No. _____

In The Supreme Court of the United States

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Petitioner,

vs.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; JOSEPH PAKOOTAS; WENATCHI CONSTITUENT TRIBE; JOHN ST. PIERRE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 24 of the Restatement (Second) of Judgments uses a pragmatic transactional test for determining whether a party's claim is precluded by *res judicata.*

2. Whether the opinion of the court below, that the Colville Tribe's present claim in this case regarding off-reservation Indian fishing rights is not barred by *res judicata,* is in direct conflict with the Restatement (Second) and the rulings of other circuit courts.

3. Whether the respondents are judicially estopped from assuming factual positions in their present claim for off-reservation Indian fishing rights that are inconsistent with the undisputed facts of their previously litigated claim, thereby giving them a full and fair opportunity to litigate this claim in a prior suit.

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PETITION FOR A WRIT OF CERTIORARI

The Confederated Tribes and Bands of the Yakama Nation respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court below (App. A *infra* 1a) is reported at *U.S. v. Oregon*, 470 F.3d 809 (9th Cir. 2006). The opinion of the District Court (App. B *infra* 20a) is unreported. There is also one prior District Court judgment and an affirming opinion by the court below that bear directly on the issues before this Court. They are reported respectively at *U.S. v. Oregon*, 787 F.Supp. 1557 (D.Or. 1992) and *U.S. v. Oregon*, 29 F.3d 481 (9th Cir. 1994).

JURISDICTION

The court below entered its judgment on December 4, 2006. A Petition for rehearing *en banc* was denied by the court below on February 28, 2007 (App. C *infra* 37a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court has had continuing jurisdiction over this case since 1968 under 28 U.S.C. § 1345.

RESTATEMENT (SECOND) OF LAW INVOLVED

The jurisdictional issue in this case involves the application of Restatement (Second) of Judgments § 24 (1982), which is also set forth at App. D *infra* 39a. The Restatement provides as follows:

§ 24 DIMENSIONS OF "CLAIM" FOR PURPOSES OF MERGER OR BAR – GENERAL RULE CONCERNING "SPLITTING"

1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

TREATY PROVISIONS AND RELATED AGREEMENT INVOLVED

The substance of this case involves the Treaty with the Yakamas of June 9, 1855 (12 Stat. 951). The Treaty is set forth in full in App. E *infra* 40a-49a. The specific provisions of the Treaty at issue in this case are as follows:

ARTICLE III.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said

> confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.
>
> ARTICLE X.
>
> *And provided,* That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquose or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

Also at issue in this case is a related agreement between the Yakamas and the United States, ratified by Congress subsequent to the Treaty in 1894, known as the "Wenatshapam Agreement" or "1894 Agreement" (28 Stat. 320). The Agreement is set forth in full at App. F *infra* 50a-54a. The relevant provisions are as follows:

> ARTICLE I.
>
> The said Indians hereby cede and relinquish to the United States all their right, title, interest, claim, and demand of whatsoever name or nature of in, and to all their right of fishery, as set forth in Article 10 of said treaty aforesaid, and also their right, title, interest, claim, or demand

of, in, and to said land above described, or any corrected description thereof and known as the Wenatshapam fishery.

ARTICLE II.

After the ratification of this agreement by Congress and the further consideration that the Indians known as the Wenatshapam Indians, residing on the Wenatchee River, State of Washington, shall have land allotted to them in severalty in the vicinity of where they now reside, or elsewhere, as they may select, in accordance with article 4 of the general allotment law.

STATUTORY PROVISIONS INVOLVED

This case also involves § 4 of the General Allotment Act, 25 U.S.C. § 334, which is set out in full in App. G *infra* 55a.

STATEMENT OF THE CASE

A. *U.S. v. Oregon* and the First Colville Claim

The present case was filed in the District Court in 1968 by the United States against the State of Oregon on behalf of the petitioner Yakama Nation and other Indian tribes. The main purpose of the litigation was to determine the treaty rights of the tribes to fish at all "usual and accustomed places" on the Columbia River and its tributaries in the wake of this Court's decision in *Puyallup Tribe v. Department of Game,* 391 U.S. 392 (1968). In 1969 the case was consolidated with *Sohappy v. Smith,* 302 F.Supp. 899 (D.Or. 1969) in which the Hon. Robert C.

