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MAT/ 90-14-09912

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Via Overnight Federal Express

April 20, 2005

Ms. Cathy A. Catterson
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94119-3939

Re: ***Skokomish Indian Tribe et al. v United States et al.,***
9th Cir. No. 01-35028

Dear Ms. Catterson:

Enclosed are an original and 50 copies of the **Federal Defendant Appellee's Response to The Skokomish Indian Tribe's Petition for Additional Rehearing by the *En Banc* Panel or Full Court Review of the *En Banc* Decision Dated March 4, 2005,** in the above-entitled case.

As indicated by the certificate of service, copies of the same and of this letter have today been served on all parties.

Sincerely,

M. Alice Thurston

Enclosures

No. 01-35028

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SKOKOMISH INDIAN TRIBE et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, TACOMA PUBLIC UTILITY AND THE CITY OF TACOMA, et al.,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

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

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TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

STANDARD OF REVIEW FOR *EN BANC* REHEARING 4

ARGUMENT 5

I. THE MAJORITY'S CONCLUSIONS AS TO RESERVED WATER RIGHTS AND THE ROLE OF FISH IN THE TRIBE'S RESERVATION ARE IRRECONCILABLE WITH EXISTING PRECEDENT 5

1. The Majority Inappropriately Employed a "Primary/Secondary Purpose" Analysis 5

2. The Majority Analysis of the Tribe's Treaty Misapplies Principles of Treaty Interpretation 11

II. THE MAJORITY'S RESERVED WATER RIGHTS ANALYSIS RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE AND HAS THE POTENTIAL TO CAUSE SUBSTANTIAL HARM IN OTHER PROCEEDINGS 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES:

Arizona v. California, 373 U.S. 546 (1963) ("Arizona I") 8,9,12
Arizona v. California, 460 U.S. 605 (1983) ("Arizona II") 9
Blake v. Arnett, 663 F.2d 906 (9th Cir. 1981) 10
Cappaert v. United States, 426 U.S. 128 (1976) 6
Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) 11
Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) 1,7-13
The Fair v. Kohler Die & Specialty Co, 228 U.S. 22 (1913)) 3
In the Matter of the Yakima River Drainage Basin; Dept. of Ecology v. Acquavella, No. 77-02-01484-5 (Wash. Super. Ct. Sept. 1, 1994) 14
In re the General Adjudication of All Rights to Use Water in the Gila River System and Source (Gila River V), 35 P.3d 68 (Ariz. 2001) 7,8
In re: The General Adjudication of All Rights to Use Water In the Big Horn River System, 753 P.2d 76 (Wyo. 1988), aff'd by an equally divided Court sub nom. Wyoming v. United States, 492 U.S. 406 (1989) 7
Joint Bd. of Control of Flathead, et al., Irr. Dist. v. United States, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988) 8,10
Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist., 763 F.2d 1032 (9th Cir. 1985), cert. denied, 474 U.S. 1032 (1985) 10
Menominee Tribe v. United States, 391 U.S. 404 (1968) 1,9,12
Montana ex rel. Greely v. Confederated Salish and Kootenai Tribes , 712 P.2d 754 (Mont. 1985) 7
Parravano v. Babbitt, 70 F.3d 539 (9th Cir. 1995) 10
Skokomish Indian Tribe v. United States, 332 F.3d 551 (9th Cir. 2003) 2,3
Skokomish Indian Tribe et al. v. United States et al., 401 F.3d 979 (9th Cir. 2005) ..... 1-4,6, ... 11-13,15
Snake River Basin Adjudication, Civ. No. 29576, sub. 03-10022 (5th Judicial Dist. Idaho) 14
State Dep't of Ecology v. Yakima Reservation Irr. Dist., 850 P.2d 1306 (Wash. 1993) 10
United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert denied, 467 U.S. 1252 (1984) 1,6-11
United States v. Dion, 476 U.S. 734 (1986) 11
United States and Lummi Nation v. Washington Department of Ecology, Civ. No. 01-0047Z (W.D. Wa.) 13
United States v. New Mexico, 438 U.S. 696 (1978) 6,7,8
United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939) 9

