No. 05-434

In the Supreme Court of the United States

SKOKOMISH INDIAN TRIBE, ET AL., PETITIONERS

v.

TACOMA PUBLIC UTILITIES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Treaty of Point No Point, which confirms certain rights in the Skokomish Indian Tribe, gives the Tribe an implied private right of action for money damages against nonsignatories of the treaty for deprivation of the Tribe's treaty rights.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-53a) is reported at 410 F.3d 506. The opinion and order of the district court (Pet. App. 54a-81a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2005. On August 9, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including October 3, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, the Skokomish Indian Tribe and individual tribal members, brought suit against the United

States, the City of Tacoma, Washington (Tacoma), and the Tacoma Public Utilities (TPU), seeking damages arising from the operation of the Cushman Project, a hydroelectric facility that Tacoma constructed during the 1920s on the North Fork of the Skokomish River. Pet. App. 4a. Petitioners alleged that project operations have harmed the Skokomish Indian Reservation, a 5000-acre reservation at the mouth of the Skokomish River that Congress set aside for the Skokomish Indian Tribe by the Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933. Pet. App. 4a-5a. The district court dismissed the United States as a defendant and rejected the claims against Tacoma and TPU on motions for dismissal and summary judgment. See 161 F. Supp. 2d 1178 (W.D. Wash. 2001); Pet. App. 5a, 54a-81a. The en banc court of appeals affirmed in part and transferred certain claims against the United States to the Court of Federal Claims. *Id.* at 1a-53a.

1. The Federal Power Commission (FPC), predecessor to the Federal Energy Regulatory Commission (FERC), issued a fifty-year "minor part" license for the Cushman Project in 1924 pursuant to the Federal Water Power Act, ch. 285, 41 Stat. 1063 (now codified as Part I of the Federal Power Act (FPA), 16 U.S.C. 792 *et seq.*). The license authorized Tacoma to flood 8.8 acres of federal lands in connection with the Cushman Project. Pet. App. 91a-97a.[1] In 1998, FERC issued an order granting Tacoma a new license for the Cushman Project. *City of*

[1] At the time, the FPC viewed its authority as limited to issuing licenses for the occupancy and use of federal lands. In 1963, the FPC repudiated that view and concluded that, where the agency has jurisdiction over part of a project, it must license the entire project. See *Pacific Gas & Elec. Co.*, 29 F.P.C. 1265, 1266 (1963).

Tacoma, 84 F.E.R.C. ¶ 61,107 (1998), on reh'g, 86 F.E.R.C. ¶ 61,311 (1999). See Pet. App. 10a n.4.

2. On November 19, 1999, petitioners filed this action in federal district court seeking damages for, among other things, alleged interference with their treaty fishing rights resulting from the licensing and operation of the Cushman Project. Pet. App. 5a, 54a-55a. Petitioners stated 34 causes of action under numerous legal theories, including violations of the Treaty of Point No Point, the Federal Power Act (16 U.S.C. 792 *et seq.*), the Clean Water Act (33 U.S.C. 1251 *et seq.*), and state law. Pet. App. 54a-55a. Only petitioners' treaty-based claims against Tacoma are at issue here. See Pet. 1. The district court dismissed petitioners' action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for lack of subject matter jurisdiction and granted summary judgment in favor of Tacoma on some of petitioners' claims, including the treaty-based claims. Pet. App. 54a-81a. It dismissed the remaining claims on various grounds. See 161 F. Supp. 2d at 1179-1183.

3. On appeal, a divided panel of the court of appeals affirmed the dismissal of the Tribe's claims against the United States, affirmed summary judgment on the Tribe's state law tort claims because the applicable statute of limitations had passed, and affirmed dismissal of the Tribe's claim under the Federal Power Act, 16 U.S.C. 803(c), because Section 803(c) does not create a private right of action. 332 F.3d 551 (9th Cir. 2003). The panel vacated the summary judgment in favor of Tacoma on petitioners' treaty-based claims because it believed that those claims were impermissible collateral attacks on FERC's decision to license the Cushman Project and that the district court therefore lacked jurisdic-

tion over those claims. *Id.* at 557-562. Accordingly, the panel remanded with instructions to dismiss those claims. *Id.* at 562.

