No. 08-35794

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA; SWINOMISH TRIBAL COMMUNITY; NISQUALLY INDIAN TRIBE; PORT GAMBLE S'KLALLAM TRIBE; SKOKOMISH INDIAN TRIBE; MAKAH INDIAN TRIBE; NOOKSACK INDIAN TRIBE OF WASHINGTON STATE; UPPER SKAGIT INDIAN TRIBE; LUMMI NATION
Plaintiffs-Appellees

v.

STATE OF WASHINGTON
Defendant-Appellee,

and

SAMISH INDIAN TRIBE
Applicant in Intervention-Appellant

ON APPEAL FROM THE FEDERAL DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
(Hon. Ricardo S. Martinez)

BRIEF FOR THE UNITED STATES IN RESPONSE TO JUNE 17, 2009 ORDER

Of Counsel:
COLLEEN KELLEY
JASON C. ROBERTS
Office of the Solicitor
U.S. Department of the Interior
Washington, D.C. 20240

JOHN C. CRUDEN
Acting Assistant Attorney General

WILLIAM B. LAZARUS
PETER C. MONSON
ELIZABETH ANN PETERSON
Attorneys, Department of Justice
P.O. Box 23795, L'Enfant Station
Washington, D.C. 20026
(202) 514-3888

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INTRODUCTION

On June 17, 2009, this Court ordered the parties to this litigation to submit briefs setting forth their positions on the question whether this case should be heard *en banc*. The United States has previously set out its position on this question in a petition for rehearing *en banc* filed on March 22, 2005, and again in its answering brief in this appeal. The United States urged in those previous filings that *en banc* consideration is necessary to maintain uniformity of this Court's decisions, which – until the most recent panel decision in this case in 2005, *U.S. v. Washington*, 394 F.3d 1152 (9th Cir. 2005) ("*Samish I*") – consistently held that federal acknowledgment as an Indian tribe is both legally and factually distinct from successorship to rights under Indian treaties; and that Rule 60(b)(6) relief was unavailable where the moving party previously had fully presented its case to the courts and used Rule 60(b)(6) to seek a different outcome on new facts. See*, e.g., U.S. v. Washington*, 98 F. 3d 1159 (9th Cir. 1996). Because this Court's precedents explicitly prevented other parties to this case from participating in litigation that would substantially affect their interests under the rule announced in *Samish I*, and because *Samish I* might well open to relitigation all of the judgments entered to date in this case, the United States urged this Court to hear the case *en banc*.

BACKGROUND

The facts underlying this litigation are set out in detail at pp. 2-15 of the United States' brief as appellee in the current appeal and pp. 2-7 of the Petition for Rehearing. The facts relevant here may be summarized briefly as follows.

In the Stevens Treaties, the United States agreed that the signatory tribes would reserve, in addition to portions of their territory, their right to fish outside their reserved lands at "usual and accustomed" places. See 12 Stat. 928 (1855). In *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974) *aff'd,* 520 F.2d 676 (9th Cir. 1975), cert. denied sub nom *Washington Reef Net Owners Association v. United States*, 423 U.S. 1086 (1976) ("*Washington I"*), the district court ruled that the treaty tribes had fishing rights that entitled them to take up to fifty percent of the harvestable fish passing through their off-reservation fishing grounds[1/] and allocated the rights among successors to the treaty signatories then residing in the State of Washington. Following the favorable judgment in *Washington I*, Samish and other groups – asserting that they were political successors to treaty-signatory tribes – sought to intervene to claim treaty fishing rights.

The district court denied Samish's motion to intervene on the ground that

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[1/] The U.S. Supreme Court ultimately affirmed this interpretation of the treaty language. *State of Washington v. Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 685 (1979).

