No. 05-

IN THE
Supreme Court of the United States

THE LUMMI NATION, *et al.*,

Petitioners,

v.

SAMISH INDIAN TRIBE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1975, a group calling itself the Samish Tribe sought a determination that it was entitled to treaty fishing rights under certain Indian treaties with the United States. After full hearings before a Special Master and the District Court, the request was denied. The Ninth Circuit Court of Appeals affirmed after "careful scrutiny". Subsequently, the Samish sought recognition as an Indian tribe in administrative hearings and litigation. Petitioner Tribes were adverse to that process assuming that Samish recognition would be used by Samish in an attempt to impair petitioners' treaty rights. However, at least one Petitioner herein was denied participation in those proceedings on the grounds that the proceedings would *not* affect any claims to treaty rights. After finally receiving federal recognition, the Samish Tribe sought to reopen the final treaty rights judgment against them. The request was denied by the district court. The circuit court reversed holding that a change in Samish legal status (i.e. recognition) was sufficient to allow reopening the final treaty rights judgment under Rule 60(b).

1. Whether a change in the law constitutes "extraordinary circumstances" to allow reopening a 25-year-old final judgment pursuant to Fed. R. Civ. P. 60(b)(6)?

2. Whether relief is available under Fed. R. Civ. P. 60(b)(6) for the alleged misconduct of a party in a separate proceeding more than one year after the judgment in this case?

3. Whether barring Petitioners from participating in administrative proceedings and litigation on the grounds that those proceedings will not affect their treaty rights denies Petitioner's right to due process as a result of the Ninth Circuit decision below?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs and Plaintiff-Intervenors

The United States of America

Puyallup Tribe of Indians

Confederated Tribes and Bands of the Yakama Indian Nation

Quileute Tribe

Hoh Tribe

Quinault Indian Nation

Jamestown, Lower Elwha & Port Gamble Bands of S'Klallam Tribes

Sauk-Suiattle Tribe

Lummi Nation

Skokomish Indian Tribe

Makah Tribe

Stillaguamish Tribe

Muckleshoot Tribe

Swinomish Indian Tribal Community

Nisqually Tribe

Tulalip Tribes

Nooksack Tribe

Upper Skagit Tribe

Defendant

State of Washington

Applicant for Intervention

Samish Indian Tribe

RULE 29.6 STATEMENT

Petitioners are federally recognized Indian Tribes, have no parents, and there are no publicly held companies that hold any stock of the petitioners.

TABLE OF CONTENTS

Contents

Page

TABLE OF CITED AUTHORITIES

Cases: *Page*

Cited Authorities

Page

Page

Unreported District Court Pleadings & Orders:

Statutes:

Cited Authorities

Page

TABLE OF APPENDICES

PETITION FOR A WRIT OF CERTIORARI

The Lummi Nation, Upper Skagit Indian Tribe, Tulalip Tribes, Swinomish Indian Tribal Community, Port Gamble S'Klallam and Jamestown S'Klallam Tribes and the Yakama Nation, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals denying rehearing is unreported. The decision of the Court of Appeals on the merits is reported at *United States, et al. v. Washington,* 394 F.3d 1152 (9th Cir. 2005). The opinion of the District Court denying relief from the judgment denying Respondent Tribe's Treaty rights, pursuant to Federal Rule of Civil Procedure 60(b)(6), is unreported.

STATEMENT OF JURISDICTION

On June 14, 2005, the Court of Appeals for the Ninth Circuit denied the request for rehearing *en banc* and the petition for rehearing by the panel and issued its mandate. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 60(b) provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.: On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or

proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

This case is the latest appeal in the complex 35 year-old Indian Treaty fishing litigation of *United States v. Washington*, 384 F.Supp. 312 (W.D. WA 1974), *aff'd*, 520 F.2d 676 (9th Cir 1975), *cert. den.*, 423 U.S. 1087 (1976), *substantially aff'd sub nom*, *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979). As in many continuing jurisdiction natural resource allocation cases, the federal courts have issued dozens of rulings upon which the parties and the public have relied and continue to rely for the management of the fishery resources of the Pacific Northwest: here, at least thirty-six (36) reported Ninth Circuit opinions, eleven (11) reported District Court decisions and countless unreported District Court rulings.[1] The Ninth Circuit has now thrown much of this settled law into question.

