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The Cushman Dam Case and Indian Treaty Rights: *Skokomish Indian Tribe v. United States, et al.*

by

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The Cushman Dam Case and Indian Treaty Rights: *Skokomish Indian Tribe v. United States, et al.*

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I. INTRODUCTION

As white settlers began to arrive in increasing numbers in the West, treaties were negotiated between the United States and resident Indian tribes. In those treaties a reservation was usually reserved as a permanent homeland for the tribe. One such reservation was the Skokomish Indian Reservation. It was established by the 1855 Treaty of Point No Point[2] ("Treaty") at the mouth of the Skokomish River in Washington State. The last six miles of the Skokomish River ("River") flow through the Reservation into Puget Sound's Hood Canal. In 1930, the City of Tacoma began operation of its Cushman Project, an unlicensed hydroelectric project several miles above the reservation. The Project diverts nearly all the flow of the North Fork of the Skokomish River and sends it through a penstock to an on-reservation powerhouse on Hood Canal. As a result, only a trickle of water flows through the River's North Fork, and only 40 percent of the original

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2. *Treaty of Point No Point* (Jan. 26, 1855), 12 Stat. 933.

mainstem River flow now passes through the Reservation. This lack of water, claims the Tribe, devastated fish runs, seriously diminished the Tribe's ability to fish in the River basin on and off the Reservation, and severely damaged the Reservation.

In 1999, the Skokomish Indian Tribe ("Tribe") sued Tacoma Public Utilities ("Tacoma") and the United States in District Court for the Western District of Washington. The Tribe sought monetary damages under federal, state and common law for destruction of the Tribe's fishing rights and property caused by Tacoma's project. The Tribe's monetary claims included allegations of interference with the Tribe's federally reserved water rights and individual members' civil rights claims under 42 U.S.C. § 1983.

The district court, on several summary judgment motions, dismissed all Tribal and individual claims. Despite relevant Treaty language and evidence of circumstances surrounding creation of the Reservation, the court also found that the Tribe had no reserved water rights for fishing purposes. It held that the Cushman Project's removal of nearly half the flow of the River water did not implicate reserved water rights because there was enough rainfall in Western Washington for crop production. The district court also dismissed the Tribe's § 1983 claims. The Tribe appealed from the district court's dismissal of all claims on summary judgment.

On June 3, 2003, a three-judge Ninth Circuit panel upheld the district court, with one member dissenting. Upon motion, the Court granted the Tribe's petition for rehearing en banc. On March 9, 2005, a majority of six of the en banc panel of eleven issued an opinion that dismissed all of the Tribe's monetary claims against Tacoma and some claims against the United States.[3] Five judges issued two partially concurring and dissenting opinions. Although the three-judge panel did not address the reserved water rights issue, this first en banc opinion went on to hold that the Tribe possessed no reserved water rights for fishing because fishing was not the primary purpose of the Reservation. Upon a request for an additional en banc review the Court filed an amended opinion superseding the original en banc opinion and deleting the original section on water rights.[4]

While acknowledging the Tribes' right to equitable relief against parties who did not sign the Treaty ("non-signatory party"), the final en banc majority opinion barred the Tribe from monetary relief. The en banc majority held that individual tribal members could not seek monetary relief under 42 U.S.C. § 1983 for violation of treaty-reserved fishing rights because treaty

3. *Skokomish Tribe v. U.S.*, 401 F.3d 979 (9th Cir. 2005).

