No. 05-

IN THE

Supreme Court of the United States

SKOKOMISH INDIAN TRIBE, SKOKOMISH INDIAN TRIBAL MEMBERS DENNY S. HURTADO, GORDON A. JAMES, JOSEPH PAVEL, ANNE PAVEL, CELESTE F. VIGIL, *et al.*,

Petitioners,

v.

TACOMA PUBLIC UTILITIES, CITY OF TACOMA, TACOMA PUBLIC UTILITIES BOARD MEMBERS WILLIAM BARKER, *et al.*, and UNITED STATES OF AMERICA,

Respondents.

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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QUESTION PRESENTED

Whether a Congressionally-ratified treaty that has been held to provide an implied right of action against states and their instrumentalities, allows a cause of action for damages against a municipality alleged to have knowingly and without Congressional or state authorization taken nearly one-half of the water flowing through a Reservation and thus destroyed a substantial portion of off- and on-Reservation Treaty-protected fisheries.

LIST OF PARTIES

Plaintiffs-Appellants in the courts below were Skokomish Indian Tribe, a federally recognized Indian tribe, in its own capacity, as a class representative, and as parens patriae, and Skokomish Indian tribal members Denny S. Hurtado, Gordon A. James, Joseph Pavel, Anne Pavel, Maures P. Tinaza Sr., Celeste F. Vigil, Roslynne L. Reed, Gary W. Peterson, Rita C. Andrews, Tom G. Strong, Marie E. Gouley, Victoria J. Pavel, Dennis W. Allen, Joseph Andrews Sr., Zetha Cush, Elsie M. Allen Gamber, Alex L. Gouley Jr., Lawrence L. Kenyon, Doris Miller, Gerald B. Miller, Helen M. Rudy, Ronald D. Twiddy Sr., and Nick G. Wilbur Sr., for themselves and all others similarly situated. Law Professors, National Congress of American Indians, and other Indian Tribes appeared as *amici curiae* in the Ninth Circuit.

Defendants-Respondents in the courts below were the United States of America; Tacoma Public Utilities, a Washington municipal corporation; City of Tacoma, a Washington municipal corporation; and Tacoma Public Utilities Board Members William Barker, Tom Hilyard, Robert Lane, Tim Strege, and G. E. Vaughn, in their official capacities.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Skokomish Indian Tribe is a federally recognized Indian tribe and has no parent, and there are no publicly held companies that hold any stock of the petitioners.

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The Skokomish Indian Tribe and individual tribal members 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.

The Tribe does not seek this Court's review of the Ninth Circuit's decision to transfer the case against the United States to the Court of Federal Claims. The Tribe does, however, seek this Court's review of the Ninth Circuit's dismissal of Treaty-based damages claims against the City of Tacoma, Tacoma Public Utilities, and board members.

OPINIONS BELOW

The district court issued two opinions on summary judgment. One is unreported (App. B: *Skokomish Indian Tribe v. United States*, No. C99-5606, Order Granting City of Tacoma's Motion for Partial Summary Judgment (entered June 4, 2001), *infra*), and the other is reported at 161 F. Supp. 2d 1178 (W.D. Wash. 2001), but does not address the issue presented and thus is not included in the Appendix. The amended *en banc* opinion of the court of appeals is reported at 410 F.3d 506 (App. A, *infra*)

JURISDICTION

An *en banc* majority of the court of appeals entered an amended opinion on June 3, 2005. Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including October 3, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article VI, cl. 2 of the United States Constitution (App. G, *infra*)

2. The Treaty of Point No Point, 12 Stat. 933 (Jan. 26, 1855) (ratified March 8, 1859; proclaimed April 29, 1859) (App. E, *infra*)

3. Indian Claims Limitation Act ("ICLA"), 28 U.S.C. §§ 2415(b) and (g) (entitled, "Time for commencing actions brought by the United States") (App. H, *infra*)