In 1974, the District Court initially confirmed that five 1850s-era Treaties secured to some fourteen Washington State Indian Tribes the opportunity to harvest half of the salmon returning to tribal usual and accustomed fishing places. Petitioners Lummi Nation, Upper Skagit Indian Tribe, and Yakama Nation were among these tribes. *Id.* When the District Court issued this decision, Petitioner Upper Skagit Indian Tribe and the Stillaguamish Tribe were not recognized by the United States as American Indian Tribes. Nonetheless, the Ninth Circuit ruled that these 'unrecognized' tribes still held valid treaty fishing rights. *United States v. Washington,* 520 F.2d at 692-3.

Many other tribes successfully moved to intervene and obtain recognition of their treaty rights, including Petitioners Swinomish Indian Tribal Community Port Gamble, Jamestown and Tulalip Tribes. Five additional

1. *See* Appendix E.

groups, including Respondent Samish Indian Nation[2] ('Samish'), sought treaty fishing rights, but were found not to have them. *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. den.*, 454 U.S. 1143 (1982). Samish chose to seek to intervene in 1974. Samish submitted the best evidence it could find to the Special Master assigned to the case, but he ruled against them. The District Court heard the matter on an appeal from the Master's decision and received substantial additional evidence. It, too, ruled against the Samish. *Id.* The Ninth Circuit made an unusually close examination of the full record before the District Court. It ruled that the factual findings (1) that Samish was not a successor in interest to any Treaty signer and (2) that Samish had not maintained an organized tribal structure in a political sense, were not clearly erroneous and were therefore affirmed. *United States v. Washington,* 641 F.2d at 1374. The Ninth Circuit reiterated its prior holding that federal recognition was not necessary, or even sufficient, to confirm treaty rights: ". . . we indicated that treaty – tribe status is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure. 520 F.2d at 693, 641 F.2d at 1371." After this ruling, Samish sought federal recognition as a tribe through the Bureau of Indian Affairs tribal acknowledgement[3] process, to gain the federal benefits that follow acknowledgement[4] and as a way around the 1979 holding that it was not a treaty tribe. By using this administrative procedure, Samish was able to exclude Petitioners from participating and challenging Samish assertions of Treaty rights. After an adverse decision

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2. Then known as the Samish Indian Tribe.

3. Federal acknowledgement and federal recognition are the same.

4. Federal recognition brings its own rewards, including health and education benefits as well as participation in gaming operations.

from the Bureau of Indian Affairs, Samish appealed, alleging (1) that the Bureau of Indian Affairs had mishandled Samish' petition for recognition, and (2) that Samish was entitled to treaty fishing rights. *Greene v. Lujan*, Cause No. C89-645Z (W.D. Wash. 1989).

Petitioner Tulalip Tribe sought to intervene in *Greene*. Samish vigorously opposed Tulalip intervention, and the District Court denied Tulalip's motion to intervene. Stating that "the calculus for tribal treaty rights under the Ninth Circuit law is separate and distinct from that for federal acknowledgment," the District Court rejected Tulalip's concern that Samish would attempt to use *Greene* as the first step to overturning the District Court's Samish treaty status rulings. Tulalip then filed an interlocutory appeal on the intervention issue, which the Ninth Circuit denied on the ground that the issues of tribal recognition and treaty tribe status were fundamentally different. *Greene v. United States,* 996 F.2d 973, 976-77 (9th Cir. 1993). (Petitioner Swinomish Indian Tribal Community also unsuccessfully attempted to intervene in the administrative process.) 61 Fed. Reg. 15,826 (1996).

