No. 01-35028

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SKOKOMISH INDIAN TRIBE
Plaintiffs-Appellants,

v.

UNITED STATES, *et al.*,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AMICI CURIAE BRIEF OF LAW PROFESSORS, NATIONAL CONGRESS OF AMERICAN INDIANS, AND INDIAN TRIBES IN SUPPORT OF 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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A. Statement of *Amici* Interest

Each of the tribes identified in Appendix A, as well as the member tribes of the National Congress of American Indians,[1] have reservations, rights reserved by treaties, or both, that will be dramatically affected by the decision of the *en banc* majority as it currently stands. Rights reserved in treaties with the United States are among the most precious and tenaciously defended rights the tribes possess, a fact demonstrated repeatedly by the extraordinary litigation over those rights in cases such as *United States v. Washington* and *United States v. Oregon*. The *en banc* majority's decision that those rights may be violated by all but the United States without fear of damages liability constitutes an unprecedented threat to the security of those rights. It provides States, counties, and private parties a license to violate tribal treaty rights with impunity, as Tribes will be unable to obtain any make-whole redress under federal law from these parties, no matter how severe or injurious their violations of the Tribes' rights. Similarly, each tribe's reservation serves as both its homeland and sovereign territory. One of the most critical components of a tribe's ability to protect and promote the health and welfare of all reservation residents, as is true for all nations and governments, is its ability to provide water for its homeland

[1] The National Congress of American Indians ("NCAI"), established in 1944, is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan native villages. NCAI is dedicated to protecting the rights and improving the welfare of American Indians.

territory. That ability is directly threatened by the decision of the *en banc* majority here.

The distinguished professors of law identified in Appendix A are legal academics specializing in federal Indian law, many of whom serve as the editorial board and authors for either or both the 1982 and forthcoming 2005 editions of Felix S. Cohen's Handbook of Federal Indian Law, the primary treatise in the field. All are authors of other casebooks, monographs, and/or articles in the field. The interest of these *amici* in this case is in maintaining the coherence of federal Indian law and the integrity of long-tested and enduring principles in that field. *Amici* are troubled by the *en banc* majority's departure from firmly established precedent in this case, particularly as it bears on the remedies available to vindicate federally protected property rights secured by treaties, the origin of Indian rights reserved by treaty, and the principles underlying rights implied for the protection of Indian reservations as homelands for Indian people.

B. The *En Banc* Opinion Repudiates Supreme Court and Ninth Circuit Precedent and Creates a Clear Circuit Split in Holding that an Indian Tribe May Not Seek Damages From Non-Signatory Third Parties for Violations of Aboriginal Rights Reserved by Treaty

The *en banc* opinion abandons the unwavering precedent of the Supreme Court, this Circuit, and other Circuits by holding that a treaty tribe is *barred* from seeking monetary damages for the violation of its treaty-protected

aboriginal rights by third parties unless the treaty specifically grants the tribe the right to seek such relief.

Nearly thirty years ago, this Court upheld a tribe's action for damages against a private railroad company for violation of its aboriginal rights unprotected by any treaty. *United States v. S. Pac. Transp. Co.*, 543 F.2d 676 (9th Cir. 1976). The Court emphasized that the tribe's property rights deserved *no less* protection merely because those rights were *not* reserved by treaty. *Id.*, 543 F.2d at 686 (citations omitted). This Court reaffirmed that holding in *United States v. Pend Oreille Pub. Util. Dist. No. 1*, when it held that the Kalispel Indian Tribe could seek damages from a county utility district for the flooding of aboriginal lands that had been set aside by executive order. 28 F.3d 1544, 1548-51 (9th Cir. 1994) (*Pend Oreille*). The Court remanded the case so that damages could be recalculated "according to the most profitable use" of the flooded lands. *Pend Oreille*, 28 F.3d at 1553. The *en banc* panel conspicuously omits *any* reference to these controlling cases, even though they stand in stark contrast to its holding that treaty-protected aboriginal rights may not be vindicated in an action for damages.