United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd,
520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976) 10,11
United States v. Washington, Civ. No. C70-9213, sub. 01-1 (W.D. Wash.) 14
United States v. Winans, 198 U.S. 371 (1905) 10,11,12
Washington v. Washington State Commercial Passenger Fishing Vessel Assn.,
443 U.S. 658 (1979) 10,11,12
Winters v. United States, 207 U.S. 564 (1908) 1,5,6,8,9,12

STATUTES, RULES AND REGULATIONS:

Federal Power Act, 16 U.S.C. 803(c) 2
Federal Tort Claims Act, 28 U.S.C. 1346 2
Indian Tucker Act, 28 U.S.C. 1505 3
28 U.S.C. 1631 3
42 U.S.C. 1983 4
Treaty of Point No Point, 12 Stat 933 (1855) 6,11,12,15
Snake River Water Rights Act of 2004, Title X of Division J
of Public Law 108-447 14

Fed.R.App.P. 35(a) 4
Fed.R.App.P. 35(b) 4

OTHER AUTHORITIES

William C. Canby, Jr., American Indian Law, 435 (4th ed. 2004) 7
Felix S. Cohen, Handbook of Federal Indian Law, Ch.10 Sec. B3 (1982 ed.) 7-8

INTRODUCTION

As directed by the Court's March 31, 2005, order, the United States submits this response to the Skokomish Indian Tribe's Petition for Additional Rehearing by the *En Banc* Panel or Full Court Review of the *En Banc* Opinion in the above-captioned proceeding. The United States urges the Court to grant additional rehearing of the March 9, 2005, *en banc* decision, Skokomish Indian Tribe et al. v. United States et al., 401 F.3d 979 (9th Cir. 2005), because the decision's analysis of the Tribe's reserved water rights (Section II B) is inconsistent with multiple decisions of the Supreme Court and this Court, including Winters v. United States, 207 U.S. 564, 576-77 (1908), Menominee Tribe v. United States, 391 U.S. 404, 406 (1968), United States v. Adair, 723 F.2d 1394 ,1408 (9th Cir. 1983), cert. denied sub nom. Oregon v. United States, 467 U.S. 1252 (1984), and Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981). If left standing, this erroneous language threatens to create disarray in Indian water rights cases. This portion of the Court's analysis is not critical to its holding, moreover, and may be deleted without altering the resulting decision.

BACKGROUND

The Skokomish Indian Tribe filed suit in federal District Court seeking damages from the United States, and from the City of Tacoma and Tacoma Public Utilities (collectively, Tacoma), arising out of the licensing and operation of Tacoma's Cushman Hydroelectric Project. The Cushman Project, located both partially on and above the

Tribe's Reservation on the Skokomish River, diverts nearly half the flow of the Skokomish River and largely dewaters the River's North Fork. The Tribe claims, *inter alia*, interference by Tacoma with the Tribe's reserved water rights for fishing.

The District Court dismissed the Tribe's action against the United States for lack of subject matter jurisdiction.[1] In addition, the district court granted summary judgment in favor of Tacoma on some of the Tribe's claims, and dismissed the remaining claims, both treaty-based and under 16 U.S.C. 803(c), for failure to state a claim.

On appeal, a split panel affirmed the dismissal of the Tribe's claims against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346, and held that the United States was immune from damages under the Federal Power Act ("FPA"), 16 U.S.C. 803(c), for any claims arising from the Tribe's objection to the licensing of the Cushman project. The panel majority affirmed summary judgment on the Tribe's state law tort claims because the applicable state statute of limitations had passed. The panel majority also affirmed dismissal of the Tribe's treaty-based claims as "impermissible collateral attacks on FERC's licensing decision." The decision vacated summary judgment on claims against Tacoma, finding that because those claims were not cognizable, the District Court lacked jurisdiction over them. Accordingly, the panel remanded with instructions to dismiss those claims. Skokomish Indian Tribe v. United

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1/ Following dismissal at this early stage in the proceeding, the United States participated as appellee defending the dismissal of claims against it and took no position as to any claims against Tacoma prior to this response.

States, 332 F.3d 551 (9th Cir. 2003). The Tribe sought *en banc* review.