On remand to the District Court, Samish sought to relitigate the issue as to whether or not it was the successor in interest to the aboriginal Samish Tribe that signed the Treaty of Point Elliot and thus entitled to treaty fishing rights. After reviewing the 1979 treaty status decision in depth, the District Court in 1991 and 1992 held that Samish was barred under the doctrine of *res judicata* from relitigating that status, and that "plaintiffs, therefore, have no rights under the Treaty of Point Elliot."[5] The Court also found that the "[Samish]

5. *Greene v. Lujan*, Cause No. C89-645Z (W.D. Wash. 1989), Order Granting Federal Defendants' Motion for Partial Summary Judgment at 10-13.

had a full and fair opportunity to litigate the issue of tribal succession," and that "[Samish] cannot escape the results entered therein by recasting its claims here."[6] The District Court subsequently reaffirmed its ruling[7]: the issue of treaty status had been resolved in *United States v. Washington*, it was binding in this case, and "treaty issues cannot be relitigated."[8] That conclusion was subsequently upheld by the Ninth Circuit in *Greene v. United States,* 996 F.2d 973, 975 (9th Cir. 1993). After additional administrative proceedings and yet another appeal to the District Court, the Samish were recognized in 1996. Five years later Samish sought relief from the 1979 treaty status judgment under Federal Rule of Civil Procedure 60(b). Samish asserted that the act of federal acknowledgment, coupled with the misconduct of the United States in its recognition battle, was grounds for relief pursuant to Fed. R. Civ. 60(b)(6). (Misconduct was not alleged as to any of the Petitioners.)

At no time from 1979 until the present has Samish alleged it was hindered in any way from presenting its case in the treaty status proceedings. Nor has Samish claimed that those proceedings were in any way unfair.

The District Court denied Samish's motion to re-open the judgment, holding that recognition did not constitute "extraordinary circumstances" justifying relief under Rule 60(b)(6) and that finality concerns outweighed Samish's interest in reopening the judgment given the complexity of the treaty fishing rights case. The Ninth Circuit reversed, finding that the need for finality was outweighed by the

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6. *Id.* at 15-16.

7. *Greene v. Lujan*, Cause No. C89-645Z (W.D. Wash. 1989), Order dated February 25, 1992 at 5,7.

8. *Id.* at 7.

"extraordinary circumstance" of federal recognition coupled with the misconduct of the United States in its handling of Samish's quest for recognition.

By granting relief based on misconduct that occurred many years ago in a separate proceeding, the Ninth Circuit creates a conflict with rulings of sister circuits and potentially unsettles the thirty-one years of decisions in *United States v. Washington*[9] which have shaped fisheries management in Washington, Oregon and Alaska and under the Pacific Salmon Treaty with Canada. The Ninth Circuit also effectively denied Petitioners due process of law by holding that an administrative decision in a proceeding in which Petitioners were denied a voice may be a basis for reopening the 1979 decision on Samish's treaty tribe status. The Ninth Circuit decision has the immediate effect of destroying the parties' expectation of finality in the many prior rulings in this case. For example, Counsel for the Samish has ***already*** argued to the District Court that certain final rulings on "political successorship," made in 1974 and 1994, are no longer binding due to the Ninth Circuit decision on review here:

> The Ninth Circuit expressly ruled that the Lummi Nation and Swinomish Indian Community are not the political successors to the Samish Tribe. The Ninth Circuit then overruled any inconsistent rulings made on this subject by Judge Boldt in *Washington I*. . . . The Samish Indian Nation cannot be bound by any previous determinations of the Court in *U.S. v. Washington* regarding successorship to the Samish Tribe. . . .
>
> A similar issue exists regarding successorship to the Noowhaha Tribe. . . . In *United States v.*

9. The original District Court decision issued in 1974.

> *Washington*, 873 F. Supp. 1422, 1449 (W.D. Wash. 1994), the Court concluded that the Upper Skagit Tribe is the successor to the Noowhaha Tribe. . . . For present purposes, Samish entry into *U.S. v. Washington* cannot be condition on acceptance by the Samish Tribe of the 1994 Upper Skagit decision. This issue must be maintained as an active issue for future resolution.

Brief of Samish Indian Nation in Support of Samish Nation's Rule 60(b)(6) Motion on remand in W.D. Wash. Cause #Civ. 70-9213 (Subproceeding 01-2), filed 8/12/2005, at pages23-26. Samish has also asked the District Court to allow it to relitigate ***any*** issue if another Tribe takes a position on the issue adverse to Samish:

> While the Samish Tribe does not intend to raise or reopen previously decided issues as a general matter, the general rule should not as a matter of equity and justice apply when another party contests the Samish Tribe.