As in this Circuit, longstanding Tenth Circuit precedent upholds the presumptive right of tribes to seek damages under federal common law against private parties for violations of their aboriginal property rights. *See Pueblo of*

Isleta v. Universal Constructors, Inc., 570 F.2d 300, 301-03 (10th Cir. 1978) (damages available to pueblo from construction company for property injuries caused by off-reservation blasting); *Mescalero Apache Tribe v. Burgett Floral Co.*, 503 F.2d 336, 337-38 (10th Cir. 1974) (damages available to treaty tribe from private company for unlawful tree-cutting). The *en banc* majority creates a clear Circuit split without even mentioning this contrary Tenth Circuit case law. In fact, prior to this case, no court to *amici's* knowledge had ever sought to restrict tribes' ability to vindicate their treaty rights in the drastic fashion – woven out of whole cloth – of the *en banc* majority.

Indeed, the *en banc* opinion openly contradicts the rulings of the Supreme Court. Relying *inter alia* on this Court's decision in *S. Pac. Transp. Co.*, the Supreme Court unequivocally held in *Oneida v. Oneida Indian Nation* that federal common law permits suits for damages against non-signatory third parties for violation of aboriginal rights *reserved by treaty*. 470 U.S. 226, 236 (1985) (*Oneida II*).[2] There, the Oneida Indian Nation sought damages from two

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[2] On March 29, 2005, subsequent to the issuance of the *en banc* opinion in this case, the Supreme Court reiterated the continuing vitality of its holding in *Oneida II*: "In sum, the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. __, 125 S. Ct. 1478, 1498 (2005) (*Oneida III*) In stark contrast to the *en banc* panel here, the *Oneida III* Court held that equitable, *as opposed to* monetary, relief was not available to the Tribe on the particular facts of that case. *Id.*, 125 S. Ct. at 1494.

counties for unlawful use and occupation of lands to which it claimed treaty-protected aboriginal rights. *Oneida II*, 470 U.S. at 229-32. The Supreme Court had previously noted, consistent with *S. Pac. Transp. Co.*, that the Oneidas' federal common law action for damages "need not" be based on a treaty but that such an action was "plain" when those rights were "confirmed by treaty." *County of Oneida v. Oneida Indian Nation*, 414 U.S. 661, 667, 669 (1974) (*Oneida I*). The *en banc* majority opinion does dramatic violence to this principle, seizing on the existence of a treaty to *circumscribe*, rather than *confirm*, the relief available to the Tribe for alleged violations of its property rights by third parties.

The *en banc* opinion purports to distinguish *Oneida II* on the grounds that the Oneidas' rights were aboriginal while the Tribe's rights here are reserved by treaty. That is an entirely false dichotomy. The property rights of the Skokomish Tribe, like the property rights at issue in *Oneida II*, are both aboriginal *and* confirmed and protected by treaty.

In *United States v. Washington*, this Court held that at treaty time, the Stevens treaty tribes "had the absolute right to harvest any species they desired, *consistent with their aboriginal title* . . . [and] the 'right of taking fish' must be read as a reservation of the Indians' pre-existing rights[.]" 135 F.3d 618, 631

(9th Cir. 1998) (quoting *United States v. Washington*, 873 F. Supp. 1422, 1430 (W.D. Wash. 1994)) (emphasis added); *see also United States v. Winans*, 198 U.S. 371, 381-82 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of right from them,-- reservation of those not granted."); *accord United States v. Michigan*, 471 F. Supp. 192, 216 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981) (tribes reserved aboriginal fishing rights in treaty).

The Supreme Court defined the Oneidas' property rights in precisely the same manner: "Their claim is also asserted to arise from treaties guaranteeing their possessory right until terminated by the United States[.]" *Oneida I*, 414 U.S. at 677-78. The Court concluded "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 controversy arising under the Constitution, laws, or treaties of the United States[.]" *Id.* at 667 (emphasis added). Thus, in its ardor to disavow *Oneida II*, the *en banc* panel repudiates the precedent of this Court and the bedrock principle of *United States v. Winans*, 198 U.S. 371 (1905): the Stevens treaty tribes' reserved fishing rights are aboriginal in origin.[3]

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[3] *Even if* one proceeds on the majority's erroneous premise that the Oneidas' property rights were aboriginal while the Tribe's rights here are treaty-reserved,