The majority of the *en banc* panel affirmed the dismissal of the FPA claims against the United States but held, *sua sponte*, that the treaty-based claims against the United States could be characterized as arising under the Indian Tucker Act, 28 U.S.C. 1505, and transferred these claims to the Court of Federal Claims pursuant to 28 U.S.C. 1631. Skokomish Indian Tribe et al. v. United States et al., 401 F.3d 979, 983-84 (9th Cir. 2005).[2] As to the Tribe's treaty-based claims against Tacoma, the majority held that the FPA does not preempt the Tribe's treaty-based claims. *Id.* at 984 n.4. Nonetheless, the majority found that, while equitable relief is available to enforce a treaty as against a non-signatory, damages are not an available remedy in this case. *Id.* at 985-988. Notwithstanding the fact that the *en banc* majority disposed of the Tribe's treaty-based claims on that ground, the majority also analyzed the subsidiary question of the nature of the Tribe's claim of a reserved water right associated with its claimed treaty-based fishing rights. The majority found that the Tribe had not, for purposes of summary

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2/ The United States questions the propriety of transferring to the CFC the claims that the Tribe chose to bring in a district court. "The party who brings a suit is master to decide what law he will rely on." The Fair v. Kohler Die & Specialty Co, 228 U.S. 22, 25 (1913). The United States does not agree that the Tribe's complaint as to the United States fairly may be read to present a claim under the Indian Tucker Act, and this position was not asserted by the Tribe nor was the question briefed to the Court. The proper course was to dismiss the claims the Tribe actually brought and suggest that the Tribe remains free to file Tucker Act claims in the CFC should it so choose. Transfer on this complaint, however, was improper, as the complaint itself contains no Tucker Act claims that could be pursued in the CFC.

judgment, made a sufficient showing of a factual dispute as to whether fishing was the primary purpose of the Tribe's reservation, and held that the Tribe consequently possessed no reserved water rights for fishing. *Id.* at 989-90. The decision also held that individual tribal members could not seek damages under 42 U.S.C. 1983 for interference with treaty-reserved fishing rights held in common by the Tribe. *Id.* at 988. Finally, the majority rejected the remainder of the Tribe's claims.

The Tribe's petition raises three issues; this response addresses only the second:

(1) whether the majority opinion erred in determining that the Tribe could not recover monetary damages, as opposed to injunctive relief, for alleged violations by Tacoma of treaties to which Tacoma was a non-signatory;

(2) whether the majority opinion erred in concluding that fishing was not a primary purpose of the Tribe's reservation and in holding that the Tribe consequently lacks reserved water rights; and

(3) whether the majority erred in holding that the Tribe's treaty-based rights did not provide individual causes of actions under 42 U.S.C. 1983 because Tribal members may not vindicate "communal rather than individual rights."

STANDARD OF REVIEW FOR *EN BANC* REHEARING

Under Fed. R. App. P. 35 (a) and (b), a petitioner must demonstrate either that "*en banc* consideration is necessary to secure or maintain uniformity of the court's decisions," *i.e.*, the contested decision conflicts with a decision of the Court, or that "the proceeding involves a question of exceptional importance," *e.g.*, the decision conflicts with a decision of another court of appeals. Both standards are met here.

ARGUMENT

I

THE MAJORITY'S CONCLUSIONS AS TO RESERVED WATER RIGHTS AND THE ROLE OF FISH IN THE TRIBE'S RESERVATION ARE IRRECONCILABLE WITH EXISTING PRECEDENT

The *en banc* majority determined that the Tribe failed to present facts sufficient to survive summary judgment as to whether fishing is a "primary" purpose of the Skokomish reservation for which water rights were necessarily reserved under the Tribe's Treaty. In so finding, the majority applied a test to determine the existence of tribal water rights that is wholly inconsistent with other rulings of this Court and the Supreme Court, and will, *at the very least*, create confusion within the Circuit in other ongoing and future Indian water rights cases. Moreover, as explained above, the *en banc* majority's analysis of the Tribe's reserved water rights was extraneous to the decision, given that the majority had otherwise disposed of all treaty-based claims against Tacoma. Declaring in an *en banc* context that the Tribe has no reserved water rights for fishing, even as *dicta*, has the potential to improperly prejudice future water rights proceedings, which are usually fact-intensive, multi-party litigation. This section of the decision should therefore be excised as incorrect and potentially harmful *dicta*.