Id. at 23. The District Court, intimately familiar with the complexities of the *United States v. Washington* litigation, predicted the disruption that relitigation of previously decided issues would cause:

> The parties have worked diligently and extensively over the many years this case has been active to establish management frameworks that accommodate the fiercely competing needs of the various tribes and of the State. The issues have been complicated by the increasing scarcity of fish stocks and the need to preserve and conserve certain fish species. This case over a 28-year period has proven to be a battleground where

> many of these issues have been fought and solutions hammered out. The Samish have not convincingly rebutted, nor could they, the unmistakable conclusion that, at this state, their addition would wreak havoc on hard-wrought management agreements and plans.

United States v. Washington, W.D. Wash. Cause # Civ. 70-9213, Order Denying the Samish Tribe's Motion to ReOpen Judgment, December 10, 2002, at page 17.

In addition to posing potential disruption to the complex litigation involved here, the Ninth Circuit decision vastly expands the grounds for re-opening a judgment under Rule 60(b)(6), and denies the Petitioner Tribes due process of law.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Ruling Denies Petitioners Due Process of Law.

After losing its bid for treaty tribe status in the courts, Samish continued to press for administrative recognition as a tribe through the federal acknowledgment process, 25 C.F.R. pt. 83. Petitioners Tulalip and Swinomish each tried to intervene in the administrative proceeding to protect their treaty fishing rights, but were refused. After the Bureau of Indian Affairs rejected Samish's recognition claim, Samish brought suit in district court alleging that the BIA had mishandled its petition for recognition and that it was entitled to treaty fishing rights. *Greene v. Lujan*, No. C89-645Z (W.D. Wash. 1989). The Tulalip Tribes again sought to intervene based on the contention that recognition could lead to dilution of Tulalip and other tribal treaty fishing allocations. The District Court rejected this contention. Minute Order (Oct. 16, 1989), *Greene*, No. C89-645Z.

Tulalip renewed its motion to intervene, arguing that Tulalip treaty fishing rights were threatened by the Samish attempt to obtain federal recognition. The District Court ultimately held that the issue of treaty status had been resolved in *United States v. Washington*, and that "treaty issues cannot be relitigated." Order of Feb. 25, 1992, at 7, 11, 16-26, *Greene*, No. C89-645Z.

Tulalip filed an interlocutory appeal of the denial of its intervention request. The Ninth Circuit affirmed because the issues of tribal recognition and treaty tribe status were fundamentally different. *Greene,* 996 F.2d at 976-78. The Circuit acknowledged that Tulalip would have a right to intervene *if* recognition would have an impact on Samish's treaty tribe status, *but expressly held that there would be no such impact*:

> We recognize that the two inquiries [*e.g.*, recognition and treaty status] are similar. Yet each determination serves a different purpose and has an independent legal effect. . . . *Federal recognition does not self-execute treaty rights claims. . . . As we just said, the Samish may not gain fishing rights from federal recognition alone.*

Id. at 977 (emphasis added).

In the case at bar, however, the Ninth Circuit did an "about-face," and held that federal recognition allows reconsideration of a treaty status decision. As the dissenting opinion below eloquently pointed out, that change of heart denied Tulalip and Swinomish[10] due process of law:

> It would have been an empty promise – indeed, a complete denial of due process – to deny the

10. Other Tribes may have foregone the opportunity to attempt intervention, in reliance upon the Court's rejection of the Tulalip and Swinomish motions to intervene.

> Tulalip Tribe's motion to intervene in the Samish BIA recognition proceedings on the basis that it could later protect its treaty rights in the *Washington I* and *II* courts, while all along assuming that by virtue of the Samish tribe gaining federal recognition, the *Washington I* and *II* courts would be required to grant the Samish tribe treaty rights. If that was the case, where then was the Tulalip Tribe to protect its interests? Elementary principles of due process . . . require that a tribe challenging the Samish Tribe's claims to treaty rights have an opportunity to disprove the maintenance of organized tribal structure and not be precluded from offering such proof by an administrative agency determination from which the challenging tribe was excluded.

United States, et al. v. Washington, 394 F.3d 1152 at 1168 (Bea, J. dissenting).

