No. 05-434

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,

vs.

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

BRIEF OF THE TACOMA RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The 1855 Treaty of Point No-Point created a reservation for the Skokomish Indian Tribe, extinguished the Tribe's aboriginal possessory claims to other lands, and reserved to the Tribe the right to fish on ceded lands at the Tribe's "usual and customary stations . . . in common with all other citizens." The specific question presented by the Tribe's Petition is whether this Court should grant *certiorari* and consider whether the Treaty implies a private remedy for money damages against Tacoma for the Cushman Hydroelectric Project's alleged adverse effect on the Tribe's off-reservation fishing right. If this Court grants *certiorari* and concludes that such a damage action can be maintained, then a second question arises: whether the Federal Power Act preempts any such remedy.[1]

[1] An affirmative answer to the second question would not change the judgment below, and therefore, a cross-petition for writ of certiorari is not required. *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924).

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I. STATEMENT

The Tribe's[2] Petition mischaracterizes the question presented and the issue adjudicated below and contains a number of critical misstatements of underlying fact.

A. The Adaptive Nature of the Treaty Right

The purpose of the Treaty of Point No-Point, like the other nine treaties negotiated by Governor Isaac Stevens, was to reconcile Indian interests and the expanding migration of non-Indians to the Pacific Northwest. The Treaty, signed in 1855 and ratified in 1859, demonstrates a clear intent to accommodate this future change in several respects.

First, the Treaty extinguished aboriginal title claims to parts of what is now Washington State in exchange for monetary payments[3] and provision of a tract of land on Hood Canal "for the present use and occupation of the said tribes and bands. . . . "[4] The Treaty further provides that the Tribe was to relocate to a temporary reservation within one year of the Treaty's ratification[5] and authorizes the President to "remove [the Indians] from said reservation to such other suitable place or places within said Territory as he may deem fit. . . ."[6]

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[2] For ease of reference, the Petitioners will be referred to collectively as "the Tribe" and the Respondents will be referred to collectively as "Tacoma."

[3] Supp. ER 157.

[4] *Id.*

[5] *Id.*

[6] Supp. ER 158.

Second, the Treaty reflects the federal government's then-extant policy of Indian assimilation by providing that the reservation eventually would be allotted into individual parcels, with individual Indians assigned parcels as their homes and farms.[7]

Third, the Treaty addresses fishing rights from the standpoint of both Indians and non-Indians. In Article 4, the Treaty secured to the Tribe the "right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the United States."[8] As noted by this Court, this adaptive nature of the treaty fishing right was essential as "new conditions came into existence to which [treaty fishing] rights had to be accommodated."[9]

B. Accommodation for Hydroelectric Development was Explicitly Sanctioned by Congress through the Federal Power Act's Comprehensive Licensing Scheme

The change contemplated by the Treaty occurred quickly. At the time of the Treaty, the Tribe numbered about 200,[10] and the Washington Territory was home to approximately 3,965 non-Indians. By 1890 Tacoma's

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[7] *Id*. This approach prevailed as American Indian policy during the mid-19th century until Franklin Roosevelt's administration in the 1930s. Supp. ER 155.

[8] Supp. ER 157.

[9] *United States v. Winans*, 198 U.S. 371, 381 (1905). The Petition raises only that part of the Ninth Circuit's *en banc* decision that addresses Article 4 and the off-reservation fishing rights. The Tribe's claim that "what remains" also includes a treaty-reserved water right or any trespass claims is incorrect. Pet. at 10.

[10] Supp. ER 110.

population alone was 36,000,[11] and by 1910 the State's population had burgeoned to over a million.[12]

Hydroelectric power was an appropriate and important part of the region's increased settlement and development. Congress enacted the Federal Water Power Act of 1920 ("FPA") to provide for the growing need for hydroelectric power throughout the country.[13] The express purpose of the FPA was to implement a "complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation."[14] The Act established the Federal Power Commission[15] ("the Commission") as the exclusive forum for accommodating the numerous – and sometimes conflicting – interests that could be affected by its licensing decisions.[16]

The FPA expressly addresses fisheries resources and tribal interests. The Act delegates full authority to the Secretaries of Interior (which has responsibility for Indian affairs) and Commerce (the home agency of the National Marine Fisheries Service, which exercises authority over anadromous fish) to provide mandatory license conditions that are designed to mitigate a hydropower operation's

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[11] Supp. ER 163.

[12] Supp. ER 165.

[13] Federal Water Power Act of 1920, Ch. 285, 330, 41 Stat. 1077.

[14] *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 180 (1946). *See also California v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490 (1990).

[15] The Federal Power Commission was reconstituted as the Federal Energy Regulatory Commission ("FERC") in 1977. These two entities will be referred to interchangeably as the "Commission."

[16] *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 445-46 (1955).

impacts on fisheries resources[17] and that may be necessary "for the adequate protection and utilization" of Indian reservations.[18] The FPA also expressly provides that the Commission "shall consider . . . the recommendations (including fish and wildlife recommendations) of Indian tribes affected by a project."[19] To issue a license, the Commission must determine that the project "will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired."[20] Importantly, this Court has noted that a federally-licensed hydroelectric project "is an example of the changing circumstances that alter the contours of the Tribe's continuing property rights."[21]

C. The Cushman Project

In 1912 the City of Seattle started investigating the present site of the Cushman Project for a hydroelectric dam. Seattle's proposal was vetted by the Commissioner of Indian Affairs, who concluded that there would be no adverse effect on the rights of the Skokomish Tribe.[22] After Seattle declined to pursue the proposal, in 1923 Tacoma submitted an application for a federal license for the Cushman Hydroelectric Project to the Commission for approval.[23] The 50-year minor part license granted in 1924

[17] 16 U.S.C. § 811.

