sender by reply e-mail, then delete this message and any attachments. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution, copying or storage of this message is strictly prohibited. Thank you.

Magno, Regina <rmagnojudd@usbr.gov>

Wed, Sep 10, 2014 at 7:14 AM

To: DaVee <davee@traceandassociatesllc.com>

Cc: "Shaw, Valerie J" <VShaw@usbr.gov>, Pamela Eld <peld@usbr.gov>

Good Morning, DaVee -

Your request has been assigned to Ms. Valerie Shaw, Pacific Northwest Region FOIA Officer. It has been assigned tracking number BOR-2014-00282. If you have any questions, please contact Ms. Shaw at 208-378-5122.

Sincerely,

Regina

[Quoted text hidden]

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Regina A. Magno-Judd

<https://mail.google.com/mail/u/0/?ui=2&ik=617e84d9f3&view=pt&q=dav...> 10/22/2014

Reclamation FOIA/Privacy Officer
Denver, Colorado

<https://mail.google.com/mail/u/0/?ui=2&ik=617e84d9f3&view=pt&q=dav...> 10/22/2014



United States Department of the Interior

BUREAU OF RECLAMATION
Pacific Northwest Regional Office
1150 North Curtis Road, Suite 100
Boise, ID 83706-1234

IN REPLY REFER TO:
PN-4402
RIM-6.11

SEP 11 2014

CERTIFIED MAIL RETURN RECEIPT - 7012 2210 0001 4286 8066

Ms. DaVee Greer
1250 N. Wenatchee Ave., Suite H154
Wenatchee, WA 98801

Subject: Freedom of Information Act (FOIA) BOR-2014-00282 (PN-14-40)

Dear Ms. Greer:

This letter acknowledges receipt of your September 9, 2014, FOIA request received by the Bureau of Reclamation on September 10, 2014, in which you request copies of the work orders for signage posted along the west bank below Grand Coulee concerning the designated off-limits fishing areas.

We will advise you of the status of our response within 20 workdays (excluding federal holidays and weekends) if we anticipate any delays. Unusual circumstances may warrant an additional 10-workday extension. During this time, you may inquire about the status of your request by referencing the above assigned FOIA request numbers on all correspondence concerning your request.

You may contact me directly at 208-378-5122, or you may submit an e-mail to PNFOIA@usbr.gov.

Sincerely,

Valerie Shaw
Freedom of Information and Privacy Act Specialist

FREEDOM OF INFORMATION APPEAL

Handwritten notes: "11/12/14" and "3/2/15" with some illegible scribbles.

Freedom of Information Act Appeals Officer
Department of the Interior
Office of the Solicitor
1849 C Street, N.W.
MS 6556 MIB
Washington, DC 20240

October 27, 2014

Dear Sir:

I am writing to appeal the denial of my request for work orders concerning signage on the West bank below Grand Coulee Dam. This is in regard to the designated public fishing area. I submitted a request to the Bureau of Reclamation on September 9, 2014. The requested information was denied on October 9, 2014 with further instructions to contact the Department of the Interior.

In the denial letter from the BOR it was stated that "the work order for signage is currently in progress and will not be signed and completed until all sign work is completed. Therefore, we have no work orders."

I would like the "in progress" work orders and/or "notes" concerning signage on the west bank below Grand Coulee Dam that designates the public fishing area. Fishing season opened in April 2014 in this area. What I am requesting is documentation of when the signage for the above stated purpose was or was not put in place.

Thank you for your attention to this matter and I look forward to hearing from you.

