

No. 05-445

In the Supreme Court of the United States

LUMMI NATION, ET AL., PETITIONERS

v.

SAMISH INDIAN TRIBE, 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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QUESTIONS PRESENTED

1. Whether federal recognition of the Samish Tribe was an extraordinary circumstance pursuant to Federal Rule of Civil Procedure 60(b)(6) warranting reopening of a 20-year-old judgment holding that the Samish Tribe was not the successor in interest to a signatory of the Treaty of Point Elliot.

2. Whether the court of appeals' determination that federal recognition of the Samish Tribe warrants reopening of the previous judgment had the effect of denying due process to the Tribes whose treaty rights would be adversely affected by a reversal of the prior determination that the Samish Tribe is not the successor to a treaty Tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 394 F.3d 1152. The order of the district court (Pet. App. 47a-66a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2005. A petition for rehearing was denied on June 6, 2005 (Pet. App. 67a-68a). On August 17, 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

1. The Samish Tribe is a group that believes itself to be a successor in interest to one of the Tribes with which the United States negotiated the Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. That treaty is one of several treaties negotiated with the Indians of the Pacific Northwest by Washington territorial governor Isaac Stevens (Stevens Treaties). In the Stevens Treaties, the United States secured the cession of the majority of the Indians' vast territory by agreeing that the signatory Tribes would reserve, in addition to portions of their territory, their right to fish outside their reserved lands. See *Washington v. Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 661-662, 666-667 (1979). The 1974 judgment in *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) (*Washington I*), allocates fishing rights among successor Tribes to the signatories of the Stevens Treaties who were then residing in what is now the State of Washington.

2. Following the judgment in *Washington I*, the Samish and various other Indian groups sought unsuccessfully to intervene in the litigation. The district court denied intervention on the ground that only federally recognized Tribes could exercise treaty fishing rights. See *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), aff'd, 641 F.2d 1368, 1371 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982) (*Washington II*). The Samish Tribe was not federally recognized at that time.

The court of appeals affirmed the denial of Samish's motion to intervene, although it rejected the district

court's reasoning. The court of appeals reasoned that "[n]onrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, but can have no impact on vested treaty rights." 641 F.2d at 1371 (internal quotation marks omitted). The court nonetheless upheld the denial of intervention based on its own "close scrutiny" of the facts, which led the court to conclude that the Samish and other applicants in intervention had failed to provide evidence sufficient to establish that they were successors to Tribes entitled to rights under the Treaty. *Id.* at 1373.

3. Before 1978, the Department of the Interior (Interior) maintained government-to-government relationships with federally recognized Tribes on an essentially *ad hoc* basis, and the members of such Tribes were granted benefits under various statutes and programs. In 1978, Interior established a uniform process for acknowledging Tribes that previously had not been recognized and issued final regulations establishing that process. See 43 Fed. Reg. 39,361 (1978).

Acknowledgment is granted to Indian groups that can establish that they have maintained a "substantially continuous tribal existence and * * * have functioned as autonomous entities throughout history until the present." 25 C.F.R. 83.3(a). Groups apply for acknowledgment by filing a petition that addresses seven mandatory criteria set forth in the regulations, one of which is proof that the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900 and that a predominant portion of the petitioning group has comprised a distinct community from historical times until the present. 25 C.F.R. 83.7. Once Interior determines that a petitioner is entitled to acknowledgment as an Indian Tribe, the Tribe becomes

eligible to apply for certain programs, services, and benefits that are available only to federally recognized Indian Tribes. 25 C.F.R. 83.12; see 25 C.F.R. 83.2 (“Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes.”).