Further, the *en banc* opinion fundamentally conflicts with precedent governing the question of whether a private cause of action for damages exists. Without explanation, the majority ignores "the general presumption that courts can award any appropriate relief in an established cause of action." *Gebser v. Lago Vista Sch. Dist.*, 524 U.S. 274, 284 (1998) (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)). The majority acknowledges that a private cause of action exists under the treaty, but *only* for equitable relief. Yet, under the *Gebser* analysis, "the general rule that all appropriate relief is available in an action brought to vindicate a federal right" is qualified only to insure that the scope of the right does not frustrate the statutory purpose. *Id.*, 524 U.S. at 284-85 (quoting *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 68 (1992)). That is, the question is not whether Congress intended for there to be a private cause of action for damages for violations of the Tribe's fishing rights, but rather whether the damages remedy is at odds with the purpose and structure of the treaty. The majority did not attempt to undertake that analysis, and its failure to do so has broad ramifications beyond Indian law.

The *en banc* panel's decision to spurn established law is inexplicable. Binding Supreme Court and Circuit precedent hold, without exception, that an

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no reason exists in precedent or logic to distinguish the two with respect to the availability of damages from third parties.

Indian tribe may seek damages from third parties for violation of its property rights. Whether these property rights are aboriginal, reserved by treaty, or confirmed by executive order is of no consequence. It is well-settled that such rights are equally enforceable against private and non-signatory third parties. *See, e.g.*, *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 348, 360 (1941) (aboriginal rights enforceable against railroad); *Winans*, 198 U.S. at 381-82 (treaty-reserved rights enforceable against private landowners). Whether a tribe's property rights are aboriginal or reserved by treaty may affect the availability of monetary relief from *the United States*, but in the *opposite manner* of that suggested by the *en banc* majority. *Compare, e.g., Menominee Tribe v. United States,* 391 U.S. 404, 413 (1968) (United States' taking of treaty fishing rights subject to Fifth Amendment compensation) *with Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955) (United States' taking of timber from aboriginal lands not subject to compensation). In sum, the *en banc* opinion creates irreconcilable conflicts and warrants further review by this Court.

C. The *En Banc* Opinion Radically Redefines the Legal Standard Governing a Treaty Tribe's Ability Under Federal Common Law to Seek Relief from Non-Signatory Third Parties for Treaty Violations

The *en banc* opinion requires any tribe in this Circuit seeking to enforce its treaty rights to identify specific treaty provisions intended to authorize *the*

relief sought against non-signatory third parties. This novel and virtually insurmountable hurdle is wholly inconsistent with prior decisions of the Supreme Court, this Court, and other Circuit courts. As discussed above, binding precedent holds that tribes may seek *all* forms of relief from third parties who allegedly violate their property rights, regardless of whether those rights are aboriginal, confirmed by executive order, or reserved by treaty.

For example, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, the Supreme Court relied on *Winans* to conclude that the Stevens treaties are self-enforcing against both the signatories and non-signatory third-parties. 443 U.S. 658, 693 n.33 (1979) (*Fishing Vessel*) (citation omitted). The Court rejected the State's argument that the plaintiff tribes could not enforce their treaties absent specific authorizing language from Congress. *Id.* Similarly, the *Oneida* Courts did not look to provisions of the 1794 Treaty of Canandaigua – the document reserving the Oneidas' aboriginal rights – to determine whether the treaty parties intended that the Oneidas be able to seek monetary or equitable relief from non-signatory third parties. In fact, as it had in *Fishing Vessel*, the Court dismissed the argument that the tribe required congressional authorization for such suits. *Oneida II*, 470 U.S. at 235-36 n.5. This Court's sister Circuits likewise hold treaty fishing rights to be

presumptively enforceable against non-signatory third parties.[4] The *en banc* panel's analysis annihilates this long-standing principle, and in wanton and unnecessary fashion creates the very Circuit splits that *en banc* review seeks to eliminate.