The dissent is correct. The Due Process Clause of Fifth Amendment to the United State's Constitution "requires that a party affected by government action be given 'the opportunity to be heard at a meaningful time in a meaningful manner.'" *California v. FERC,* 329 F.3d 700, 708 n.6 (9th Cir. 2003), *quoting Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). Petitioners were denied that opportunity when their motions to intervene in the recognition proceedings were denied. If the Ninth Circuit decision is allowed to stand, then the Tulalip Tribe, the Swinomish Indian Tribal Community, and all the other Tribes which relied on the rulings in the *Greene* cases must now be permitted to seek relief from the judgment in the recognition proceeding and from the judgment in *Greene,* on the grounds that these judgments are void because they were issued in violation of Petitioners' constitutional right to due process of law. Re-opening the

Samish recognition proceeding would in turn upset the basis for the Ninth Circuit's ruling below, requiring reversal here. Either way, the Ninth Circuit's decision cannot stand.

B. The Ninth Circuit's decision in this case creates a substantial conflict among the Circuits on two issues.

1. Whether a change in the law constitutes "extraordinary circumstances" justifying relief under Rule 60(b)(6).

Every other federal court of appeals that has addressed the issue, other than the Ninth Circuit in the case below, has held that a change in the law does not constitute "extraordinary circumstances" warranting re-opening under Fed. R. Civ. P. 60(b)(6):

> It appears to be the settled rule of law that a change in the judicial view of the applicable law, after a final judgment, is not the basis for vacating a judgment entered before the announcement of the change

Berryhill v. United States 199 F.2d 217 (6th Cir 1952) (citations omitted), *Accord: Ashland Oil, Inc. v. Delta Oil Products Corp.*, 806 F.2d 1031 (Fed. Cir. 1992); *Morris v. Horn*, 187 F.3d 333 (3rd Cir. 1999); *Kirby v. General Elec. Co.*, 210 F.R.D. 180 (W.D.N.C. 2000), *aff'd*, 20 Fed. Appx. 167 (4th Cir. 2001); *Hess v. Cockrell*, 281 F.3d 212 (5th Cir. 2002); *Lehman Co. v. Appleton Toy & Furniture Co.*, 148 F.2d 988 (7th Cir. 1945).

The Ninth Circuit, on the other hand, stands alone and opines for the first time in any circuit that a change in a rule of law (i.e. the rule that federal recognition is neither relevant to nor determinative of treaty tribe status) is an "extraordinary

circumstance" justifying reopening pursuant to Fed. R. Civ. P. 60(b)(6). This Court should grant certiorari and bring the law of the Ninth Circuit back into line with the law of its sister Circuits.

2. Whether post-judgment misconduct occurring many years ago in a separate proceeding is a basis for relief under Rule 60(b)(6).

The Ninth Circuit opinion also creates a split in the Circuits on the issue of whether post-judgment misconduct occurring many years ago in a separate proceeding is a basis for relief under Rule 60(b)(6). The Ninth Circuit granted reopening in this case under Rule 60(b)(6) in part on the basis of alleged misconduct by the United States many years ago, even though (1) "misconduct" is covered by Rule 60(b)(3) and is therefore limited to a period of one-year, and (2) the alleged "misconduct" occurred not in the treaty tribe status proceedings to be reopened, but in Samish's *separate* recognition proceeding. This ruling ignores well-settled precedent, creates a conflict among the Circuit Courts, vastly expands the scope of relief available under Rule 60(b), and eviscerates the time limit in Rule 60(b)(3).

a. By granting a Rule 60(b) motion based on federal misconduct that occurred many years ago, the Ninth Circuit created a conflict with rulings from its sister Circuits that subsection (6) of Rule 60(b) cannot be used to expand subsections (1) through (3).

Fed. R. Civ. P. 60(b)(3) permits reopener for misconduct of a party:

> On motion and upon such terms as are just, the court may relieve a party or his legal

> representative from a final judgment, order or proceeding for the following reasons: . . . (3) fraud, misrepresentation, or other misconduct of an adverse party . . . ***The motion shall be made . . . not more than one year after the judgment, order, or proceeding was entered or taken***. (Emphasis added.)

