Judicial Regrets and the Case of the Cushman Dam

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Recommended Citation

William H. Rodgers, Jr., Judicial Regrets and the Case of the Cushman Dam, 35 ENVTL. L. 397 (2005), https://digitalcommons.law.uw.edu/faculty-articles/242

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This essay is a criticism of the Ninth Circuit's en banc decision in Skokomish Indian Tribe v. United States. It finds particular fault with the court's understanding of Indian treaty rights as "something given," and its outlandish conclusion that fishing was not a "primary purpose" of the Stevens treaties. The article further criticizes the court's treatment of the "continuing nuisance" doctrine that is applied to afford a statute of limitations defense to enterprises that did lasting environmental damage by diverting the entire North Fork of the Skokomish River out of the watershed. It concludes by describing the court's judicial techniques as being grim, narrow, and stilted.
"the announcement of our benevolence"¹

I. INTRODUCTION

Those were the words of the Honorable Frederick Bausman in the 1916 Washington Supreme Court opinion in *State v. Towessnute.*² Justice Bausman went on to say that the Indians were "incompetent occupants of the soil." Their property was "disdained." He said they were savage tribes "whom it was generally tempting and always easy to destroy, and whom we have so often permitted to squander vast areas of fertile land before our eyes."³

It followed, then, for the Honorable Frederick Bausman, that a treaty with the Indians was a "dubious document." A treaty was "the announcement of our benevolence." Any fishing right "given" to them would be a short-term gratuity. Nothing "could be plainer," he wrote, than that "the numbers of white fishers, their advancing population, and their encroaching towns and mills would speedily render the reserved fishing spots worthless."⁴

The opinion in *Towessnute* caused great pain and spawned deep regrets. It was soon criticized by Washington Supreme Court Justice Kenneth Mackintosh, who condemned the court for its "ingenious reasons and excuses."⁵ U.S. Attorney Francis Garrett said of the *Towessnute* judgment that "no court in this country has ever gone to the length of this opinion."⁶ *Towessnute* was officially overruled and interred by the Washington Supreme Court in a 1957 case involving the Puyallup Indian, Robert Satiacum.⁷

Regrets over *Towessnute* linger. In March of 2005, Washington Supreme Court Chief Justice Gerry L. Alexander responded to a request by attorney Jack W. Fiander of Yakima to withdraw the court's opinion in the post-*Towessnute* 1927 Indian fishing case of *State v. Wallahee.*⁸ Chief Justice Alexander wrote, "Replacing the withdrawn opinion with a new opinion would require the court to reconsider the merits of the case, which for such an old case would be problematic."⁹ The Chief Justice added, "I regret that we are unable to accede to your request. We do, though, appreciate your views and those of Jim Wallahee's descendants and hope that the more

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¹ State v. Towessnute, 154 P. 805, 807 (Wash. 1916).
² Id.
³ Id. at 807.
⁴ Id.
⁵ State v. Meninick, 197 P. 641, 643 (Wash. 1921) (joined by the Hon. J.B. Bridges).
⁸ State v. James Wallahee, 255 P. 94 (Wash. 1927).
II. TOWESSNUTE II: SKOKOMISH INDIAN TRIBE V. UNITED STATES

This slow healing of the Towessnute wounds was rudely halted on March 9, 2005, by an *en banc* decision of the U.S. Court of Appeals for the Ninth Circuit in *Skokomish Indian Tribe v. United States*, popularly known as the *Cushman Dam Decision*. The tribe had sought $5 billion in damages to rectify one of the most environmentally destructive deeds in the history of western Washington. It was occasioned by the 1930 diversion of the entire North Fork of the Skokomish River out of the watershed. For seventy-five years, the tribe has endured destroyed fisheries, on-reservation flooding, backed-up septic tanks, destruction of orchards, and the silting over of fisheries and shellfish beaches. A 1931 photo gives the picture that should be kept in mind:

![Dewatered North Fork of the Skokomish River below Dam No. 2 of the City of Tacoma's Cushman Hydroelectric Project](photo on cover of report).

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10 *Id.*
11 401 F.3d 979 (9th Cir. 2005).
13 *Id.* (photo on cover of report).
In a six to five majority opinion, Judge Alex Kozinski ruled that the tribe and its individual members had no remedy for damages to rectify these longstanding wrongs. The United States could not be sued under either the Federal Tort Claims Act or the Federal Power Act. Further the City of Tacoma and Tacoma Public Utilities could not be sued under the Treaty of Point No Point or the Civil Rights Act; state law theories of trespass, nuisance, or inverse condemnation; nor under the Federal Power Act. This majority opinion is so retrogressive, combative, and wrong that it is sadly reminiscent of the *Towessnute* ruling. The *Cushman Dam Decision*’s weaknesses are deftly exposed by the dissent of Judge Marsha S. Berzon (joined by three other judges), so the good news is that this judicial error is strongly on the defensive as it emerges from Judge Alex Kozinski’s deeply held self-deceptions.

On June 3, 2005, in response to the tribe’s motion for additional rehearing or rehearing en banc, the Court formally amended its opinion of March 9. It did this by the simple expedient of dropping the seven-paragraph section of the March 9 opinion, entitled “Reserved Water Rights Claim.” This change in turn necessitated the excision of the twelve-paragraph rebuttal in Judge Berzon’s dissent of March 9. These redacted paragraphs are reproduced as an Appendix to this comment. These opinions are no longer law but they are of immediate historical interest.