STATEMENT OF THE CASE

A. The Skokomish Indian Reservation

The 1855 Treaty of Point No Point ("Treaty") set aside as a permanent homeland for the Skokomish Indians ("Skokomish") the 5,000-acre Skokomish Indian Reservation ("Reservation") at the mouth of the Skokomish River ("River"). (App. E, *infra*; Excerpts of Record ("ER") 245[1]). The site was the aboriginal home of the Skokomish and the River was an extremely productive salmon and steelhead stream. Salmon and steelhead obtained from the "marine areas of Puget Sound, the Skokomish River, and its tributaries traditionally comprised the basis of the tribal economy and diet of the Skokomish Indians." ER 245. "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens . . ." under Article 4 of the Treaty.

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1. All references to "ER" are to the Tribe's Excerpts of Record, unless otherwise noted.

The River's mainstem forms the southern Reservation boundary before flowing into Hood Canal on Puget Sound. The Department of the Interior ("Interior") has determined, and the State of Washington has never contested, that the last six miles of the Skokomish River mainstem are within the Reservation. ER 264-78.

B. The Cushman Hydroelectric Project

In 1924, the Federal Power Commission ("FPC"), predecessor of the Federal Energy Regulatory Commission ("FERC"), issued Tacoma a 50-year "minor part license" that only authorized the flooding of "8.8 acres" of the Olympic National Forest to create a portion of one reservoir. (App. F). This was just a small part of the Cushman Hydroelectric Project ("Project"). In 1925, Tacoma began constructing extensive Project works, including two dams, two reservoirs, transmission lines, and a power house, which are on the River's North Fork, upriver from the Reservation. Tacoma also constructed a second powerhouse on the Reservation, as well as some Project transmission lines and access roads.

Beginning in 1939, the FPC issued the first in a series of orders that "repudiated" the practice of issuing minor part licenses to full projects as "arbitrary, capricious, without statutory or other authority, and contrary to law. . . ." *Pacific Gas and Electric Company*, 2 FPC ¶ 632 (1939). *See also Wisconsin Michigan Power Co*., 3 FPC ¶ 449 (1943); *Western Colorado Power Co.*, 24 FPC ¶ 968 (1960); *Pacific Gas & Electric Co.*, 29 FPC ¶ 1265 (1963); *Pacific Gas and Electric*, 56 FPC ¶ 994 (1976). FERC recognizes that the minor part license "did *not* authorize the construction, operation, and maintenance of the Cushman Project, . . ." 410 F.3d at 512 n.4, *citing City of Tacoma*, 67 FERC ¶ 61,152 (1994) (italics

inserted by circuit court). Additionally, the Washington Department of Ecology, which administers the Washington Water Code, determined that Tacoma did not obtain the necessary State water rights to divert and store Project water. ER 209-12.

The Project, when completed in 1930, diverted virtually the entire North Fork flow out of its channel and sent it through a large pipe (penstock) to an unlicensed on-Reservation power plant on Hood Canal. Project dams dried up the last 8.3 miles of the North Fork before it joins the mainstem. Drastically reduced River flows also contribute to silting and shrinkage of the lower mainstem River channel, which has raised the Reservation water table; turned one-third of the Reservation into swamp; and caused frequent on-Reservation flooding. Because of the North Fork diversion, only about 40% of the original River flowed through the mainstem. The loss of water in the River extirpated some major fish runs and "greatly contribut[ed] to the decline of native salmon stocks." ER 245. The Tribe suffered "severe losses to [its] traditional fishery." ER 259. Transmission lines and access roads traverse the Reservation and trespass on Skokomish Reservation lands.[2] Both dams lack fish passage facilities.