Since Samish could not meet the one-year time limit, the Ninth Circuit granted relief under 60(b)(6). That decision is in direct conflict with the multitude of cases from this Court and the Circuit Courts holding that 60(b)(6) cannot be used to expand subsections (1) through (3). *E.g. Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 (1988) ("Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just,' ***provided that*** the motion . . . is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." (Emphasis added.); *Marquip, Inc. v. Fosber America, Inc.*, 198 F.3d 1363 (Fed. Cir. 1999); *Simon v. Navon*, 116 F.3d 1, 5 (1st Cir. 1997); *Hopper v. Euclid Manor Nursing Home, Inc.,* 867 F.2d 291, 294 (6th Cir.1989).

The Fourth Circuit explained the policy behind this rule:

> Respect for finality of judgments is deeply ingrained in our legal system. As Justice Story observed, "[i]t is for the public interest and policy to make an end to litigation. . . ." so that "suits may not be immortal, while men are mortal." *Ocean Ins. Co. v. Fields*, 18 F. Cas. 532, 539 (No. 10, 406) (C.C.D. Mass. 1841) (Story, J. sitting as Circuit Judge). *See also Southern Pacific RR Co. v. United States*, 168 U.S. 1, 49 (1897). Equally compelling circumstances may arise, however, in which parties are entitled to be

> relieved of an unjust judgment arrived at through mistake, ignorance, inadvertence or misconduct. . . .
>
> Federal Rule of Civil Procedure 60 provides the terms on which these two principles are balanced. Rule 60(b)(3) allows a court to relieve a party from final judgment on the grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." A motion under 60(b)(3), however, must be made within one year after the judgment was entered. ***Thus, the Rule suggests that equitable considerations prevail in such cases for one year,*** *and that the interest in finality of judgments prevails thereafter.*
>
> We are in complete accord . . . that 60(b)(6) ("any other reason justifying relief") cannot be used to circumvent the one-year limitation for grounds specified previously in the rule. . . .

Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 675 F.2d 1349, 1354-55 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983) (emphasis added). In addition, "the one year time limit applicable to the first three clauses of Rule 60(b) would be meaningless if relief was also available under the catchall provision." *Wesco Prods. Co. v. Alloy Automotive Co.*, 880 F.2d 981, 983 (7th Cir. 1989). *Accord Simon v. Navon*, 116 F.3d at 5.

The only time the federal courts allow a challenge based on "fraud or other misconduct" after the one-year time limit has expired is when the conduct is so egregious as to constitute a "fraud on the court." The Circuit Courts have

uniformly held that the concept of "fraud on the court" is to be construed narrowly:

> The federal courts that have struggled with the definition of "fraud on the court" in the context of Rule 60(b) have found such a definition elusive . . . but have generally agreed that the concept should be construed very narrowly. . . . ***The principle concern motivating narrow construction is that the otherwise nebulous concept of "fraud on the court" could easily overwhelm the specific provision of 60(b)(3) and its time limitation and thereby subvert the balance of equities contained in the Rule***. . . . Not all fraud is "fraud on the court." . . . "[F]raud on the court" is typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged. . . .

Great Coastal Express, Inc., 675 F.2d at 1356 (emphasis added) (holding that perjury and fabricated evidence did not constitute a fraud on the court).

The Ninth Circuit's ruling in this case stands this well-established law on its head, and creates a split in the circuits as to when relief is available under Rule 60(b) for "fraud and other misconduct." The United States' treatment of Samish in the context of recognition may have been regrettable, but it has been remedied[11] and certainly does not rise to the level of a fraud on the court. Relief was therefore

11. Regardless of whether the Ninth Circuit decision is allowed to stand, Samish will still be entitled to all of the federal benefits that flow from federal recognition, such as health care and education benefits, as well as the economic stimulus provided by gaming.

not available under 60(b)(3) or (6), and the Ninth Circuit's decision to allow Samish to re-open is in direct conflict with established law from this Court and the Circuit Courts.

b. By reopening a judgment based on misconduct without requiring Samish to prove that the misconduct prevented Samish from fully and fairly presenting its case to the District Court in 1979, the Ninth Circuit created a conflict with rulings from its sister Circuits that such proof is necessary.