Belloni ruled that Oregon's authority to regulate Indian treaty fishing was limited to the non-discriminatory conservation necessity outlined in *Puyallup*. The Yakama Nation and three other tribes, the Confederated Tribes of the Umatilla Reservation, the Confederated Tribes of the Warm Springs Reservation, and the Nez Perce Tribe, intervened as plaintiffs. Judge Belloni retained jurisdiction over the case to allow the parties to seek relief when necessary to enforce the District Court's decree. Subsequently, the District Court permitted the State of Washington to intervene in 1974, and the State of Idaho followed suit in 1983. In 1977 the parties stipulated to, and the District Court adopted, a five-year conservation management plan for the Columbia Basin. This plan expired in 1982, but a modified plan was approved by the parties and adopted by the District Court on October 7, 1988.

In 1989, over two decades after the case was filed, the Respondent Confederated Tribes of the Colville Indian Reservation (hereinafter "Colville") moved to intervene, asserting that some of its constituent tribes had retained rights reserved in 1855 by both the Yakama and Nez Perce treaties. A successful intervention would not only have permitted Colville to participate in all proceedings of this case, but also would have presumably allowed Colville to regulate fishing by members of those constituent tribes at all usual and accustomed places. See *Settler v. Lameer,* 507 F.2d 231 (9th Cir. 1974). The District Court granted Colville's motion to intervene on the condition that it first must establish that it has off-reservation fishing rights secured by treaty. After trial, the District Court, Hon. Malcolm F. Marsh presiding, concluded that Colville had not retained such rights because the constituent bands that were signatories to the Yakama and Nez Perce

treaties, including the Respondent Wenatchi Tribe, had voluntarily moved to the Colville Reservation and refused to be bound by those treaties. The Court emphasized that these groups now comprise a minority of Colville tribal members, and "to accept the argument urged by Colville would result in the majority benefiting from the treaty rights of a minority with a resulting proportionate loss of fishing rights" by the Yakama Nation and Nez Perce Tribe. *U.S. v. Oregon,* 787 F.Supp. 1557, 1570 (D.Or. 1992). The court then dismissed Colville's motion to intervene. *Id.* at 1572. On appeal, the court below affirmed the decision. *U.S. v. Oregon,* 29 F.3d 481, 486 (9th Cir. 1994).

Important to the decisions of both courts was the undisputed fact that Colville is "the only entity that can legally act on behalf of its members." *U.S. v. Oregon,* 29 F.3d at 483. This meant that any off-reservation fishing rights claimed by the constituent tribes could only be asserted by the Colville Tribe as a whole.[1] This foreclosed any possibility that the Wenatchi Tribe could claim any such rights on its own. Moreover, Colville agreed to the following factual findings by the District Court regarding the rights of the Wenatchi Tribe:

> 21. In 1896, the United States Government purchased the lands of the Wenatshapam Fishery reserved under Article X of the Yakima Treaty. The funds from that purchase were used to develop the Yakima Indian Reservation irrigation project and to provide direct payment to Wenatchi Indians who lived at or near the

[1] The tribal government of the Colville Confederacy was established in 1938 under the Indian Reorganization Act, 25 U.S.C. § 476. *U.S. v. Oregon,* 29 F.3d at 483.

> Wenatshapam Fishery. The agreement for the purchase of the Wenatshapam Fishery also included provision to allot the Wenatchi Indians living at or near the sale of the Wenatshapam Fishery in the area of the fishery on the Wenatchee River.

U.S. v. Oregon, 787 F.Supp. at 1580. All of these facts later became the subject of controversy despite their establishment through a final judgment on the merits.

B. Proceedings Below In the Present Colville Claim

In May 2003, nine years after the Colville motion to intervene was dismissed by the District Court, a group of enrolled Colville tribal members appeared at Icicle Creek, a tributary of the Wenatchee River in Central Washington, and began fishing near the Leavenworth National Fish Hatchery.[2] The fishermen claimed that they were asserting off-reservation fishing rights as members of the "Colville Wenatchi Tribe," but did not produce any judicial decree validating such rights. The Yakama Nation then sought injunctive relief in the District Court against the Confederated Tribes of the Colville Reservation, maintaining that all Colville members were precluded from fishing at Icicle Creek by the court's 1992 dismissal of the Colville intervention in this case. Yakama argued that Colville had, in its previous proceeding, fully and completely litigated this matter and had no off-reservation rights under the court's rulings.