In 1974, when the 1924 minor part license expired, FERC began a relicensing proceeding and issued annual licenses that merely incorporated the terms of the minor part license. The Tribe intervened in that proceeding and has remained an active participant. In 1998, FERC issued a new license, which it amended in 2004. The license and other final orders

2. *United States v. Tacoma*, 332 F.3d 574 (9th Cir. 2003) (holding that the Project illegally trespasses upon certain Skokomish allotments).

are on appeal to the D.C. Circuit Court of Appeals. *City of Tacoma et al. v. FERC*, No. 05-1054 (consolidated) (D.C. Cir. filed Feb. 18, 2005). Since the new license was stayed at Tacoma's request, Tacoma still operates the Project today under the 1924 minor part license, which remains devoid of environmental conditions. FERC has authority to impose future license conditions but lacks authority to award damages for past injury from hydroelectric projects. *South Carolina Public Service Authority v. FERC*, 850 F.2d 788 (D. C. Cir. 1988).

C. Early Tribal Attempts to Assert Damage Claims

In 1930, just before the Project began diverting the North Fork, tribal members petitioned the federal government "that they be authorized to enter into a contract with an attorney . . . in order that their interests can be protected in the proposed diversion of waters of the Skokomish River." ER 315. The government refused on grounds that it needed congressional authorization but promised "to protect their interests." ER 313.

Also in 1930, tribal members sued Tacoma in Mason County Superior Court to enjoin the Project's diversion of the North Fork. ER 296-97. Tribal members also sought an injunction against Tacoma in federal district court, alleging "[t]hat if said water is diverted that use [to catch, dry and cure fish] will be taken from said Indians without compensation and contrary to the laws and constitution of the United States and in contravention of said treaty agreement." ER 304. The district court dismissed the case on grounds that the "United States is the real party in interest who must sue. . . ." ER 308.

During that period, Interior officials urged the U.S. Attorney General to sue to "establish the question of whether or not the diversion of water from the north fork . . . has in fact damaged or destroyed the fishing rights of these Indians and if so, the amount of damage that ought to be assessed for the loss occasioned." ER 288. The reasons for the Attorney General's refusal are somewhat unclear, but appeared to be based on conflicts-of-interest. ER 287.

D. Preservation of the Tribe's Damages Claims

In the late 1970's, the Department of the Interior began identifying tort claims for damages that the United States could bring on tribes' behalf against third parties, since those claims might be affected by federal statutes of limitations. In 1977, Interior presented to Congress a "potential claim" based on the Treaty of Point No Point entitled, "Destruction of fishery by diversion of water for hydroelectric project on North Fork River. Defendant: City of Tacoma." Tacoma's ER 404K.

In 1982, Congress enacted the Indian Claims Limitation Act ("ICLA"), 28 U.S.C. § 2415, which in part established procedures for preserving or rejecting treaty-based and other tort claims for damages against third parties. At least three Treaty-based claims against Tacoma were and remain preserved under the ICLA: No. P06-000-002 "Fishery-Skokomish River-Cushman Dam-1"; P06-000-003 "Fishery-Skokomish River-Cushman Dam-2"; and P06-120-004 "Fishery-Cushman Dam/Skokomish River." The United States has not pursued those claims.

E. The Instant Litigation

In 1999, the Tribe sued Tacoma and the United States (the latter under the Federal Tort Claims Act) in federal district court seeking compensation for past Project-caused damage. The Tribe alleged state and federal causes of action, including Treaty-based claims. The district court, in ruling for Tacoma, held that "the Tribe's claims belong before FERC and not this Court." (App. B at 78a). The district court also dismissed the United States as a defendant, and denied certification of the plaintiff class.

In a two-to-one decision, a Ninth Circuit panel affirmed the district court. *Skokomish Indian Tribe v. United States*, 358 F.3d 1180, 1181 (9th Cir. 2004). The Ninth Circuit granted rehearing and ordered that the panel opinion "not be cited as precedent" within the circuit, "except to the extent adopted by the *en banc* court." A divided *en banc* court issued a decision adverse to the Tribe (discussed below), which also denied relief based on the lack of an Indian reserved water right for the Reservation fishery. *Skokomish Indian Tribe v. United States*, 401 F.3d 979 (9th Cir. 2005). The Tribe, United States, and Amici (consisting of law professors, National Congress of American Indians and certain tribes) sought additional rehearing on the reserved water rights issue. The Tribe and Amici sought rehearing on additional issues, including the instant issue. The court granted additional *en banc* rehearing.