How ironic in this Indian case that there is a departure between what was said first and what was said last. It was at the Walla Walla Treaty Council in 1855 when the Indians first noticed amendments to the record of the proceedings. Things thus said were understood not to be truly said.

This comment will call attention to Judge Kozinski’s 1) characterization of the treaty, 2) his misrepresentation of its purposes, 3) his treatment of continuing nuisances under state law, and 4) the want of judiciousness of his approach to these important matters. It will also address the strategy of redaction that his colleagues on the Ninth Circuit used to restrain the excesses of this opinion. This comment will treat everything said as truly said, but will indicate if the language discussed has been stricken from the amended opinion.

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15 Id. at 510–512.

16 Id. at 512–516.

17 Id. at 516–518.

18 Id. at 518–519.

19 Skokomish Indian Tribe v. United States, 410 F.3d 506 (9th Cir. 2005) (with a partial concurrence and partial dissent by Judge Graber and a dissent by Judge Berzon).

A. The Treaty as Something Given

When the Honorable Frederick Bausman gave voice in 1916 to the "announcement of our benevolence" and to the generosity of the treaty rights "given," the offense to the Indians was not in the condescension of the delivery nor in the flippancy of the result. It was in the complete countermand of legal authenticity. In the treaties the tribes were "given" nothing. They retained certain entitlements, and what they retained the United States had not "given."\(^{21}\)

This is why Judge Berzon is resoundingly correct when she says that the majority opinion reveals a "fundamental misunderstanding of the very claim it summarily dismisses."\(^{22}\) "Like the Oneidas," she writes, "the Tribe here is not simply seeking to enforce rights created by the Treaty. Rather, it is claiming to enforce an aboriginal right – the right of taking fish at usual and accustomed grounds and stations – reserved in the Treaty."\(^{23}\) She goes on to say that there are hard issues hiding in the treaties but that "the majority's simplistic approach misses them all."\(^{24}\)

The majority approaches the treaty as if it were trying to discover an implied remedy for damages in the Rivers and Harbors Act.\(^{25}\) The court actually says that "there are no grounds for inferring that the parties to the Treaty intended to create" a damages remedy nor is there "anything in the language of the Treaty that would support a claim for damages against a non-contracting party."\(^{26}\) The Natives who know full well to this day what went on in the treaty negotiations will openly laugh at this naiveté. It could only have been written by a man from Mars. It is an embarrassment to every conscientious judge who has ever tried to get behind the meaning of these important Northwest historical documents. Frankly, Governor Stevens would have been lucky to get home alive had he told the Nez Perce Chief, Looking Glass: "By the way, if some 'non-contracting' settler dynamites your fisheries, there will be no damages available." In a thousand ways, Governor Stevens assured the Indians that their fisheries were "secure,"\(^{27}\) and no one on earth can believe honestly that Looking Glass, Leschi or any other Indian left the treaty negotiations worrying about the ambiguity in the implied damages remedy.

There is a difference, of course, between a cause for war between nations and an opportunity for lawsuits in their courts. A damages remedy is not unavailable to the tribes because they never thought of it nor asked for one in the treaty negotiations. The question is whether Congress has made a

\(^{21}\) See United States v. Winans, 198 U.S. 371, 381 (1905) (describing treaties as "not a grant of rights to the Indians, but a grant of right from them").

\(^{22}\) Cushman Dam Decision, 410 F.3d at 526.

\(^{23}\) Id. at 526-527 (emphasis in original).

\(^{24}\) Id. at 523.


\(^{26}\) Cushman Dam Decision, 410 F.3d at 513 (majority opinion).

\(^{27}\) The literature is vast, but a good place to start is CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY (2000).
forum available. This question is answered by the "self-enforcing" nature of the Stevens treaties. This first enforcement lawsuit was brought against a "non-contracting" party in 1884 and enforcement-by-injunction has been the rule ever since.

Judge Kozinski embarrasses only himself (and colleagues who joined with him) by explaining Winans as an instance where the treaties "occasionally" are invoked to afford equitable relief against non-contracting parties. This makes sense only if "occasionally" is understood to mean "constantly." The treaties were used to secure injunctions against the Taylors in the 1880s and '90s, the Winans in the 1890s and 1900s, the Seufert Brothers in the 1910s and 1920s, Brookfield Fisheries in the 1930s, and the Kramers in the 1940s, just for starters.

One would suppose that the implied remedy of the injunction would include the lesser option of money damages. Injunctions can be sold and turned into money damages. Judge Berzon does a good job of explaining that this sensible expectation is confirmed by ample authority that "makes plain that Indian tribes may bring a damages action under federal common law to enforce their rights to use of land." Judge Kozinski distinguishes Oneida on the curious ground that the federal common law damages claim for unlawful possession of land rested on "well-established federal common law principles regarding aboriginal possessory rights in land." In the Cushman case, by contrast, the tribe "is seeking to collect damages for violation of fishing rights reserved to it by treaty."

The unintentional jest in this passage is that it accords the aboriginal right some authenticity above and beyond the treaty right. Indian lawyers spend their careers being told that the aboriginal right is some flimsy phantom falling well short of a meaningful western property right such as a treaty. To hear now that the aboriginal right has legal force above and beyond the treaty right is so discordant to expectations that it is humorous: a judicial joke.