By the same token, in *Pend Oreille* and *S. Pac. Transp. Co.*, this Court did not look to the pertinent executive orders to determine whether the tribes could seek damages from a county utility district and railroad company. Nor did the Tenth Circuit in *Pueblo of Isleta* and *Mescalero Apache Tribe*. In *S. Pac. Transp. Co.* this Court specifically noted that "as long as an executive order creating a reservation remains in effect, the Indian title to the reservation lands deserves *the same protection* as the Indian title to reservations created by treaty or statute." 543 F.2d at 686 (citations omitted) (emphasis added). The *en banc* opinion represents a radical and unilateral reversal of course. For if, as the panel concludes, the remedies available to tribes from third parties are limited

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[4] *See e.g.*, *Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Mich. Dep't of Natural Res.*, 141 F.3d 635 (6th Cir.), *cert denied sub nom.*, *Township of Leland v. Grand Traverse Band of Ottawa & Chippewa Indians*, 525 U.S. 1040 (1998); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Menominee Indian Tribe of Wisconsin v. Thompson*, 943 F. Supp. 999 (W.D. Wis. 1996), *aff'd*, 161 F.3d 449 (7th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999).

by the particular language of their treaties, then treaty-protected property rights may receive *less protection* than property rights not confirmed by treaty.

D. The *En Banc* Panel's Analysis of the Tribe's Reserved Water Rights is Patently Inconsistent With Every Decision of this Court Previously Addressing the Question

Nearly 100 years ago, the Supreme Court held that each federal reservation of Indian lands impliedly reserves water sufficient to make that reservation a tribal homeland. *Winters v. United States*, 207 U.S. 564, 576-77 (1909). Without exception, this Court has held that fishing is an integral purpose of the homelands of the tribes of the Pacific Northwest, and thus, that these tribes possess reserved water rights sufficient to support on-reservation fisheries. In remarkably terse fashion, the *en banc* majority abandons this precedent. Instead, the majority relies almost exclusively on federal reserved water rights cases *not* involving Indian tribes. Yet, the chief difference between Indian reservations and generic federal reservations is that Indian reservations were set aside as the homelands of Indian people. *See* F. Cohen, *Handbook of Federal Indian Law* 582-85 (1982 ed.).[5] Because this fundamental principle

[5] A leading commentator has noted that "[a]lthough the purposes for which the federal government reserves other types of land may be strictly construed, *United States v. New Mexico*, 438 U.S. 696 (1978) (national forest), the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained." W. Canby, Jr., AMERICAN INDIAN LAW at 435 (4th ed. 2004). *See also* 4 WATERS AND WATER RIGHTS § 37.02(c) (R. Beck Ed., 2004 Replacement Volume).

has governed this Court's analysis of Indian reserved water rights for a quarter century, *amici* request further review of the *en banc* opinion.

This Court articulated the homeland purposes principle in *Colville Confederated Tribes v. Walton*: "the general purpose for the creation of an Indian reservation . . . [is to provide] a homeland for the survival and growth of the Indians and their way of life." 647 F.2d 42, 49 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (*Colville*). The Court noted that this purpose "is a broad one and must be liberally construed." *Id.*, 647 F.2d at 47. After finding that one homeland purpose of the Colville Reservation was to allow the tribes to "maintain their agrarian society," the Court addressed the traditional fishing activities of, and their economic and religious importance to, the Colville Tribes and other Pacific Northwest Indians. *Id.* at 48 (citing *Fishing Vessel*, 443 U.S. at 665; *Winans*, 198 U.S. at 381). The Court had little difficulty concluding that "preservation of the tribe's access to fishing grounds" and "the development and maintenance of replacement fishing grounds" on-reservation was likewise a purpose for which water was impliedly reserved, even though the Executive Order creating the reservation makes *no reference* to fishing. *Id.*[6] The majority fails to mention *Colville*.

