No. 01-35028

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FILED
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U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SKOKOMISH INDIAN TRIBE,
Plaintiff-Appellant,
v.
UNITED STATES, et al.,
Defendants-Appellees.

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On Appeal from the United States District Court
For the Western District of Washington
Honorable Judge Franklin D. Burgess

SKOKOMISH INDIAN TRIBE'S PETITION FOR ADDITIONAL REHEARING BY THE EN BANC PANEL OR FULL COURT REVIEW OF THE EN BANC OPINION DATED MARCH 4, 2005

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

1. INTRODUCTION

Pursuant to Circuit Rule 35-3 and General Order § 5.8, the Skokomish Indian Tribe ("Tribe") files its Petition for Rehearing by the Full Court Rehearing of the En Banc Opinion Issued on March 9, 2005 or in the alternative, for additional review by the en banc panel. The majority opinion alters federal Indian law on reserved water rights in a way that will reverberate throughout the West. The majority opinion also collides with binding Supreme Court rulings, as well as the rulings of this Circuit and sister circuits, by establishing a brand new rule on remedies with a sweeping effect that goes far beyond Indian law. The new rule precludes a damages remedy even when the Court recognizes a private cause of action for a violation of federal law. Finally, the majority opinion denies individual members of Indian tribes monetary relief under 42 U.S.C. § 1983, which contravenes binding Supreme Court law, as well as the precedent of this Circuit and its sister circuits.

An unusually vehement dissent explains, the majority has gone against "the weight of history and the unequivocal judicial authorities." Dissent at 3000. Rehearing is crucial on questions of exceptional importance. Consideration by the full Court is necessary to secure and maintain uniformity of Circuit decisions. Correcting the majority opinion will also help lessen the profound injustice that the opinion works on the Skokomish Indian Tribe.

2. ISSUES PRESENTED FOR REHEARING BY FULL COURT

The majority opinion conflicts with decisions of the United States Supreme Court and this Circuit, and reconsideration by the en banc panel or full Court is necessary to secure and maintain uniformity of the Court's decisions; and because this proceeding involves questions of exceptional importance because the panel decision conflicts with the authoritative decisions of sister circuits.

2.1. The Appropriate Remedy For A Recognized Cause of Action.

Should a plaintiff be barred from seeking the relief of monetary damages even when there is recognized a private cause of action for a violation of federal law, when the Supreme Court, this Circuit and sister circuits have ruled that damages are the ordinary relief and that injunctive relief should only be granted when damages are inadequate? The opinion conflicts with a long line of cases that include *Northern Calif. Power Agency v. Grace*, 469 U.S. 1306 (1984); *Continental Airlines v. Intra Brokers*, 24 F.3d 1099 (9th Cir. 1994); *Lawson v. Hill*, 368 F.3d 955 (7th Cir. 2004); *New Era Publications International v. Henry Holt and Co., Inc.*, 873 F.2d 576 (2d Cir. 1989).

Should an Indian tribe be barred from seeking the relief of monetary damages against anyone other than the United States, for violation of aboriginal rights reserved in a treaty with the United States, where the Supreme Court, this Circuit, and sister circuits, have held that Indian tribes possess a federal common

law right to bring damage claims for violation of treaty-protected aboriginal rights against parties other than the United States? The opinion conflicts with *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *United States v. Pend Oreille Public Utility District No. 1*, 28 F.3d 1544 (9th Cir. 1994); *Mescalero Apache Tribe v. Burgett Floral Company*, 503 F.2d 336 (10th Cir. 1974); and *Pueblo of Isleta v. Universal Constructors*, 570 F.2d 300 (10th Cir. 1978).

2.2. The Majority Denies Indian Reserved Water Rights

Can a water right be denied on grounds that access to fish is but one of the purposes of a reservation, where both the Supreme Court and this Circuit have held that the right to take fish is not much less necessary to the Indians than "the atmosphere they breathed", and where both courts have held that the treaties have multiple purposes, including preserving the tribes' rights to take fish? The opinion conflicts with many cases including *Winters v .United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979); and *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

Where both the Supreme Court and this Circuit have consistently required a "careful examination" of circumstances surrounding reservation creation to determine the existence and scope of reserved water rights, should the test require that organic document(s) expressly guarantee an "exclusive" on-reservation

purpose for use of the water, and reject evidence of circumstances surrounding creation of the reservation? The opinion conflicts with many cases includeing *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981)).

2.3. Individual Tribal Members Cause of Action Under 42 U.S.C. § 1983

Can individual tribal members be barred from seeking monetary damages under 42 U.S.C. § 1983 where the Supreme Court, this Circuit and sister circuits recognize a cause of action for individual tribal members' enforcement of well-delineated communal property rights reserved by treaty? The majority opinion conflicts with *United States v. Dion*, 476 U.S. 734 (1986); *United States v. Winans*, 198 U.S. 371 (1905); *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979); *United States v. Washington*, 935 F.2d 1059 (9th Cir. 1991); and *United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985).