1. The Majority Inappropriately Employed a "Primary/Secondary Purpose" Analysis. -- Under Winters v. United States, 207 U.S. 564, 576-77 (1908), the establishment of Indian reservations includes an implied reservation of water necessary

for tribal sustenance. The *en banc* majority cites Winters, but inappropriately applies a test, first articulated in United States v. New Mexico, 438 U.S. 696 (1978), for determining whether a non-Indian federal reservation has implied water rights, rather than whether an Indian reservation has implied water rights. 401 F.3d at 989. According to the majority, a water right is implied only for the "primary purpose" -- and apparently only one such purpose -- of a federal reservation; a use of a reservation that is regarded as "secondary" is insufficient to warrant an inference of a reserved water right. *Id.* The majority then finds that, based on facts adduced at summary judgment, fishing was not a primary purpose of the Skokomish reservation and consequently the Tribe has no reserved water rights for fishing. Moreover, because the Tribe's treaty, the Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933, "merely" provides that the Tribe shall have the right of taking fish in common with all citizens, it does not overcome the "inadequacy of the evidence the Tribe has presented." *Id.* at 990.

This Court, however, has held that the primary/secondary purpose distinction set forth in New Mexico does not directly apply to Indian reservations. United States v. Adair, 723 F.2d 1394, 1408 (9th Cir. 1983) ("Adair") (non-Indian federal reservation reserved water rights cases (New Mexico and Cappaert v. United States, 426 U.S. 128 (1976)), while providing guidance, are "not directly applicable to Winters doctrine rights on Indian reservations"). The fundamental purpose in establishing Indian reservations – to provide a permanent homeland capable of supporting a self-sustaining tribal

community – could not be achieved if water rights were limited to those that further a single, narrow purpose, or if some of the water rights necessary to support a community had to be acquired in accordance with state law.[3]

This Court has consistently followed that approach. In Colville Confederated Tribes v. Walton, 647 F.2d 42, 47-48 (9th Cir. 1981) ("Walton"), the Court held that the Colville Tribes' one-paragraph Executive Order reserved water rights for the purpose of providing a land-based agrarian society *and* preserving access to fishing runs. Walton, which predated Adair, relied on New Mexico to conclude, in contrast to the *en banc* majority's narrow holding, that "[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government." 647 F.2d at 47.[4] Adair similarly determined that the Klamath reservation could have multiple purposes with attendant water rights, including agriculture and subsistence activities like

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3/ Accord, In re the General Adjudication of All Rights to Use Water in the Gila River System and Source (Gila River V), 35 P.3d 68, 76-77 (Ariz. 2001); In re: The General Adjudication of All Rights to Use Water In the Big Horn River System, 753 P.2d 76, 96-97, 99 (Wyo. 1988), aff'd by an equally divided Court sub nom. Wyoming v. United States, 492 U.S. 406 (1989); Montana ex rel. Greely v. Confederated Salish and Kootenai Tribes , 712 P.2d 754, 767-68 (Mont. 1985).

4/ See William C. Canby, Jr., American Indian Law, 435 (4th ed. 2004) ("Although the purpose for which the federal government reserves other types of lands may be strictly construed . . . the purpose of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained."); Felix S. Cohen, Handbook of Federal Indian Law, Ch.10 Sec. B3 (1982 ed.) ("the relevant inquiry in ascertaining Indian reserved rights is not whether a particular use is primary or

fishing, hunting and gathering. 723 F.2d at 1408-10.[5] Relying on Adair, this Court has subsequently recognized that the Salish and Kootenai's aboriginal dependence on fishing, and the Hellgate Treaty recognizing their right to fish on their reservation, clearly implied a reserved water right. Joint Bd. of Control of Flathead, et al., Irr. Dist. v. United States, 832 F.2d 1127, 1131 (9th Cir. 1987), cert. denied, 486 U.S. 1007(1988).

