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NO. 28079-9-III

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LESTER RAY JIM,

Respondent.

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PETITION FOR REVIEW

ROBERT M. MCKENNA
Attorney General

MICHAEL S. GROSSMANN
Senior Counsel
WSBA 15293
(360) 586-3550
JOSEPH V. PANESKO
Assistant Attorney General
WSBA 25289
(360) 586-0643
1125 Washington Street SE
Post Office Box 40100
Olympia, Washington 98504-0100

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I. IDENTITY OF PETITIONER

The Petitioner is the State of Washington, Respondent at the Court of Appeals.

II. COURT OF APPEALS' DECISION

The State seeks review of the published decision of the Court of Appeals, Division III, in *State v. Lester Ray Jim*, Cause No. 28079-9-III.¹ The decision was filed on May 11, 2010.

III. ISSUES PRESENTED FOR REVIEW

The State presents two issues for review by this Court:

1. Do off-reservation treaty fishing access sites purchased and managed by the United States for the use of tribal members constitute “established Indian reservations” held in trust or restricted from alienation so as to preclude State criminal jurisdiction over Indians under RCW 37.12.010?²

2. To the extent *State v. Sohappy*, 110 Wn.2d 907, 757 P.2d 509 (1988), holds that a tribal fishing site owned and managed by the United States for the use of multiple tribes constitutes an “established Indian reservation” for purposes of RCW 37.12.010, should the case be overruled?

¹ The Slip Opinion is attached as Appendix 1.

² The statute is attached as Appendix 2.

IV. STATEMENT OF THE CASE

A. Introduction

This case involves the question of whether the State can exercise criminal jurisdiction over the actions of Lester Ray Jim, a Yakama Indian, when his alleged criminal conduct occurred on a site along the Columbia River that is owned and managed by the federal government for the use and benefit of four tribes with treaty fishing rights. While this case arises in the context of a fisheries crime, the question of criminal jurisdiction under RCW 37.12.010 is analytically the same whether the criminal charge involved a property crime, an assault, or a drug crime. In other words, this is not a fishing rights case—it is a criminal jurisdiction case.

Pursuant to the authority granted by Public Law 280, (Pub. L. 83-280, 67 Stat. 588 (1953)), the State of Washington assumed civil and criminal jurisdiction over Indians and Indian country. RCW 37.12.010. With limited exceptions, this assumption of jurisdiction excluded tribal lands or allotted lands “within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States” *Id.* Under this assumption of jurisdiction, the State may exercise criminal jurisdiction over an Indian who engages in criminal activities off-reservation.

This case challenges the State's assumption of criminal jurisdiction over an Indian at an off-reservation location where Mr. Jim's tribe (the Yakama Indian Nation) and other Tribes hold nonexclusive treaty fishing rights. Mr. Jim was arrested on land purchased by the United States Army Corps of Engineers (Corps of Engineers) to provide Indian fishing access sites along the Columbia River. The access sites were purchased by the Corps of Engineers at the direction of Congress to replace traditional off-reservation fishing sites that were inundated by reservoirs behind federal dams, and then transferred to the Bureau of Indian Affairs. The sites have not been placed in trust for any tribe, nor have they been designated as part of any Indian reservation.

B. Factual and Procedural History

The superior court's opinion provided the following findings of fact, which were unchallenged on appeal:

The Respondent, Lester Ray Jim, an enrolled member of the Yakama Tribe, was commercially fishing on the Columbia River on June 25, 2008. In his gill net Mr. Jim incidentally caught some undersized sturgeon. Although Indians may keep incidentally caught sturgeon for subsistence use, the sturgeon must be between four and five feet in length.

Mr. Jim took the illegal sturgeon to the Maryhill Fishing Access Site. Officers from the Washington State Fish and Wildlife noticed the undersized sturgeon and cited Mr. Jim for unlawfully retaining five undersized sturgeon under WAC 220-32-05100W.

The East District Court of Klickitat County dismissed the citation finding that the State lacked jurisdiction over Mr. Jim because he was on Indian land when cited.

Clerk's Papers (CP) at 50.³

The "Maryhill Fishing Access Site" on which Mr. Jim was cited is a property owned and managed by the Bureau of Indian Affairs (BIA). The site is one of several treaty fishing access sites (TFASs) on the banks of the Columbia River. Congress directed the Corps of Engineers to acquire these sites to replace *off-reservation* fishing locations along the shore of the Columbia River that were submerged by reservoirs behind several dams on the Columbia River. See Pub. L. No. 100-581, § 401(a), 102 Stat. 2938, 2944; S. Rep. No. 577, 100th Cong., 2d Sess. The Corps of Engineers has transferred the sites to the BIA. They are not part of any reservation.⁴

The Klickitat County Superior Court reversed the district court's dismissal of the case after concluding that the State has jurisdiction over Indians acting within Indian country under RCW 37.12.010 (Washington's

³ The cited rule, WAC 220-32-05100W, was a temporary emergency rule promulgated in the Washington State Register. See Wash. St. Reg. 08-14-029.