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[6] The Order creating the Colville Reservation provides:

> It is hereby ordered that ... the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on

This Court reiterated the homeland purposes analysis in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied sub nom., Oregon v. United States*, 467 U.S. 1252 (1984). As it had in *Colville*, the Court found that the Klamath Tribe not only impliedly reserved water for agricultural purposes, but also "to guarantee continuity of the Indians' hunting and gathering lifestyle" on the reservation. *Id.*, 723 F.2d at 1409. The Court made clear that these purposes were not inconsistent. *Id.* at 1410. Likewise, in *United States v. Anderson*, the district court determined that "one of the purposes for creating the Spokane Indian Reservation was to insure the Spokane Indians access to fishing areas and to fish for food." 591 F. Supp. 1 (E.D. Wash. 1982), *aff'd in relevant part*, 736 F.2d 1358 (9th Cir. 1984). As in *Colville*, the Executive Order establishing the Spokane Indian Reservation makes no reference to fishing or any other reservation purpose.[7]

The homeland purposes principle is deeply rooted in Supreme Court precedent. In *Winters*, the Court noted that the Congress had created the Fort

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> the north by British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

Executive Order of July 2, 1872, reprinted in 1 Kappler, *Indian Affairs and Treaties* 916 (2d ed. 1904)).

[7] This Court again recognized implied water rights for on-reservation fisheries in *Joint Bd. of Control of the Flathead, Mission & Jocko Irrigation Dists. v. United States*, 832 F.2d 1127 (9th Cir. 1987).

Belknap Reservation as a "permanent home and abiding place" for the Gros Ventre and Assiniboine tribes. 207 U.S. at 565. The Court asked:

> The Indians had command of the lands and the waters – command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?

Id. at 576. The Court answered its questions in the negative, finding itself bound to interpret the congressional reservation in a manner consistent with the understanding of the tribes. *Id.* at 576-77. Relying on *Winters*, in *Arizona v. California* the Supreme Court reaffirmed the fundamental notion that Indian reservations impliedly reserved waters sufficient to make those reservations "livable". 373 U.S. 546, 598-99 (1963) ("water from the river would be essential to the life of the Indian people and to the animals they hunted and crops they raised"). Indeed, the Supreme Court has cited homeland purposes – the need for immediate fisheries – as the basis for recognizing an implied reservation of the *exclusive* use of waters adjacent to an Indian reservation. *Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78, 88-90 (1918).

The Arizona Supreme Court recently endorsed this Court's homeland purposes analysis of Indian reserved water rights. Citing *Colville*, the Arizona Supreme Court announced its "permanent homeland" rule in *In Re General Adjudication of All Rights to Use Water in the Gila River System & Source*. 35

P.3d 68, 76 (Ariz. 2001). The Court declined to limit the purpose of the reservations at issue, and reserved water rights, to agriculture: "We agree with the Supreme Court that the essential purpose of Indian reservations is to provide Native American people with a 'permanent home and abiding place,' that is, a 'livable' environment." 35 P.3d 68, 74 (Ariz. 2001) (quoting *Winters*, 207 U.S. at 565; *Arizona*, 373 U.S. at 599). While the Arizona Supreme Court followed the lead of this Court in *Colville*, the *en banc* majority now silently departs from that precedent, without acknowledging what it has in fact done. Creation of jurisprudential chaos of this sort is directly converse to one of the principal purposes of *en banc* review, and warrants further intervention by this Court.

The only nod the *en banc* majority gives to the canon of Indian water rights law is its superficial attempt to dismiss the import of *Adair*. Although the majority purports to distinguish *Adair* on the grounds that treaty language in that case expressly reserved exclusive on-reservation fishing and gathering rights to the Klamath Tribe, the Court's conclusion in *Adair* did not rest solely on that treaty language. Rather, the Court held that "in view of the historical importance of hunting and fishing," one of the "very purposes" of the Klamath Reservation was "to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle" – *despite the treaty's omission of any reference* to on-reservation hunting. *Adair*, 723 F.2d at 1409 and n.14. Thus, the tribe reserved

water for those purposes. *Id.* at 1409. In reaching this conclusion, the Court relied on its prior holdings that the tribe possesses exclusive on-reservation hunting rights. *Id.* (citations omitted).