4. The Tribe successfully petitioned for rehearing en banc. The en banc court of appeals affirmed the dismissal of petitioners' claims against the United States, except that it transferred to the Court of Federal Claims petitioners' claims alleging that the United States had breached its treaty obligations to the Tribe, finding that those claims could have been brought under the Indian Tucker Act, 28 U.S.C. 1505. See Pet. App. 5a-8a. The en banc court next examined the claims against Tacoma. *Id.* at 10a-15a. It construed petitioners' claims for violation of their treaty-based rights as a claim brought directly under the Treaty of Point No Point against a nonsignatory to the treaty. See *id.* at 10a-12a. With this understanding, the en banc court analyzed whether that treaty created an implied private right of action for damages against third parties, and the court held that it did not. *Id.* at 12a-15a. The majority distinguished *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985), on the ground that that case involved a federal common law damages claim rather than an implied cause of action for damages under a treaty against a nonsignatory to the treaty. Pet. App. 14a-15a.

On the remaining issues, the en banc court held that neither the Tribe nor individual tribal members could seek damages under 42 U.S.C. 1983 for damage to treaty-reserved fishing rights, Pet. App. 15a-19a, that state statutes of limitations barred the Tribe's state-law claims, *id.* at 19a-24a, and that petitioners' claims under 16 U.S.C. 803(c) failed to state a claim upon which relief could be granted because that statutory provision does not provide a private right of action. Pet. App. 25a-26a.

The court also affirmed the denial of petitioners' motion to disqualify the district court judge. *Id.* at 26a-27a. Five judges dissented in part in two separate opinions. See *id.* at 28-32a, 33a-53a. The Tribe filed a petition for further rehearing. On June 3, 2005, the en banc court amended its decision and denied the petition. *Id.* at 3a.[2]

ARGUMENT

Petitioners principally urge that the en banc court of appeals' ruling broadly holds that Indian treaties afford no damages remedy against non-signatories and thereby "dramatically curtails the remedies available to all persons, not only Indians and Indian tribes, to enforce their federal rights." Pet. 11. Petitioners, however, misconstrue the court of appeals' decision in this case. The court of appeals holds only that the Treaty of Point No Point does not give petitioners an implied private right of action to sue nonsignatories for money damages arising from deprivations of petitioners' treaty rights. That decision, which was based on an examination of the specific language of the treaty, raises a case-specific issue that does not warrant this Court's review. The court of

[2] The en banc majority's original decision held that the Tribe did not possess reserved water rights for fishing. See 401 F.3d 979, 989-990 (9th Cir. 2005). The amended en banc decision excised that holding and the court's discussion of that issue. Pet. App. 3a. In the court of appeals, the United States participated as appellee defending the district court's dismissal of claims against it. The United States took no position as to the Tribe's claims against Tacoma until the United States filed a response to the Tribe's petition for further rehearing en banc, in which it supported the Tribe's request to reconsider the en banc majority's original holding that the Tribe did not possess reserved water rights for fishing. The United States did not, however, take a position on petitioners' argument that they should have a cause of action for damages under the Treaty. See Gov't Resp. Br. 15 n.10.

appeals recognized that an Indian Tribe may seek money damages against a non-signatory through a federal common law claim designed to protect federally confirmed real property interests. The court of appeals' decision therefore does not conflict with decisions of this Court and the lower courts, which address federal common law claims.

1. The crux of petitioners' argument for certiorari is that the court of appeals' ruling deprives Indian Tribes of their ability to seek money damages when they are deprived of their treaty-based rights by the actions of a non-signatory. Pet. 11-15. Stated in those broad terms, such a ruling could conflict with *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985). This Court ruled in that case that an Indian Tribe may assert a trespass claim for damages against a local government for violation of the Tribe's rights in land. See *id.* at 229-230, 235-236. Petitioners' argument overlooks, however, a crucial distinction between this case and *County of Oneida*. The Court's decision in *County of Oneida* upheld the Tribe's claim under federal common law and explicitly did not reach the issue of whether the Tribe had an implied right of action—in that case, an implied right of action under the Indian Non-Intercourse Act, now codified at 25 U.S.C. 177. See 470 U.S. at 233-236.[3]

[3] The other cases cited by petitioners (Pet. 14) similarly upheld claims under federal common law and did not speak to the availability of private rights of action for money damages brought directly under a treaty. See, *e.g.*, *United States* v. *Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994), cert. denied, 514 U.S. 1015 (1995); *Pueblo of Isleta* v. *Universal Constructors, Inc.*, 570 F.2d 300 (10th Cir. 1978); *United States* v. *Southern Pac. Transp. Co.*, 543 F.2d 676 (9th Cir. 1976); *Mescalero Apache Tribe* v. *Burgett Floral Co.*, 503 F.2d 336 (10th Cir. 1974). None of those cases, moreover, recognized a right of action for damages based on interference with a fishery.