[18] 16 U.S.C. § 797(e).

[19] 16 U.S.C. § 803(a)(2)(B).

[20] *Id. See also* Supp. ER. 88.

[21] *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960).

[22] Supp. ER 178-83; Supp. ER 166; Supp. ER 170-77.

[23] Supp. ER 188, 190.

authorized the flooding of 8.8 acres of federal land in connection with Tacoma's construction of the Project on the North Fork of the Skokomish River. Consistent with its interpretation of the FPA at the time, the Commission did not license the entire project but did review its full scope.[24] The scope specifically included "[t]he proposed scheme of development [ ] to utilize substantially all of the waters of the North Fork of the Skokomish River."[25] Indeed, the Commission found that "the project . . . will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of water-power development and of other beneficial public uses, and . . . will not interfere or be inconsistent with the purpose for which any

[24] Supp. ER 188-207. The Tribe has asserted Tacoma has operated the project "illegally" simply because the license issued to Tacoma was a minor-part license that only covered 8.8 acres, not the entire area occupied by the Project. The Commission, however, specifically considered this matter and concluded that issuing a minor-part license was "consistent with the Commission's interpretation of its jurisdiction at that time, [although] the Commission later concluded that Tacoma should obtain a license for the entire Cushman Project. . . ." *City of Tacoma*, 84 FERC ¶ 61,107, p. 61,535 (July 30, 1998) (*City of Tacoma 1998*). Despite finding that Tacoma's original minor-part license was "under inclusive," the Commission ruled that the license had not been invalidated and that Tacoma was legally entitled to seek a relicense for the entire project as originally built. *City of Tacoma*, 71 FERC ¶ 61,381 at pp. 62,487-88 (June 22, 1995) (*City of Tacoma 1995*). The Tribe's allegations to the contrary are apparently aimed at making this case resemble the facts in *United States v. Pend Oreille*, 28 F.3d 1544 (9th Cir. 1994), which found a hydropower project unlawfully trespassed on a tribe's land. But both Judge Boldt's findings in *Skokomish Indian Tribe v. France*, No. 1183, Findings of Fact and Conclusions of Law, Finding 43 (W.D. Wash. Jan. 29, 1962), *aff'd*, 320 F.2d 205 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964) (Supp. ER 102-03) (discussed *infra* at 7-8), and FERC's determinations in the relicensing appeal make *Pend Oreille* readily distinguishable.

[25] Supp. ER 190.

reservation affecting thereby was created or acquired."[26] The license stated further that "the said dam" was "necessary and convenient for the development and utilization of power."[27]

As noted by the Tribe, most of the Project's facilities are located on the North Fork of the Skokomish River. Contrary to the implications of the Tribe's statements, however, Cushman Powerhouse No. 2 is not located "on" Tribal lands.[28] Rather, that powerhouse is located on land Tacoma owns in fee within the Skokomish Reservation's exterior boundaries.[29] Part of the Project's transmission line and access roads traverse the Reservation, but any claims regarding the line or roads are not at issue here, as they were separately litigated[30] and are not raised in this case.

The Tribe also repeats what are clearly disputed and unresolved allegations in its Petition, including its allegation

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[26] Supp. ER 88.

[27] *Id*.

[28] Pet. at 3.

[29] ER 188-89. *See also City of Tacoma 1998*, 84 FERC at p. 61,540.

[30] *United States v. City of Tacoma*, 332 F.3d 574 (9th Cir. 2003). Indeed, the Tribe's statement that the Ninth Circuit has held "that the Project illegally trespasses upon certain Skokomish allotments" as well as its assertion there is a "remaining issue" for "trespass for lands illegally condemned for Project transmission lines and access roads," Pet. at 4 n. 2, 10, are patently false. In litigation unrelated to this case, the Ninth Circuit affirmed a District Court holding that the conveyance of easements (for the transmission line and access roads) across certain Reservation allotments to Tacoma was invalid at the time that a state court and the Department of Interior approved it in 1922. *United States v. City of Tacoma*, 332 F.3d 574. Importantly, neither the Ninth Circuit nor the District Court made any findings regarding current ownership status of the parcels in question.

that the Project has caused "aggradation" in the main stem of the Skokomish River, allegedly resulting in flooding on the Reservation, and that the Project has taken nearly one-half of the water flowing through the Reservation and "thus destroyed a substantial portion of the off- and on-reservation fisheries."[31] These assertions remain at issue in the pending relicensing proceeding.[32] Moreover, causes of action related to aggradation or flooding are state law causes of action dismissed by the trial court,[33] and that dismissal was sustained on appeal.[34] In any event, the state causes of action are not relevant to the issue raised in the Tribe's Petition for *Certiorari*.[35]

In sum, the only remaining issue presented to this Court involves off-Reservation treaty fishing rights, and the Tribe's statements to the contrary should be ignored.

D. Project Licensing is under FERC Jurisdiction

No issues related to the Project's licensing are part of the Petition. A federal court determined in 1948 that Tacoma had a valid license and that it complied with its license and all applicable laws, rules and regulations. In

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[31] Pet. at *i* ("Question Presented"). The Tribe also incorrectly represents that six miles of the mainstem of the Skokomish River are on Tribe's Reservation. Pet. at 3. This is completely at odds with the historical record, which shows that the mainstem borders the Reservation but is not on the Reservation. ER 445-66, 476-78.

[32] Supp. ER 35.

[33] ER 9.

[34] *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 516-18 (9th Cir. 2005).