4. In 1972, a group identified as the Samish Indian Tribe of Washington applied for federal acknowledgment. *Greene v. Babbitt*, 64 F.3d 1266, 1269 (9th Cir. 1995). In 1979, after Interior adopted the regulations governing its acknowledgment process, Samish filed a revised petition. The Secretary denied the petition on February 5, 1987. *Ibid.* Samish sought judicial review of the denial, claiming that Interior had violated its due process rights by failing to hold a formal hearing on its petition. Samish also renewed its effort to obtain judicial recognition of its claimed status as the successor to a Treaty signatory.

a. The district court ruled that Samish was barred from relitigating the question of its claimed treaty successorship because of the *res judicata* and collateral estoppel effects of *Washington II*. See *Greene v. United States*, 996 F.2d 973, 975 (9th Cir. 1993) (*Greene I*). In a separate ruling, the district court denied a petition by the Tulalip Tribe for intervention in the Samish acknowledgment proceeding, in which Tulalip argued that its interest in protecting the treaty rights it had secured in *Washington I* and *II* could be adversely affected by federal acknowledgment of Samish. Intervention was denied on the ground that Tulalip lacked the requisite interest in the Samish acknowledgment proceeding. *Id.* at 976.

b. The court of appeals affirmed both the *res judicata* and intervention rulings, holding that “[e]ven if the federal government says that the Samish are an official Indian tribe, whether they may fish as a treaty tribe in common with the Tulalip is another question.” 996 F.2d at 975. The court of appeals explained the distinction as follows:

To gain federal acknowledgment, the Samish must establish the requisite social cohesion and community, continuity of political authority and ancestry from a historic tribe. *See* 25 C.F.R. §§ 83.1 thru 83.7. To assert treaty fishing rights, the Samish must demonstrate that they descended from a treaty signatory and “have maintained an organized tribal structure.” *Washington II*, 641 F.2d at 1372.

* * * * *

[T]he Samish need not assert treaty fishing rights to gain federal recognition. They might document repeated identification by federal and state authorities, *see* 25 C.F.R. § 83.7(a), sometime after or independent of the 1855 Treaty. Even if they obtain federal tribal status, the Samish would still have to confront the decisions in *Washington I and II* before they could claim fishing rights. Federal recognition does not self-execute treaty rights claims.

Greene I, 996 F.2d at 976-977.

The court of appeals rejected the argument of the Tulalip Tribe, in seeking to intervene in the acknowledgment proceedings, that factual determinations in the administrative proceedings concerning Samish’s application for federal acknowledgment could be used to over-

turn the decisions in *Washington I* and *II* concerning Samish's efforts to obtain treaty fishing rights. The court reasoned that "the district court ruled expressly that the ALJ 'will not consider' treaty rights established by [*Washington II*]." 996 F.2d at 977 (citation omitted). The court of appeals further concluded that Tulalip's asserted interest in defending *Washington II* from collateral attack was "immaterial," because the district court had "explicitly ruled that the Samish may not use the reopened hearing to attack [*Washington II*]." *Ibid.* The court likewise determined that the Tulalip's concern that a decision to acknowledge Samish could undermine the finality of *Washington II* was unwarranted, because "[t]he *Washington I* court need not accord any deference to an agency proceeding that has been expressly limited to matters other than rights under the 1855 treaty. * * * Tulalip's interests are not practically impaired precisely because each action has an independent legal effect." *Id.* at 978.

c. In a separate ruling, the district court concluded that due process required a hearing on the Samish acknowledgment petition and remanded it to the agency for a formal adjudication. The United States appealed from that decision. See *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995) (*Greene II*). Tulalip appeared as amicus curiae in that appeal to argue that Samish was collaterally estopped by *Washington II* from litigating issues concerning federal acknowledgment.

The court of appeals ruled that, while *Washington II* had "finally determined the Samish were not entitled to tribal treaty fishing rights," *Greene I* had established that "the issues of tribal recognition and treaty tribe status [are] fundamentally different." *Greene II*, 64 F.3d at 1269. The court therefore held that the *Wash-*

ington II litigation did not preclude Samish's pursuit of federal recognition as a tribe for purposes of securing benefits for its members under federal entitlement programs. The court explained that "the recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights." *Id.* at 1270. The court reiterated that the interests at stake in the treaty-rights litigation would not be affected by a decision to recognize Samish:

Greene [I] * * * squarely rejected the Tulalip's position that federal recognition of the Samish would be inconsistent with *Washington I* and *II*. Instead, we agreed with the district court in *Greene* that the question of federal recognition as a tribe "did not implicate treaty claims." *Greene* at 975. We are bound by *Greene [I]*.