3. COURSE OF PROCEEDINGS AND DISPOSITION

In 1999, the Tribe sued Tacoma Public Utilities ("Tacoma") and the United States in District Court for the Western District of Washington for monetary damages under federal, state and common law for destruction of the Tribe's property by Tacoma's upriver Cushman hydroelectric project. The Tribe appealed from the district court's dismissal of all claims on summary judgment.

On June 3, 2003, the circuit panel upheld the district court, with one member dissenting. The Court granted the Tribe's petition for rehearing and/or rehearing en banc. On March 9, 2005, a majority of the en banc panel issued an opinion that dismissed all of the Tribe's monetary claims against Tacoma and some claims against the United States. Five judges issued two concurring and dissenting opinions.

4. STATEMENT OF FACTS

The Skokomish Indian Reservation was established by the 1855 Treaty of Point No Point, 12 Stat. 933 (Jan. 26, 1855) ("Treaty") at the mouth of the Skokomish River. The last six miles of the Skokomish River ("River") flow through the Reservation into Puget Sound's Hood Canal. Opinion at 2956. Tacoma's Cushman Project, an unlicensed hydroelectric project several miles above the reservation, diverts nearly half the flow of the Skokomish River and sends it through a penstock (pipe) to an on-Reservation powerhouse on Hood Canal. Opinion at 2956, 2960 n. 4. As a result, only a trickle of water flows through the River's North Fork, and only 40% of the original River flows through the Reservation. *See id.* This lack of water has devastated the Tribe's ability to fish in the River basin on and off the Reservation. *See id.* The Tribe's monetary

claims included allegations of interference with the Tribe's federally reserved water rights and individual members' claims under 42 U.S.C. §1983.[1]

The district court, on summary judgment, ignored Treaty language and evidence of circumstances surrounding creation of the Reservation to find that the Tribe had no reserved water rights for fishing purposes. It held that the Cushman Project's removing 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 three-judge panel did not address the reserved water rights issue, but the majority held that the Tribe possessed no reserved water rights for fishing because fishing was not the primary purpose of the Reservation. *Id.* While acknowledging the Tribes' right to equitable relief against parties who did not sign the Treaty ("nonsignatory party"), the majority barred the Tribe from monetary relief. Finally, the 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 rights are held only by the Tribe.

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[1] Complaint at ¶¶ 216-221, 242-270.

5. ARGUMENT

5.1. Since There is a Private Cause of Action, Monetary Relief Should Be Available.

In *Oneida II*,[2] the 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. This Circuit followed *Oneida II* in *United States v. Pend Oreille Public Utility District No. 1*[3], by allowing the Kalispel Tribe to seek money damages against a public utility in a federal trespass. 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.[4]

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[2] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). The treaties were the Treaties of Fort Harmar, 7 Stat. 33 (Jan. 9, 1789), and of Canandaigua, 7 Stat. 44 (Nov. 11, 1794). *Id.*

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

[4] *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *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, binding precedent establishes that damages are the preferred and ordinary remedy, while injunctive relief is the extraordinary remedy.[5] Injunctive relief is thus proper only if monetary damages or other legal remedies will not compensate plaintiffs for their injuries. *Id.*

The majority properly recognized that Indian treaties are the "supreme law of the land," are self-enforcing, and are enforceable against "non-contracting" parties. Opinion at 2961-63. However, in its rush to absolve Tacoma of all monetary liability, the majority conflicts 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. *Id.* at 2963-64.

The dissent noted the direct conflict with the Supreme Court's holding in *Oneida II* and this Circuit's decision in *Pend Oreille*, both of which upheld the existence of the tribes' federal common law cause of action *and* allowed monetary relief. Dissent at 2980-89. Further, by barring monetary damages while accepting

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[5] *Continental 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 International v. Henry Holt and Co., Inc.*, 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.").

injunctive relief, the majority stands on its head the universally recognized principle that injunctive relief is extraordinary and only available when damages are inadequate.[6] There is no basis for an exception to this general rule when Indians or Indian tribes are plaintiffs.

The majority also erroneously distinguished the *Oneida II* decision as "not based on any treaty." Opinion at 2964. *Oneida II* involved possessory rights reserved by two treaties.[7] 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].[8]

The majority also either overlooks or ignores settled, binding precedent that treaty rights protect and reserve pre-existing aboriginal rights.[9] Accordingly, there is thus no difference between the cause of action and relief in *Oneida II* and the cause of action and relief sought here.