[35] Pet. at 1.

denying the Tribe's suit to remove the Project's transmission lines from tidelands, Judge George Boldt concluded:

> [The FPC] issued a license to the City of Tacoma for Project No. 460 Washington. That ever since said time said license has been in full force and effect and, at all times since the issuance of said license, the defendant City of Tacoma has operated said hydroelectric project pursuant to *and in accordance with the terms of said Federal Power Commission license and all laws, rules and regulations pertaining thereto*. . . .[36]

Similarly, FERC asserted its exclusive jurisdiction under the FPA in the relicensing proceedings when Tacoma filed an application for a "new" license (i.e., relicense) for the Project in 1974. After FERC granted the Tribe the right to intervene, the Tribe played an active role in the relicensing proceeding and asserted many of the same claims against Tacoma that it has asserted in this litigation.[37] For these reasons, both the trial court and a majority of the three-judge panel of the Ninth Circuit concluded that the Tribe's treaty-based claims were

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[36] Supp. ER 102-03 (emphasis added). Judge Boldt further concluded that the Tribe's claim impermissibly "constitutes, insofar as Tacoma is concerned, a collateral attack upon the order of the FPC in issuing a license to Tacoma for the construction of a hydroelectric project . . . Supp. ER 106. The Ninth Circuit affirmed Judge Boldt's decision, and this Court denied certiorari. *Skokomish Tribe v. France*, 320 F.2d 205 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964).

[37] *City of Tacoma*, 67 FERC ¶ 61,152, p. 61,439 (May 4, 1994). *City of Tacoma*, 84 FERC ¶ 61,107 (July 30, 1998) (*City of Tacoma 1998)*; *City of Tacoma, Order on Rehearing*, 86 FERC ¶ 61,311 (Mar. 31, 1999). Petitions for review of FERC's decisions are pending before the United States Court of Appeals for the District of Columbia Circuit. *City of Tacoma v. FERC*, No. 05-1054 (D.C. Cir. filed Feb. 18, 2005).

preempted by the FPA, notwithstanding the minor part license.[38] The Ninth Circuit *en banc* panel disagreed in a footnote[39] and instead dismissed the Tribe's treaty-based claims on the grounds that no private right of action for damages for off-reservation fishing rights could be implied from the Treaty.[40] Both grounds, however, clearly support the same result.

E. Current Project Operations

Pending the outcome of the relicensing litigation, Tacoma is not, as suggested by the Tribe, operating "under the 1924 license, which remains devoid of environmental conditions."[41] Many events delayed FERC's issuance of a new license, which is now being challenged in the Court of Appeals for the District of Columbia Circuit by both the Tribe and Tacoma.[42] Although the license is stayed pending the outcome of that challenge, Tacoma has implemented significant environmental measures that have benefited the Tribe and the citizens of the state. These include monetary contributions to the George Adams Fish Hatchery; purchasing the Nalley Ranch and allowing it to return to its natural estuarine condition; and doubling the flow in the North Fork of the Skokomish River to at least 60 cubic

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[38] ER 32-33, 37; *Skokomish Indian Tribe v. United States*, 332 F.3d 551, 560 (9th Cir. 2003), *vacated by Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005).

[39] *Skokomish Indian Tribe v. United States*, 410 F.3d at 512 n. 4.

[40] *Id.* at 514.

[41] Pet. at 5.

[42] *City of Tacoma v. FERC*, No. 05-1054 (D.C. Cir. filed Feb. 18, 2005).

feet per second to provide improvements to spawning and rearing conditions for salmon.[43]

II. ARGUMENT

The Petition presents only a single, narrow issue: whether Article 4 of the Treaty of Point No-Point, which secures to the Tribe the "right of taking fish at usual and accustomed stations in common with all citizens of the United States,"[44] creates an implied private right of action for money damages associated with the operation of a hydroelectric project licensed under the FPA.

No court has ever implied such a private right of action for money damages for an alleged violation of Indian treaty fishing rights.[45] Rather, this remedy is at odds with the adaptive and accommodative nature of the fishing right shared "in common with all citizens." Indeed, every federal judge that has considered the Tribe's claim, including both the majority and dissenters in the Ninth Circuit's *en banc* determination, characterized the Tribe's treaty-based claim as one that turns on Article 4's adaptive fishing rights. Given this limitation, the Tribe's claim of conflicts with other decisions involving tribal treaty rights is illusory. Accordingly, the Ninth Circuit *en banc*

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[43] *City of Tacoma*, 89 FERC ¶ 61,273, p. 61,796 (Dec. 16, 1999).

[44] Supp. ER 157.

[45] The only cases that have considered such a novel claim have uniformly ruled that the tribe does not have such a remedy. *See, e.g., Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994); *Muckleshoot Tribe v. Puget Sound Power & Light Co.*, No. 472-72C2V (W.D. Wash. Oct. 8, 1986) (cited in *Nez Perce*, 847 F. Supp. at 807); *Nisqually Indian Tribe v. City of Centralia*, No. C75-31T (W.D. Wash. Nov. 18, 1981) (cited in *Nez Perce*, 847 F. Supp. at 807).

decision does not conflict with any existing case law and, thus, the Petition does not warrant granting *certiorari*.

Moreover, there is no other compelling reason to grant certiorari because the Tribe continues to pursue regulatory protection for its in-common fishing rights through the FERC relicensing process. The decision also does not in any way implicate the extensive precedent providing for equitable remedies and regulatory protections designed to protect treaty fishing rights of tribes. Nor does it implicate recognized remedies in tort or affect common law damages remedies available to Indian tribes to vindicate possessory interests in real property. And it does not implicate or conflict with established precedent governing the implication of private causes of action under federal statutes and treaties.