Distinctions of this genre will become known as "Kozinski distinctions." These are differences in precedent without rhyme, reason, or import. In one case the plaintiff was a woman, in another a man. Mention it and you have your distinction. This difference need not be linked by reason to a different

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29 Cushman Dam Decision, 410 F.3d at 512 (majority opinion).
32 Cushman Dam Decision, 410 F.3d at 526 (emphasis in original).
33 Id. at 514 (majority opinion).
legal outcome. Precedents thus can be discarded with the facility of tearing off a gum wrapper. Cardozo was far too conscientious.

I am told that this judge, Kozinski, was one of the youngest ever honored with an appointment to a court of appeals. He should have gone to law school first.35

Lawyers have a duty to explain their case to the court and judges have a duty to understand it. All the Stevens treaties are structured with a "reservation" (where tribal use is "exclusive") and with off-reservation "rights of taking fish" (that are shared with non-treaty people). Documents filed with the court show that the Skokomish tribe has suffered enormous damage from the Cushman Project both on and off reservation.36 How then can six members of a U.S. Court of Appeals, then, be comfortable with distinguishing United States v. Adair37 on the implausible ground that the rights implied there were occasioned by the on-reservation structure of the treaty?38

The majority also goes wildly wrong in floating the simplistic syllogism that individual Indians have no rights cognizable under 42 U.S.C. § 1983 for communal treaty fishing entitlements.39 Judge Berzon identifies ample precedents to the contrary.40 If the court cares to know, these rights are complex amalgams of individual and community holdings. The hundreds of fishing places at the historic Celilo Falls were partly communal and fished by rotation, partly family held, and partly individually controlled.41 The lead plaintiffs in Winans—the most famous of all the cases seeking legal vindication of these common rights—were not the United States or the Yakama tribe; they were White Swan and Thomas Simpson, individual Yakama Indians.

The majority says this case looks more like a Tucker Act case than a Civil Rights Act case.42 The court should take the trouble to review the bitter

35 Of course Judge Kozinski went to law school — at University of California, Los Angeles — and he was a top student. He has written impressively on how the judge's own "self respect," as well as his colleagues, can constrain what he describes as the "serious occupational hazard" of "self-indulgence." He full well knows the difference "between judgment and dishonesty, between distinguishing precedent and burying it." Alex Kozinski, What I Ate for Breakfast and Other Mysteries of Judicial Decision Making, 26 Loy. L.A. L. Rev. 993–994, 997–998 (1993). This opinion in Cushman Dam is a dreadful error and he will forever regret it.

36 DAMAGES REPORT, supra note 12.

37 723 F.2d 1394 (9th Cir. 1983).

38 Cushman Dam Decision, 401 F.3d at 989–90, amended by 410 F.3d at 516.

39 Cushman Dam Decision, 410 F.3d at 514–16 (majority opinion).


41 For an introduction, see EUGENE S. HUNN, WITH JAMES SELAM & FAMILY, NCH'I-WANA "THE BIG RIVER": MID COLUMBIA INDIANS AND THEIR LAND (1990); and Andrew H. Fisher, Tangled Nets: Treaty Rights and Tribal Identities and Celilo Falls, 105 OR. HISTOR. Q. 178 (Summer 2004).

42 Cushman Dam Decision, 410 F.3d at 511–12.
history of the fishing conflicts in the Pacific Northwest. It might understand better the police beatings, tear-gas episodes, midnight arrests, gear seizures, and zestful harassment that are all part of this history. The court might then take comfort in recognizing that these treaty cases readily take on the plumage of the Civil Rights Act.

B. Misstatement of Treaty Purposes

The most glaring re-write of history in Cushman was Judge Kozinski’s insistence “that the Tribe cannot survive summary judgment with its claim that fishing was a primary purpose of the reservation.” The rules of this legal-political game are set by Justice William Rehnquist’s opinion in United States v. New Mexico. Almost all in the West understand that federally reserved water rights are defined by the purpose of the reservation. Most also know that the states customarily work to restrict federally reserved water rights. The less water for federal reservations the more water for everybody else.

If you were to ask a thousand Indians about the purpose of the treaties, each would say: “to protect the fishing.” If you were to consult a thousand documents on the meaning of the treaties, each would confirm: “to protect the fishing.” The Skokomish tribe is ready to prove that it cannot fish because the water is gone from the river. The only way to defeat this bedrock reality is to deny the obvious. Judge Kozinski did this deftly by simply declaring that fishing is not a “primary purpose” of the reservation.