Sincerely,

DaVee Greer
Trace & Associates, LLC
1250 N. Wenatchee Ave. Ste. H-154
Wenatchee, WA 98801



United States Department of the Interior

BUREAU OF RECLAMATION
Pacific Northwest Regional Office
1150 North Curtis Road, Suite 100
Boise, ID 83706-1234

IN REPLY REFER TO:

PN-4402

RIM-6.11

OCT 09 2014

E DELIVERY CONFIRMATION

Ms. DaVee Greer
1250 N. Wenatchee Ave., Suite H154
Wenatchee, WA 98801

Subject: Freedom of Information Act (FOIA) BOR-2014-00282 (PN-14-40)

Dear Ms. Greer:

This letter is in response to your September 9, 2014, FOIA request received by the Bureau of Reclamation on September 10, 2014, in which you requested copies of work orders for signage posted along the west bank below Grand Coulee concerning the designated off-limits fishing areas.

After consulting with staff at the Grand Coulee Office, I was informed that the work order for the signage is currently in progress and will not be signed and completed until all the sign work is complete. Therefore, we have no completed work orders.

If you consider this response to be a denial of your request, you may appeal this no record response by writing the FOIA Appeals Officer. The FOIA Appeals Officer must receive your FOIA appeal no later than 30 workdays from the date of this final letter responding to your FOIA request. Appeals arriving or delivered after 5 p.m. E.T., Monday through Friday, will be deemed received on the next workday. FOIA appeals delivered via courier to the Main Interior Building will not be accepted after 4:30 p.m. E.T., due to the Department's security requirements. Your appeal must be in writing and addressed to:

Freedom of Information Act Appeals Officer
Department of the Interior
Office of the Solicitor
1849 C Street, N.W.
MS 6556 MIB
Washington, DC 20240

You must include with your appeal copies of all correspondence between you and Reclamation concerning your FOIA request, including a copy of your original FOIA request and this no record response letter. Failure to include this documentation with your appeal will result in the Department's rejection of your appeal. The appeal should be marked, both on the envelope and

the face of the letter, with the legend, "FREEDOM OF INFORMATION APPEAL." Your letter should include in as much detail as possible, any reason(s) why you believe Reclamation's response is in error.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation.

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

The Department of the Interior does not charge for FOIA processing fees totaling \$50 or less. Because the cost to process your request is under the \$50 threshold, there is no charge for the enclosed records. See 43 CFR Subpart G § 2.49(a)(1).

If you have any questions or concerns regarding this letter, please refer to the assigned FOIA request number above in all correspondence that pertains to this request. You may contact Erin Maskalick at 208-378-5128, or send an e-mail to PNFOIA@usbr.gov.

Sincerely,


Valerie Shaw

Freedom of Information and Privacy Act Specialist



United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

July 2, 2015

IN REPLY REFER TO:
Appeal No. 2015-014

DaVee Greer
Trace & Associates, LLC
1250 N. Wenatchee Avenue, Suite H-154
Wenatchee, WA 98801

Dear Mr. Greer:

This responds to the October 27, 2014, Freedom of Information Act ("FOIA") appeal ("appeal") that you filed with the Department of the Interior ("Department"), which it received on November 4, 2014, and assigned as **Appeal Number 2015-014**. Your appeal concerns your September 9, 2014, FOIA request to the Bureau of Reclamation ("BOR") that seeks copies of work orders related to signage to designate off limits fishing areas that were posted along the west bank below Grand Coulee Dam. In response to the request, the BOR advised you that "the work order for the signage is currently in progress and will not be signed and completed until all the sign work is complete. Therefore, we have no completed work orders." You filed the appeal to challenge the BOR's response to you.

Subsequent to the filing of the appeal, the BOR advised the Department that it has completed the work order that is the subject of your FOIA request. Therefore, to resolve the appeal, by copy of this letter, the Department will **REMAND** the appeal to the BOR for it to:

- **Make a determination on the release of the work order that the Appellant seeks in the September 9, 2014, FOIA request.**
- **Release to the Appellant any documents (or portions of documents) that are not protected from disclosure by any FOIA exemption.**
- **Within 20 workdays of the date of this decision, correspond directly with the Appellant regarding the remand of the appeal (with a copy to this Office), including releasing the non-exempt portions of responsive documents.**