In the end, granting the Tribe's Petition and reversing the Ninth Circuit's decision would create an unprecedented cause of action that could greatly expand the potential exposure of third parties to court-imposed money damages without Congressional authority. As emphasized by this Court recently in *City of Sherrill v. The Nation of Oneida*,[46] the law disfavors addressing the wrongs of prior generations in a manner that fundamentally disrupts settled long-held and reasonable expectations.[47] For all of these reasons, Tacoma respectfully requests that the Tribe's Petition be denied.

[46] __ U.S. __, 125 S.Ct. 1478 (2005).

[47] *Id.* at 1491.

A. The Ninth Circuit Correctly Held the Treaty Does Not Establish a Private Right of Action for Money Damages Against A Third Party Who Indirectly Affected the Amount of Fish Available for the Tribe to Harvest.

1. Settled Precedent Supports Finding There is No Private Right of Action for Damages Implied in the Treaty.

A fundamental tenet of this Court's decisions in which a private right of action for damages has been implied is that the conduct to be remedied must be specifically and unmistakably prohibited by the Congressional scheme.[48] Parties must also be clearly on notice that the type of conduct is prohibited. In this case, the challenged conduct involves a hydroelectric facility under the aegis of, and affirmatively encouraged by, the Federal Power Act. The well-established four-part test set forth in *Cort v. Ash*[49] for determining whether a private right of action exists demonstrates that no implied right of action exists for the Tribe's asserted fishing claim:

(a) *Is the plaintiff one of the class for whose special benefit the statute was enacted?* Although the Point-No-Point Treaty was for the benefit of the Skokomish Tribe, it also was intended to benefit all citizens by accommodating settlement and development.

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[48] *Jackson v. Birmingham Bd. of Ed.*, __ U.S. __, 125 S.Ct. 1497 (2005); *Gonzaga University v. Doe*, 536 U.S. 273, 280 (2003); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998).

[49] 422 U.S. 66, 78 (1975).

(b) *Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?* All parties agree there is no explicit provision in the treaty for money damages for shared, in-common fishing rights. Since Congress has not spoken with a "clear voice" or manifested an "unambiguous" intent to confer individual rights, the courts should not imply a remedy of money damages for alleged violation of treaty fishing rights.

(c) *Is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff*? Since Congress has never enacted a statute or approved a treaty expressly providing money damages to tribes for alleged violations of in-common, off-reservation treaty fishing rights, it is not surprising that no court has ever found a basis for implying such a remedy. The only court-made remedies for harm to in-common, off-reservation treaty fishing rights have been prospective and equitable in nature.[50] This approach is consistent with the historical context of these treaties defining such rights. The treaties were meant to accommodate change, and the fishing rights were not meant to be static and immutable. Article 4 of the Treaty, therefore, did not impose an environmental servitude on off-reservation areas, or anything akin to a property interest protected at law by remedial money damages.

Indeed, any inference that Congress necessarily contemplated that the Tribe could entertain a damage action for allegedly adverse affects on the environment,

[50] *See e.g.*, *Winans*, 198 U.S. at 384; *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968) (*Puyallup I*); *United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

which then affected the availability of fish, is dispelled by over 150 years of history. Had Congress intended to allow money damages for impacts of authorized hydropower projects on treaty fishing rights, certainly it could have addressed the issue in the FPA. Instead, it provided only prospective remedies such as conditions, enhancements and mitigation.[51] The FPA explicitly sets forth procedures for accommodating tribal in-common fishing rights as part of the licensing process.[52]

The comprehensive character of the FPA not only determines how the Tribe's in-common fishing right accommodates subsequent federal hydropower development; it also preempts any federal common law claims that could be fashioned to enforce those rights.[53] The courts have been vigilant in ensuring that this comprehensive scheme of the FPA and the Commission's jurisdiction is not eroded and have rejected collateral attacks in similar circumstances.[54]

Although the Tribe argues the Indian Claims Limitation Act is evidence of Congressional intent to create a private right of action, this statute does not create – but

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[51] 16 U.S.C. § 803(j).

[52] 16 U.S.C. §§ 797(e), 803(a)(2)(B), 811.

[53] 16 U.S.C. § 791(a) *et seq.*; *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-26 (1978). *See also In re Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) ("[S]eparation of powers concerns create a presumption in favor of preemption of federal common law whenever it can be said that Congress has legislated on a subject.")

[54] *Escondido Mutual Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765 (1984); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958); *DiLaura v. Power Auth. Of the State of New York*, 982 F.2d 73, 79 (2d Cir. 1992); *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908 (9th Cir. 1989).

only preserves – alleged causes of action from being barred by a statute of limitations.[55]

(d) *Is the cause of action one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law?* The Tribe itself answered this question by pleading and relying on many state law causes of action for which it sought the same "damages" as in its treaty-based claim.[56] The Tribe's state-law causes of action were dismissed by the district court on summary judgment on other grounds – a decision sustained by the Ninth Circuit – and are not raised in this Petition. If the Tribe can obtain relief under state-law causes of action, finding an implied right of action in the Treaty is unwarranted as a matter of law.

Overall, application of the *Cort v. Ash* test demonstrates that no private right of action exists. The Tribe ignores this test and instead cites *Gebser v. Lago Vista Independent School District*[57] as if it conflicted with the decision in *Cort v. Ash* and supported its claim for an implied private right of action for money damages in the Treaty. But *Gebser* does not create a "conflict" that would warrant granting certiorari, because *Gebser* rests on the same, settled *Cort v. Ash* test described above. Moreover,

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[55] 28 U.S.C. § 2415. Section 10(c) the FPA provides that federal licensees are not immunized from state damages claims. As with the ICLA, this provision is intended only to subject licensees to state damage claims under state law that otherwise exist. It does not create a federal cause of action for damages. *DiLaura v. Power Auth. of the State of New York*, 982 F.2d 73, 78 (2d Cir. 1992).