4. *Skokomish Tribe v. U. S.*, 410 F.3d 506 (9th Cir. 2005). The opinion was written by Circuit Judge Alex Kozinski, and concurred in by Chief Judge Mary M. Schroeder, and Circuit Judges Pamela Ann Rymer, Ronald M. Gould, Jay S. Bybee and Consuelo M. Callahan. A separate opinion by Circuit Judge Susan M. Graber concurs in part and dissents in part, and is joined by Circuit Judges Harry Pregerson, Richard A. Paez, and Marsha S. Berzon. A separate opinion by Circuit Judge Marsha S. Berzon dissents in part, and is concurred in by Circuit Judges Harry Pregerson, Richard A. Paez, and Johnnie B. Rawlinson. The court therefore divides 6:4:4, with five judges in various degrees of consent.

rights are held only by the Tribe.[5] State common law based claims were dismissed on statute of limitations grounds.[6] Thus, after 75 years of destroyed fisheries, Reservation plundering, and river estuary damage, the Tribe was denied any meaningful remedy. In a six to five majority the Court ruled that the Tribe and its individual members had no remedy for damages to rectify these longstanding wrongs. The United States could not be sued under either the Federal Tort Claims Act or the Federal Power Act. The City of Tacoma and Tacoma Public Utilities could not be sued under the Treaty of Point No Point or the Civil Rights Act. Nor were state law theories of trespass, nuisance, or inverse condemnation available. Even though the licensing requirement of the Federal Power Act had been ignored, no remedy was available.

Because there are many similar Indian Treaties involving numerous Indian Tribes, the Cushman case has potentially far reaching implications.

II. THE COURT BARS MONETARY RELIEF DESPITE CLEAR DAMAGE TO TREATY PROTECTED RIGHTS

The majority's decision has been soundly criticized even by other members of the court.

> There are hard issues in this case concerning the precise import of several precedents concerning Indians' treaty-protected rights, but the majority's simplistic approach misses them all.[7]

In barring Tribal claims in the Cushman case, the Ninth Circuit departed from clear Supreme Court precedent. In *Oneida II*, the United States Supreme Court allowed a tribe's federal common law claim for monetary damages against a non-signatory party that had violated possessory aboriginal rights protected by treaties.[8] The Ninth Circuit followed *Oneida II* in *United States v. Pend Oreille Public Utility District No. 1,*[9] by allowing the Kalispell Tribe to seek money damages against a public utility in a trespass setting. Sister circuits follow the principles established in *Oneida I*, which like *Oneida II* also recognized a federal cause of action for violation of a tribe's federal possessory rights.[10]

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5. *Id.* at 515.

6. *Id.* at 516.

7. *Id.* at 523 (Berzon, J., dissenting).

8. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*"); *Treaty of Fort Harmar* (Jan. 9, 1789) 7 Stat. 33; *Treaty of Canandaigua* (Nov. 11, 1794) 7 Stat. 44. *Id.* ***

9. 28 F.3d 1544, 1550 n. 8 (9th Cir. 1994).

10. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) ("*Oneida I*"); *Mescalero Apache Tribe v. Burgett Floral Company*, 503 F.2d 336 (10th Cir. 1974) (court held federal jurisdiction existed for tribe's federal common law suit for monetary damages against businesses that allegedly destroyed trees on the reservation); *Pueblo of Isleta v. Universal Constructors*, 570 F.2d 300 (10th Cir. 1978) (court held that federal common law claim for monetary damage existed for harm to on-reservation property caused by off-reservation blasting).

Additionally, precedent clearly establishes that damages are the preferred and ordinary remedy, while injunctive relief is the extraordinary remedy.[11] Injunctive relief is thus proper only if monetary damages or other legal remedies will not compensate plaintiffs for their injuries.

The en banc majority properly recognized that Indian treaties are the "supreme law of the land," are self-enforcing, and are enforceable against "non-contracting" parties.[12] Then, however, the majority inexplicably conflicted with binding law by holding that an Indian tribe has no federal common law right to sue anyone, other than a treaty signatory, for damages for violation of federal property rights reserved by treaty. "There is no basis for implying the right of action for damages that the Tribe seeks to assert."[13]

The dissent by Judge Berzon noted the direct conflict of the majority's opinion with the Supreme Court's holding in *Oneida II,* which upheld the existence of the tribes' federal common law cause of action *and* allowed monetary relief.[14] Further, by barring monetary damages while accepting injunctive relief, the majority completely reversed the universally recognized principle that injunctive relief is extraordinary and only available when damages are inadequate.[15] The Court's basis for an exception to this general rule, where Indians or Indian tribes are plaintiffs, does not appear.