Samish was not recognized as a tribe by the federal government. This Court rejected that reasoning. *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981) ("*Washington II*"). It instead engaged in its own review of the record to determine whether Samish had established facts showing that it was the successor to the Samish tribe that was a treaty signatory (*id.* at 1372), and concluded that it had not. This Court acknowledged that it had affirmed the district court's determination in *Washington I* that other groups that were not then federally recognized are treaty successors. See *id.* at 1374. It nonetheless held that Samish had not made a sufficient showing of continuous political and cultural cohesion to establish that it was the political successor to a treaty tribe, and therefore affirmed the denial of Samish's motion to intervene. *Id.*[2/]

In 1972, before moving to intervene in *Washington I*, Samish requested that the Secretary of the Interior recognize it as a tribe; and following this Court's conclusion in *Washington II*, it continued to press Interior for acknowledgment as a tribe. Samish refiled its request in 1979 under Interior's then-newly-promulgated regulations governing acknowledgment of non-recognized groups as Indian tribes.

[2/] Judge Canby dissented. In his view, the assumption that federal recognition was required for the exercise of treaty rights permeated the district court's factual findings, which therefore could not support the legal conclusion that the groups were not successors to treaty signatories under the correct legal standard. 641 F.2d at 1374-76.

See *Greene v. United States*, 996 F.3d 973, 975 (9th Cir. 1993) ("*Greene I*"). The Secretary denied Samish's application in 1987, whereupon Samish sought judicial review of the Secretary's action and judicial recognition of treaty successorship. *Id.*

The district court held that Samish could not relitigate its treaty successorship and denied an application by the Tulalip Tribe to intervene in the proceedings related to Samish's federal acknowledgment. See *Greene I*, 996 F.2d at 973. On Tulalip's appeal from that ruling, this Court affirmed the denial of intervention, relying on the district court's conclusion that Samish could not relitigate its treaty successorship claim. *Id.* Although it recognized that the showing necessary to establish federal acknowledgment is similar to the requirements for demonstrating treaty successorship, this Court held that "each determination serves a different legal purpose and has an independent legal effect," *Greene I*, 996 F.2d at 976-77, and that Samish therefore "might document repeated identification by federal and state authorities * * * sometime after or independent of the 1855 Treaty" to gain acknowledgment. *Id.* (citation omitted). This Court accordingly concluded that, although Samish was barred from relitigating the question of its claimed treaty successorship, Samish nonetheless was entitled to reassert its request for federal acknowledgment, which would not "self-execute" treaty rights. See *Greene I*, 996 F.2d at 977.

In a subsequent appeal, this Court ruled that, while *Washington II* "finally determined the Samish were not entitled to tribal treaty fishing rights," *Greene I* had established that "the issues of tribal recognition and treaty tribe status [are] fundamentally different." *Greene v. Babbitt*, 64 F.3d 1266, 1269 (9th Cir. 1995) ("*Greene II*"). This Court therefore again held that the conclusion in *Washington II* that Samish was not a treaty successor did not preclude Samish's pursuit of recognition as a tribe for purposes of securing benefits for its members under federal entitlement programs available to Indians. The Court explained that "the recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights." *id.* at 1270.

This Court rejected the Tulalip Tribe's attempt to intervene in the litigation regarding Samish acknowledgment on the ground that Tulalip had no interest in the question of Samish's acknowledgment status, and rejected Tulalip's argument that factual determinations in the administrative proceedings could be used to overturn the decisions in *Washington I* and *Washington II*. The Court reasoned that the acknowledgment proceedings "'will not consider' treaty rights established by [*Washington I*]." *Greene I*, 996 F.2d at 977; and that Tulalip's asserted interest in defending *Washington II* from collateral attack was "immaterial" because the district court had "explicitly ruled that the Samish may not use the reopened hearing to attack

[the treaty rights decisions]." *Id.* It ruled that Tulalip's concern that a decision to acknowledge Samish could undermine the finality of *Washington II* was unwarranted, because the *Washington I* court "need not accord any deference to an agency proceeding that has been expressly limited to matters other than rights under the 1855 treaty." *Id.* at 978. This Court reiterated that under *Washington I*, "recognition or lack of recognition by the Secretary of the Interior does not determine whether the tribe has vested treaty rights." *Greene II*, 64 F.3d at 1270; and that *Greene I* had conclusively determined that the interests at stake in the treaty-rights litigation would not be affected by a decision to recognize Samish, because "the question of federal recognition as a tribe 'd[oes] not implicate treaty claims.'" *Greene II* at 1271, quoting *Greene I* at 975.