On June 3, 2005, a split *en banc* panel issued an amended opinion that withdrew all portions of the earlier ruling as to Indian reserved water rights but preserved intact the

remaining rulings.[3] (App. A, *infra*, *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005)). As to Defendant Tacoma, the majority rejected the district court's holding that the FPA preempted Treaty-based claims against Tacoma. It held that "the Tribe is not attempting to collaterally attack the licensing decision; rather it is suing for damages based on impacts that are not covered by the license. The FPA does not preempt the Tribe's treaty-based claims." *Id.* at 512 n.4. The majority based this ruling on the fact that the "narrow 'minor part' license" only applied to "8.8 acres" of federal land, and "did *not* authorize the construction, operation, and maintenance of the Cushman Project." *Id.*, quoting *City of Tacoma*, 67 FERC ¶ 61,152 (1994) (majority included italics).

The majority, however, dismissed the Tribe's Treaty-based claims against Tacoma. While the majority recognized longstanding precedent that treaties "provide rights of action for equitable relief against non-contracting parties," it found "no basis for implying the right of action for damages." *Id.* at 512, 514. The majority held that "the City and TPU [i.e., Tacoma Public Utilities] are not contracting parties to the Treaty. Nor is there anything in the language of the Treaty that would support a claim for damages against a non-contracting party." *Id.* at 513.

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3. As to Defendant United States, the majority held that "Treaty-based claims against the United States" "might properly have been brought under the Indian Tucker Act" (28 U.S.C. § 1505), and "transfer[ed] these claims to the Court of Federal Claims." *Id.* at 983-84. The Tribe does not challenge this ruling here. The majority stayed transfer and issuance of the mandate pending final disposition in this Court. There are unresolved questions concerning the Court of Federal Claims' jurisdiction over those claims.

Four of the eleven *en banc* judges vigorously dissented on the Treaty claims issue.[4] They stated that the majority opinion "call[ed] into question bedrock understandings" that the Supremacy Clause's "supreme Law of the Land" includes treaties. *Id*. at 525. The dissent cited long-established precedent that "[c]ities and local governments" are subject to and "cannot pass ordinances or laws that "'interfere with, or are contrary to,' federal law." *Id*. at 524 n.5. Finally, the dissent noted that the majority "points to no indication that Congress intended to allow suits in equity but not for damages to enforce Indian fishing rights reserved by treaties"; that the majority was quite "correct in recognizing – albeit in passing – that rights of action are available for equitable relief against 'non-contracting' parties to Indian treaties"; and that "the cases relying on the principle that states and their agents are bound to respect treaty-created rights are legion." *Id*. at 523-25.

While the United States did not seek rehearing on the instant issue, it noted in its rehearing brief that, "[N]o inference should be taken that the United States agrees with the *en banc* majority's potentially anomalous understanding . . . of the available remedies for treaty violations by non-signatories, where a treaty acknowledges a tribe's property interest." U.S. Brief at 15 n.10. The Tribe urges the Court to seek the views of the Solicitor General on this matter.

Finally, based on nearly 75 years of continuing damage, the Tribe originally pleaded $5.86 billion as an absolute ceiling on damages pursuant to Federal Tort Claims Act

4. A fifth judge, joined by three of the dissenters, also dissented from the majority's rulings barring state law-based claims for damage to fisheries.