The majority also erroneously distinguished the *Oneida II* decision as "not based on any treaty."[16] However, *Oneida II* involved possessory rights reserved by two treaties.[17] Moreover, the Court in *Oneida I* held:

> Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, *particularly when confirmed by treaty*, it is plain that the complaint asserted a [federal cause of action].[18]

The majority also either overlooked or ignored settled, binding precedent that treaty rights protect and reserve pre-existing aboriginal rights.[19] There

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11. *Contl. Airlines v. Intra Brokers*, 24 F.3d 1099, 1104 (9th Cir. 1994) ("[f]or equitable relief to be appropriate, there must generally be no adequate legal remedy"); *New Era Publications Intl. v. Henry Holt and Co.*, 873 F.2d 576, 597 (2d Cir. 1989) ("The preference for damages over injunctive relief is a corollary of the requirement of demonstrable injury."); *Lawson v. Hill*, 368 F.3d 955, 959 (7th Cir. 2004) ("[A]n injunction may be issued only in a case or class of cases where damages are deemed an inadequate remedy. . . . [A]n injunction might be thought 'extraordinary' relief because damages are the ordinary relief.").

12. *Skokomish Tribe*, 410 F.3d at 512.

13. *Id.* at 514.

14. *Skokomish Tribe* , 410 F.3d at 522 (Berzon, J., dissenting).

15. *Skokomish Tribe v. U. S.,* 410 F.3d at 516.

16. *Id.* at 514.

17. *Oneida II, supra* n. 7.

18. 414 U.S. at 667 (emphasis added).

19. *U.S. v. Winans*, 198 U.S. 371, 381 (1905); *Bd. of Control of Flathead v. U.S.*, 832 F.2d 1127, 1131 (9th Cir. 1987).

appears to be no difference between the cause of action and relief in *Oneida II* and the cause of action and relief sought in the Cushman case.

Finally, the majority's ruling conflicts with Circuit precedent that recognizes a cause of action by commercial fishers to recover monetary damages against those who negligently despoil the waters and thus injure the fishers' livelihoods.[20] Non-Indian fishers do not have treaties that are the supreme law of the land. Yet the majority denies damages to Indian fishers, with all of their attendant rights, while non-Indian fishers with no treaty are evidently entitled to compensation for infringement of their rights.

III. INDIVIDUAL TRIBAL MEMBERS HAVE A CAUSE OF ACTION BUT ARE BARRED MONETARY RELIEF UNDER 42 U.S.C. § 1983

The majority also eliminated any possibility that individual tribal members could sue for damages to their treaty rights. In so doing, the Ninth Circuit, once again, ignored Supreme Court precedent to the contrary. The United States Supreme Court in *United States v. Dion*[21] held that tribal members can enforce treaty fishing rights. In so doing, the Court relied on *Winans*, the Ninth Circuit's decision in *Kimball v. Callahan*, and the Tenth Circuit's decision in *United States v. Felter*[22]. As the Ninth Circuit held in *Kimball*, "an individual Indian enjoys a right of use in tribal property derived from the legal or equitable property right of the Tribe of which he is a member."[23] Finally, binding law requires evaluating the adequacy of monetary damages if a private cause of action exists for a violation of federal law.

Nonetheless, the majority opinion rejected the rule that individual tribal members have a cause of action for violating treaty fishing rights.[24] The only cases on which the majority relied – *Settler v. Lameer,*[25] and *Whitefoot v. United States,*[26] – were decided before *Dion*, *Kimball*, and *Felter* and did not address rights against third parties. Instead, *Settler* and *Whitefoot* only addressed whether the tribe, acting as a government, could regulate individual fishing rights.