In 1993, three of the parties – not including Samish – to *Washington II* sought relief from that judgment pursuant to Rule 60(b)(6), alleging that evidence indicating that the district judge who had decided the case may have been suffering from a mental disability at the time of the decision constituted "extraordinary circumstances" warranting such relief. *U.S. v. Washington*, 98 F.3d 1150 (9th Cir 1996). This Court affirmed the denial of that motion, holding that it need not determine whether Rule 60(b) provided the authority to correct an "injustice" in the circumstances presented, because, *inter alia*, a magistrate judge and a panel of this Court had both examined

the record closely and reached the same conclusion as the allegedly disabled judge. 98 F.3d at 1163-64.

In 2002, following a favorable decision on its acknowledgment petition in 1996, Samish moved under Rule 60(b)(6) for relief from the judgment in Washington *II* on the ground that its acknowledgment was an "extraordinary circumstance" warranting relief. The district court denied the motion on the ground that Rule 60(b) generally is not available to remedy "injustice" where no inadequacy or defect in the original proceeding is alleged (ER 59). It further ruled that this Court's repeated rulings to the effect that federal recognition as a tribe is a question independent of the treaty successorship issues decided in *Washington II* had conclusively settled the question of Samish's treaty rights, and had determined that acknowledgment as a federally recognized tribe should not affect the finality of that judgment.

This Court, however, reversed and remanded the case in *Samish I*.[3/] It held (394 F.3d at 1157,1160-61;ER 77,79-80) that this Court's rulings distinguishing

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[3/] Judge Bea dissented, finding the majority's decision "fundamentally" erroneous for two reasons. First, the dissent found (ER 83) that Samish was not precluded in *Washington II* from presenting evidence necessary to establish its treaty rights, and that prior panel decisions had explicitly held that federal recognition as a tribe is not required to establish treaty rights. Second, the dissent found (*id.*) the majority's conclusion that the district court should have relied on the factual findings underlying the Tribe's recognition by Interior as evidence that the Tribe was entitled to treaty status to be contrary to circuit precedent holding that the two determinations were "fundamentally different" and that the court considering treaty rights would owe no deference to the acknowledgment decision.

between treaty rights and federal acknowledgment as a recognized tribe established only that recognition was not *necessary* to establish treaty rights, and not that it was *insufficient* to establish entitlement to such rights. It expressed the view that earlier precedent in the case led instead "to the inevitable conclusion that federal recognition is a sufficient condition for the exercise of treaty rights." 394 F.3d at 1158 (ER78). The *Samish I* panel made clear that it disagreed with *Greene II* that "recognition or lack of recognition by the Secretary of the Interior does not determine whether the tribe has vested treaty rights," but treated this "incorrect" statement of the law in the opinion in *Greene II* as "dicta." See 394 F.3d at 1158 (ER 78). The United States unsuccessfully sought rehearing *en banc* on the ground that the decision in *Samish I* was inconsistent with *Washington I, Greene I,* and *Greene II*.

On remand, the district court considered whether Rule 60(b) relief was warranted in light of other relevant factors (ER 3 at 15), following this Court's conclusion that acknowledgment as a recognized tribe was an "extraordinary circumstance" and concluded that Rule 60(b) relief was not warranted. Samish now argues that that conclusion is barred by the doctrine of law of the case, as reflected in *Samish I*.

ARGUMENT

A. Samish I cannot be reconciled with this Court's precedents in Greene I, Greene II, and Washington I. – The *Samish I* panel reasoned that "federal recognition is a sufficient condition for the exercise of treaty rights." 394 F.3d at 1158 (ER 78). That result is directly contrary to this Court's prior decisions in *Washington I*, *Greene I*, and *Greene II*, in which the Court repeatedly held that the determination whether Samish qualifies for federal recognition and the determination whether the Tribe can exercise treaty rights present distinct issues (*see Greene I*, 996 F.2d at 976-977), and that Samish may not gain fishing rights from federal recognition alone. *Id.* at 977.[4/] Moreover, this Court denied other tribes the right to participate in litigation concerning Samish's acknowledgment on the ground that the decision to recognize Samish would have "marginal influence at best" on any judicial reconsideration of Samish's treaty rights. *Id.* at 978. It held that "recognition or lack of recognition by the Secretary does not determine whether the tribe has vested treaty rights." *Greene II*, 64 F.3d at 1270 and that the "recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights," *Id*.