[56] *Skokomish Indian Tribe v. United States*, 410 F.3d at 516-18. The state-law claims asserted by the Tribe included negligence, trespass, public nuisance, private nuisance, and inverse condemnation. *Id.*

[57] 524 U.S. 274.

Gebser, a sexual-harassment case,[58] did not establish an implied right of action for money damages under Title IX but merely noted that the issue had already been decided by *Cannon v. University of Chicago*.[59] And *Cannon* expressly relies on the established *Cort v. Ash* four-part test applied above.[60]

More importantly, the Court in *Gebser* had the benefit of Congressional guidance in a similar statute that did provide money damages to victims of racial discrimination under Title VII.[61] No such Congressional support exists here. In fact, the comprehensive scheme of the Federal Power Act demonstrates Congressional intent to *disallow* this type of a claim.[62]

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[58] *Id.* at 277.

[59] 441 U.S. 677 (1979).

[60] *Id.* at 688-89. In *Gebser,* the Court also noted that it had previously extended the *Cannon* holding to imply money damages in such cases in *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60 (1992). Therefore, *Gebser* did not create by only "define[d] the contours" of the private right of action for money damages that had already been established by previous decisions. *Gebser*, 524 U.S. at 281.

[61] *Gebser*, 524 U.S. at 283.

[62] The existence of such negative Congressional intent also distinguishes *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001), a civil rights case that the Tribe relies on to argue that a statute that focuses on "individuals protected" is an expression of Congressional intent to create a private right of action. In any event, the Alexander court rejected the plaintiff class's contention that there was a private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. *Id.* at 290-91.

2. The Adaptive Nature of the Treaty Right Defined by Congress Is Inconsistent With A Private Right of Action for Damages

Traditional property rights involve the exclusive, possessory right to own property, while the Tribe's in-common fishing right is neither possessory nor exclusive. Rather, it is often described as a "usufructuary" right,[63] which is most closely akin to a *profit-à-prendre*.[64] Even the Tribe acknowledges that its treaty right to catch fish is an adaptive use subject to change.[65] As this Court has previously noted, the Tribe does not own the fish but rather secured in the Treaty an opportunity to take a fair share of the fish at usual and accustomed fishing stations.[66] Therefore, the Treaty protects the Tribe's interest in "available" fish[67] but does not guarantee that fish will always be available.

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[63] *Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172 (1999). *See also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 352 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983) (stating that usufructuary rights include off-reservation hunting, fishing, trapping, and gathering rights, and they do not require title to the land and are similar to a *profit-à-prendre*); *Sokaogon Chippewa Community v. Exxon Corp*., 805 F. Supp. 680, 701 (E.D. Wis. 1992), *aff'd*, 2 F.3d 219 (7th Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994).

[64] *See generally Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341.

[65] *Skokomish Indian Tribe*, 332 F.3d at 558. As long ago as 1905, this Court recognized: "[n]ew conditions came into existence to which [treaty fishing] rights had to be accommodated." *Winans*, 198 U.S. at 381.

[66] *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284 (1977). *See also Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. at 813.

[67] *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684-85 (1979) (*"Passenger Fishing Vessel"*).

The treaty fishing right is also an "in common" right that is shared with non-Indian fishers to harvest a "fair share" of the resource.[68] The right is not an exclusive right, but rather must be balanced against the usufructuary rights of others.

Since the treaty fishing right must accommodate change and is held "in common" with non-Indians, this Court and other courts consistently have used equitable remedies to protect and define these rights. This is precisely what occurred in *United States v. Winans*,[69] where the United States enforced the treaty (as it would any federal law) and sought and obtained an injunction – not damages – to remedy the impact of settler fishing on tribal harvest.[70]

In fact, only equitable remedies are consistent with the nature of the right itself. Equity allows courts and regulatory agencies to fashion an appropriate remedy based upon a balancing of competing interests, public policies, and changing conditions. An action at law for money damages does not permit such balancing.

Numerous examples exist of courts and regulatory agencies exercising their unique equitable and statutory power to protect Indian treaty fishing rights and to accommodate the changes occasioned by new circumstances facing tribes without invoking any money-damage remedy. For example, courts have used equity to allow the adaptive fishing right to extend to hatchery fish resources that did

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[68] *Id*.

[69] 198 U.S. 371.

[70] *Passenger Fishing Vessel*, 443 U.S. at 681 (*citing* Brief for United States, O.T. 1904, No. 180, pp. 54-56).

not exist at the time of the treaty.[71] Courts also have used equity to allow treaty tribes to vary their "usual and accustomed" fishing places to adapt to the diminishment and geographic dispersal of fish,[72] and to employ modern fishing techniques.[73]

Similarly, the fishing right – a right to share in the harvest of *public resources* – is protected by and subject to

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[71] *United States v. Washington*, 759 F.2d 1353, 1360 (9th Cir.), *cert. denied*, 474 U.S. 994 (1985) (noting it would be inequitable for tribes to bear the full burden of the decline of natural fish without sharing the replacement achieved through hatcheries); *United States v. Washington*, 506 F. Supp. 187, 198 (W.D. Wash. 1980) ("It is now beyond dispute that natural fish have become relatively scarce, due at least in part to the commercialization of the fishing industry and the degradation of the fishing habitat caused primarily by non-Indian activity in the case area. The record also establishes that the State has developed and promoted its artificial propagation program in order to replace the fish that were artificially lost."); *United States v. Washington*, 459 F. Supp. 1020, 1081 (W.D. Wash. 1978) ("This court has consistently maintained that a trial of the treaty right to hatchery fish is inherently interwoven with the history of Washington State's developing economy, its effects on the environment, the Washington State management program for fisheries and the cumulative effect of the above on the natural anadromous fish runs."); *id*. at 1079-80 ("Due to man's activities, subsequent to the settlement of the area by non-Indians, and to other environmental changes, sections of streams or entire streams have been removed from salmon and steelhead production.").