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[2] The hatchery, which releases spring chinook and coho salmon into Icicle Creek, is operated by the U.S. Fish and Wildlife Service.

Colville countered by claiming that it was presenting a "new theory" of the case, this time based on rights allegedly secured to the Wenatchi Constituent Tribe by an 1894 agreement between the Yakama Nation and the United States. This agreement, which was ratified by Congress, had its origin in Article X of the Yakama treaty. By claiming that the Wenatchis' fishing rights were not actually "treaty" rights, Colville hoped to avoid a ruling that its claims were barred by *res judicata.* In doing so, Colville was forced to renounce several of the facts that were established by its own admission in the first case.

The District Court, Hon. Garr M. King presiding, disagreed with Colville, ruling that the tribe could have made this new claim in the prior case, but chose not to. App. B *infra* 30a-31a. As a result, the court held that Colville's claim was precluded by its previous failure to intervene as a party in this case, citing the holding of the court below in *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency,* 322 F.3d 1064 (9th Cir. 2003). App. B *infra* 33a. Petitioner's motion was granted and the Wenatchi Tribe was permanently enjoined from fishing at Icicle Creek.

On appeal to the court below, Colville continued to veer away from the factual positions that it had taken in the first claim. Despite previous stipulations that only its tribal government could act to assert the legal rights of its members, Colville argued that the Wenatchi Constituent Tribe itself could legally claim its own off-reservation fishing rights. Reply Brief For the Appellants at 12-14, App. I *infra* 63a. Colville alleges that these are "new" fishing rights that were granted by the United States at the Icicle Creek under the 1894 Wenatshapam Agreement, and that the Wenatchis' claim is not the same one litigated

by Colville for intervention in this case. This claim directly contradicts the facts stipulated by the parties in the earlier case regarding the meaning of the Wenatshapam Agreement.

Nonetheless, the court below agreed with Colville and reversed. *U.S. v. Oregon,* 470 F.3d 809 (9th Cir. 2006); App. A *infra* 1a. In holding that *res judicata* did not bar the new Wenatchi claim, the court emphasized that Colville was prevented from bringing this claim in the intervention case by the conditions imposed by the District Court:

> Because Colville was required to meet the condition of establishing a treaty right before it would be allowed to intervene, it could not advance an argument that the Wenatchi Tribe obtained fishing rights from the 1894 Agreement independent of any treaty rights. In other words, if the Wenatchi acquired rights under the 1894 Agreement that were distinct from those reserved in the 1855 Treaty, Rule 24 itself would have prevented Colville from asserting those separate rights in a proceeding expressly limited to the adjudication of the 1855 rights.

Id. at 816; App. A *infra* 14a-15a. The court below also concluded that the Yakama Treaty of 1855 and the 1894 Agreement were entirely different "transactions" for purposes of determining whether the two claims are the same, despite the fact that the latter had its origin in the former. *Id.*; App. A *infra* 17a-18a. The court reasoned that its previous decision denying the Wenatchi Tribe any rights under that same treaty somehow gave credence to the new claim that its fishing rights were later cut from whole cloth:

> Accordingly, the law of the case supports the view that any fishing rights the Wenatchi gained under the 1894 Agreement must have been new rights. The 1855 Treaty and the 1894 Agreement, therefore, present entirely different transactional nuclei. Such a conclusion is in keeping with our requirement that, "when considering whether a prior action involved the same 'nucleus of facts' for preclusion purposes, we must narrowly construe the scope of that earlier action." *Central Delta Water Agency v. United States,* 306 F.3d 938, 953 (9th Cir. 2002).

Id.; App. A *infra* 15a. The court below remanded the case for trial on the merits. The injunction against the Wenatchi Tribe was then vacated by the District Court. The Yakama Nation's petition for rehearing and suggestion for rehearing *en banc* were denied. App. C *infra* 37a.