This approach accords with New Mexico and other Supreme Court cases. The Supreme Court has repeatedly recognized that Indian reservations may be established for broad purposes and provided the framework for the permanent homeland principle. Both Winters and Arizona v. California, 373 U.S. 546, 599 (1963) ("Arizona I"), recognize that the broad purpose of an Indian reservation is to enable the establishment of a self-sustaining Indian community.[6] In both cases, as in Walton, the reservations' organic documents were brief Executive Orders. In Winters, the Court rejected the

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secondary but whether it is completely outside the scope of a reservation's purposes").

5/ Even if the primary-secondary purpose distinction did apply with respect to Indian reservations, it would have no meaningful effect because Indian reservations are established for a broad, primary purpose: to provide a permanent, liveable homeland. In effect, all specific purposes or uses of Indian reservation lands that are necessary for a liveable homeland constitute the "very purposes" for which the reservation was created and cannot properly be considered secondary uses for which no water was reserved. Gila River V, 35 P.3d at 73-74.

6/ Even New Mexico recognized that a federal reservation could have "extremely broad" purposes. 438 U.S. at 707. The Court considered the possibility that one of the purposes of the national forests was "to improve and protect the forest," rejecting it only as a matter of statutory construction. *Id.* at 708. The Court there recognized that Congress intended national forests to be reserved for *two* purposes. *Id.*

notion that Congress had not intended to reserve waters necessary to make the reservation livable. 207 U.S. at 576-77. The homeland purpose was even more explicitly acknowledged in Arizona I, which recognized that the establishment of Indian reservations impliedly reserved water "necessary to sustain life" and "essential to the life of the Indian people and to the animals they hunted and crops they raised." 373 U.S. at at 599-600. Similarly, in Arizona v. California, 460 U.S. 605, 616 (1983) ("Arizona II"), the Court stated that "the creation of the Reservations by the federal government implied an allotment of water necessary to 'make the reservation livable.'" Accord, Menominee Tribe v. United States, 391 U.S. 404, 405-406 (1968) (treaty language establishing reservation "for a home, to be held as Indian lands are held" impliedly reserves hunting and fishing rights on the reservation). By contrast, federal proprietary lands, such as those of the Forest Service and Bureau of Land Management, were reserved for more specific purposes and generally at later dates than Indian reservations. Adair, 723 F.2d at 1408-10; Walton, 647 F.2d at 47.[7]

The majority discusses only one of these cases, Adair, and, in so doing, draws a

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[7] The theory on which the primary/secondary distinction rests – that Congress intended the *United States* to compete with other users for water rights for secondary uses – is inapplicable to Tribes. At the establishment of most reservations, Indian tribes were not in a position to compete with other potential water users to obtain water rights under the state's appropriations systems. For example, tribes frequently lacked the agricultural experience, particularly the ability to develop irrigation systems, that would allow them to put water to beneficial use as state law required. See United States v. Walker River Irrigation Dist., 104 F.2d 334, 339 (9th Cir. 1939).

false distinction between an exclusive tribal right to fish on its reservation, and the exclusive use by a tribe of its reservation. See *infra* section 2. The decision also ignores numerous Supreme Court, Ninth Circuit, and water rights adjudication decisions finding that salmon were vitally important to the Indian tribes in Washington, Oregon, western Montana and northern California. United States v. Winans, 198 U.S. 371, 381 (1905); Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 664-68 (1979); Parravano v. Babbitt, 70 F.3d 539, 542, 546 (9th Cir. 1995);Kittitas Reclamation Dist. v. Sunnyside Valley Irr. Dist., 763 F.2d 1032, 1035 (9th Cir.), cert. denied sub nom. Sunnyside Valley Irr. Dist. v. United States, 474 U.S. 1032 (1985); Joint Bd. of Control v. United States, 832 F.2d 1127, 1131-32 (9th Cir. 1987); Adair, 723 F.2d at 1408-1411; Blake v. Arnett, 663 F.2d 906, 909 (9th Cir. 1981); Walton, 647 F.2d at 47-48; United States v. Washington, 384 F.Supp. 312, 377 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); see also State Dep't of Ecology v. Yakima Reservation Irr. Dist., 850 P.2d 1306, 1310, 1322-23 (Wash. 1993) (subsequently confirming in state's general stream adjudication that Yakama Nation's reserved water rights included instream flows to maintain and enhance all life stages of anadromous fish and other aquatic life under annual prevailing conditions). This extensive judicial recognition of the importance of salmon fishing to tribes in the Pacific Northwest was disregarded by the *en banc* majority. The majority instead adopted an incorrect analysis and limited review of evidence that the Tribe was

to continue to fish to support itself. 401 F.3d at 989.