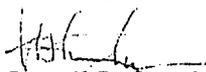
As a final matter, the Department notes your request in the appeal for copies of the "in progress" work orders and/or 'notes' concerning signage...that designate the public fishing area." If you remain interested in obtaining these documents in light of the fact that the BOR has now completed the work order that you requested and the Department's direction in this decision for the BOR to release the non-exempt portions of the final work order(s) to you, you must submit a new FOIA request to the BOR requesting copies of those "in progress" work orders and/or 'notes'." Please ensure that you include in any such new FOIA request to the BOR information regarding your payment of processing fees, as required by the Department's FOIA regulations.¹

¹ See 43 C.F.R. § 2.6(a) (requiring a requester to "explicitly state [in his FOIA request that he] will pay all fees associated with processing the request, that [he] will pay fees up to a specified amount, and/or that [he is] seeking a fee waiver.").

DaVee Greer
FOIA Appeal No. 2015-014
Page 2 of 2

This completes the Department's response to your appeal. If you have any questions regarding this matter, please call the FOIA Appeals Office at (202) 208-5339.

Sincerely,



Darrell R. Strayhorn
FOIA Appeals Officer
Department of the Interior

cc: Debbie Suehr, FOIA Officer, BOR (FOR ACTION)
Yadyra Esparza, Regional FOIA Coordinator, BOR-Pacific Northwest Region
Cindy Cafaro, Departmental FOIA Officer



United States Department of the Interior

BUREAU OF RECLAMATION
Pacific Northwest Regional Office
1150 North Curtis Road, Suite 100
Boise, ID 83706-1234

IN REPLY REFER TO:
PN-4402
RIM-6.11

JUL 31 2015

CERTIFIED MAIL RETURN RECEIPT – 7012 2210 0001 4286 9285

Ms. DaVee Greer
Managing member
Trace & Associates, LLC
23 South Wenatchee Avenue, Suite 116
Wenatchee, Washington 98801

Subject: Freedom of Information Act (FOIA) Request No. BOR-2015-00347 (PN-15-57)

Dear Ms. Greer:

This letter is in response to the FOIA Appeal (No. 2015-014) remanded on July 2, 2015, to the Bureau of Reclamation (BOR or Reclamation) Pacific Northwest Regional Office for release determination and direct response. The appeal concerns your September 9, 2014, FOIA request to Reclamation that seeks copies of work orders related to signage to designate off limits fishing areas that were posted along the west bank below Grand Coulee Dam.

With this letter, we have enclosed a compact disc containing two pages in response to your request. The pages on the CD are provided to you in their entirety. We consider this response to be a total grant.

In 2007, a number of amendments to the FOIA were enacted. As part of these FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS as follows:

Office of Government Information Services
National Archives and Records Administration, Room 2510
8601 Adelphi Road
College Park, Maryland 20740-6001
ogis@nara.gov
877-684-6448

Beginning October 1, 2012, the inclusion of the following statement is mandatory for all BOR FOIA response letters:

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

The Department of the Interior does not charge for FOIA processing fees totaling \$50 or less. Because the cost to process your request is under the \$50 threshold, there is no charge for the enclosed CD. *See* 43 CFR Subpart G §2.49(a)(1).

If you have any questions or concerns regarding this letter, please refer to the assigned FOIA request number above in all correspondence that pertains to this request. You may contact me at (208) 378-5122 or send an e-mail to PNFOIA@usbr.gov.

Sincerely,



Yadyra P. Esparza
Freedom of Information Act Specialist

Enclosure

- Responsive Records (1 CD/2 pages)

The Court of Appeals
of the
State of Washington
Division III

FILED

MAR 30 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,)	No. 33438-4-III
)	
)	
Respondent,)	
)	
v.)	COMMISSIONER'S RULING
)	
)	
JOSEPH P. SULLIVAN,)	
)	
Appellant.)	
_____)	

Joseph P. Sullivan has appealed the Grant County Superior Court's June 8, 2015 Judgment and Sentence which the court entered on a jury verdict that found that he had committed third degree assault and resisting arrest. Pursuant to RAP 9.11 and the interest of justice, he now moves this Court to remand the matter to the superior court to take additional evidence.