Are there no constraints on judicial innovation by reason of history, law, or common sense? None whatsoever. Deception is the easier path because it requires less research. Historical opinion is unanimous that preservation of the fisheries was the unwavering motivation of the Puget Sound tribes. This has been proven in courts hundreds of times. A world-

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44 Cushman Dam Decision, 401 F.3d at 989, amended by 410 F.3d at 516.
46 See State v. United States, 12 P.3d 1284, 1289-91 (Idaho 2000) (denying claims of the federal government to reserved water rights within wilderness and non-wilderness areas of Idaho’s Sawtooth National Recreation Area).
47 See, e.g., Wilkinson, supra note 27.
48 Cushman Dam Decision, 401 F.3d at 989, amended by 410 F.3d at 516.
49 This would be the simple summary of the nine years of litigation known as the Boldt case (after federal District Judge George Boldt) that came to a conclusion in Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658 (1979).
50 See, e.g., United States v. Winans, 198 U.S. 371, 380–81 (1905) (“The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians . . . and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.”); Seufert Bros. Co. v. United States, 249 U.S. 194, 199 (1919) (“[C]learly . . . their understanding of the treaty was that they had the right to resort to these fishing grounds and make use of them in common with other citizens of the United States—and this is the extent of the right that is secured to them by the decree we are asked to revise.”); Puyallup Tribe v. Dep’t. of Game of Wash., 391 U.S. 392, 394–98 (1968) (Puyallup I) (“To construe the treaty as giving the Indians no rights but such as they would have without the treaty . . . would be an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of
class historian, Richard White, has made a lifetime study of this subject. He is quoted not in the majority opinion but in the dissent (both of which are now vanished in the shame that has descended on this case):

When read with a real attempt to discern Indian concerns, the treaty journals reveal a concern on the part of the Indians for preserving their entire subsistence cycle and particularly the full range of the species in their fisheries. What Indians wanted was access to their customary food resources.\(^5\)

_Towessnute_ died because the case rested on arrogant utterance, false assertion, and historical revisionism. This _Cushman Dam Decision_ was built on a similar super-structure of self-deception and mischaracterization. Sheer fiction has a deservedly limited life expectancy in a real world.

### C. The Legal Mis-Treatment of Continuing Nuisances

To its fundamental errors on Indian law, the _Cushman Dam Decision_ adds a regrettable mistake on environmental law. In the course of the legal debate on the Cushman Project's long-standing "takeover" of Skokomish tribal lands, diligent researchers came across the doctrine of "continuing" trespass and nuisance.\(^5\) Problems at Cushman dam certainly seem to be "continuing" in the vernacular sense. They began in the 1920s and are still going strong in 2005. Cushman dam itself is operating under an authority FERC deftly describes as a "perpetual annual license."\(^5\)

Judge Kozinski discovered that the characterization of nuisance or trespass as "continuing" figures in the application of the statute of limitations and in the measure of damages.\(^5\) A continuing nuisance, as distinguished from a permanent nuisance, is defined as "reasonably abatable" by the majority opinion.\(^5\) The Cushman Dam was held not to be reasonably abatable because costs of fixing the problem would exceed the benefits to the tribe.\(^5\) Thus, the Cushman nuisance was declared a permanent one and the entire nuisance-trespass claim was barred by the statute of limitations.

This continuing nuisance doctrine was not misstated by the majority opinion. It was not misunderstood. It was misapplied to divest the Natives of their properties and the river of its life.

Circuit Judge Susan B. Graber (joined by Judges Harry Pregerson, Richard A. Paez, and Marsha S. Berzon) saw the danger in this "abatability" doctrine.\(^5\) She identified issues of fact in the tribe's nuisance-trespass

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\(^5\) _Cushman Dam Decision_, 401 F.3d at 1006, amended by 410 F.3d at 531.

\(^6\) _See infra_, note 54.

\(^7\) _See_ Lac Courte Oreilles Band v. Federal Power Comm'n, 510 F.2d 198, 205 (D.C. Cir. 1975) (describing perpetual license phenomenon).

\(^8\) _Cushman Dam Decision_, 410 F.3d at 518 (majority opinion); _see also_ WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR & WATER, VOL I, § 2.7, at 75–77, § 2.10, at 89–91 (1986).

\(^9\) _Cushman Dam Decision_, 410 F.3d at 518.

\(^10\) _Id._

\(^11\) _Id._ at 520–21.
claims for aggradation (siltation of the river), and she credited tribal
evidence that aggradation could be abated by dredging the river or
increasing the flushing flows. The majority and Judge Graber are divided
philosophically over how demanding and urgent "abatability" must be. Judge
Graber's law has technology-forced improvements built into it.

The majority's casual (if firm) conclusion that "nothing can be done" to
repair this gross and historic intrusion is heavy with irony. Nuisance is
quintessentially a corrective justice doctrine, and one who is stripped of
property can expect its return without a philosophical excursion into the
costs and benefits of setting things right. But it didn't work that way at
Cushman, and the Indians' chances of getting any corrective relief under
classical nuisance theory are now blocked by some cold and contrived cost-
benefit test built into the "abatability" doctrine.

The majority's dismissal of the nuisance doctrine at Cushman is wrong
on an additional ground. It is important to understand the full purport of a
quick trigger on the statute of limitations insisted upon by the majority. It is
a deft way to give gross environmental divestitures a clean bill of legal
health. Understand the full consequence of the majority's utilitarianism now
written into the very definition of continuing nuisance: it is a world of "dead
zones" and "sacrifice areas" and scorched earth enclosed by prudential
counseling against improvident cleanups; it is the North Fork of the
Skokomish with the fish long gone and the water somewhere else.

Judge Kozinski also neatly orchestrated the escape of the City of
Tacoma and its public utility from liability under section 803(c) of the
Federal Power Act. It seemed an impossible feat. Section 803(c) could not
be more clear: "[e]ach licensee hereunder shall be liable for all damages
occasioned to the property of others by the construction, maintenance, or
operation of the project works or of the works appurtenant or accessory
thereto, constructed under the license, and in no event shall the United
States be liable therefore." Are not ruination of the reservation, capture of
the river, and destruction of the fisheries "damages" to the "property of
others" for which recompense is necessary? Section 803(c) creates no
federal right of action, the court reasoned, but only preserved existing state-

D. Being Judicious

Towessnute and Cushman Dam are documents similar in tone and
spirit. They are judicial "opinions" that show no joy or curiosity or sympathy.