⁴ Background information about the development of Columbia River Treaty Fishing Access Sites is available on the U.S. Army Corps of Engineers website, <https://www.nwp.usace.army.mil/Pm/Projects/crtfas/home.asp>, and the Columbia River Intertribal Fish Commission website, <http://www.critfc.org/text/inlieu.html>. (Internet sites last visited June 4, 2010.) See also Pub. L. No. 104-303, § 512, 110 Stat. 3658, 3762 (authorizing boundary adjustments that cleared the way for development of the Maryhill Site).

statutory assertion of criminal jurisdiction as conferred by Federal Public Law 280). In assuming criminal jurisdiction over "Indians and Indian territory, reservations, country, and lands" in Washington, the legislature enacted an exclusion for "Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation." The superior court ruled that the Maryhill Treaty Fishing Access Site did not fit within the jurisdictional exclusion for tribal lands or allotted lands held in trust. CP at 50-51. The superior court also determined that its ruling was dictated by *State v. Cooper*, 130 Wn.2d 770, 772-73, 928 P.2d 406, 407 (1996), which had emphasized that the decision in *State v. Sohapp*y, 110 Wn.2d 907, 757 P.2d 509 (1988), was limited to its facts and did not apply.⁵

Division III of the Court of Appeals granted discretionary review and reinstated the district court's dismissal order, relying entirely on *Sohapp*y. Slip Op. at 5. Notwithstanding the *Sohapp*y court's express admonition that its holding was based on inadequate briefing and therefore limited to the Cooks Landing Site, and notwithstanding the *Cooper* court's limitation of *Sohapp*y, the Court of Appeals concluded that *Sohapp*y

⁵ In *Sohapp*y, this Court concluded that the State did not have criminal jurisdiction over an Indian who assaulted an officer on an "in-lieu" fishing site known as Cooks Landing.

controls the issue of State criminal jurisdiction under RCW 37.12.010 at the Maryhill TFAS. *Id.* The Court of Appeals reasoned that the Maryhill TFAS is similar in nature to Cooks Landing (i.e., acquired by the federal government to provide treaty tribes with access to off-reservation fishing places) and is thus “entitled to reservation status” for purposes of the exception to State jurisdiction under RCW 37.12.010. *Id.*

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case merits review under RAP 13.4(b)(1), (2) and (4). First, the decision conflicts with *State v. Cooper*, which considered the full scope of RCW 37.12.010 and confirmed that the statutory exception to the State’s assertion of criminal jurisdiction within Indian country is limited to trust land or restricted allotments *within* an established Indian reservation. *Cooper*, 130 Wn.2d at 776. The decision also conflicts with *State v. Boyd*, 109 Wn. App. 244, 34 P.3d 912 (2001), which followed *Cooper* and also recognized the precision of the exclusion from criminal jurisdiction in RCW 37.12.010—it “removes from state jurisdiction land that is *both* on the Reservation *and* either in trust or land otherwise subject to restriction against alienation.” *Boyd*, 109 Wn. App. at 247 (emphasis added).

Second, this case is of substantial public interest because it effectively bars State criminal jurisdiction over any crime that an Indian may commit at these off-reservation sites. Because this is not a fishing

rights case, but rather a case about State criminal jurisdiction, the Court of Appeals' decision implicates the State's jurisdiction to pursue a charge of murder, rape, drug dealing, or robbery. For example, if a tribal member were to assault a person at one of these off-reservation sites, similar to the assault in *State v. Boyd*, the State would lack criminal jurisdiction over that crime under the Court of Appeals' misapplication of RCW 37.12.010. Accordingly, the Court of Appeals' decision leaves a gap in the State's criminal enforcement authority at these off-reservation sites, contrary to the plain language of RCW 37.12.010; contrary to the legislature's intent to provide for comprehensive criminal jurisdiction over all persons in all parts of the state, except for Indians when they are on their tribal or allotted lands that are both within an established Indian reservation and held in trust by the United States or subject to a federal restriction against alienation; and contrary to the public interest in comprehensive and effective enforcement of the criminal laws.

A. The Court of Appeals' Decision Conflicts with *State v. Cooper* and *State v. Boyd*

The issues presented by this case involve the proper interpretation and application of RCW 37.12.010, which provides that the State has criminal jurisdiction over Indians, but which, with limited exceptions, excludes jurisdiction over Indians on "tribal lands or allotted lands within

an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States.” The Court of Appeals erred in holding that the Maryhill Treaty Fishing Access Site fits within this statutory exception to State jurisdiction, and the holding conflicts with *State v. Cooper*, 130 Wn.2d 770, 777, 928 P.2d 406, 409 (1996), and *State v. Boyd*, 109 Wn. App. 244, 34 P.3d 912 (2001).