2. The Majority Analysis of the Tribe's Treaty Misapplies Principles of Treaty Interpretation. -- The brief assessment of the Treaty of Point No Point also ignores Supreme Court precedent and canons of construction that mandate a broader view of Tribal treaty rights. The *en banc* majority compares the treaty's language acknowledging the Tribe's "right of taking fish * * * in common with all citizens of the United States," and distinguishes the treaty language at issue in Adair -- which provided an "exclusive" on-reservation fishing and gathering right. The omission of a single word, "exclusive," led the majority to assume that fishing was not a primary purpose.

Contrary to the majority's approach, treaties are not grants of rights but rather acknowledge existing aboriginal rights. Fishing Vessel, 443 U.S. at 680-81, addressing, *inter alia*, the Treaty of Point No Point and quoting U.S. v. Winans, 198 U.S. 371, 381 (1905); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). It is not a question of whether a treaty includes specific rights but whether "such rights were clearly relinquished by treaty." United States v. Dion, 476 U.S. 734, 738 (1986). As a result, tribes retain exclusive hunting and fishing rights on their lands within the reservation unless that right is expressly surrendered. *Id.*; Walton, 647 F.2d at 47-48. Indeed, the majority's analysis is inconsistent with United States v. Washington, 384 F.Supp. 312, 332, and n.12 (W.D. Wash. 1974), aff'd on other grounds, 520 F.2d 676 (9th Cir. 1975), in which the trial court determined that the Stevens Treaties fishing clause, including the

one in the Treaty at issue here, provided an exclusive right to fish within the boundaries of the reservation even though it was not expressly stated. The Treaty acknowledges the Skokomish's "exclusive use" of their reservation. Treaty of Point No Point, Art. 2 (Pet. 16, n. 29). As the Tribe points out, exclusive control of lands has been held to include exclusive dominion over hunting and fishing. Pet. 14-17. Any ambiguity on this issue should have been resolved with reference to the perspective of the Tribe (Fishing Vessel, 443 U.S. at 675-76; Winans, 198 U.S. at 380-81) and ambiguities must be resolved in favor of the treaty parties' intent in agreeing to the reservation. Winters, 207U.S. at 576.

The dissent is thus correct that "[e]xpress treaty recognition of the specific purpose as exclusive is *not* necessary to recognize an activity as a primary purpose of a reservation." 401 F.3d at 1006-07 (emphasis in the original). A reservation of water may be inferred from silence where water is necessary to fulfill the purpose of an Indian reservation. Winters, Arizona I, Walton, Menominee Tribe. Walton, in particular, highlights both of the majority's analytical errors. There, the Colville Tribes' Executive Order simply set aside a certain territory for them. It mentioned nothing about fishing or the Tribes' exclusive use of the land. Viewed through the homeland purpose prism, this Court found the general historical recognition that tribes in the Pacific Northwest used salmon and trout to sustain themselves sufficient to justify recognition of reserved water rights. 647 F.2d at 48. Nor were the Colville Tribes expressly granted any "exclusive" right to fish on their reservation, and not even a clearly stated "exclusive use" of their

own reservation lands as the Skokomish do. Finally, in Walton, the implied water right for the Colville Tribes was for a replacement fishery for the non-exclusive, "in common" fishery that the Tribes had on the Columbia River. *Id.* at 48. The erroneous "primary purpose" test employed by the majority would never permit this result.[8]

II

THE MAJORITY'S RESERVED WATER RIGHTS ANALYSIS RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE AND HAS THE POTENTIAL TO CAUSE SUBSTANTIAL HARM IN OTHER PROCEEDINGS