58 Id.
59 Id. at 520-22.
60 RODGERS, supra note 53, §§ 2.1, 2.4.
61 Cushman Dam Decision, 410 F.3d at 518-19.
63 See Cushman Dam Decision, 410 F.3d at 519 (interpreting 16 U.S.C. § 803(c)).
64 Id. at 518.
They show no interest even in getting the story straight. Some years ago Judge Alex Kozinski wrote a decision (he was the dissenter) in which he expressed doubts that the Indians of the Columbia River took up permanent residence at their fishing places. Nobody with a reasonably open mind could doubt this. The reservations were deliberately placed well away from the river (seventy miles or so) and the Indians were obliged to travel these long distances by mid-nineteenth century means to reach their only available food supply. At the moment of the treaties, living close to the river became a survival option for the Natives. Nineteenth-century researchers understood this though twentieth-century courts may not.

*Towessnute* and *Cushman Dam* are both malignant in tone and dismissive in posture. The *Cushman Dam* majority opinion is replete with distinctions that do not matter, implausible rewrites of history, and hasty dismissal of doctrines that might help Indians. The decision is a study in

65 Sohappy v. Hodel, 911 F.2d 1312, 1325 n.5 (9th Cir. 1990) (Kozinski, J., dissenting). To be precise, Judge Kozinski wrote: "I must disagree with the majority's implicit assertion that, immediately prior to the signing of the 1855 treaties, the Indians maintained permanent or semipermanent structures on the shores of the Columbia River on a year-round basis. We just don't know." Historical truth, then, is a matter of the sufficiency of the record while historical fiction is subject to judicial notice. On the "permanency" of Indian life on the river, Judge Kozinski might enjoy reading about Tommy Kuni Thompson, Wyam Chief and lifelong resident of the Celilo Indian village. Thompson was born in 1855, the very year of the treaty, and died in 1959 with 104 years invested in the fisheries. *See* JOAN ARRIVEE WAGENBLAST & JEANNE HILIS, *FLORA'S SONG: A REMEMBRANCE OF CHIEF TOMMY KUNI THOMPSON OF THE WYAMS* (Optimist Printers 1993).

66 DUPRIS ET AL., supra note 30, chs. 2–3.

67 *See* GEORGE W. GORDON, *REPORT UPON THE SUBJECT OF FISHING PRIVILEGES, ETC., GUARANTEED BY TREATIES TO INDIANS IN THE NORTHWEST WITH RECOMMENDATIONS IN REGARD THERETO* 46 (1889) (criticizing a decree requiring Indians to remove drying and curing houses at the end of each fishing season because "this would be tantamount to a denial of the Indians' right to take fish at all").

68 Judge Kozinski distinguishes *Adair* in complete ignorance of the on-reservation / off-reservation distinction that is common to all Stevens treaties. 401 F.3d at 989, amended by 410 F.3d at 516. He distinguishes *Kimball* on the fatuous ground that individual Indian treaty rights are enhanced, not diminished, by termination. 410 F.3d at 516 n.7. He distinguishes *Oneida* without reference to the *Tee-Hit-Ton* precedent. Id. at 514; *see also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289 (1956) (denying compensation to Alaskan Natives with aboriginal right to occupancy for taking of timber by federal licensee). He distinguishes *Winans* as an odd example of an equitable treaty suit against a private party, not knowing or caring to know that the oddity identified is the norm. *Cushman Dam Decision*, 410 F.3d at 512.

69 Judge Kozinski twists the evidence on fishing into the *New Mexico* mould in utter defiance of all that is known about the Northwest Indian fishing cultures. *Cushman Dam Decision*, 401 F.3d at 989, amended by 410 F.3d at 516. He treats *Winters* as if it were a "public land" reservation case, ignoring the separate historical status of Indian lands and properties. *Id.* He treats the City of Tacoma and the Tacoma Public Utilities as "non-contracting" parties as if the century-and-a-half of conflict over the treaties did not inevitably involve private parties in the very sticky business of making Indians' property their own. 410 F.3d at 524.

70 The interpretive canons are dismissed on the improper ground that they "cannot be extended to reach cases where a particular interpretation could not have been contemplated by the parties." *Id.* at 516 n.9. The canons are often applied in this context. *See*, e.g., United States v. Washington, 506 F. Supp. 187, 203, 204, 207 (W.D. Wash. 1980), *aff'd in part and rev'd in part en banc*, 759 F.3d 1353, 1357 (9th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985) (discussing interpretive canons of Indian treaties). The court invokes a flinty-eyed, common law pleading rule to declare the state claims not preserved under the statutes of limitations. *Cushman Dam
sneering insolence. It is a political opinion, and it will produce its own harvest of regrets.

E. The Strategy of Redaction

The tribe and its attorneys are no doubt appreciative of the court's take-back of things said about water rights. The issue was not argued and the decision was wrong.