("FTCA") administrative and statutory requirements that plaintiffs plead a maximum "sum certain." *See* 28 U.S.C. § 2675(b), 28 C.F.R. § 14.2(a). The Tribe was aware that courts rarely award the amount pleaded in FTCA cases. During this litigation, the number of claims against Tacoma (originally 35) has dramatically decreased. What remains here are essentially the same Treaty-based claims that the United States preserved under the ICLA: (1) infringement of Treaty-reserved fisheries and water; and (2) trespass for lands illegally condemned for Project transmission lines and access roads. The Tribe fully understands that $5.86 billion exceeds what the Tribe could recover if the Court granted certiorari and ultimately returned the case to district court. If this occurs, the district court would determine the level of fisheries to which the Tribe is entitled to claim as lost to the Project, as well as the appropriate method of valuation.

REASONS FOR GRANTING THE PETITION

This Court and the circuits have consistently recognized that treaties between the United States and Indian tribes, as the "supreme Law of the Land" under the Supremacy Clause, are binding on states and other nonsignatories. Following this fundamental principle in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*"), this Court upheld an Indian tribe's implied cause of action for damages against a local government that violated treaty-reserved rights. This Court recently reaffirmed that aspect of *Oneida II* in *City of Sherrill v. Oneida Indian Nation*, __ U.S. __, 125 S. Ct. 1478 (2005). Additionally, this Court has consistently recognized that once a private cause of action has been found to exist, all appropriate relief, including damages, ordinarily is available to vindicate the underlying federal right.

The majority's ruling conflicts with all of these decisions, and will be binding precedent in the Nation's largest Circuit. As described below, the ruling dramatically curtails the remedies available to all persons, not only Indians and Indian tribes, to enforce their federal rights. The majority held, as condition for accepting a claim, that the relevant statute or treaty must have express language authorizing a damages remedy. It is the rare case when Congress enacts such a statute. In many cases, an equitable remedy is insufficient to compensate for past losses. Even when well-established private causes of action exist, courts within the Ninth Circuit now need look no further than the absence of express statutory language before denying a damage remedy.

I. THE MAJORITY'S RULING THAT TREATIES AFFORD NO DAMAGES REMEDY AGAINST NON-SIGNATORIES CONFLICTS WITH DECISIONS OF THIS COURT, THE NINTH CIRCUIT AND OTHER CIRCUITS.

Article VI, cl. 2 of the Constitution establishes that "Treaties," as "Laws of the United States," are "the supreme Law of the Land" and are binding upon "the Judges in every State." Longstanding Court precedent holds that states and others nonsignatories are subject to Congressionally-ratified treaties with Indian tribes. *Antoine v. Washington*, 420 U.S. 194, 201-205 (1975) (rejected state court holding that the State of Washington was not subject to a Congressionally-ratified agreement between the United States and the Colville Tribe). In reaching that result in *Antoine*, this Court relied on *Choate v. Trapp*, 224 U.S. 665 (1912) (tax exemption in an 1897 agreement ratified by Congress between the United States and Indian tribes was "enforceable against the State of Oklahoma which was not a party to the agreement.");

Perrin v. United States, 232 U.S. 478 (1914) ("Court enforced a clause of an agreement ratified by Act of Congress that no intoxicating liquor should be sold on land in South Dakota ceded and relinquished to the United States, although South Dakota was not a party to the agreement."); and *Dick v. United States*, 208 U.S. 340 (1908) (Court enforced clause of 1893 agreement between United States and tribe, which Congress ratified, that prohibited introduction of intoxicating liquors into Indian country). The *Antoine* Court held:

> The fallacy in that proposition is that a legislated ratification of an agreement between the Executive Branch and an Indian Tribe is a "[Law] of the United States . . . made in Pursuance" of the Constitution and, therefore, *like "all Treaties made*," is made binding upon affected States by the Supremacy Clause. (*Id*. at 201) (emphasis added).
>
> Once ratified by Act of Congress, the provisions of the agreements become law, and *like treaties*, the supreme law of the land. . . . (*Id*. at 204 (emphasis added)).
>
> . . .
>
> The proper inquiry is not whether the State was or should have been a consenting party to the 1891 Agreement, but whether appellants acquired federally guaranteed rights by congressional ratification of the Agreement. (*Id*. at 205).