REASONS FOR GRANTING THE PETITION

I. THE RESTATEMENT (SECOND) OF JUDGMENTS § 24 EMPLOYS A PRAGMATIC TRANSACTIONAL TEST FOR DETERMINING WHETHER A CLAIM IS PRECLUDED BY *RES JUDICATA*

This Court has been very clear regarding the finality of judgments, and the policies behind the doctrine of *res judicata.* A final judgment on the merits "puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Nevada v. United States,* 463 U.S. 110, 130 (1983) (quoting *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948)). Enforcement of claim preclusion ensures that civil courts can fulfill their purpose of settling matters in dispute

between the parties that invoke their jurisdiction; conclusiveness "is essential to the maintenance of social order." *Id.* at 129 (quoting *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 49 (1897)).

Although the proper standards for determining whether a party's "cause of action" is the same for purposes of *res judicata* have vexed both federal and state courts for a long time, the past quarter century has seen a revolution in the way the federal circuit courts of appeals have examined the issue. This development is largely the legacy of a gradual adoption by the courts of Section 24 of the Restatement (Second) of Judgments, which provides as follows:

> 1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> 2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24(1) (1982). In most federal jurisdictions this approach has supplanted

the prior Restatement's test, in which claims were determined to be the same "if the evidence needed to sustain the second action would have sustained the first action." Restatement of Judgments § 61 (1942). This Court has looked upon the new method favorably but has never applied it to any specific case. See *Nevada,* 463 U.S. at 130 n.12. The circuit courts, however, have employed the standard repeatedly since *Nevada.*

The element of the Restatement (Second) approach that makes it much broader in scope than past standards for claim preclusion is the factual focus on a transaction or series of transactions ("transactional nucleus"). The First Circuit, for example, has been fairly consistent in holding that it does not matter whether the legal theories are different in the second action; the test is whether the factual bases are the same, and it does not require "an exact match." See *U.S. v. Cunan,* 156 F.3d 110 (1st Cir. 1998) ("*res judicata* is intended to foreclose parties from multiple attempts to obtain relief for the same harm through the use of new legal theories"); *Manego v. Orleans Board of Trade,* 773 F.2d 1 (1st Cir. 1985) (alleged conspiracy in second civil rights claim with different alleged motives was based on same transactions as a prior claim and was precluded).

This broader test is perhaps best illustrated in the cases involving contracts. For example, the Tenth Circuit has looked at successive contracts as one "series of transactions" that should be treated as one unit for all claims to be brought in one action. See *Petromanagement Corporation v. Acme-Thomas Joint Venture,* 835 F.2d 1329, 1336 (10th Cir. 1988) (separate contracts for drilling and operation of oil and gas wells were a sufficiently related "series of transactions" to prohibit "piecemeal litigation"). The

Eleventh Circuit has also made it clear that claims based on a series of transactions occurring as a result of an initial contract must be brought in the same suit. *Trustmark Insurance Co. v. ESLU, Inc.,* 299 F.3d 1265 (11th Cir. 2002) (successive claims for breach of numerous insurance policies, issued under single contract from previous judgment, were barred). In the area of employment rights, the Tenth Circuit has also been very clear that separate decisions involving one employment constitute a "series" that bars additional claims. *King v. Union Oil Co. of California,* 117 F.3d 443, 445 (10th Cir. 1997) (termination and subsequent denial of benefits by employer were "not unrelated transactions").

The policy behind this standard is that parties should not be allowed to keep creating new legal claims for the same factual occurrences, even though such claims may appear to be distinctive. The Eighth Circuit summed it all up in a case that barred claims under federal law for transactions that had been already litigated under state law:

> One of the merits of the Restatement (Second)'s approach is that it prevents parties from suing on a claim that is in essence the same as a previously litigated claim but is dressed up to look different. Thus, where a plaintiff fashions a new theory of recovery or cites a new body of law that was arguably violated by a defendant's conduct, res judicata will still bar the second claim if it is based on the same nucleus of operative facts as the prior claim.

Lane v. Peterson, 899 F.2d 737, 744 (8th Cir. 1990). This policy clearly serves the purposes that this Court has

enunciated for enforcing *res judicata. Nevada,* 463 U.S. at 129.