[4/] The *Samish I* panel acknowledged this conflict, treating as "dicta" the "incorrect" statement in *Greene I* that "in *Washington I* we held that a tribe's recognition or lack of recognition by the Secretary of the Interior does not determine whether the tribe has vested treaty rights." 394 F.3d at 1158 (ER 78).

B. Samish I cannot be reconciled with this Court's precedents concerning the availability of relief pursuant to Rule 60(b) – In *U.S. v. Washington*, 98 F. 3d 1159 (9th Cir. 1996) this Court denied Rule 60(b)(6) relief from the judgment in *Washington II* to three groups that – like Samish – were denied treaty successorship. The three groups asserted that they may have been prevented from proving their claims to treaty successorship by virtue of the ill health of the judge who heard the case. This Court held that Rule 60(b) relief was not warranted, *inter alia,* because "this court, as well as a magistrate judge, closely examined the case and reached the same conclusion," *U.S. v. Washington*, 98 F. 3d at 1163-64; see *Ackermann v. United States*, 340 U.S. 193, 198-201 (1950). *Samish I* nonetheless held that Rule 60(b) relief was available here, because Samish had been denied the opportunity to present its case in "a proper fashion." That conclusion cannot be reconciled with the Court's earlier decision, which denied Rule 60(b) relief in part on the ground that the record here demonstrated that the groups had presented their case to a magistrate, a district court and this Court, all of which had reached the same conclusion.

The district court on remand here found (ER 29) that "it cannot be said with any degree of certainty" that the acknowledgment decision, had it occurred earlier, would have prevented entry of the judgment against Samish regarding treaty fishing rights. In light of the record, on which other groups were able to establish treaty

successorship despite the lack of federal recognition, see *Washington II* at 1374, citing *U.S. v. Washington*, 384 F. Supp. at 327, 378-79, the district court concluded that Samish would be entitled to reopen the record only upon a showing of some defect in the proceeding underlying the court's determination in *Washington II* that it was not a treaty successor. Noting that there had been a five-day trial before a magistrate judge, and a second, *de novo* evidentiary hearing before the federal district judge who concluded in 1979 that Samish was not a successor to treaty fishing rights, the district court found, consistent with this Court's 1996 ruling, that no evidence in the record supported the conclusion in *Samish I* that the Tribe was "effectively prevented" from proving its tribal status in *Washington II*. It denied relief for this reason, among others.

C. Where Circuit precedents are irreconcilable, this Court must call for en banc consideration – As we explained in our Answering Brief, because of the discretionary nature of relief pursuant to Rule 60(b)(6), this Court must affirm the lower court's denial of the motion unless *none* of the grounds on which it concluded that relief was unwarranted was available to it. Accordingly, the district court had discretion to deny the motion on any ground that was not expressly foreclosed. The disposition of this appeal therefore may not require the Court to confront the irreconcilable conflicts with Circuit precedent that are reflected in *Samish I*.

However, the conflicting decisions in this case threaten to unsettle the ongoing management of the treaty fishing rights at issue in this litigation, and may open to relitigation all of the judgments entered to date in this case. In addition, the conflicting rulings at issue here have already raised serious issues in *Evans v. Tulalip Tribes*, 9th Cir. No. 08-35938, and threaten to result in substantial additional litigation and confusion in the event that additional, non-treaty tribes succeed in achieving federal acknowledgment.

With respect to both the question whether recognition is "sufficient" to establish the right to fish and the question whether "extraordinary circumstances" exist for purposes of Rule 60(b)(6) in the absence of evidence that Samish was prevented from proving its case in the prior proceeding, the applicable prior decisions of this court are irreconcilably in conflict. The law of this Circuit is that, unless an alternative method is provided by rule of this Court, "[a] panel faced with such a conflict must call for *en banc* review." *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (*en banc*), citing *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir.1987) (*en banc*), cert. denied, 485 U.S. 989 (1988).

