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,

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

REPLY BRIEF

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *ii* the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

The Question Presented is 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. The Oppositions filed by the United States and Tacoma fail to describe in any meaningful way compelling reasons why this Court should deny the Petition.

The majority's sweeping ruling conflicts with precedent established by this Court that 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 dramatically curtails the remedies available to all persons, not only Indians and Indian tribes, to enforce their federal rights. In this case, the Ninth Circuit has established binding precedent in the Nation's largest Circuit that directly violates the teaching of this Court in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), that recognizes an implied right of action for damages.

1. The Majority's Erroneous Decision Will Have A Sweeping Effect.

The United States incorrectly states that this case involved "only" a specific set of claims under a specific treaty and thus the ruling below "would not effect other cases." U.S. Oppos. at 8-9. The fact that the majority, as the United States points out, restricted its ruling to Treaty-based claims and did not foreclose claims based on "federal common law"

such as in *Oneida II*,[1] does not detract from the sweeping effect of the majority's ruling. In fact, there are many treaties with nearly identical language affecting many tribes throughout the nation.[2] We know of no treaty that expressly authorizes damages suits against non-signatories that destroy treaty-reserved rights.

2. The United States Fails To Explain The Ninth Circuit Majority's Failure To Apply Binding Precedent To Determine Whether A Damages Remedy Was Available.

The majority denied a damages remedy in this case based only on the absence in the Treaty of any express provision for a damages remedy. Tribe's Pet. at 16-19; *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 513 (9th Cir. 2005). This is in direct violation of this Court's ruling in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). *Gebser* and earlier cases held that once a private cause of action is found to exist, a damages remedy is available. Such a remedy is overridden *only* "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.

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1. U.S. Oppos. at 6-9; 410 F.3d at 514 ("By contrast [to *Oneida II*], the Tribe in our case is seeking to collect damages for violation of fishing rights reserved to it by treaty."). Tacoma also makes this distinction. Tacoma's Oppos. at 22-23. Some of the Tribe's claims, however, may be construed as being based on federal common law. *See, e.g.*, Tac. ER 605 (Claim 8), at 612 (Claim 18), at 613 (Claim 19), at 618 (Claim 25). Contrary to Tacoma's assertion, however, the Petition does not state that the Tribe "is not seeking review of any of the counts in its complaint that addressed tortuous conduct." Tacoma's Oppos. at 25.

2. The majority's erroneous ruling also applies to reservations created by statutes and executive orders.

The majority's decision conflicts with *Gebser*, since the majority failed to find a reason to deny a damages remedy when there is clearly a private cause of action for equitable relief. However, the United States asserts that this Court's decision in *Washington v. Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658 (1979), supplies no basis for review because that decision did not expressly hold that the treaties created a private cause of action for equitable relief. U.S. Oppos. at 9-10. Since the United States was the plaintiff, it argues, the Court did not address whether the tribes alone had viable causes of action to enforce the treaties. *Id.* at 9-10. That argument is clearly mistaken.

The United States ignores the cases of *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968) and *Antoine v. Washington*, 420 U.S. 194 (1975), which were cited by the *en banc* majority, the dissent, the Tribe, and even Tacoma in which federal courts awarded tribes equitable relief in treaty-based causes of action *where the United States was not the plaintiff*. *Skokomish*, 410 F.3d at 512 (majority found that treaties "provide rights of action for equitable relief against non-contracting parties."); Tacoma's Oppos. at 24 ("The question is not whether the Treaty can be enforced. . . .") and at 21 ("[N]one of these equitable or regulatory remedies are either implicated or affected by the Ninth Circuit's decision in this case"). It is therefore well-settled that treaties afford tribes implied causes of action for equitable relief.

And, the trial court in *Fishing Vessel* expressly found that the tribes, separate from the United States, had treaty-based equitable claims for the non-signatory State's "violation[s] of" and "depriv[ation] of rights secured to them in the treaties". *United States v. Washington*, 384 F. Supp. 312, 399 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 683 (9th Cir. 1975), *aff'd sub nom Washington v. Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658 (1979). Accordingly, the trial court tailored the equitable relief to each tribe's individual circumstances. *See generally United States v. Washington*, 384 F. Supp. 312.

The United States ignored these issues, as well as whether the majority decision conflicts with *Gebser*.

3. The Court Should Decline Tacoma's Invitation to Conduct A *Gebser* Analysis Now.

Tacoma inappropriately asks this Court to conduct a *Gebser* analysis *now*, and supplies a lop-sided version of why the criteria in *Gebser* and *Cort v. Ash*, 422 U.S. 66 (1975), disallow a damages remedy here. Tacoma's Oppos. at 12-16. The Court should view Tacoma's argument as a concession of the majority's application of an improper standard for determining whether the Tribe may assert an implied cause of action for damages as against a non-signatory.