Although not explicitly stated, most of the circuit court cases appear to use a modified form of the "but for" test commonly used in factual causation analysis to determine whether transactions are "connected" under the Restatement. See, e.g., *Petromanagement,* 835 F.2d at 1336. For example, if transaction B were the result of transaction A, or would not have occurred without it, the two would be sufficiently related to bar any successive claims based on either one.

II. THE OPINION BELOW THAT THE COLVILLE TRIBE'S PRESENT CLAIM IS NOT BARRED BY *RES JUDICATA* IS IN DIRECT CONFLICT WITH THE RESTATEMENT (SECOND) AND THE RULINGS OF OTHER CIRCUIT COURTS

The court below held that the Yakama Treaty of 1855 and the Wenatshapam Agreement of 1894 were "entirely different transactional nuclei," and as a result the Wenatchi Constituent Tribe was not barred by *res judicata* from bringing its claim that the Agreement granted off-reservation fishing rights to its members. *U.S. v. Oregon,* 470 F.3d 809, 816 (9th Cir. 2006); App. A *infra* 15a. This conclusion is not supported by the Restatement (Second)'s liberal analysis, and conflicts directly with the decisions of other circuit courts.

In its examination of the two transactions at issue in this case, the court below completely failed to use the proper factors for determining a "series" of transactions – whether they are related "in time, space, origin, or

motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) § 24(2); see also *Nevada,* 463 U.S. at 130 n.12. Instead, the court used a far more constrictive approach, stating that it should "narrowly construe the scope" of the earlier cause of action, citing its holding in *Central Delta Water Agency v. U.S.,* 306 F.3d 938, 953 (9th Cir. 2002). *U.S. v. Oregon,* 470 F.3d at 816; App. A at 15a. It is not clear why the court cites *Central Delta* – its facts are completely inapposite from those in this case because the later transaction (implementation of a water management plan) occurred *after* the prior judgments on the merits. The same is true of the decision to which the *Central Delta* court looked for its precedent. *Fund For Animals v. Lujan,* 962 F.2d 1391 (9th Cir. 1992).

This pinched construction could not be more in conflict with the preclusion standard upheld by other circuit courts of appeals, especially the Tenth Circuit. See *Petromanagement,* 835 F.2d at 1336; *King,* 117 F.3d at 445; see also Section I *supra.* As one court noted, the Restatement (Second) approach is "concerned with the substance, and not the form, of the proceedings." *Trustmark,* 299 F.3d at 1270. However, the court below made the clear error of looking at the form of Respondents' claim rather than its factual origin in the Treaty of 1855.

If the court below had conducted the proper Restatement (Second) analysis, it would have shown that the 1855 Treaty and the 1894 Agreement are inextricably linked. Article I of the Wenatshapam Agreement states clearly in its language that the fishery being sold to the United States is the one "set forth in Article 10 of said treaty aforesaid." 28 Stat. 320; App. F *infra* 51a. Thus neither

Colville nor Wenatchi can reasonably claim that the 1894 Agreement was an isolated incident apart from the Treaty itself. Nevertheless they are presently engaged in a quest to prove the same, arguing that any rights the Wenatchis retained under the Agreement are somehow not "treaty rights." However, Judge King's District Court opinion made the point very well:

> If it is Colville's position now that the meaning of the rights set forth in the Yakama Treaty was changed by the 1894 Agreement, then the transactional nucleus of facts surrounding the 1894 Agreement is absolutely the same nucleus of facts as was before Judge Marsh when he interpreting [sic] the Yakama Treaty. The relevant transactional nucleus of facts is Colville's claim of off-reservation fishing rights at Icicle Creek, whether it arose under the Yakama Treaty or the effect of the subsequent 1894 agreement on the provisions of the Treaty.

App. B *infra* 30a-31a. The District Court clearly recognized that under a pragmatic transactional analysis, it is difficult if not impossible to separate any fishing rights claims reserved under the Treaty from those currently being claimed by the Wenatchi Tribe. Under a "but for" test, they would also certainly be part of the same set of transactions as well.