The jurisdictional exception in RCW 37.12.010 can be re-stated as follows: With limited exceptions not present here, no State jurisdiction exists over Indians when they act:

- (1) within an established Indian reservation; *and*
- (2) on tribal lands or on allotted lands; *and*
- (3) the lands are held in trust by the United States or subject to a restriction against alienation imposed by the United States.

All three of these elements must be satisfied, with the second and third elements each containing alternatives. Numerous cases, especially *State v. Cooper* and *State v. Boyd*, confirm that RCW 37.12.010 requires all three elements to be present before the statutory language excludes application of the State’s jurisdiction.

In *Cooper*, a defendant convicted of molesting a child on Indian allotment property claimed that the State lacked criminal jurisdiction

against him under the exception in RCW 37.12.010. The defendant and the victim were both members of the Nooksack Tribe, and the allotment land was held in trust by the United States, but the property was outside the boundaries of the Nooksack Reservation. *Cooper*, 130 Wn.2d at 772.

The court in *Cooper* analyzed the language of RCW 37.12.010, focusing heavily on the location of the reservation boundary (the first element of the jurisdictional exception in RCW 37.12.010):

[W]ashington assumed full nonconsensual civil and criminal jurisdiction over all Indian country *outside established Indian reservations*. Allotted or trust lands are not excluded from full nonconsensual state jurisdiction unless they are “within an established Indian reservation.”

Cooper, 130 Wn.2d. at 775-76 (quoting RCW 37.12.010) (emphasis added). Immediately following this paragraph, the court quoted language from *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 475, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979), where the Supreme Court described the State’s jurisdictional exclusion as applying only to certain lands *within* established Indian reservations. *See Cooper* at 776.

Relying upon *State v. Sohapp*y, Mr. Cooper argued that the *situs* of the crime qualified as “reservation” lands, despite being outside the boundaries of the established reservation, because the land was held in

trust by the United States for the benefit of Indians. *Cooper* at 776. This Court strongly disagreed with Mr. Cooper's argument:

As the State points out, Cooper's interpretation would render the phrase "within an established Indian reservation" totally meaningless. If the term "reservation" in RCW 37.12.010 included all Indian lands *outside the formal boundaries of established reservations*, then the exception would swallow the rule.

Id. at 778 (emphasis added). Because the land on which Cooper's crime occurred was not within the formal boundaries of an established Indian reservation, the State jurisdictional exception did not apply, and the Court affirmed Cooper's conviction. *Compare State v. Cayenne*, 165 Wn.2d 10, 13-14, 195 P.3d 521 (2008) (State criminal jurisdiction "does not extend to an offense committed by a tribal member upon trust property located *within the geographical boundaries of a reservation.*") (emphasis added) (citing Const. art. XXV; RCW 37.12.010).

In *State v. Boyd*, 109 Wn. App. 244, 34 P.3d 912 (2001), the defendants attacked campers at a campground within the Colville Indian Reservation, but on land that had been condemned by the Federal Bureau of Reclamation as part of the Grand Coulee Dam project. *Id.* at 246-47. The trial court found that although the lands were within a reservation boundary (the first element of the jurisdictional exception in RCW 37.12.010), they were not tribal lands nor allotted lands, and were

not held in trust or subject to any restriction on alienation (the second and third elements of the jurisdictional exception in RCW 37.12.010). *Boyd* at 248. The Court of Appeals held that absent those factors, the defendants fell within the State's jurisdiction under RCW 37.12.010. *Boyd* at 252.

The *Boyd* defendants argued that the site was under a "constructive trust or constructive restriction on alienation" as a result of a cooperative management agreement between the federal government and the Colville Confederated Tribes. The court rejected the argument. *Id.* at 252-53.

The Court of Appeals in the present matter acknowledges at the outset of its opinion that the Maryhill TFAS "is not on an Indian reservation." Slip Op. at 1. Later, the court again admits that the site is "not on Yakama reservation land," yet the court nonetheless concludes that the land is part of Indian country, and "is entitled to reservation status." Slip Op. at 5. This holding fundamentally conflicts with the language of RCW 37.12.010 as well as the holdings of *Cooper* and *Boyd*, both of which acknowledge the statutory requirement that the exception to jurisdiction applies only to acts occurring within the boundaries of an established Indian reservation. Failing to heed the warning in *Cooper*, the Court of Appeals' ruling here has allowed the exception to swallow the rule.