Antoine, *Choate*, *Perrin* and *Dick* have not been reversed, modified or weakened.

This Court, in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*"), relied on these bedrock principles in upholding a damages remedy against a non-signatory local government that had violated treaty-protected property rights. Recently, in *City of Sherrill*, the 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*." 125 S. Ct. at 1494. In contrast to the majority's ruling, *City of Sherrill* held that equitable, *as opposed to* monetary, relief was not available to the Tribe on the particular facts of that case. *Id.* at 1489.

The majority below refused to follow *Oneida II*. Instead, it erroneously distinguished *Oneida II* on grounds that "[T]he Court's decision [in *Oneida II*] was not based on any treaty." 410 F.3d at 514. This is clear error. As the Court in *Oneida II* noted, the claim was in fact based on *three* treaties that reserved the Oneida Nation's lands. 470 U.S. at 231 ("[I]n the Treaty of Fort Stanwix, 7 Stat. 15 (Oct. 22, 1784), the National Government promised that the Oneidas would be secure 'in the possession of the lands on which they are settled.' Within a short period of time, the United States twice reaffirmed this promise, in the Treaties of Fort Harmar, 7 Stat. 33 (Jan. 9, 1789), and of Canandaigua, 7 Stat. 44 (Nov. 11, 1794)."); *see also City of Sherrill*, 125 S. Ct. at 1484-85. Additionally, the Court in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) ("*Oneida I*"), stated:

> 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]. (*Id.* at 667 (emphasis added)).

Even if *Oneida II* had not been based on a treaty, however, the majority ignored settled, binding precedent that treaty rights protect and reserve pre-existing aboriginal rights. *United States v. Winans*, 198 U.S. 371, 381 (1905); *Oneida II*, 470 U.S. 226. Accordingly, there is no relevant difference between *Oneida II* and the cause of action and relief sought here.

Until now, the Ninth Circuit and other circuits have allowed a damages remedy when a non-signatory violates a tribe's property rights reserved by treaty or Presidential executive order.[5] The majority ignored these cases and created both an inter- and intra-circuit conflict. In *Mescalero Apache Tribe v. Burgett Floral Company*, 503 F.2d 336 (10th Cir. 1974), the Tenth Circuit held that the federal court has jurisdiction over a tribe's federal common law suit for monetary damages against private businesses that destroyed trees on the reservation. In *Pueblo of Isleta v. Universal Constructors*, 570 F.2d 300 (10th Cir. 1978), the Tenth Circuit also held that federal common law claim for monetary damage existed for harm to on-reservation property caused by off-reservation blasting. The Ninth Circuit followed *Oneida II* in *United States v. Pend Oreille Public Utility District No. 1*, 28 F.3d 1544 1550 n.8 (9th Cir. 1994) (upholding the right of the Kalispel Tribe to seek money damages against a public utility in a federal trespass action). In *United States v. S. Pac. Transp. Co.*, 543 F.2d 676 (9th Cir. 1976), the Ninth Circuit upheld a tribe's action for

5. The Second Circuit recently denied a damages remedy for the taking of land to a tribe based on laches in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005). *Cayuga*, which was decided on June 28, 2005, is markedly distinguishable from this case. The Tribe understands that some of the plaintiffs and plaintiffs-intervenors may petition this Court for a writ of certiorari in that case.

damages against a private railroad company for violating the tribe's aboriginal rights confirmed by an Executive Order of the President.

Additionally, the majority violated this Court's longstanding canons of construction governing Indian treaties. *Oneida II*, 470 U.S. at 247. Indian canons require construing treaties "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id*. (citations omitted). Not only did the circuit not apply Indian canons of construction in interpreting the Treaty, it construed the Treaty's silence against the Tribe. 410 F.3d at 513 ("Nor is there anything in the language of the Treaty that would support a claim for damages against a non-contracting party").