The decision of the court below reversing this reasoning was a step backward to an analysis pre-dating the Restatement (Second), one that frequently allowed two separate actions from related facts if the legal issues presented were different. See, e.g., *Abramson v. University of Hawaii,* 594 F.2d 202 (9th Cir. 1979). It does not uphold the policy considerations supporting use of the

"transactional nucleus" approach – that parties should not be able to come back with a "new theory" arising from the same facts. See *Lane,* 899 F.2d at 744. It also does not comport with the interest of the judicial system in fostering finality and the "peace and repose of society." *Nevada,* 463 U.S. at 129 (quoting *Southern Pacific,* 168 U.S. at 49).

III. BY JUDICIAL ESTOPPEL THE RESPONDENTS MAY NOT ASSERT FACTUAL POSITIONS IN THEIR PRESENT CLAIM THAT ARE INCONSISTENT WITH THE UNDISPUTED FACTS OF THEIR PREVIOUS CLAIM, AND RESPONDENTS HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE THE PRESENT CLAIM

The Respondents will argue, as they did to the court below, that the Wenatchi Constituent Tribe must have had a "full and fair opportunity" to make this claim in the prior proceeding to be barred by *res judicata.* See *Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 481 n.22 (1982) (noting that this requirement normally applies to collateral estoppel but "*res judicata* or claim preclusion is subject to the same limitation"). Based on this consideration, the court below concluded that the intervention proceeding placed limitations on what the Colville Tribe could present at trial; the tribe had to prove that its fishing rights were under the treaty. *U.S. v. Oregon,* 470 F.3d at 815; App. A at 14a. As a result, the court held that the Wenatchi Tribe had been prevented by the District Court from making its present claim back in 1989.

This ruling was largely based on a complete reversal by the Colville and Wenatchi Tribes regarding two key facts that were not in dispute in the previous litigation.

Their new representations of previously litigated factual issues have essentially created a new claim where none existed in 1994. In formulating its opinion the court below ignored the record and allowed the Respondents to put a new suit on an old claim.

However, prior decisions of this Court have held that a party may not assume a position in a legal proceeding, and then assume a contrary position to the prejudice of the party that had acquiesced in the position taken previously. *New Hampshire v. Maine,* 532 U.S. 742, 749 (2001); *Davis v. Wakelee,* 156 U.S. 680, 689 (1895). The purpose of this doctrine, known as judicial estoppel, is "to protect the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire,* 532 U.S. at 749 (quoting *Edwards v. Aetna Life Ins. Co.,* 690 F.2d 595, 598 (6th Cir. 1982), and *United States v. McCaskey,* 9 F.3d 368, 378 (5th Cir. 1993)).

There are three basic factors that have been employed by the Court to determine whether judicial estoppel should apply in a given case. First, a party's later position should be clearly inconsistent with its earlier position. *Id.* at 750. Second, the party must have succeeded in persuading a court to accept that party's earlier position, so that another court's acceptance of an inconsistent position in a later proceeding would create the perception that either court was misled. *Id.* Finally, a third factor is whether the party asserting the inconsistent position would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751 (citing *Davis,* 156 U.S. at 689).

In this case it is clear that the Respondents' present positions regarding certain factual issues are inconsistent with the positions taken by the Colville Tribe in an earlier trial. First, the Respondents are now claiming that the Wenatchi Constituent Tribe and its members may take legal action to assert off-reservation fishing rights. Since these particular Respondents would be the only ones who could exercise such rights if established, they have correctly maintained that they would be necessary parties to such a claim. However, this position is diametrically opposed to that taken by the Colville Tribe during the intervention trial in 1991. At that time Colville argued from the outset that the Colville tribal government was the only entity that could represent and act for the legal interests of the Wenatchi Tribe and its other constituent tribes. This fact was stipulated by the Yakama Nation, was recognized by the decisions of both the District Court and the court below, and was indeed an important factor in their conclusion that the Colville Tribe does not have off-reservation treaty fishing rights. *U.S. v. Oregon,* 787 F.Supp. 1557, 1570 (D.Or. 1992) ("Because Colville is now their only recognized representative, the Colville Confederacy, as a whole, succeeds to the treaty interests reserved in 1855"); *U.S. v. Oregon,* 29 F.3d at 483 ("It is not disputed that Colville is the only entity that can legally act on behalf of members of the Confederated Tribes").