The *Samish I* panel majority ignored the strict limitations of Rule 60(b)(6) at the expense of both the settled expectations of the parties to this longstanding and complex litigation and the public's and the judiciary's interest in the finality of

judgments, by ruling that although Samish fully litigated its case, it was prevented from presenting it in "a proper fashion" and therefore is entitled to Rule 60(b)(6) relief. This expansive interpretation of the limitations in Rule 60(b)(6) is contrary to Supreme Court authority, see *Ackermann*, *supra*, and the law of this Circuit. This Court has long held that "Rule 60(b) was not intended to provide relief for error on the part of the court * * * [n]or is a change in the judicial view of applicable law after a final judgment sufficient basis for vacating such judgment entered before announcement of the change." *United States v. Title*, 263 F.2d 28, 31 (9th Cir. 1959) (citing *Ackermann*). And, although the *Samish I* panel speculated (394 F.3d at 1159) that this Court might have deemed Samish a Treaty tribe if it had been recognized prior to its attempt to intervene, Rule 60(b)(6) may not relieve the movant of the effects of free, calculated, deliberate choices, such as Samish's decision to litigate its intervention in *Washington I* to final judgment while it remained unrecognized. *Ackermann, supra*, at 212. Moreover, *Samish I* allowed such relief where this Court previously had reviewed the very same record and concluded that the plaintiffs in *this case* had fully presented their case to the courts prior to the original judgment. It thus allowed the use of Rule 60(b)(6) to seek a different outcome on new facts, contrary to well-established precedent.

Samish I is contrary to Circuit law regarding the effect of federal

acknowledgment on the exercise of treaty rights and the degree of deference owed by the Treaty rights court to Interior's factual findings in Samish's acknowledgment proceeding. And to the extent that it held that Rule 60(b)(6) relief was available as a matter of law, based on district court actions that were reversed by the court of appeals and on post-judgment administrative actions, *Samish I* significantly broadened the application of Rule 60(b)(6), contrary to established precedent and to the public interest in the finality of judgments.

CONCLUSION

For the foregoing reasons and those explained in our Petition for Rehearing *en Banc* in *Samish I* and our Answering brief in this appeal, the United States urges this Court to call for *en banc* review to resolve the conflicts in its earlier opinions.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
/s/
WILLIAM B. LAZARUS
PETER C. MONSON
ELIZABETH ANN PETERSON
Attorneys, Department of Justice
P.O. Box 23795, L'Enfant Station
Washington, D.C. 20026
(202) 514-3888

Of Counsel:
COLLEEN KELLEY
JASON C. ROBERTS
Office of the Solicitor
U.S. Department of the Interior
Washington, D.C. 20240

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STATEMENT OF RELATED CASES

Michael C. Evans v. Tulalip Tribes, No. 08-35938, pending in this Court addresses issues raised in this case. This Court has previously heard cases between the same parties involving related issues on several occasions: *United States v. Washington*, 520 F.2d 676 (9th Cir 1975); *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981); *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993); *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995); *United States v. Washington*, 98 F.3d 1159 (1996); *United States v. Washington*, 394 F.3d 1152 (9th Cir. 2005).

/s/

Elizabeth Ann Peterson
Attorney, U.S. Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for the United States have been served on counsel this 15th day of July, 2009, through the Ninth Circuit CM/ECF System.

I further certify that copies of the foregoing Brief for the United States have been served this 15th day of July, 2009, on the following participants in the case who are not registered CM/ECF users:

Harry Chesnin, Attorney
Office of the Tribal Attorney
Upper Skagit Indian Tribe
25944 Community Plaza Way
Sedro Woolley, WA 98284

David Hawkins, Attorney
Office of the Tribal Attorney
Upper Skagit Indian Tribe
25944 Community Plaza Way
Sedro Woolley, WA 98284

/s/

Elizabeth Ann Peterson
Attorney, Department of Justice