But the lopping off of much-regretted paragraphs is a clumsy tool. It cannot reach tone and style and impoverished scholarship. Judge Henry Friendly was a great judge who served a professional lifetime on the Second Circuit. His rule was that anything written with his concurrence got his help, advice, and editorial assistance.\(^7\) He put a great deal of himself into collective decisions written by others.

The problems with the Cushman decision go deeper than the remedy of hasty surgery. Perhaps it is the mourning of the passing of a federal judiciary that used to be.

III. Conclusion

In the wake of Towessnute, the Yakima Indian, George Meninick, then seventy-seven years old, was arrested and fined for fishing at his traditional place at Töp-tut on the Yakima River. On January 21, 1921, Meninick spoke on his own behalf before the Washington Supreme Court. He spoke in his Native tongue but with a translation handy.\(^7\) One of his arguments was that upholding the treaties was as important to the honor of the white man as it was to the welfare of the Indians. "I have tried to speak as the spirit of my father would speak," said Meninick. "He never taught me lies. He taught me to speak the truth and to stand by what is right, and we hope you, Chief Judge, will speak as the spirit of Stevens would speak if he were here today. We are sure he would never want it said that he deceived the Indians with lying words or that he made promises for the white people that they would never keep. [So] take this Treaty out of the grave where it lies buried in error," Meninick added, "shake off the dust from it so you can see its words plainly, read it as the Spirit of Governor Stevens and of our fathers would want you to interpret it, as they understood it and agreed to it. Then hold it up high so all the people can know its truth, for when the white people really

\(^7\) Based on observation when I was a law clerk to the Hon. Frederick Van Pelt Bryan, Southern District of New York, many years ago.

\(^7\) George Meninick, Plea Before the Washington State Supreme Court (Jan. 27, 1921) (transcript available in the National Archives, Pacific Northwest Region, Record Group No. 75, BIA, Box 126, File #115 Hunting and Fishing (General), 1930-1943).
know this truth, I am sure they will see to it that the Indians may have the rights which the Treaty secures for them." These are the sentiments that destroyed Towessnute and they are the same sentiments that will bring down the reincarnation of this opinion in the sorry rulings in this Cushman Dam decision.

It has been twenty-five years since Judge William Orrick held in these same treaty cases that "implicitly incorporated" in the treaties' fishing clause "is the right to have the fishery habitat protected from man-made despoliation." He could not understand how "the right to take fish would be reduced to the right to dip one's net into the water . . . and bring it out empty." It has been nine years since the United States Environmental Protection Agency said of the Cushman Project that continuation as is would yield "significant, big term (30 to 50 years) adverse ecological, social, economic and cultural impacts." Still, the damage continues.

Surgeons do not operate on their patients without observing the symptoms and evaluating the context. The jurists who joined in this decision to sanction the destruction of the Skokomish River should be obliged to operate under similar rules. They should not be allowed to hide their eyes and deny their sympathy to the Skokomish people on the reservation, to the Skokomish River that no longer flows, or to the "dead zone" that lingers in Hood Canal.

Towessnute was the source of its own regrets and apologies. The Ninth Circuit's ruling in Cushman Dam will suffer a similar fate as people turn away from its calculated insolence and strive for a law that is sympathetic, reasoned, and honest.

73 Id.
75 Id. at 203.
77 It is painful to see that five judges concurred in the majority opinion—Schroeder, Rymer, Gould, Bybee, and Callahan. Some decisions are so important as to be career-defining. And for some choices, there are only regrets. But the wonderful thing about judicial decisionmaking is that minds can be changed upon further reflection.
IV. APPENDIX: THE OPINIONS THAT ARE NO MORE

Skokomish Indian Tribe v. United States, 401 F.3d 979, 989–90 (9th Cir. 2005) (Opinion by Kozinski, J., joined by Schroeder, Rymer, Gould, Bybee, and Callahan):

B. Reserved Water Rights Claim

The Tribe also sues on the theory that the City has violated water rights that were impliedly reserved to the Tribe when it entered into the Treaty with the United States.

In Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), the Supreme Court held that federal reservations of public land can sometimes carry implied property rights in appurtenant waters. "While many of the contours of what has come to be called the 'implied-reservation-of-water doctrine' remain unspecified, the Court has repeatedly emphasized that [the United States] reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more.'" United States v. New Mexico, 438 U.S. 696, 700, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978) (quoting Cappaert v. United States, 426 U.S. 128, 141, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976)). The Court has found implied water rights stemming from a reservation of public land only where "without the water the purposes of the reservation would be entirely defeated." Id. But "[w]here water is only valuable for a secondary use of the reservation, . . . there arises the contrary inference that [the United States] intended, consistent with its other views, that the [reservation] would acquire water in the same manner as any other public or private appropriator." Id. at 702, 98 S.Ct. 3012.

The district court concluded that the water diverted by the City was not necessary for any primary purpose of the reservation. The Tribe argues that this was error, contending that the City has infringed upon its implied water rights in the Skokomish River by impeding its ability to fish. We agree with the district court that the Tribe cannot survive summary judgment with its claim that fishing was a primary purpose of the reservation.