Respondents also now take the position that the 1894 Wenatshapam Agreement granted off-reservation fishing rights to the Wenatchi Tribe. See 28 Stat. 320; App. F *infra* 52a-53a – Article II. This stance is in direct conflict with the agreed facts in the Colville intervention case, which briefly outlined the historical context and meaning of the 1894 Agreement. *U.S. v. Oregon,* 787 F.Supp. at 1580.

Colville accepted that under the Agreement, the United States purchased the Wenatshapam Fishery and then allotted lands to the Wenatchi Indians in the area of that fishery. *Id.* There is no mention of any grant of fishing rights by the federal government to the Wenatchis – only a grant of land allotments.[3] Petitioner agreed to those facts, and the District Court accepted them and incorporated them as factual findings as to the Wenatchi Indians. *Id.* at 1562.

As the opinion in the court below has shown, Colville's assertion of inconsistent positions in the present case has allowed the Respondents to gain an unfair second bite at the apple by avoiding *res judicata.* Although the District Court was not fooled, the Ninth Circuit panel that heard this case was clearly confused about the facts, because it accepted both that Wenatchi could make its own claim and that the 1894 Agreement could be the basis for that claim. Although Yakama pointed out repeatedly in its brief to the court below that the Respondents have changed the facts to suit their new claim, the resulting decision essentially adopted their positions. Now that the matter is back before the District Court, Colville has again switched positions, asserting that the Colville Tribe is the managing entity for a "Wenatchi" fishing season at Icicle Creek. Emergency Resolution of Colville Confederated Tribes for 2007 Fishing Season, App. H *infra* 56a-60a.

Although it was the sole intervenor in the previous action, Colville was permitted to slip the noose of *res*

[3] Article II of the 1894 Agreement states that the "Wenatshapam Indians . . . shall have land allotted to them in severalty in the vicinity of where they now reside, or elsewhere, as they may select, in accordance with article 4 of the general allotment law." 28 Stat. 320, 321; see also 25 U.S.C. § 334 (App. G).

judicata by arguing that the Wenatchi Tribe itself was never afforded an opportunity to litigate this claim. *Kremer v. Chemical Constr. Corp.*, 456 U.S. at 481 n.22. However, the agreed facts in the District Court clearly indicate just the opposite – any rights under the Agreement were indeed litigated, and the Colville Tribe expressly agreed that Wenatchi could not bring *any* claim for such rights on its own.

In giving the Wenatchi Tribe its own legal rights and thereby breathing new life into the 1894 Agreement, the Respondents' factual inconsistencies have unfairly prejudiced the legitimate interests of the Yakama Nation and its members. Respondents are therefore judicially estopped from taking those positions in this case, and their argument that there was no "full and fair opportunity" to litigate the present claim must fail.

CONCLUSION

The test that the court below used to determine whether the present claim of the Respondents is barred by *res judicata* is not in keeping with the broad approach of the Restatement (Second) of Judgments, in which a series of related transactions may constitute a single set of facts from which no party can split its claim. In determining that the Respondents may continue with a claim for alleged off-reservation fishing rights under an 1894 agreement with the United States, the court below is in direct conflict with decisions of other circuit courts that have construed the Restatement (Second), the Tenth Circuit in particular.

Although the District Court concluded in 1992 that none of the Respondents have retained rights to fish

off-reservation under the Yakama Treaty of 1855 (and the court below affirmed that decision), those same Respondents have returned for a second bite at the apple under a "new theory." However, it is clear that a broad construction of "transaction" under the Restatement (Second) produces a direct relationship between the Yakama Treaty and the 1894 Wenatshapam Agreement, thereby producing a unitary transactional nucleus. The approach of the court below, in which the scope of the prior claim is narrowly construed, is in direct conflict with this test.

Finally, the Respondents' argument that they did not have a full and fair opportunity to litigate the present claim is not supported in the record of this case. Colville made it very clear in its earlier action that it was the sole representative of the Wenatchi Constituent Tribe, and had sole authority to claim any rights under any theory. As a result, both those parties are precluded from presenting any new fishing rights claims. In addition, the meaning and historical context of the 1894 Agreement in relation to fishing rights was stipulated by the parties in the prior case. *Res judicata* should therefore bar any new claim by the Respondents based on such Agreement.

Based upon the foregoing, this Court should grant the Petition for Certiorari.

Respectfully submitted,

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