Ibid.

d. Following a hearing on remand to the agency, an Interior Department administrative law judge (ALJ) recommended that the Samish Tribe be acknowledged. See *Greene v. Babbitt*, 943 F. Supp. 1278, 1282 (W.D. Wash. 1996). The Assistant Secretary agreed in a final decision dated November 8, 1995. *Ibid.*; see 61 Fed. Reg. 15,825 (1996) (publication of final decision). The decision explicitly made "no determination as to what rights, if any, the [Samish Tribe] or its members may have pursuant to any treaty." *Id.* at 15,826.

5. More than five years later, the Samish Tribe filed the motion at issue here, in which it asserted that its acknowledgment as a Tribe was an "extraordinary circumstance" warranting relief from the judgment in *Washington II* under Federal Rule of Civil Procedure 60(b)(6). Samish asserted that its acknowledgment was

based on criteria similar to those applied by the Ninth Circuit in *Washington II* and would have affected the result had it occurred earlier.

a. The district court denied the motion on the ground that Rule 60(b)(6) generally is not available where no inadequacy or defect in the original proceeding is alleged. Pet. App. 58a. The court reasoned that the Samish had not been prevented “from adducing all evidence to support its claim to treaty fishing rights” in the *Washington II* litigation. *Ibid.* The court further concluded that relief was unwarranted because the Ninth Circuit’s earlier rulings had established that federal acknowledgment served a legal purpose independent of treaty status and should not affect the finality of *Washington II*. *Id.* at 57a-58a.

b. The court of appeals reversed. Pet. App. 1a-41a. It held that Rule 60(b)(6) relief was appropriate because the Samish “were effectively prevented from proving their tribal status ‘in a proper fashion’” in the *Washington II* litigation because of: “excessive delays and . . . misconduct” by the government in “withholding of recognition”; the government’s “position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue”; and “the district court’s erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States’ boiler-plate findings of fact in *Washington II*.” *Id.* at 16a (internal quotation marks omitted). The court of appeals further held that its earlier rulings distinguishing between treaty rights and federal recognition as an Indian Tribe had established only that recognition was unnecessary to establish treaty rights, not that it was *insufficient* to establish treaty rights. *Id.* at 12a, 16a-17a. In the court’s

view, its precedents lead “to the inevitable conclusion that federal recognition is a sufficient condition for the exercise of treaty rights.” *Id.* at 12a.

ARGUMENT

The United States agrees with petitioners that the result reached by the court of appeals is contrary to that court’s previous decisions. This Court’s review of the issues raised by the petition, however, does not appear warranted, at least at the present time.

1. When the Tulalip Tribe sought to intervene in *Greene I*, the court of appeals affirmed the denial of intervention on the ground that the determination whether the Samish qualify for federal recognition and the determination whether the Samish can exercise treaty rights present distinct issues. 996 F.2d at 976-977. The court explained that “the Samish may not gain fishing rights from federal recognition alone.” *Id.* at 977. In *Greene II*, the court of appeals reiterated that the “recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights.” 64 F.3d at 1270. In the decision below, however, the court of appeals reasoned that “federal recognition is a sufficient condition for the exercise of treaty rights.” Pet. App. 12a. That result is directly contrary to the court of appeals’ previous decisions, and it calls into question the court’s previous determination in those decisions that the litigation concerning the acknowledgment proceedings should go forward without the participation of the parties to *Washington I*.

The petitioner Tribes contend (Pet. 9-12) that their due process rights were denied when they were barred from intervening in the *Greene* litigation. The United States agrees that the decision below contradicts the

court of appeals' previous rulings and significantly undermines the holding of those previous decisions denying intervention. There nonetheless does not appear to be a compelling need for this Court's review at this time.