Finally, the majority distinguished *Kimball* on grounds that the Klamath Tribe had been terminated.[27] The Circuit initially held that individual

20. *Union Oil v. Oppen*, 501 F.2d 558 (9th Cir. 1974); *Emerson G.M. Diesel v. Alaskan Enter.*, 732 F.2d 1468 (9th Cir. 1984).

21. 476 U.S. 734, 738 n. 4 (1986).

22. 752 F.2d 1505 (10th Cir. 1985).

23. 590 F.2d 768, 773 (9th Cir. 1979); *see also Mason v. Sams*, 5 F.2d 255, 258 (W.D. Wash. 1925) ("The treaty was with the Tribe; but the right of taking fish at all places within the reservation, and usual and accustomed grounds and stations outside the reservation, was plainly a right common to the members of the tribe – a right to a common is the right of an individual of the community."); *U.S. v. Wash.*, 935 F.2d 1059 (9th Cir. 1991).

24. *Skokomish Tribe* , 410 F.3d at 515.

25. 507 F.2d 231 (9th Cir. 1974).

26. 293 F.2d 658 (Ct. Cl. 1961).

27. *Skokomish Tribe* , 410 F.3d at 515 n. 7.

Klamaths had a cause of action for violation of treaty fishing and hunting rights, before reaching the question of whether the Klamath Termination Act divested those rights. Accordingly, a tribe's subsequent termination has nothing to do with the existence of an individual Indian's cause of action to enforce treaty fishing rights.

IV. THE ORIGINAL PANEL MAJORITY OPINION RELEGATES FISHING TO A "SECONDARY" PURPOSE OF THE RESERVATION WITHOUT ATTENDANT RESERVED WATER RIGHTS

The withdrawn "water rights" section of the original opinion[28] is historically important and an insight into the thinking of at least some Ninth Circuit judges. Over the past 100 years, the Supreme Court developed a body of law on the federally reserved water rights doctrine. This doctrine recognizes that federal reserved rights in unappropriated water are impliedly created when the federal government withdraws lands from the public domain and reserves them for federal purposes.[29] Federally reserved rights attach to water that is appurtenant to the reservation, such as water that flows through the Reservation. The amount of water reserved is that amount necessary to fulfill the purposes of the reservation.[30] Although Congress seldom expressly reserved water when setting aside Indian reservations, it intended to satisfy the then-present and future needs.[31]

Additionally, the Supreme Court has affirmed the overriding importance of fishing to Washington Indian Tribes at treaty time.[32] The Supreme Court and Ninth Circuit have held that "[fishing rights] were not much less necessary to the existence of the Indians than the atmosphere they breathed."[33]

The dissent recognizes that the majority opinion conflicts with binding law by ranking reservation purposes to exclude fishing. The Ninth Circuit has held, "We have never encountered difficulty in inferring that the Tribes' traditional salmon fishing was necessarily included as one of [the] 'purposes' [of the Reservation]."[34] The Circuit also warned in *Adair* that the cases of *Cappaert v. United States* and *United States v. New Mexico* are "not directly applicable to *Winters* doctrine rights on Indian reservations" because they apply to non-Indian public lands.[35] Nevertheless, the majority used *Cappaert* and *New Mexico* to relegate fishing to a "secondary use"

28. See *Skokomish Indian Tribe v. U.S.*, 401 F.3d 979 (9th Cir. 2005). The redacted portions are also reprinted in William H. Rodgers, Jr., *Judicial Regrets and the Case of the Cushman Dam*, 35 Envtl. L. 397 (2005).

29. *See e.g. Winters v. U.S.*, 207 U.S. 564 (1908); *Ariz. v. Cal.*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976); *U. S. v. N.M.*, 438 U.S. 696 (1978).

30. *U.S. v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983).

31. *Ariz. v. Cal.*, 373 U.S. 546, 600 (1963).