[72] *See, e.g., United States v. Washington*, 384 F. Supp. 312, 361-62 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (a tribe's "usual and accustomed" fishing place embraced the new location of fish no longer found in their prior spot).

[73] *See, e.g., Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Mich. Dep't of Natural Resources*, 141 F.3d 635, 639-40 (6th Cir. 1998); *United States v. Michigan*, 471 F. Supp. 192, 260 (W.D. Mich. 1979) ("The right [to fish] may be exercised utilizing improvements in fishing techniques, methods and gear.").

state and federal regulation.[74] This Court has held that a state may so regulate, so long as the regulation is nondiscriminatory and properly tailored to the public's need.[75]

The 1998 *United States v. Washington* shellfish decision[76] is a good example of a court using both equitable relief and state regulation to protect and restrict an adaptive treaty fishing right. The court extended the right to take shellfish to any species of shellfish, not merely those harvested by the tribes before the treaty[77] and allowed the tribes to take shellfish on privately owned natural (as opposed to artificial) tidelands.[78] The tribes'

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[74] *See, e.g., United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987) (finding that the Cherokee Nation's treaty-guaranteed ownership of portions of the bed of the Arkansas River is not absolute, but subject to the federal government's dominant navigational servitude); *United States v. Dion*, 476 U.S. 734 (1986) (a hunting and fishing right not a defense to violations of the Eagle Protection Act and the Endangered Species Act); *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (discussing the Makah treaty fishing right and the ongoing efforts to address the harvesting of the gray whale under federal programs). *See also Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999) (discussing the United State's trust obligation to protect the tribes' treaty fishing rights and the United State's regulation allocating groundfish catches off the Washington coast to four Northwestern Tribes).

[75] *See generally Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*); *Puyallup I*, 391 U.S. 392; *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Tulee v. Washington*, 315 U.S. 681 (1942). *See, e.g., United States v. Oregon*, 657 F.2d 1009, 1016-17 (9th Cir. 1981) (affirming a State's total ban on tribal harvest of spring Chinook salmon when it was necessary to preserve the species).

[76] 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999). The right to harvest shellfish is also an "in common" right, although it is subject to a restriction against harvesting from beds staked and cultivated by non-Indians. *Id.* at 638-39.

[77] *Id.* at 643.

[78] *Id.* at 646-49.

take from the latter, however, was limited to 50 percent of shellfish that would have been harvested had the beds not been enhanced through the labor of commercial growers.[79] Moreover, the tribes were limited by time, place, and manner restrictions.[80]

Importantly, none of these equitable or regulatory remedies are either implicated or affected by the Ninth Circuit's decision in this case.

B. This Ninth Circuit Decision Does Not Conflict with *Oneida II*.

The Tribe insists that the Ninth Circuit decision conflicts with this Court's decision in *County of Oneida v. Oneida Indian Nation* ("*Oneida II*"),[81] in which the Court held that the Oneidas had a federal common law right to sue for money damages to enforce a possessory right to their aboriginal lands that had been conveyed without the required Congressional authorization.[82] But the Tribe ignores obvious and significant differences that distinguish *Oneida II*.

First, the right the Oneidas sought to vindicate was an exclusive, possessory interest in real property.[83] Here, in contrast, the Tribe's fishing right under the Treaty of Point No-Point is neither exclusive nor possessory. Rather, it is a non-exclusive, usufructuary, "in common" right to

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[79] *Id.* at 651-53.

[80] *Id.* at 654-55.

[81] 470 U.S. 226 (1985).

[82] *Id.* at 235-36.

[83] *Id.* at 229.

take a fair share of fish. It was intended to change over time to adapt to new conditions.

Second, the Court did not imply a private right of action from a treaty or statute. Instead the Court permitted the Oneidas to sue for unlawful possession of and trespass on their historical lands because no act of Congress had ever divested the Oneidas of their possessory rights to aboriginal lands.[84] These causes of action are "well-established federal common law" remedies for injuries affecting "possessory rights in land."[85] The Ninth Circuit explicitly acknowledged this point.[86] Conversely, the damages remedy the Tribe urges this Court to imply from the Treaty for alleged injury to its non-exclusive, in-common fishing right has never been approved or recognized by any court. Rather, as discussed above, these rights have traditionally been protected by equitable remedies and regulation. Notably, although the Oneidas urged the Court to imply a private right of action for

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[84] *Id.* at 235 (*citing Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) ("*Oneida I*")). For this same reason, *Pend Oreille*, 28 F.3d 1544, also is distinguishable, as it involved a situation where a licensee had violated its license and trespassed on reservation territory.