The United States is currently involved in 20 major water rights adjudications involving Tribes in states within the Ninth Circuit. The *en banc* majority's extraneous and improper application of the primary/secondary test may adversely affect these cases by creating confusion about Ninth Circuit precedent, thus providing opponents an illegitimate argument for limiting tribal water rights.[9] These cases might thereby be detrimentally affected by the *en banc* majority's analysis of an issue that was entirely unnecessary to its holding. Moreover, many other tribes that were parties to the Stevens Treaties, which reserve to the tribes "the right of taking fish in common with the citizens

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8/ This is not to say that the Tribe has, as yet, demonstrated the existence of their water rights. That may be more appropriately presented in a water rights adjudication. See also dissent, 401 F.3d at 1007, n.14.

9/ Indeed, the majority's *dicta* has already been cited in United States and Lummi Nation v. Washington Department of Ecology, W.D. Wa. Civ. No. 01-0047Z, for the proposition that "preservation of on-reservation fishing rights was not a primary purpose of the treaty at issue there, notwithstanding a clause in the treaty reserving the right to fish at usual and accustomed grounds." Wash. Dept. of Ecology's Motion for Partial Summary Judgment at 6 - 7.

of the territory," have yet to file claims on this basis in water adjudications. Indeed, one state court has recognized such a water right outside of the tribe's reservation. See In the Matter of the Yakima River Drainage Basin; Dept. of Ecology v. Acquavella, No. 77-02-01484-5, "Memorandum Opinion: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places," at 15 (Wash. Super. Ct. Sept. 1, 1994). Other cases utilizing this theory are on-going, or have been settled favorably, such as the recent Nez Perce settlement in the Snake River Basin Adjudication, 5th Judicial District Idaho, Civ. No. 39576, Sub. 03-10022 (Snake River Water Rights Act of 2004, Title X of Division J of Public Law 108-447).

Other litigation involves determining the purposes of the reservation and could be affected by the *en banc* majority's analysis. For example, in the "Culverts case" (United States v. Washington, Civ. No. C70-9213, sub. 01-1 (W.D. Wa.)), the tribes are asserting, with the support of the United States, that the treaty fishing right carries with it an implied right of habitat protection such that the State of Washington is obligated to repair state-owned culverts so as not to block the passage of migrating fish. The *en banc* majority's narrow construction of the treaty fishing right, and its consequent refusal to recognize an implied water right, might adversely impact litigation such as that case as well.

As noted, however, the harmful impact of this analysis can be limited without unduly affecting the outcome of this case by simply removing that section of the opinion

addressing reserved water rights, Section II B, at 401 F.3d 989-990. Because the *en banc* majority had already addressed and dismissed all treaty-based claims in Section II A of its decision, any analysis of the reserved water rights is *dicta*. As the Tribe notes, claims of reserved water rights are themselves treaty-based claims, since any reserved water rights at issue here would derive from the Tribe's asserted treaty-based fishing rights. See Pet. at 12, n.18. The treaty-based claims dismissed in Section II A included the Tribe's claimed treaty-based fishing rights -- the same rights on which the reserved water rights were predicated. If no other review were granted, this harmful language could be readily removed from the majority decision, and the outcome of the resulting decision would be no different. The prudent course of action would be for the Court to simply strike language which is plainly *dicta*, rather than to sow confusion in an area where the Court has already spoken clearly.[10]

CONCLUSION

For the foregoing reasons, the United States respectfully submits that the *en banc* panel or the full court should grant further review of the above described issues.

10/ The United States in this pleading has addressed an issue of great importance to the government. No inference should be taken that the United States agrees with the *en banc* majority's potentially anomalous understanding, as set forth in Section II A, of the available remedies for treaty violations by non-signatories, where a treaty acknowledges a tribe's property interest. Should the Court decide to reconsider Section II A of the *en banc* majority's decision, the government strongly urges the Court also to revisit the Section II B water rights analysis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on April 20, 2005, copies of the foregoing **Federal Defendant Appellee's Response to The Skokomish Indian Tribe's Petition for Additional Rehearing by the *En Banc* Panel or Full Court Review of the *En Banc* Decision Dated March 4, 2005,** were mailed by first class mail, postage prepaid, to:

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