Finally, the ruling below also conflicts with precedent recognizing a common law private cause of action by commercial fishers to recover monetary damages against those who negligently despoil the waters and thus injure the fishers' livelihoods. *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). Non-Indian fishers do not have treaty protected rights recognized as 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 violations of their rights.

II. THE MAJORITY'S DENIAL OF A DAMAGES REMEDY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS.

The majority decision conflicts with established law as to damage remedies for violation of federal law. It is clear that non-contracting parties may be sued for equitable relief for violating an Indian treaty. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). In reviewing whether a damage remedy was also available, the majority below cited but ignored this Court's teaching in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). In *Gebser*, this Court addressed whether Title IX of the Education Amendments of 1972 afforded a damages remedy to a plaintiff who had been sexually harassed at a school that received Title IX funds. Well-settled precedent had established that Title IX was "enforceable through an implied private right of action," as are Indian treaties. *Id.* at 281; *Fishing Vessel*, 443 U.S. 658.

The issue before this Court in *Gebser* was whether defendants could be held liable in damages. *Gebser*, 524 U.S. at 281. In *Gebser*, the Court reaffirmed the general rule that once a private cause of action is found to exist, "all appropriate relief is available in an action brought to vindicate a federal right." *Id.* at 285, *quoting and following Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 68 (1992). The general rule, however, "yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved." *Gebser*, 524 U.S. at 285, *quoting Guardians Assn. v. Civil Ser. Comm'n of New York City*, 463 U.S. 582, 595 (1983).

Justice O'Connor, writing for the Court in *Gebser*, acknowledged that the statutory text did not "shed light on Congress' intent with respect to the scope of available remedies." *Gebser*, 524 U.S. at 285. Accordingly, this Court had "latitude to shape a sensible remedial scheme that best comports with the statute" and would not be "at odds with the statutory structure and purpose." *Id.* at 284. This Court also inquired as to how "Congress would have addressed the issue had the . . . action been included as an express provision in [Title IX]." *Id.* at 285, *quoting Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 178 (1994). Based on the entire "statutory structure and purpose," this Court concluded that Congress would not have subjected to damages a Title IX funding recipient who was "unaware of the discrimination." *Gebser*, 524 U.S. at 287. The Court predicated damages upon notice to an appropriate person, an opportunity to rectify any violation, and a response evidencing deliberate indifference to discrimination. *Id.* at 290.

The circuit courts, including the Ninth Circuit in its prior decisions, have faithfully followed this Court's *Gebser* analysis in determining whether a damages remedy is available, as a part of a private cause of action under a broad range of federal statutes. *See, e.g.*, *Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir. 1998) (availability of damages remedy under the Americans with Disabilities Act); *Norfolk Southern Railway Co. v. Brotherhood of Locomotive Engineers*, 217 F.3d 181 (4th Cir. 2000) (availability of damages under the Railway Labor Act). Now, however, the Ninth Circuit has sanctioned outright rejection of damages remedies without conducting any *Gebser* analysis. This implicates a host of federal statutes that lack express language authorizing a damages remedy, where federal courts have

determined that a private cause of action exists. *See, e.g.*, Rehabilitation Act, 29 U.S.C. § 794; Anti-Head Tax Act, 49 U.S.C. § 40116; Federal Aid Highway Act, 23 U.S.C. § 301; Fair Credit Reporting Act, 15 U.S.C. § 1681s-2; Social Security Act, 42 U.S.C. § 1396(a)(8); Motor Carrier Act, 49 U.S.C. § 14704(a)(2); Adoption Assistance and Child Welfare Act, 42 U.S.C. § 671(a); Title VI of the Civil Rights Act, 42 U.S.C. § 2000d.