The Circuit Courts have uniformly held that in order to get relief under Rule 60(b) based on fraud or other misconduct of an adverse party, the moving party must prove by clear and convincing evidence that the conduct complained of ***"prevented the losing party from fully and fairly presenting the defense."*** *Harley v. Zoesch*, 413 F.3d 866, 870 (8th Cir. 2005) (emphasis added); *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 641 (5th Cir. 2005); *State Street Bank and Trust Co. v. Inversiones,* 374 F.3d 158, 176 (2nd Cir. 2004), *cert. denied* __ U.S. __ (February 22, 2005); *Cummings v. General Motors Corp.*, 365 F.3d 944, 955 (10th Cir. 2004); *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 21 (1st Cir. 2002); *De Saracho v. Custom Food Machinery, Inc.,* 206 F.3d 874, 880 (9th Cir. 2000); *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1287 (11th Cir. 2000), *cert. denied*, 531 U.S. 876 (2000).[12] Conduct that occurs ***after*** judgment is entered ***necessarily*** does not affect a party's earlier presentation of its case.[13]

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12. The same principle applies when a movant seeks to set aside a judgment for fraud on the court under Rule 60(b)(6). *E.g., State Street Bank*, 374 F.3d at 176; *Davenport Recycling Associates v. C.I.R.*, 220 F.3d 1255, 1262 (11th Cir. 2000).

13. Petitioners have found only one exception to this rule: Where a party *foregoes* presenting its case, in reliance on a settlement

(Cont'd)

The Ninth Circuit's decision in this case granted relief to Samish on the basis of post-judgment "misconduct" that ***could not***, and ***did not***, prevent Samish from fully and fairly presenting its case to District Court in 1979 and/or to the Ninth Circuit in 1981. The vast majority of the federal misconduct[14] took place after the treaty status of Samish was decided in 1979. Moreover, Samish was represented by highly competent counsel in the proceedings before the Special Master, the District Court, the Ninth Circuit and this Court in its Petition for Certiorari. Nothing the United States might have done hindered the Samish in the presentation of its treaty status case.[15]

By granting re-opening based on the United States' "misconduct" without requiring Samish to prove that the misconduct affected Samish's ability to fully and fairly present its case to the District Court, the Ninth Circuit effectively overruled its own existing precedent and created a conflict with all the other Circuit Courts who have held to the contrary.

(Cont'd)

agreement which is repudiated by the other party more than one year after judgment, 60(b)(6) may provide an avenue of relief. *See United States v. Sparks*, 685 F.2d 1128 (1982). *Sparks* may have been effectively overruled by this Court's decision in *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, (1994) (district courts lack jurisdiction to enforce settlement agreements except where order dismissing the action, by agreement of the parties, incorporates terms of settlement agreement or otherwise expressly indicates that court intends to retain jurisdiction over settlement agreement).

14. No misconduct by the Petitioners is alleged, and none exists.

15. In fact, Samish presented the District Court with additional evidence that was not before the Special Master.

c. By re-opening a judgment based on misconduct that did not occur in the course of the proceeding to be re-opened, the Ninth Circuit has vastly expanded the scope of "misconduct" covered by Rule 60(b).

The Ninth Circuit's decision to expand the grounds for relief under Rule 60(b)(6) is made even worse by the fact that the alleged misconduct involved the United States' handling of Samish's federal recognition proceedings, not the United States' handling of the treaty tribe status judgment sought to be re-opened here. Recognition proceedings have "marginal influence at best" on treaty tribe status, because "the Samish may not gain fishing rights from federal recognition alone." *Greene v. United States,* 996 F.2d 973 at 937. In other words, not only has the Ninth Circuit allowed its concern for Samish to create a split in the circuits, it has done so by allowing Samish to prove misconduct in a ***another, separate*** proceeding. The Ninth Circuit's unwarranted expansion of Rule 60(b), as well as the conflict among the Circuit Courts created by the Ninth Circuit's ruling in this case, argue in favor of granting certiorari.

VIEWS OF THE SOLICITOR GENERAL

The Court may want to request the views of the United States Solicitor General on this Petition for Certiorari. The United States was aligned as a party with Petitioners, and may be adversely affected if Samish is allowed to relitigate issues previously decided in this case.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted on behalf of the Petitioning Tribes this 3rd day of October, 2005.

Respectfully submitted,

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