The Tribe directs us to submitted declarations from a historian and a cultural anthropologist, but these declarations only suggest that fishing was important to the Tribe, and that the United States intended to ensure the Tribe was not excluded from its fisheries. Demonstrating that the United States intended for the Tribe to continue fishing on the reservation is not the same as showing that fishing was a primary purpose of the reservation. Cf. id. at 716, 98 S.Ct. 3012 ("While Congress intended the national forests to be put to a variety of uses, including stockwatering, not inconsistent with the two principal purposes of the forests, stockwatering was not itself a direct purpose of reserving the land."); id. at 716–17, 98 S.Ct. 3012 ("Congress, of course, did intend to secure favorable water flows, and one of the uses to which the enhanced water supply was intended to be placed was probably stockwatering. But Congress intended the water supply from the Rio Mimbres to be allocated among private appropriators under state law.").
Nor does the Treaty language help the Tribe. The Treaty merely provides that the Tribe shall have "[t]he right of taking fish . . . in common with all citizens of the United States." Treaty, art. 4. This language distinguishes our case from United States v. Adair, 723 F.2d 1394 (9th Cir.1983), where we based our finding of implied water rights in part on treaty language "expressly provid[ing] that the [plaintiff Indian Tribe] will have exclusive on-reservation fishing and gathering rights." See id. at 1409 (emphasis added). The Treaty language in this case cannot make up for the inadequacy of the evidence the Tribe has presented.

We thus conclude that the district court properly granted summary judgment for defendants on the Tribe's reserved water rights claim.

Skokomish Indian Tribe v. United States, 401 F.3d 979, 1004-07 (9th Cir. 2005) (Berzon, C.J., dissenting in part, with whom Pregerson, Paez, and Rawlinson concur)

III

With respect, finally, to plaintiffs' reserved water rights claims under Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), the majority concludes that the Tribe fails to show, for purposes of surviving summary judgment, that there is a factual dispute concerning whether preserving its ability to fish was a primary purpose of its reservation under the Treaty. The majority's water rights analysis, once again, entirely disregards binding precedent, proceeding as if both the reserved water doctrine and the interpretation of treaty fishing rights language were matters of first impression. They are not.

Taking these questions in reverse order:

(1) I do not believe that the interpretation of the "right of taking fish" language is directly controlling on the reserved water rights issue. Reserved water rights cases usually concern preservation of water flows of rivers and streams appurtenant to a federal reservation. See, e.g., Winters, 207 U.S. at 566-67, 28 S.Ct. 207; Joint Bd. of Control v. United States, 832 F.2d 1127, 1131 (9th Cir.1987); United States v. Adair, 723 F.2d 1394, 1408 (9th Cir.1983). The Treaty fishing language, in contrast, pertains primarily to off-reservation fishing, preserving fishing rights on nonreservation land that is accessible to both Indians and non-Indians. See, e.g., Fishing Vessel, 443 U.S. at 674-85, 99 S.Ct. 3055.

This majority is wrong, however, in stating that the "right of taking fish" language is not pertinent at all in establishing, for purposes of the Winters doctrine, that preserving a fishing culture was a primary purpose of the reservation. Ante at. The "taking fish" language indicates awareness by the parties to the Treaty of the importance of fishing to the Tribe. Surely, if the parties were concerned enough with protecting the Tribe's access to fish to

"That language comes from article 4 of the Treaty and explains that "[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States . . . ."
create easements over private land so as to allow off-reservation fishing, see *Winans*, 198 U.S. at 381, 25 S.Ct. 662, they would also be centrally concerned with preserving the Tribe's ability to fish in water accessible on the reservation itself.

Further, decades of hard-fought litigation concerning Northwest Indian fishing rights have resulted in a Treaty interpretation, ignored by the majority, that supports the Tribe's position. *Fishing Vessel* concerned the meaning of identical treaty language to that in this case. See 443 U.S. at 674, 99 S.Ct. 3055. In *Fishing Vessel*, the Washington Game Department and, later, the State of Washington, proposed an "equal opportunity" approach to the language, arguing that "the treaties gave the Indians no fishing rights not enjoyed by non-treaty fishermen except the two rights previously recognized by decisions of this Court—the right of access over private lands to their usual and accustomed fishing grounds." *Id.* at 671, 99 S.Ct. 3055 (citations omitted).

The Supreme Court, however, unequivocally rejected such an approach. The Court held that the treaty language does not mean that Indians have only the same right as individual non-Indians, but rather, that they retain a right to a portion of the fish runs in an amount "so much as . . . is necessary to provide the Indians with a livelihood—that is to say, a moderate living." *Id.* at 677, 686, 99 S.Ct. 3055. While the percentage distribution can vary depending upon factual conditions, the salient point is that the "treaty guarantees the Indians more than simply the 'equal opportunity' along with all of the citizens of the State to catch fish, and it in fact assures them some portion of each relevant run." *Id.* at 681-82, 99 S.Ct. 3055. In so ruling, *Fishing Vessel* exhaustively reviewed the treaty language itself, additional language in the treaties, and six of the Court's precedents, concluding that the treaty language is "unambiguous" and that all of the Court's precedents reject an "equal opportunity" approach. See *id.* at 674–84, 99 S.Ct. 3055.

The majority ignores this binding treaty interpretation, relying instead on the absence of any language assuring exclusive on-reservation fishing rights. For present purposes, however, the question is not whether any fishing rights reserved are exclusive. Rather, what is here pertinent is that the treaty does reserve a right to take fish that goes beyond that held by citizens generally. That interpretation of the treaty, commanded by the precedents, supports the conclusion that a primary purpose of entering into the Treaty and establishing the reservation was preserving the Indians' ability to engage in subsistence fishing.