32. *Wash. v. Passenger Vessel Assn.*, 443 U.S. 658, 664-68 (1979).

33. *Winans*, 198 U.S. at 381; *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995); *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981).

34. *Parravano*, 70 F.3d at 546.

35. *Adair*, 723 F.2d at 1408.

without attendant reserved water rights.[36] In so doing it nullified reserved water rights for fishing on an Indian reservation located at a river mouth even though "[f]ishing was the most important food acquisition technique" of the Tribe's predecessors,[37] and thus paved the way for obliterating reserved water rights for fishing purposes for all tribes within the Circuit.

Relegating fishing to a secondary purpose conflicts with other Circuit precedent. *Colville Confederated Tribes v. Walton* held that the Supreme Court's narrow interpretation in *New Mexico* did not extend to Indians since: (1) specific purposes of an Indian reservation were usually unarticulated; (2) the general purpose -- providing a homeland for the Indians -- is a broad one that must be liberally construed; and (3) the government created reservations for the Indians, not on its own behalf.[38]

There are additional reasons for not applying the majority's "secondary purpose" rule to Indian reservations. Indian reservations were usually established as economically self-sufficient homelands, which reserved greater quantities of water than other federal land areas dedicated to preserving natural resources.[39]

Until now neither the Ninth Circuit nor the Supreme Court has ever concluded that an Indian and other reservations could not have more than one primary purpose.[40] The majority in the *Skokomish* original decision attempted to change that, finding that there is only one primary purpose of the Skokomish Reservation, which is, ludicrously, agriculture.

V. THE REDACTED MAJORITY OPINION ESTABLISHED A NEW TEST FOR RESERVED WATER RIGHTS THAT COLLIDED WITH BINDING LAW AND CIRCUIT PRECEDENT

The Supreme Court in *Washington v. Fishing Vessel Association* upheld the pre-eminent importance of fishing to the tribes when their reservations were created, including on-reservation fishing (and thus on-reservation water): "It is perfectly clear, however, that the Indians were vitally interested in protecting their right to take fish at usually and accustomed places,

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36. In fact, the majority opinion on the issue of reserved water rights was unnecessary. The majority dismissed all Treaty-based claims against Tacoma. The Tribe's reserved water rights claim is a Treaty-based claim. Ultimately, the Court simply excised Section II.B of the 1st Opinion in the Amended Opinion.

37. *U.S. v. Wash.*, 384 F.Supp. 312, 377 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

38. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981).

39. Felix S. Cohen, *Handbook of Federal Indian Law* 581-85 (rev. ed., Lexis Law Publg. 1982).

40. *N.M.*, 438 U.S. at 698 ("Congress intended national forests to be reserved for only *two purposes*") (emphasis added); *Adair*, 723 F.2d at 1410 ("Neither *Cappaert* [cite omitted] nor *New Mexico*[cite omitted] requires us to choose between [agriculture or hunting/fishing] or to identify a single essential purpose which the parties to the 1864 Treaty intended the Klamath Reservation to serve."); *Walton*, 647 F.2d at 48 (while recognizing that both "[p]roviding for a land-based agrarian society" and "preservation of the tribe's access to fishing grounds" were reservation purposes).

whether on or off the reservations."[41] Both the Skokomish Tribe and the United States were parties in *Fishing Vessel* and the present case, which accentuates the binding nature of *Fishing Vessel.*

Additionally, the Supreme Court has established a bedrock approach to determining "primary purposes" that *always*: (1) requires "careful examination" of the reservation's organic document(s), legislative history, and other evidence of circumstances leading to creation of the reservation;[42] (2) applies Indian law canons of construction to the reservation's organic documents by interpreting ambiguities in favor of the Tribe and ascertaining the parties' understanding at the time;[43] and (3) finds an "exclusive" on-reservation fishing or hunting right, even when such rights-specific language was absent from the reservation's organic document.[44] In *Dion,* the Supreme Court held:

> As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. These rights need not be expressly mentioned in the treaty.[45]

Additionally, the Ninth Circuit held in *Walton* that despite the omission of the term "exclusive" in the reservation executive order, the order reserved water rights appurtenant to the Colville Reservation for purposes of (1) providing a land-based agrarian society, *and* (2) preserving access to fishing runs.[46]

Nonetheless, the majority, in the redacted water rights section, disallowed federal reserved water rights for fishing arguing that, unlike the case of *United States v. Adair*, the fishing clause in the Treaty did not expressly guarantee an "exclusive" right. The majority opinion thus clearly departed from previous law by: (1) requiring that the term "exclusive" appear in the fishing clause as a precondition to an on-reservation fishing purpose; (2)

41. 443 U.S. at 667.

42. *See e.g. N.M.*, 438 U.S. at 701; *Winters*, 207 U.S. at 575-78. Prior Circuit rulings uniformly followed the Supreme Court. *See e.g. U.S. v. Walker River Irrigation Dist.*, 104 F.2d 334, 335-36 (9th Cir. 1939); *U.S. v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 325-27 (9th Cir. 1956); *Walton*, 647 F.2d at 47; *San Carlos Apache Tribe v. Ariz.*, 668 F.2d 1093, 1094-95 (9th Cir. 1982); *U.S. v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984); *Bd. of Control of Flathead v. U.S.*, 832 F.2d 1127 (9th Cir. 1987); *Alaska v. Babbitt*, 72 F.3d 698, 703-04 (9th Cir. 1995).

43. *See e.g. Winters*, 207 U.S. at 575-78.

44. *Menominee Tribe of Indians v.U.S.*, 391 U.S. 404, 406 n. 2 (1968) (recognizing an "exclusive" on-reservation hunting right despite the treaty's omission of that word). Subsequent alienation of some Indian reservation lands to non-Indians allows the non-Indians to hunt on fee lands within the reservation. *U.S. v. Mont.*, 450 U.S. 544, 557 (1981).

45. *Dion*, 476 U.S. at 737 (emphasis added) (citation omitted). *See also U.S. v. Wash.* 384 F. Supp at 332, n.12 ("[W]ithout exception, the United States Supreme Court has assumed that on reservation fishing is exclusive and has interpreted and applied similar fishing clauses as though the word 'exclusive' was expressly stated therein as in the Yakima treaty. Research has not disclosed any reported decision to the contrary").

46. *Colville Confederated Tribes*, 647 F.2d at 47-8.

either ignoring or overlooking that Article 2 of the Treaty reserved to the tribe "exclusive use" of its lands as a homeland, and such use included fishing; and (3) relying on evidence developed long after creation of the reservation, to the exclusion of evidence developed at Treaty time.[47]

The majority, in its stark departure from binding precedent, conducted no "careful examination." Every Supreme Court case that has determined primary reservation purposes, whether for an Indian reservation or other federal reservation, conducted a "careful examination" of the organic reservation documents, the legislative history, and evidence of the surrounding circumstances.[48]

VI. CONCLUSION

The majority's decision in the Cushman Dam case has disturbing implications. The majority seems to say that it does not matter that the Indian tribe was promised certain property rights in a treaty. There is really nothing they can do about damage or destruction to such rights caused by a so-called third party, such as the City of Tacoma. At least one respected commentator has referred to the opinion as containing "sorry rulings" of "calculated insolence."[49] But Professor Rodgers also notes, it is a wonderful thing about judicial decision making "that minds can be changed upon further reflection."[50] Perhaps it will be so.

47. *Treaty of Point No Point*, *supra* n. 1 (Article 2 "reserved" to the Skokomish "for their exclusive use [and occupation]" lands "situated at the head of Hood's Canal").

48. *N.M.*, 438 U.S. at 701.

49. Rodgers, *supra* n. 27, at 409.

50. *Id.* at 409, n. 77.