[85] *Skokomish Indian Tribe v. United States*, 410 F.3d at 514. Exactly the same analysis can be applied to every other alleged "conflict" in the cases cited by the Tribe as a basis for granting cert. *See* Pet. at 14, citing *Mescalero Appache Tribe v. Burgen Floral Company*, 503 F.2d 336 (10th Cir. 1974) (involving destruction of trees on real property owned exclusively by the tribe); *Pueblo of Isleta v. Universal Constructors*, 570 F.2d 300 (10th Cir. 1978) (involving blasting damages to reservation property); and *Pend Oreille*, 28 F.3d 1544 (involving trespass on real property owned by the tribe). Every one of these cases involved traditional common law remedies for established causes of action.

[86] *Skokomish Indian Tribe v. United States*, 410 F.3d at 514.

damages in the Nonintercourse Act of 1793,[87] the Court expressly declined to do so.[88]

Third, the claim this Court recognized in *Oneida II* was based on aboriginal title. In this case, by contrast, the Tribe has never asserted that its claim is based on aboriginal title. Nor could it do so. By ratifying the Treaty of Point-No-Point in 1859, Congress extinguished the Tribe's aboriginal title, leaving only treaty-based rights.[89]

The Tribe also argues an implied right of action for damages against local government was "reaffirmed" in *City of Sherrill v. Oneida Indian Nation*.[90] But *Sherrill* was a suit in equity, not a suit at law. The Oneidas brought the claim to avoid local property taxes, and "the question of damages for the Tribe's ancient dispossession [was] not at issue."[91] If anything, *Sherrill* supports the result in this case, because this Court made a firm distinction between a theoretical right and the means that might be used to

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[87] In 1795, the Tribe's ancestors sold tribal land to the State of New York. In 1970, several Oneida bands sued for damages on the ground that the agreement with the state violated the Nonintercourse Act of 1793, which prohibited the conveyance of Indian land without Congressional authorization pursuant to the treaty power. *Oneida II*, 470 U.S. at 231-33.

[88] *Id.*

[89] *Skokomish Indian Tribe v. United States*, 332 F.3d at 554; *Passenger Fishing Vessel Ass'n*, 443 U.S. at 661-62. Whether the Treaty adequately compensated the Tribe for the divesture of aboriginal possessory rights is not the subject of this case.

[90] 125 S.Ct. 1478.

[91] *Id.* at 1494. The Oneidas had repurchased some of the same lands at issue in *Oneida II* within the City of Sherrill and sought to resist paying property taxes on the ground that the Tribe's reacquisition of fee title to parcels of historic reservation land merged the fee and revived the Oneidas' ancient sovereignty of each parcel. *Id.* at 1488.

enforce it and then denied relief "based upon the long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties . . . [that] preclude [the Oneida Indian Nation] from gaining the disruptive remedy it now seeks."[92]

In sum, the Ninth Circuit's decision does not conflict with, or even implicate, *Oneida I, Oneida II,* or *Sherrill*. Accordingly, this case does not warrant *certiorari*.

C. The Ninth Circuit Decision Does Not Conflict with This Court's Decisions Holding That Treaties are the "Supreme Law of the Land"

It is disingenuous to argue that the Ninth Circuit's decision in this case conflicts with Supreme Court cases finding treaties enforceable against the States as the "supreme law of the land."[93] The question is not whether the Treaty can be enforced, but whether a court can imply a private remedy for money damages against third parties to the Treaty, especially where a treaty grants not exclusive, possessory rights, but only an adaptive, "in common" right to use a shared resource. As stated by the Ninth

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[92] *Id.* at 1491. As the Tribe notes, this same reasoning was recently applied by the Second Circuit in *Cayuga Indian Nation of New York v. Pataki*. 413 F.3d 266 (2d Cir. 2005). The *Cayuga* court held that the equitable and monetary relief sought by a tribe relating to a land claim was "indisputedly disruptive" and barred by equitable doctrines "even when such a claim is legally viable and within the statute of limitations." *Id.* at 273.

[93] Pet. at 11-12 (citing *Antoine v. Washington*, 420 U.S. 194, 201-05 (1975); *Choate v. Trapp*, 224 U.S. 665 (1912); *Perrin v. United States*, 232 U.S. 478 (1914); and *Dick v. United States*, 208 U.S. 340 (1908)).

Circuit opinion, "[h]olding that a state is precluded from passing laws inconsistent with a treaty is quite different from saying that a non-contracting party can be sued for damages under the treaty."[94] In answer to the true question presented, no court has ever implied such a remedy for this type of a right. Therefore, the Court would be embarking on an entirely new course if it implied such a cause of action here.

D. The Traditional Tort Cases Cited By the Tribe Are Irrelevant

This Court's review is not necessary to resolve any "conflict" between the Ninth Circuit's decision and tort cases such as *Union Oil v. Oppen*.[95] The Tribe suggests a double standard would be created by allowing non-Indian fishers a remedy for despoliation of waters, but not Indian fishers. But no such "conflict" exists, because there is nothing in the Ninth Circuit's opinion that would prevent a tribe from suing in tort for negligence. Indeed, the Tribe expressly notes in its petition that it is not seeking review of any of the counts in its complaint that addressed tortious conduct.[96] Therefore, the tort cases are not relevant.

Nor is the Ninth Circuit's decision in conflict with any of the cases involving money damages for violation of traditional property rights asserted by tribes against

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[94] *Skokomish Indian Tribe v. United States*, 410 F.3d at 514.

[95] *Union Oil v. Oppen*, 501 F.2d 558 (9th Cir. 1974). *Oppen* involved the tort of negligence for polluting waters through an oil spill. The Tribe also cites *Emerson G.M. Diesel v. Alaskan Enterprise*, 732 F.2d 1468 (9th Cir. 1984), a product liability case arising under admiralty that has no conceivable connection to the present case.