(2) Looking at the record as a whole, including the treaty language, I would hold that the Tribe made a sufficient factual showing on summary judgment that preserving the Tribe's fisheries was a primary purpose of agreeing to the Treaty and creating the reservation.

11 "[A]n equitable measure of the common right should initially divide the harvestable portion of each run that passes through a 'usual and accustomed' place into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." *Fishing Vessel*, 443 U.S. at 685, 99 S.Ct. 3055.
In interpreting Indian treaties, we pay particular attention to the sense
in which the Indians would naturally have understood the treaty. As Fishing
Vessel explained:

When Indians are involved, this Court has long given special meaning to
this rule. It has held that the United States, as the party with the
presumptively superior negotiating skills and superior knowledge of the
language in which the treaty is recorded, has a responsibility to avoid taking
advantage of the other side. "[T]he treaty must therefore be construed, not
according to the technical meaning of its words to learned lawyers, but in
the sense in which they would naturally be understood by the Indians."

443 U.S. at 675-76, 99 S.Ct. 3055 (quoting Jones v. Meehan, 175 U.S. 1,
11, 20 S.Ct. 1, 44 L.Ed. 49 (1899) (alteration in original)). As noted, fishing
was sufficiently important to the Tribe that even off-reservation fishing
rights were enshrined in the Treaty, suggesting that the Tribe would not have
agreed to the Treaty were it not assured that it could continue its traditional
fishing way of life. In addition, there is expert historical evidence in the
record so indicating, and indicating as well that the United States saw
preservation of the Tribe's fisheries as essential to the Treaty.

Moreover, the evidence that TPU and the City offer to refute the Tribe's
claim is not enough to support summary judgment. They assert that a
primary purpose of the reservation is agriculture. Assuming that to be true,
such a purpose would not preclude finding that another primary purpose of
the reservation was fishing. There does not have to be only one primary
purpose to a reservation. See Adair, 723 F.2d at 1410 ("Neither Cappaert [, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976),] nor New Mexico [, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978),] requires us to choose
between [agriculture or hunting/fishing] or to identify a single essential
purpose which the parties to the 1864 Treaty intended the Klamath
Reservation to serve."); see also Colville Confederated Tribes v. Walton, 647
F.2d 42, 48 (9th Cir.1981) (holding that there was an implied reservation of
water for fishing grounds while recognizing that both "[p]roviding for a land-

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12 For example, Richard White, Professor of American History at Stanford University and an
expert on the Stevens treaties and the Puget Sound tribes, wrote that:

When read with a real attempt to discern Indian concerns, the treaty journals reveal a
concern on the part of the Indians for preserving their entire subsistence cycle and
particularly the full range of the species in their fisheries. What Indians wanted was
access to their customary food resources.

13 Professor White's declaration reports, relying on documents concerning the negotiation of the
Stevens treaties, that Stevens promised the Indians that "as for food, you yourselves now, as in
times past, can take care of yourselves ... you will have the means and the opportunity to
cultivate the soil to get your potatoes and to go over these waters in your canoes to get your
fish." (emphasis added). Professor White goes on to explain:

Stevens's desire for Indians to have permanent access to fish, including shellfish, makes
perfect sense given his ambitions for the treaty. Permanent access to food supplies
meant that the costs of the treaties could be kept down. Permanent access to resources
meant that Indians could feed themselves and still be available for seasonal labor among
whites. Permanent access to resources meant that Indians could continue to serve as
suppliers of shellfish and other fish to the white market.
based agrarian society” and that “preservation of the tribe’s access to fishing grounds” were purposes for the reservation).

Furthermore, the majority’s comparison to Adair to note that decision’s reliance on the express recognition of fishing rights is unpersuasive. That the treaty at issue in Adair expressly recognized an exclusive fishing right does little to impair the Tribe’s case here. Express treaty recognition of the specific purpose as exclusive is not necessary to recognize an activity as a primary purpose of a reservation. See Adair, 723 F.2d at 1409 (implying the right to hunt from language that only noted “fishing and gathering rights”). Indeed, express recognition of any purpose is not even necessary for that purpose to be a primary one. Colville Confederated Tribes, 647 F.2d at 47 & n. 8 (implying a reservation of water for both irrigation and fishing purposes from a one paragraph Executive Order that articulates no purpose for the reservation).14

The majority does not consider in any detail the evidence submitted by the Tribe regarding its Winters claim, instead responding to the Tribe’s claims with a narrow and inaccurate reading of the record and of our precedents. I submit that the weight of history and the unequivocal judicial authorities compel an understanding of Indian law that accounts for the unique traditions of Indians. Looking at the record and at the precedents with the requisite historical perspective, I conclude that summary judgment on the reservation of water rights claim was improper.

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In sum, because I find no support for barring the Tribe and its members from bringing suit—either under the federal common law based on Treaty-secured rights or via § 1983—I respectfully dissent. I also dissent from the grant of summary judgment on the reserved water rights claim. Once more, because the majority does not decide the question, critical though it is, I do not decide whether the Tribe or its members have alleged a right to preservation of fisheries that is protected under federal common law or § 1983.

14 I am not prepared to say how many fish the Tribe is entitled to or how many gallons of reserved water that implies. Those questions have no answer until there is a definitive determination, after trial, of what water rights were reserved by the Treaty, the question never reached by the majority.