Ironically, Tacoma emphasizes that in a *Gebser/Cort* analysis, "the conduct to be remedied must be specifically and unmistakably prohibited by the Congressional scheme", and that "[p]arties must be clearly on notice that the type of conduct is prohibited." Tacoma's Oppos. at 12. Tacoma, of course, fails to inform the Court that, from the start, Tacoma has been "clearly on notice" that 99.9% of its hydropower activity is unlicensed and directly[3] infringes on the Tribe's rights. Congress in the FPA "specifically and unmistakably prohibited" unlicensed hydropower activities.[4]

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3. Tacoma makes an unsupported assertion that the conduct at issue before this Court case consists only of "indirect" Project effects. Tacoma's Oppos. at 26. The effects now at issue occurred *promptly and directly* upon the cutting off of North Fork flow, which resulted in two lawsuits by the Tribe or individual Skokomish within one year that sought relief from those direct effects. Petition at 5-6.

4. The 1920 FPA expressly requires that FERC issue licenses covering whole projects and their operations. 16 U.S.C. § 797(e) (requires an original license "for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works" that are in a (Cont'd)

4. The FPA Does Not Preempt This Case Because Tacoma's Activity Is Not Authorized By The FPA Or By Any Other Federal Or State Authority.

The Question Presented is whether the Treaty allows an implied right of action for damages against a municipality that "*without Congressional or state authorization*" took nearly one-half of the water flowing through the Reservation and destroyed treaty fisheries. Petition at *i* (emphasis added). Tacoma obfuscates the issue by asserting that its hydropower activities are "licensed", and by discussing the FPA's comprehensive coverage and accommodation of Indian interests. Tacoma's Oppos. at 2-10, 12-14, 26-29. The FPA has a wide reach and provides for the accommodation of Indian interests, but only when projects are properly licensed and conditioned. The majority opinion and the record establish that since Tacoma's activities at issue are unlicensed and Skokomish interests were not accommodated, Tacoma cannot hide behind the FPA. *See* discussion below; *Skokomish*, 410 F.3d at 512 n.4; Petition at 3-4. Notably, every FPA case that Tacoma cites involved fully and properly licensed hydropower projects, not "minor part licenses" that did not authorize the activities at issue.

The majority correctly ruled that Tacoma's damaging activities were not sanctioned or protected under the FPA.

(Cont'd)

"stream[] . . . over which Congress has jurisdiction under its authority to regulate commerce . . . among the several States" and are "upon any part of the public lands and reservations of the United States."); and § 817(1) (declaring it "unlawful for any . . . municipality" "to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto" in a Commerce Clause stream or upon the public lands or reservations "except under an in accordance with the terms of . . . a license granted pursuant to this chapter.").

Tacoma attempts to minimize this issue. Tacoma's Oppos. at 9 ("The Ninth Circuit *en banc* panel disagreed in a footnote"). Instead, Tacoma searches for FPA protection in the trial court opinion, which the majority reversed, and the majority opinion from the three-judge panel, which the Ninth Circuit declared "shall not be cited as precedent . . . except to the extent adopted by the en banc court." *Id*. at 28; Order, *Skokomish Tribe v. United States*, No. 01-35028 (filed Feb. 23, 2004).

The majority considered *exactly* the same arguments that Tacoma now raises, including the references to the *France* case and FERC's 1994 and 1995 orders. Tacoma's Brief at 5, 7-8. "The FPA does not preempt the Tribe's treaty-based claims." *Skokomish*, 410 F.3d at 512 n.1. The majority also rejected Tacoma's attempt to characterize the Tribe's damages case as a "collateral attack" on FERC's licensing decision. *Id.* ("But the Tribe is not attempting to collaterally attack the 1924 licensing decision; rather it is suing for damages based on impacts that are not covered by the license."). Tacoma's 1924 minor part license, the majority found, was but a "narrow" license that applied only to "the occupancy and use of approximately 8.8 acres" of National Forest land. *Id*. The majority agreed with FERC and its predecessor Federal Power Commission ("FPC") that the minor part license "did *not* 'authorize the construction, operation, and maintenance of the Cushman Project.'" *Id.* (emphasis by court), quoting *City of Tacoma*, 67 FERC ¶ 61,152 at ¶ 61440 (1994); *See also* Tacoma's Oppos. at 5 ("the Commission did not license the entire project"). Accordingly, this case is like *United States v. Pend Oreille Public Utility District No. 1*, 28 F.3d 1544 (9th Cir. 1994), where the license did not authorize flooding the Kalispel Reservation. Finally, Tacoma has not asked this Court to review the question of whether the Tribe's damages claim is precluded by the FPA or by the FPC's issuance of the minor part license.