Finally, the majority's ruling conflicts with Circuit precedent that recognizes a cause of action by commercial fishers to recover monetary damages against those

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[6] Note 5, *supra.*

[7] Note 2, *supra.*

[8] 414 U.S. at 667.

[9] *Winans*, 198 U.S. at 381; *Bd. of Control*, 832 F.2d at 1131.

who negligently despoil the waters and thus injure the fishers' livelihoods.[10] Non-Indian fishers do not have treaties that are the supreme law of the land. It makes no sense for the majority to deny a damages remedy to Indian fishers, with all of their attendant rights, when non-Indian fishers are entitled to compensation for infringement of their rights. Treaties should not be a basis for providing less protection.

5.2. The Majority Opinion Defies Binding Law and Circuit Precedent By Relegating Fishing To A "Secondary" Purpose Of The Reservation Without Attendant Reserved Water Rights.

Over the past 100 years, the Supreme Court has 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.[11] Federally reserved rights attach to water that is appurtenant to the reservation, such as water that flows through the Reservation.

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

[11] *See, e.g., Winters*, 207 U.S. 564; *Arizona*, 373 U.S. 546; *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. State of New Mexico*, 438 U.S. 696 (1978).

The amount of water that is necessary to fulfill the purposes of the reservation.[12]

Although Congress seldom expressly reserved water when setting aside Indian reservations, it intended to satisfy the then-present and future needs.[13]

Additionally, the Supreme Court has affirmed the extreme importance of fishing to Washington Indian Tribes at treaty time.[14] The Supreme Court has held, and this Circuit has held, that fishing rights "[w]ere not much less necessary to the existence of the Indians than the atmosphere they breathed."[15]

The dissent recognizes that majority opinion conflicts with binding law by ranking reservation purposes to exclude fishing. Dissent at 2995-96. This 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]."[16] 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

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[12] *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983).

[13] *Arizona*, 373 U.S. at 600.

[14] *Passenger Vessel*, 443 U.S. at 664-68.

[15] *United States v. Winans*, 198 U.S. 370, 381 (1905); *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995); *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981).

[16] *Parravano*, 70 F.3d at 546.

Winters doctrine rights on Indian reservations" because they apply to non-Indian public lands.[17] Neverthless, the majority used *Cappaert* and *New Mexico* to relegate fishing to a "secondary use" without attendant reserved water rights.[18] Opinion at 2968. It established precedent that nullifies 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,[19] and thus paves 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

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[17] 723 F.2d at 1408.

[18] In fact, the majority opinion on the issue of reserved water rights was unnecessary. The majority dismissed all Treaty-based claims against Tacoma. Opinion at 2960-67. The Tribe's reserved water rights claim is a Treaty-based claim. Accordingly, if the full panel or Court chooses not to correct the finding, it should simply excise Section II.B of the Opinion.

[19] *United States v. Washington*, 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).

liberally construed; and (3) the government created reservations for the Indians, not on its own behalf.[20]

There are additional reasons for not strictly 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.[21]

Finally, until now neither this Circuit nor the Supreme Court have ever concluded that an Indian and other reservations could not have more than one primary purpose.[22] The majority changed that, finding that there is only one primary purpose of the Skokomish Reservation. Opinion at 2968.

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[20] 647 F.2d at 46-48.

[21] Felix S. Cohen, Handbook of Federal Indian Law at 581-85 (1982 ed).

[22] *New Mexico*, 438 U.S. at 698 ("Congress intended national forests to be reserved "for only *two purposes*") (emphasis added); *Adair*, 723 F.2d at 1410 (9th Cir. 1983) ("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).

5.3. The Majority Establishes A New Test For Reserved Water Rights That Collides With Binding Law And Circuit Precedent.

The Supreme Court in *Washington v. Fishing Vessel Assn.* upheld the enormous 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, whether on or off the reservations.[23]

Both the Skokomish Tribe and the United States were parties in both *Fishing Vessel* and this case, which accentuates the binding nature of *Fishing Vessel.*

Additionally, the Supreme Court has established a bedrock approach to determining primary purposes followed by this Circuit 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;[24] (2) applied Indian law canons of construction to the reservation's organic documents

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[23] 443 U.S. at 658.