Mr. Sullivan's convictions stem from his entry into an area at Grand Coulee Dam

No. 33438-4-III

to fish. The officer who arrested Mr. Sullivan testified that several "no trespassing" signs were visible from the parking lot to the water bank, and the court admitted photographs of the signs that the officer stated he took the same day as his encounter with Mr. Sullivan. Mr. Sullivan testified to the contrary. He also testified that he had heard and read media announcements that the area, which had closed after the September 11, 2001 terrorist attacks, was now re-opened for fishing. According to Mr. Sullivan and other witnesses, the "no trespassing" signs were not present until later.

The State cites the officer's testimony that he did not initially intend to arrest Mr. Sullivan for trespassing. Rather, he intended to merely notify him that he was in a restricted area. Mr. Sullivan refused to produce identification. At that point, the officer attempted to arrest him for obstructing and trespassing. When the officer reached for Mr. Sullivan's arm, Mr. Sullivan pulled away. He then warned Mr. Sullivan that he could arrest him for resisting arrest. The officer again reached for Mr. Sullivan. The officer testified that Mr. Sullivan moved forward and struck the officer on the thigh. They tussled until the officer tasered Mr. Sullivan.

Mr. Sullivan testified in his own defense. He agreed that the officer told him that the area was restricted, at which point they engaged in an exchange about the media reports that the area was now re-opened for fishing and whether the officer had authority to ask him to leave. He also agreed that the officer asked him for identification, and he responded with the question, "why?" RP at 749. In addition, he agreed that the officer

No. 33438-4-III

then told him to step back and put his hands behind his back. He differed from the officer's account in that he stated he slipped on the rocks when he attempted to step back. And, the officer then "lunged" at him. RP at 751.

After the verdict, defense counsel received documents from the United States Bureau of Reclamation that reflected that it had ordered "no trespassing" signs six days after the incident and that it installed the signs several months later. Mr. Sullivan argues that this Court should remand his cause to the superior court for a hearing, presumably because he views the new information as proof he was not trespassing.

However, Mr. Sullivan's motion does not satisfy the criteria of RAP 9.11 that a party must meet to add new evidence to the record, which include that the new evidence probably would change the result. Nor, is the new evidence needed to serve the interest of justice.

First, the work order does not prove that signs were *not* present on the date in question; the order may have been for replacement signs. *Moreover, Mr. Sullivan's conviction for resisting arrest is not dependent upon whether the area was posted "no trespassing" because the officer told him he was in a restricted area and should not be there.* And, when Mr. Sullivan did not leave and did not produce identification, the officer arrested him for trespass.

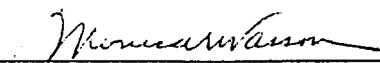
As defined in the jury instructions, "[a] person commits the crime of resisting arrest when he intentionally prevents or attempts to prevent a peace officer from lawfully

No. 33438-4-III

arresting him.” CP at 323. The instructions also defined “lawful arrest” as an arrest that occurs when “the arresting officer had probable cause to believe the person arrested had committed the crime of criminal trespass in the second degree, obstruction of a law enforcement officer, and/or assault in the third degree in the officer’s presence.” CP at 326. And, “probable cause” “means facts that would cause a reasonably cautious officer to believe that the person had committed that crime.” *Id.*

Here, the officer had been notified that a man was in a restricted area. That information gave rise to probable cause for arrest no later than when Mr. Sullivan did not leave after the officer told him he could not fish there. When Mr. Sullivan refused to produce identification and, instead, asked “why,” the officer also had probable cause to arrest him for obstructing. None of the foregoing depends on the presence or absence of “no trespassing” signs.

Accordingly, IT IS ORDERED, Mr. Sullivan’s motion to remand to add evidence to the record is denied.