By contrast, petitioners' claim, at least as construed by the court of appeals, was brought directly under the Treaty of Point No Point and not federal common law. The court of appeals repeatedly characterized its inquiry as whether the Treaty of Point No Point creates an implied right of action for money damages against nonsignatories. Pet. App. 11a n.5, 14a, 15a. The court specifically distinguished *County of Oneida* on the ground that it involved "a federal common law damages claim." *Id.* at 14a.

For that reason, the court of appeals' decision in this case does not, as petitioners argue, prevent Indian Tribes from seeking money damages to protect against the infringement of property interests that are recognized in treaties, even in the absence of express language in the treaty creating a right of action. The court of appeals' decision does not address, and therefore does not limit, the availability of federal common law actions in such situations. Nor would the court of appeals' decision respecting treaty-based rights preclude prospective remedies or suits under other alternatives to a suit brought directly under the treaty, such as a state common law action. See Pet. App. 19a-24a.[4]

The court of appeals' decision in this case merely concludes that the availability of a direct right of action for money damages under an Indian treaty depends on the specific language of the treaty. That ruling, which by its own terms only "analyze[d] a specific set of claims

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[4] The court of appeals held that petitioners' state common law claims were time-barred. Pet. App. 19a-24a. The court also held that petitioners could not state a claim under two particular statutes, 42 U.S.C. 1983 or 16 U.S.C. 803(c), and petitioners do not seek review of those holdings. The court of appeals neither addressed nor foreclosed the availability of claims under other statutes. Pet. App. 15a-19a, 25a-26a.

brought under a specific treaty," Pet. App. 11a n.5, does not merit further review. And even if the en banc majority misconstrued the nature or basis of petitioners' claims in this case, such an error would not affect other cases and therefore would not warrant certiorari.

2. Petitioners also argue (Pet. 16-20) that the court of appeals' decision conflicts with *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274, 284 (1998), which cited a "general presumption that courts can award any appropriate relief in an established cause of action." According to petitioners, this Court previously ruled in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), that Indian treaties create an implied right of action for equitable relief against nonsignatories. See Pet. 16. Petitioners urge that the Court's ruling in *Fishing Vessel*, in combination with the presumption cited in *Gebser*, should have led the court of appeals to find an implied right of action under the Treaty of Point No Point for money damages against nonsignatories. Pet. 16-17.

The Court's decision in *Fishing Vessel*, however, concerned the scope of treaty fishing rights, not who could bring an action to enforce them or the full range of remedies (including damages) for a violation. Indeed, the Court did not address the availability even of a right of action in equity by the Tribes under the treaties at issue in that case. The United States brought the suit "on its own behalf and as trustee for seven Indian tribes." See 443 U.S. at 669. Only later did Indian Tribes become parties to the case. *Id.* at 770. The Court accordingly had no occasion to address whether the treaties granted the Tribes a right of action or what remedies might be

available to them.[5] See *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 125 S. Ct. 577, 586 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") (citation omitted); see also *Hernandez-Avalos* v. *INS*, 50 F.3d 842, 846 (10th Cir.) (distinguishing a private right of action from cases in which the government brings suit as the plaintiff), cert. denied, 516 U.S. 826 (1995); *Miscellaneous Serv. Workers* v. *Philco-Ford Corp.*, 661 F.2d 776, 780 (9th Cir. 1981) (same). Accordingly, *Fishing Vessel* does not furnish a basis for this Court to grant review of petitioners' argument that they must have a private right of action for damages under their treaty because they have a demonstrated private right of action under the treaty for equitable relief.

[5] Of course, the Court has also held that 28 U.S.C. 1362, which provides for district court jurisdiction over suits brought by Indian Tribes that arise under the Constitution, laws, or treaties of the United States generally enables Tribes to bring the sort of suits that could have been brought by the United States as trustee, but for whatever reason were not so brought. See *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472-474 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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