[24] *See, e.g., New Mexico*, 438 U.S. at 701; *Winters*, 207 U.S. at 575-78. Prior Circuit rulings uniformly followed the Supreme Court. *See, e.g., United States v. Walker River Irr. Dist.*, 104 F.2d 334, 335-336 (9th Cir. 1939); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 325-327 (9th Cir. 1956); *Walton*, 647 F.2d at 47; *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093, 1094-1095 (9th Cir. 1982); *United States v. Anderson,* 736 F.2d 1358, 1362 (9th Cir. 1984); *Bd. of Control of Flathead, et al. Irr. D. v. United States*, 82 F.2d 1127 (9th Cir. 1987); *Alaska v. Babbitt*, 72 F.3d 698, 703-04 (9th Cir. 1995).

by interpreting ambiguities in favor of the Tribe and ascertaining the parties' understanding at the time[25]; and (3) found an "exclusive" on-reservation fishing or hunting right, even when that word was absent from the reservation's organic document.[26] In *United States v. Dion* 476 U.S. 734 (1986), 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. [citation omitted] These rights need not be expressly mentioned in the treaty.[27]

This Circuit held in *Walton*, despite the reservation executive order's omission of the term "exclusive," that 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.[28]

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[25] *See, e.g., Winters*, 207 U.S. at 575-78.

[26] *Menominee,* 391 U.S. at 406 n. 2 (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. *United States v. Montana*, 450 U.S. 544, 557 (1981).

[27] *Id.* at 2219 (emphasis added). *See* also *United States v. Washington* 384 F. Supp at 332. "[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."

[28] 647 F.2d at 47-48.

Nonetheless, the majority here disallowed federal reserved water rights for fishing because, unlike the case of *United States v Adair*, the fishing clause in the Treaty of Point No Point did not expressly guarantee an "exclusive" right. Opinion at 2969. The majority opinion flies in the face of binding law by: (1) requiring that the term "exclusive" appear in the fishing clause as a precondition to an on-reservation fishing purpose; (2) either ignoring or overlooking that Article 2 of the Treaty of Point No Point reserved to the tribe "exclusive use" of its lands as a homeland, and that use included fishing; and (3) relying on evidence developed long after creation of the reservation, to the exclusion of evidence developed at Treaty time[29] Opinion at 2967-69.

The majority, in its stark departure from binding precedent, conducts 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.[30] So has this Circuit.[31] Here the majority rejects evidence

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[29] Article 2 "reserved" to the Skokomish "for their exclusive use [and occupation]" lands "situated at the head of Hood's Canal."

[30] *See* note 24, *supra*.

surrounding creation of the Reservation that it fully admits shows: (1) that the United States intended that the Tribe continue fishing on the Reservation; (2) that fishing was important to the Tribe; and (3) that the United States intended to prevent the Tribe's exclusion from its fisheries. Opinion at 2968. When evidence shows that a tribe was "heavily dependent" on fishing an area at treaty time, the treaty clearly preserved the water needed for fishing.[32]

In the majority view, documents created at treaty time evidently shed no light on the Reservation's primary purposes.

5.4. The Majority Opinion Conflicts With Binding Law And Circuit Precedent By Acknowledging That Individual Tribal Members Have A Cause of Action But Barring Monetary Relief Under 42 U.S.C. § 1983.

The Supreme Court in *Dion*[33] held that tribal members can enforce treaty fishing rights. The Court relied on *Winans*, this Circuit's decision in *Kimball v. Callahan*, and the Tenth Circuit's decision in *United States v. Felter.* [34] As this Circuit held in *Kimball* that

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[31] *Id.*

[32] *Bd. of Control*, 832 F.2d at 1131.

[33] 476 U.S. 734, 738 n. 4 (1986).

[34] 752 F.2d 1505 (10th Cir. 1985).

> 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. [35]

Finally, binding law requires evaluating the adequacy of monetary damages if a private cause of action exists for a violation of federal law.[36]

Nonetheless, the majority opinion first rejects the binding rule that individual tribal members have a cause of action for violating treaty fishing rights. Opinion at 2965-67. The majority next bars those same individuals a monetary damages remedy, despite binding Supreme Court law holding that equitable remedies exist for violations of treaty rights.[37] The only cases on which the majority relies – *Settler v. Lameer,* 507 F.2d 231 (9th Cir. 1974) and *Whitefoot v. United States,* 293 F.2d 658 (Ct. Cl. 1961) – were decided before *Dion*, *Kimball*, and *Felter* and did not address rights against third parties. Instead, *Settler* and *Whitefoot* only addressed whether the tribe could regulate individuals' fishing rights.

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[35] 590 F.2d at 773; *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."); *United States v. Washington*, 935 F.2d 1059 (9th Cir. 1991).

[36] Note 5, *supra.*

[37] Section 5.1, *supra.*

Finally, the majority wrongly distinguishes *Kimball* on grounds that the Klamath Tribe had been terminated. Opinion at 2966 n.7. The Circuit initially held that individual 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.[38] 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.

6. CONCLUSION

For the reasons described herein, the Tribe respectfully requests that the Court grant the Tribe's petition for rehearing by the full Court or alternatively an additional en banc review.

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[38] 590 F.2d at 772-74.

DATED this 22nd day of March, 2005.

Respectfully submitted,

MORISSET, SCHLOSSER, JOZWIAK & McGAW

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