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Skokomish Indian Tribe v. United States, 401 F.3d 979 (9th Cir. 2005)

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dams altogether. Judge McKeown argued that instead of hiding behind the threat of dam removal, the Corps should have addressed the "real issue" of compliance with water quality standards head-on.

The court affirmed the district court's decision to grant summary judgment in favor of the Corps.

Andrew L. Ellis

Skokomish Indian Tribe v. United States, 401 F.3d 979 (9th Cir. 2005) (holding a treaty between the United States and an Indian tribe does not implicitly reserve water rights to the tribe beyond the amount necessary for the reservation's primary purpose).

In 2004 the Skokomish Indian Tribe of Washington ("Tribe") sought damages from the United States, the City of Tacoma ("City"), and Tacoma Public Utilities ("TPU") for alleged harm caused by the Cushman Hydroelectric Project ("Project"). The City constructed the Project in 1930, which consisted of two dams and two reservoirs. The Tribe sued the City and TPU because the Project released water that flooded over thirty acres of federal land upstream from the Tribe's land holding. The Tribe claimed the Project diverted the flow of the Skokomish River and caused flooding of the reservation, the failure of septic systems, contamination of water wells, and damage to orchards and fisheries. In total, the Tribe claimed nearly \$5 billion in losses. The District Court for the Western District of Washington granted summary judgment for the defendants and dismissed the Tribe's claim.

On appeal to the United States Court of Appeals for the Ninth Circuit, the Tribe claimed the Project infringed on the Tribe's water rights by diverting water and impeding the Tribe's ability to fish in the Skokomish River. Specifically, the Tribe argued its treaty with the United States implicitly reserved water rights sufficient to allow the tribe to fish in the Skokomish River. However, the treaty provided the Tribe should have "the right of taking fish...in common with all citizens of the United States." This language differed from the treaty in *United States v. Adair* that expressly provided tribes with "exclusive on-reservation fishing" rights. Additionally, the court reasoned that past case law suggested treaties reserved "only that amount of water necessary to fulfill the purpose of the reservation, [but] no more." Thus, because the district court found fishing was not a primary purpose of the reservation, diverting water for the Project did not violate the Tribe's water rights. Therefore, the court upheld the district court's grant of summary judgment.

In addition, the court dismissed the Tribe's claims under the Federal Power Act ("FPA"). The Tribe alleged the United States violated the FPA by issuing a license to the City to build and operate the Project without considering or providing protection for fish and wildlife. The

court dismissed this claim because the FPA clearly exempted the United States from liability.

In dissent, Judge Berzon disagreed with the majority's grant of summary judgment on the issue of water rights. Judge Berzon argued there a sufficient factual dispute over whether fishing was a primary purpose of the reservation existed. Thus, Judge Berzon believed the Tribe's claims should survive summary judgment. First, Judge Berzon argued the court could interpret the treaty as implicitly giving the Tribe the right to fish on the reservation. Based on United States Supreme Court precedent in *Winters v. United States*, the parties to the treaty were concerned with protecting the Tribe's fishing rights on the reservation because the treaty preserved the right to fish off-reservation. In addition, prior precedent in *Fishing Vessel* suggested the court should construe the treaty in the manner in which it "would naturally be understood by the Indians." Therefore, the court should have given weight to the Tribe's understanding of the treaty. Thus, Judge Berzon believed on-reservation fishing could be a primary purpose of the reservation and the court could construe the treaty as retaining water rights sufficient to provide for fishing.

The court thus affirmed the district court's holding that the Project did not violate the Tribe's water rights.

Kathryn L. Garner

United States v. Orr Ditch Co., 391 F.3d 1077 (9th Cir. 2004) (holding under the Orr Ditch Decree, Nevada procedures were applicable to the adjudication of water rights).

The Orr Ditch Decree represented the final adjudication of water rights in the Truckee Division of the federal Newlands Reclamation Project, and allowed entitled parties to change the place, means, manner, or purpose of water use so long as they did so in a manner provided by law. This case arose after the United States District Court for the District of Nevada ruled Nevada law, rather than the Federal Rules of Civil Procedure, governed a motion for a stay of the State Engineer's ruling under the Orr Ditch Decree.

The Orr Water Ditch Company appealed the State Engineer's ruling, granting the Lake Paiute Tribe of Indians ("Tribe") and the United States' application to make temporary changes to two water rights. Nevada Revised Statute section 533.450(5) allowed for an automatic stay of the State Engineer's ruling on a change application upon a timely request and posting of bond. The Tribe and the United States argued the Federal Rules of Civil Procedure should control because the stay was a procedural matter. However, the district court concluded Nevada law governed the motion for a stay.

In upholding the district court's decision, the United States Court of Appeals for the Ninth Circuit concluded the Orr Ditch Decree's