Monica Wasson
Commissioner

FILED
JUNE 22, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 33438-4-III
)	
Respondent,)	
)	
v.)	ORDER DENYING
)	MOTION TO MODIFY
JOSEPH PATRICK SULLIVAN,)	COMMISSIONER'S RULING
)	
Appellant.)	

THE COURT has considered appellant's motion to modify the Commissioner's Ruling of March 30, 2016, and the respondent's answer thereto, and is of the opinion the motion should be denied, without prejudice, to the issue being presented to the trial court. Therefore,

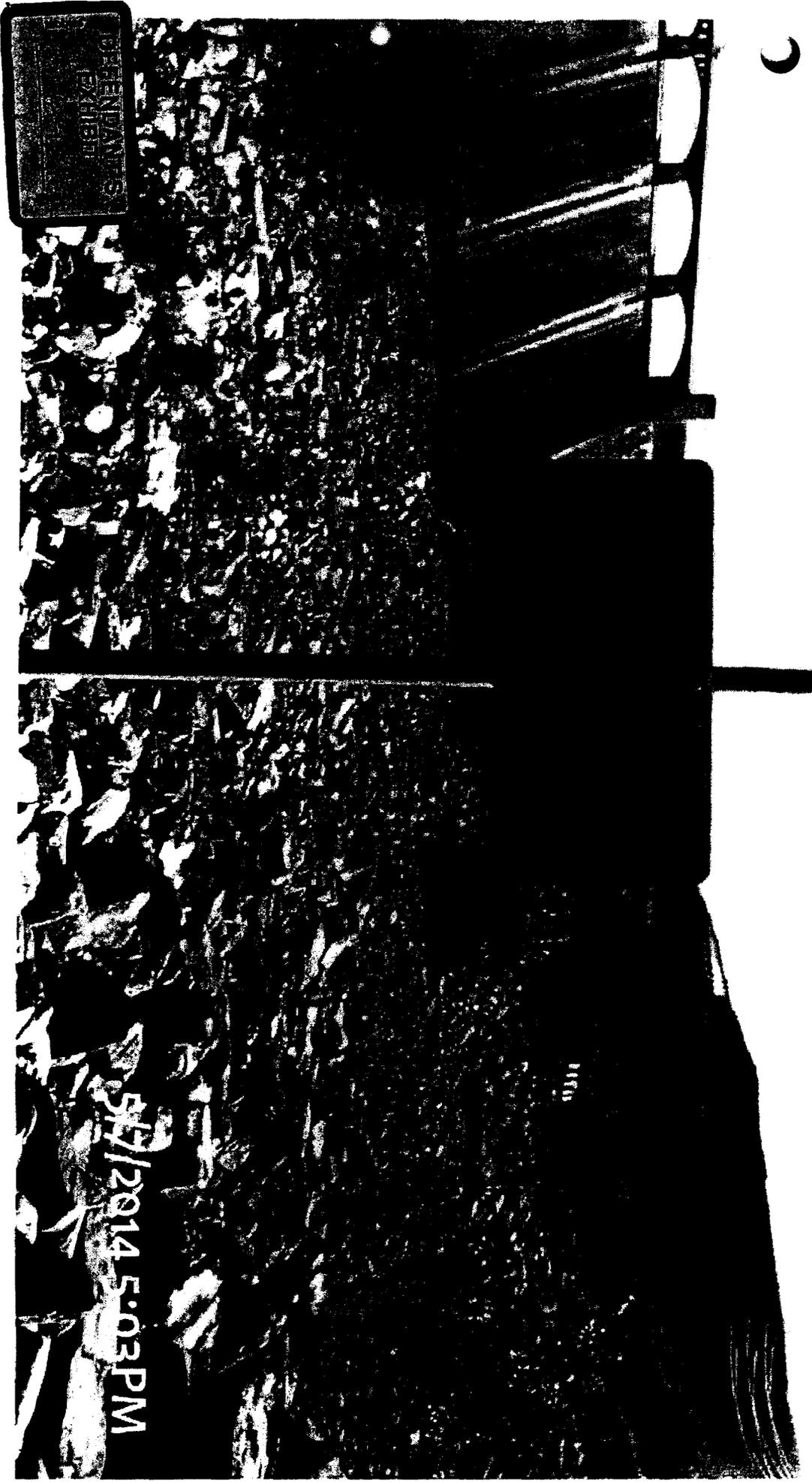
IT IS ORDERED, the motion to modify is hereby denied.