Here, the Ninth Circuit starkly departed from the *Gebser* analysis and its precedents, with adverse ramifications for all plaintiffs who seek damages to vindicate violations of federally protected rights. As in *Gebser*, the Ninth Circuit recognized that the law at issue (here, the Treaty) provided an implied right of action for equitable relief against those who interfere with treaty-reserved rights but did not sign the treaty.[6] The majority recognized longstanding precedent that treaties can be used "to force state and governmental entities and their officers to conform their conduct to federal law." 410 F.3d at 51213.

The majority, however, started and ended its analysis of whether damages were available with the express language of the 1855 Treaty of Point No Point: "Nor is there anything in the language of the Treaty that would support a claim for damages against a non-contracting party." *Id.* at 513. The

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6. 410 F.3d at 512-14, *citing United States v. Winans*, 198 U.S. 371 (1905) (upheld treaty based equitable remedy against non-Indian fishermen); *Puyallup Tribe v. Department of Game of Washington (Puyallup I)*, 391 U.S. 392 (1968) (Treaty of Medicine Creek restricted acts of Washington Legislature and executive branch); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (upheld United States' and tribes' treaty-based equitable claims against State of Washington).

majority ignored the general rule that "all appropriate relief is available in an action brought to vindicate a federal right." *Gebser*, 524 U.S. at 285. The majority did not examine, as required by *Gebser*, whether a damages remedy was "at odds with the [Treaty's] structure and purpose."[7] *See id.* at 284. In fact, the majority ignored that Congress indeed did specifically recognize a damages remedy against nonsignatories for violations of treaty-protected rights. The Indian Claims Limitation Act, 28 U.S.C. § 2415, establishes a mechanism for preserving exactly these types of claims. *Id.* at § 2415(b); Bureau of Indian Affairs, Notice, 48 Fed. Reg. 13,698 (1983). *See* discussion *infra* at Statement of the Case, subsection D.

The majority also disregarded a key aspect of the test established by this Court when determining whether an implied right of action exists in the first place (which was not at issue in this case). In deciding whether a statute "display[ed] congressional intent to create new rights," this Court concluded in *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001), that statutes that focused on the "individuals protected" created a far stronger case of congressional intent to create a private right of action. In *Sandoval*, Title IV focused on "agencies that will do the regulating," which gave the Court "far less reason to infer a private remedy in favor of individual persons, ..." *Id.*, *quoting Cannon v. University*

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7. Had the circuit followed *Gebser*, it should have concluded that a damages remedy did not frustrate the statutory purpose because: (1) Congress' purpose in ratifying the Treaty was to reserve to the Tribe a homeland and fishing rights; (2) Tacoma had deliberately and without express authority deprived the Reservation of fisheries and nearly one-half of the water flowing through it; and (3) Tacoma knew from the start that the loss of water and fish would be a devastating loss to the Tribe.

of Chicago, 441 U.S. 677, 69091 (1979). It did not occur to the majority that the Treaty *solely* focuses on the "individuals protected" – i.e., the Skokomish Tribe and its members. *See id.*

Additionally, by barring monetary damages while acknowledging the availability of injunctive relief, the majority stood on its head the universally recognized principle that injunctive relief is extraordinary and available only when damages are inadequate. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). There is simply no basis for an exception to this general rule when Indians or Indian tribes are plaintiffs.

Finally, the Ninth Circuit's decision has the sweeping effect of denying a host of private causes of action for damages for violations of federally protected rights. All plaintiffs, not just Indians and Indian tribes, could be deprived of a federal forum for claims seeking damages in the absence of an express recognition in the statute of a right to seek damages. The Circuit's test violates the teaching of *Gebser* that recognizes an implied right of action for damages.

VIEWS OF THE SOLICITOR GENERAL

The Court may want to request the views of the United States Solicitor General on this Petition for Certiorari, since it raises serious issues concerning third party violations of Treaties between the United States and Indian tribes and since potential liability of the United States may be affected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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