[96] Pet. at 1.

common law tortfeasors. The Tribe claims[97] the decision creates an inter- and intra-circuit conflict with three trespass cases – *Mescalero Apache Tribe v. Burgett Floral Company*,[98] *Pueblo of Isleta v. Universal Constructors*,[99] and *United States v. S. Pac. Transp. Co.*[100] To the contrary, every one of these cases involves money damages arising from violation of traditional exclusive and possessory interests in real property and common law torts, in which money damages is a common remedy, not implied or created by treaty. Moreover, unlike the prohibited or wrongful conduct at issue in a tort case, the "conduct" complained of here consists only of the indirect effects of the proper operation of a hydroelectric facility authorized under the FPA[101] on the off-reservation, in-common fishing right secured by the Treaty. In fact, the operation of a federally-licensed Project under the FPA is just the type of conduct that this Court has held would alter the contours of the Tribe's continuing property rights.[102]

This same reason distinguishes the case of *United States v. Pend Oreille Public Utility District No. 1*.[103] In *Pend Oreille*, the Ninth Circuit allowed a damage action against a hydroelectric project owner that had violated its

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[97] Pet. at 14.

[98] 503 F.2d 336 (9th Cir. 1974).

[99] 570 F.2d 300 (10th Cir. 1978).

[100] 543 F.2d 676 (9th Cir. 1976).

[101] Again, this is an issue properly determined by FERC. See discussion, *supra*, at fn. 24.

[102] *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. at 118.

[103] 28 F.3d 1544.

license and trespassed on reservation real property.[104] This claim is far different from an alleged violation of an "in common" treaty fishing right that is regulated for the common benefit of the Tribe and other citizens of the state and subject to equitable remedies. Unlike *Pend Oreille*, the Tribe is asking for an unprecedented new cause of action that substantially departs from traditional common law remedies.

E. The Federal Power Act Preempts any Implied Private Right of Action.

The Tribe's in-common fishing rights have been, and continue to be considered by FERC as part of the re-licensing process. This case represents a collateral attack on that proceeding, and there is no "compelling reason" to allow the Tribe to disrupt that proceeding.

The federal government has traditionally considered Indian treaty fishing rights through its licensing authority for hydroelectric projects under the FPA, which authorizes the Commission to balance tribal and other public interests when licensing a project:

> The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction. . . .

[104] *Id.* at 1549. Unlike the claim at issue in this case, *Pend Oreille* would not have been preempted by the FPA because it was a common law trespass claim allowed by Section 10(c) of the FPA.

> *It neither overlooks nor excludes Indians or lands owned or occupied by them.*[105]

As noted above, FERC and the D.C. Circuit in the re-licensing proceeding have exercised continuing jurisdiction over substantially the same issues raised by the Tribe in this case. Both the trial court and the majority of the three-judge Ninth Circuit panel held that the Federal Power Act preempted the Tribe's treaty-based damage claims and that the Tribe's suit was an impermissible collateral attack on the Commission's licensing authority, the jurisdiction of the Commission, and the exclusive remedy the FPA provides for licensing decisions.[106]

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[105] *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. at 118 (emphasis added). Courts routinely hold that congressional treatment of a substantive area within its Article I powers divests federal courts of the authority to create or adapt federal common law remedies to vindicate interests Congress has addressed comprehensively by statute. *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (Federal Water Pollution Control Act (FWPCA) preempts federal common law of nuisance). *See also Middlesex County Sewerage Authority v. National Sea Clammers*, 453 U.S. 1, 22 (1981) (Clean Water Act preempts federal common law remedy); *Connor v. Aerovox*, 730 F.2d 835, 840-842 (1st Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985) (FWPCA preempts private federal maritime law damages remedy for water pollution); *In re Oswego Barge Corp.*, 664 F.2d at 335, 339-44 (Clean Water Act preempts the federal maritime remedy for governmental oil spill cleanup cost recovery); *Lee v. United States*, 629 F. Supp. 721, 728-29 (D. Alaska 1985) (Alaska Native Claims Settlement Act preempts federal common law remedy for invasion of possessory interest in land); *United States v. Price*, 523 F. Supp. 1055, 1069 (D.N.J. 1981) (RCRA and CERCLA preempt federal common law of nuisance), *aff'd*, 688 F.2d 204 (3rd Cir. 1982).

[106] ER 37 (District Court Opinion) (" . . . [T]he Tribe's claims flow directly from FERC's licensing decisions. The Court agrees with the City of Tacoma that the Tribe's claims belong before FERC and not this Court."); *Skokomish Indian Tribe v. United States*, 332 F.3d at 560 ("The Tribe's claims were raised and addressed in the FERC licensing

(Continued on following page)

The *en banc* opinion correctly noted in footnote 4 that the FPA "provides *exclusive* jurisdiction for the Courts of Appeals to review and make substantive modifications to FERC licensing orders."[107] By focusing on the minor part license, however, the *en banc* panel failed to acknowledge that the FPA itself would preempt any Court-created cause of action, not the four corners of the license. Although *certiorari* is not warranted on this issue, it was extensively argued below and is another ground upon which the exact same result would have been reached.

III. CONCLUSION

There is no disagreement between the circuits or other compelling interest to be served by granting the Tribe's Petition for *Certiorari*. Tacoma respectfully requests that the Petition be denied.

Respectfully submitted,

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proceeding, and any dispute over FERC's decision belongs first before FERC and then the circuit courts, not the district courts. Thus, the Tribe's claims are impermissible collateral attacks on FERC's licensing order.")

[107] *Skokomish Indian Tribe v. United States*, 410 F.3d at 512 n. 4 (citing *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. at 118 (emphasis in original)).