5. The Off-Reservation, Treaty-Reserved Fishing Right Is A Possessory Right.

Tacoma also attempts to cloud the issue on which certiorari is sought by asking the Court to find that the Stevens' treaty fishing right is now obsolete, presenting a skewed view of treaty negotiations to argue that the treaty fishing right was vaporized through "new conditions." Tacoma's Oppos. at 2, 19, 22. The Court outright rejected this position 100 years ago in *United States v. Winans,* 198 U.S. 371 (1905). There, the Court rejected the notion that new circumstances such as granting fee title to land to non-Indians somehow defeated the reserved treaty right. *Id.* at 380. To do so, said the Court, would certainly be "an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *Id*.

The Court did so again in the modern-day case of *Fishing Vessel* by holding the fishing rights secured by the treaties had continued viability and were enforceable through injunctive relief against non-signatory parties.[5] *See generally Fishing Vessel*. Additionally, this issue was not even addressed by the court below and therefore is not ripe for review or consideration by this Court.

5. Tacoma attempts to relitigate the State of Washington's unsuccessful position in *Fishing Vessel*, in which the State argued that at the phrase "common fishery" only meant a nonexclusive right of access", and "nothing more than a guarantee that individual Indians would have the same right as individual non-Indians". 443 U.S. at 677 and n.23. Instead, the Court held that the tribes preserved a "right of *taking* fish" (emphasis in original), as opposed to "merely the 'opportunity' to try to catch" some of the which "had no special meaning at common law" but "obvious significance to the tribes" who were "relinquishing a portion of their pre-existing rights to the United States in return for this promise." *Id.* at 678. The Court, after examining historical legal treaties, further held, "[I]t would hardly make sense that the Indians effectively relinquished all of their fishing rights by granting a merely non-exclusive right." *Id.* at 678 n.22.

The Court should also reject Tacoma's assertion that treaty-reserved rights to off-reservation fisheries are not "possessory rights." Tacoma's Oppos. at 11, 17-18, 21-22, 24-27. In binding precedent in *Winans* and *Fishing Vessel*, this Court held that the right "secure[s] to the Indians" such "*easements*" as enable the right to be exercised, and that "[T]he Indians were given *a right in the land* – the right of crossing it to the river – the right to occupy it to the extent and for the purpose mentioned.".[6] This Court recognizes that an "easement is 'property' within the meaning of the Fifth Amendment"[7], and that treaty-reserved off-reservation fishing rights are possessory rights that are compensable under the Fifth Amendment.[8] *See also Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) (Court affirmed Court of Claims' judgment that tribe had cause of action for taking of treaty-reserved hunting and fishing rights, holding,

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6. 198 U.S. at 381, 384 (emphasis added). These easements preserved tribal members' "right to occupy" the off-reservation fishing stations, and to "access" them. *Id.* at 381; *Fishing Vessel*, 443 U.S. at 680-81. This Court in *Fishing Vessel* reiterated *Winans'* "right in the land" language. *Id.* at 681.

7. *See, e.g.*, *United States v. Virginia Electric Co*., 365 U.S. 624, 627 (1961) ("Similarly, there can be no question that the Government's destruction of that [flowage] easement would ordinarily constitute a taking of property within the meaning of the Fifth Amendment.").

8. *See also Muckleshoot v. Hall*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988) (district court, enjoining construction of marina within Muckleshoot Tribe's off-Reservation historic fishing grounds, relied on *Menominee*, "The Tribes' right to take fish is a *property right, protected under the fifth amendment*", and, "If Congress does authorize taking the tribes' treaty rights, *that loss must be compensated under the fifth amendment*."); *Whitefoot v. United States*, 293 F.2d 658, 661 (Ct.Cl. 1961) (discussing off-reservation treaty fishing "easements" as "property"), *cert. denied*. 369 U.S. 818 (1962). (Emphasis added to all.)

"We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation [] by destroying *property rights* conferred by treaty. . . .").

Nor should this Court take seriously Tacoma's assertion that the fishing rights have disappeared by "adapting" to "new conditions". *Id.* at 2, 17-21, citing *United States v. Winans*, 198 U.S. 371 (1905). Tacoma cites no precedent to support that unlicensed hydropower activity is a "new condition" to which the right must adapt. It would be a different story if the FPA authorized the activity and Tacoma held sufficient State water rights.

Finally, Tacoma asserts that "only equitable remedies are consistent with the nature of the right itself" because courts can then "balance competing interests, public policies, and changing conditions." Tacoma's Oppos. at 18. This argument has no force where the "competing interests" and "changing conditions" are not authorized, and, at any rate, can be considered as part of a *Gebser* analysis. The Court should also disregard Tacoma's assertion that FERC's licensing addresses the issues herein, since every license condition is *prospective* and does not compensate for past harm. *Id.* at 11.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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