The court of appeals' decision addressed only the threshold question of whether there exist "extraordinary circumstances" permitting reopening of the *Washington II* judgment under Federal Rule of Civil Procedure 60(b)(6). The court of appeals' decision therefore did not itself affect the treaty Tribes' fishing rights or reallocate those rights. Accordingly, the court of appeals' decision does not effect a deprivation of property for purposes of petitioners' due process challenge. Furthermore, it would be quite novel to apply due process principles on behalf of other Tribes in the determination by Interior whether to recognize a group as a sovereign Tribe and thereby establish a government-to-government relationship with it. And the interaction of such recognition with litigation concerning treaty rights of other Tribes raises potentially complex issues that could render resolution of particular due process claims in that setting quite context-specific.¹

In any remand, moreover, the district court must first consider Samish's compliance with the other limitations contained in Rule 60(b), including timeliness. The district court expressly declined to reach the question whether Samish's motion, which was filed more than five years after the Samish Tribe's federal recognition, was

¹ The petitioner Tribes' due process claim assumes that Indian Tribes are "persons" for purposes of the Due Process Clause. Cf. *South Carolina v. Katzenbach*, 383 U.S. 301, 323-324 (1966) (States are not "persons" under the Due Process Clause); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-193 (1989) (Tribes are not "States" for purposes of the Interstate Commerce Clause).

filed “within a reasonable time.” Fed. R. Civ. P. 60(b); see C.A. E.R. 19. Even assuming that the district court reopens the *Washington II* litigation, the treaty Tribes may assert a right to an opportunity to challenge Samish’s claim to treaty successorship. See *Greene I*, 996 F.2d at 977 (“Even if they obtain federal tribal status, the Samish would still have to confront the decisions in *Washington I and II* before they could claim fishing rights. Federal recognition does not self-execute treaty rights claims.”). But see Pet. App. 15a (“And although we have never explicitly held that federal recognition necessarily entitles a signatory tribe to exercise treaty rights, this is an inevitable conclusion.”). In addition, the district court has yet to determine whether particular prior rulings concerning the allocation of treaty fishing rights and other matters could be revisited (and to what extent) in further proceedings, and what accommodations for respondent’s asserted rights might be in order. See Samish Br. in Opp. 6 n.9, 7-8. Accordingly, there does not appear to be a compelling need for this Court’s review at this time.

2. Petitioners correctly criticize (Pet. 12-19) the court of appeals’ decision as a departure from the strict limitations on the availability of relief from a judgment pursuant to Federal Rule of Civil Procedure 60(b)(6). “Extraordinary circumstances” sufficient to warrant relief from a judgment generally do not exist when the moving party could have presented its case in the previous proceeding. See *Ackermann v. United States*, 340 U.S. 193, 198-201 (1950). The court of appeals, however, allowed relief under Rule 60(b) even though respondent was not prevented from demonstrating its treaty rights in the *Washington II* litigation. See Pet. App. 27a (Bea, J., dissenting).

There nonetheless does not appear to be a need for this Court's review because the court of appeals' decision indicates that it does not establish a broad rule concerning the circumstances in which Rule 60(b)(6) relief is available. The decision instead reflects the court's conclusion that the unusual circumstances of this particular case warranted a case-specific departure from that principle that would normally govern relief under Rule 60(b)(6). In particular, the court acknowledged "that the Samish had the opportunity to litigate the factual basis underlying the tribe's treaty status in *Washington II*," Pet. App. 15a-16a, but the court nonetheless found "extraordinary circumstances" to exist based on what it considered to be "the government's excessive delays and . . . misconduct in withholding of recognition from the Samish," the "government's position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue," and "the district court's erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States' boiler-plate findings fact in *Washington II*." Pet. App. 16a (internal quotation marks omitted). Although we do not agree with the court of appeals that those considerations justify relief under Rule 60(b)(6), the court of appeals' application of Rule 60(b)(6) in those particular circumstances does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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