In its search for exclusive on-reservation fishing rights in the treaty text, the *en banc* majority contravenes *Adair* and other decisions of this Court recognizing that Indian Tribes *always* have exclusive rights to fish on their reservations, at least at the time the reservation is reserved, *whether or not* the reserving document expressly so states. The Skokomish Tribe is one of twenty-one tribes party to *United States v. Washington* and thus has vested and *exclusive* rights to fish on its reservation. *United States v. Washington*, 384 F.Supp. 312, 332 and n. 12 (W.D. Wash. 1974) ("...without 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 ...") (emphasis in original), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *see also United States v. Washington*, 694 F.2d 188, 190 (9th Cir. 1982) (Canby, J., concurring) ("[i]t is already established in this case that the tribe retains exclusive fishing rights within the boundaries of its Reservation."). Thus, as in *Adair*, when the Tribe confirmed its reservation by the Treaty of Point No Point, it confirmed exclusive on-reservation fishing rights. In short, there is no

basis in precedent to reject the Tribe's claim to reserved water rights to support its homeland fisheries.

E. Conclusion

The *en banc* majority opinion cannot coexist with the Supreme Court's *Oneida* trilogy, this Court's decisions in *S. Pac. Transp. Co.* and *Pend Oreille*, the Tenth Circuit's decisions in *Pueblo of Isleta* and *Mescalero Apache Tribe*, or a century of Stevens treaty interpretations. Indian tribes have a federal common law right to seek monetary damages from non-signatory third parties for the violation of aboriginal property rights confirmed and protected by treaty. Likewise, the *en banc* majority's abandonment of *Colville* and this Court's consistent construction of the homeland purposes of Pacific Northwest Indian reservations cannot stand. Accordingly, *Amici* respectfully request further review by this Court.

Respectfully submitted this 20th day of April, 2005.

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APPENDIX A

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Associate Justice, Cheyenne River Sioux Tribal Court of Appeals
Associate Justice, Colorado River Tribes Court of Appeals

INTERTRIBAL INDIAN ORGANIZATIONS

National Congress of American Indians
Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages. NCAI is dedicated to protecting the rights and improving the welfare of American Indians.

San Luis Rey Indian Water Authority

INDIAN TRIBES

Confederated Tribes of the Umatilla Indian Reservation
Confederated Tribes of the Warm Springs Reservation of Oregon
Confederated Tribes and Bands of the Yakama Nation
Gidutikad Band of the Northern Paiute Nation – Fort Bidwell Indian Community Council
Grand Traverse Band of Ottawa and Chippewa Indians
Hoh Tribe
Jamestown S'Klallam Tribe
La Jolla Band of Mission Indians
Little River Band of Ottawa Indians
Little Traverse Bay Band of Odawa Indians
Lower Elwha Klallam Tribe
Lummi Indian Nation
Makah Tribe
Moronga Band of Mission Indians
Navajo Nation
Nez Perce Tribe
Nisqually Tribe

Nooksack Tribe
Pala Band of Mission Indians
Pauma Band of Mission Indians
Port Gamble S'Klallam Tribe
Puyallup Tribe
Rincon San Luiseno Band of Mission Indians
Rosebud Sioux Indian Tribe
San Pasqual Band of Mission Indians
Sauk-Suiattle Tribe
Squaxin Island Tribe
Stillaguamish Tribe
Suquamish Tribe
Swinomish Indian Tribal Community
Tulalip Tribes of Washington
Ute Indian Tribe of the Uintah and Ouray Reservation
Walker River Paiute Tribe

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32

Pursuant to Ninth Circuit Rule 32-1, I certify that this brief is proportionally space, using a 14-point Times New Roman – Microsoft Word font. It contains 4,105 words.

Date: April 20, 2005

Phillip E. Katzen

CERTIFICATE OF SERVICE

I, Gayle A. Rodgers, hereby certify that two (2) copies of "*Amici Curiae* Brief of Law Professors, National Congress of American Indians, and Indian Tribes in Support of 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" were served, via United States Postal Service first class postage prepaid, on this 20th day of April, 2005 on the following:

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Pursuant to Federal Rule of Appellate Procedure 25(a)(B)(ii), I also certify that the original and fifty (50) copies of "*Amici Curiae* Brief of Law Professors, National Congress of American Indians, and Indian Tribes in Support of 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" were dispatched, via Federal Express Overnight Delivery Service, this 20th day of April, 2005, to the Clerk of the Court.

Gayle A. Rodgers
Legal Assistant