PANEL: Judges Siddoway, Korsmo, Lawrence-Berrey

FOR THE COURT:

Fearing, C.J.

GEORGE B. FEARING, Chief Judge



Appendix D-1

tabbles

PLAINTIFF'S
EXHIBIT

45

NO TRESPASSING ON
ROAD OR RIVERBANK

Instruction No. 7

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of Tyler Mellick's contacts with law enforcement on April 20 and 21, 2014, Tyler Mellick's current civil litigation involving the Grand Coulee Police Department, and Tyler Mellick and Robert Fields' personal opinions regarding the propriety of law enforcement officers who have been commissioned by Washington State to enforce laws on federal property. This evidence may be considered by you only for the purpose of witness credibility. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Instruction No. 12

A person commits the crime of resisting arrest when he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him.

Instruction No. 15

An arrest is lawful if the arresting officer had probable cause to believe the person arrested had committed the crime of criminal trespass in the second degree, obstruction of a law enforcement officer, and/or assault in the third degree in the officer's presence. "Probable cause" means facts that would cause a reasonably cautious officer to believe that the person had committed that crime. In determining whether the facts known to the officer justified this belief, you may take into account the officer's experience and expertise.

Instruction No. 16

In making your determination whether an officer had probable cause to arrest a person for criminal trespass in the second degree, one factor you may consider is whether the defendant reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain. This factor alone, however, is not dispositive on the issue.

Instruction No. 19

A person commits the crime of criminal trespass in the second degree when he knowingly enters or remains unlawfully in or upon premises of another unless the person reasonably believed that the owner of the premises or other person empowered to license access to the premises would have licensed the defendant to enter or remain.

FILED

JUL 29 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 334384

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSEPH P. SULLIVAN,

Defendant.

Superior Court No.: 14-1-00364-4

DECLARATION OF SERVICE

On the 22nd day of July 2016 Declarant emailed the Motion for Discretionary
Review of Commissioner Ruling to the following parties:

Katharine Mathews
Grant Co. Deputy Prosecuting Attorney
kwmathews@grantcountywa.gov
PO Box 37
Ephrata, WA 98823

Kaye Burns
Grant Co. Prosecuting Attorney Office
PO Box 37
Ephrata, WA 98823
kburns@grantcountywa.gov

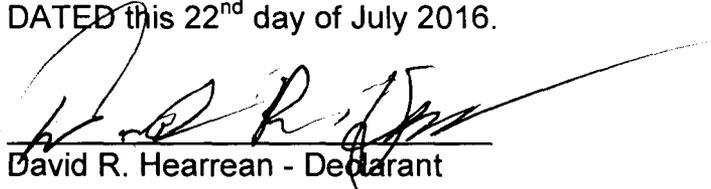
Declaration of Service - 1`

David R. Hearrean
Attorney at Law
P.O. Box 55
Wilbur, WA 99185
davidhearrean@gmail.com
(509)324-7840

1 Additionally, on July 22, 2016, the declarant hand delivered a copy of the Motion for
2 Discretionary Review of Commissioner Ruling to:

3 Joseph P. Sullivan
4 7437 Bruce Road
5 Wilbur, WA. 99185

6 DATED this 22nd day of July 2016.

7 
8 David R. Hearrean - Declarant

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24 Declaration of Service - 2`

25 David R. Hearrean
Attorney at Law
P.O. Box 55
Wilbur, WA 99185
davidhearrean@gmail.com
(509)324-7840