The Court of Appeals in the present matter also failed to address the fact that the TFASs are not held by the United States *in trust* for any one tribe, nor are the sites restricted from alienation—an additional requirement in RCW 37.12.010 before state jurisdiction can be precluded. This error constitutes an additional conflict with *State v. Boyd*. Even if the Maryhill TFAS were part of an established Indian reservation, the site is owned in fee simple title by the United States government,⁶ more closely resembling the on-reservation lands at issue in *State v. Boyd* where the court upheld the State's criminal jurisdiction.

This Court should accept review under RAP 13.4(b)(1) and (2) to resolve the conflict and to reinstate the State's criminal charge against Mr. Jim.

B. The Court of Appeals' Decision Raises Issues of Public Concern Because it Creates a Significant Gap in Law Enforcement Authority on Tribal Fishing Access Sites

Congress passed Public Law 280 with the intent “to extend the jurisdiction of the States over Indian country and to encourage state assumption of such jurisdiction” *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 887, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986). The primary motivation behind the law “was to remedy the lack of adequate criminal law enforcement on some reservations.” *State v. Schmuck*, 121

⁶ See page 4 above.

Wn.2d 373, 394, 850 P.2d 1332 (1993) (citing *Native Village of Venetie I.R.A. Coun. v. Alaska*, 944 F.2d 548, 560 (9th Cir. 1991); *Bryan v. Itasca Cy.*, 426 U.S. 373, 379-80, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976)). Federal law enforcement on Indian reservations was considered underfunded and lackluster. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 541 (1975).

In 1963, the State legislature accepted Congress's invitation and assumed full criminal and civil jurisdiction over Indians and "Indian territory, reservations, country, and lands within this state" Laws of 1963, ch. 36, § 1 (codified at RCW 37.12.010). Although Public Law 280 authorized the State to unilaterally assume full jurisdiction over crimes and civil cases across entire reservations, the State chose to limit its exercise of jurisdiction by excepting out certain lands within established reservations. See *Washington v. Yakima Indian Nation*, 439 U.S. 498, 499, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1978). The exception operates to leave "substantial play for tribal self-government . . . that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation" *Id.*

The Court of Appeals' holding that the State lacks criminal jurisdiction over Indians at treaty fishing access sites erroneously opens an

enforcement gap that RCW 37.12.010 intended to close—and did close—and which Public Law 280 clearly authorized. When Indians commit crimes outside reservations, they are subject to the jurisdiction of Washington State courts to the same extent as non-Indian citizens.⁷ *Puyallup Tribe v. Wash. Game Dep't*, 433 U.S. 165, 171, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977); *accord Cayenne*, 165 Wn.2d at 13-14.

RCW 37.12.010 does not distinguish between criminal activity related to the exercise of treaty fishing rights and all other criminal conduct. As a result, the Court of Appeals' holding in the present case effectively precludes State criminal jurisdiction over all criminal conduct by tribal members at TFASs.

Because the access sites are not within the formal boundaries of any tribal reservation, no tribe holds general criminal jurisdiction over the sites. *See Settler v. Lameer*, 507 F.2d 231, 240 (9th Cir. 1974) (off-reservation tribal criminal jurisdiction is "very narrow" and "is limited strictly to violations of tribal fishing regulations."). In the Columbia River

⁷ When the State prosecutes tribal members fishing outside their tribe's reservation, the tribal members may raise an affirmative defense that their conduct was consistent with a treaty right. *State v. Petit*, 88 Wn.2d 267, 269-70, 558 P.2d 796 (1977). If the State can prove that the regulation at issue is nondiscriminatory and conservation based, the State can apply the regulation to the off-reservation conduct. *Dep't of Game v. Puyallup Tribe*, 70 Wn.2d 245, 257, 422 P.2d 754, 761 (1967), *aff'd*, 391 U.S. 392, 88 S. Ct. 1725, 20 L. Ed. 2d 689 (1968); *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). A claimed right to fish *does not present a jurisdictional matter*, but rather an affirmative defense that Mr. Jim could raise on remand, if this Court grants review and rules in favor of the State's jurisdiction.

area, the Treaty Tribes have acknowledged concurrent State jurisdiction over tribal members when exercising their treaty rights off reservation.⁸ Furthermore, four separate Tribes share the use of TFASs and each Tribe probably lacks general criminal jurisdiction over actions of the members of the other three Tribes at the sites. *Cf. United States v. Lara*, 541 U.S. 193, 204, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004) (a tribe's power to prosecute non-member Indians "concerns a tribe's authority to control events that occur upon the tribe's own land").

Because tribal criminal jurisdiction is limited, if the State lacks criminal jurisdiction over Indians at TFASs, the federal government would be the only authority remaining to enforce criminal laws against tribal members on TFASs. The federal government's criminal jurisdiction over Indian-on-Indian crimes, however, is also limited to narrow categories of federal crimes and major crimes. *See* 18 U.S.C. § 1152 (General Crimes Act excludes federal jurisdiction over Indian offenses committed against other Indians), 18 U.S.C. § 1153 (Major Crimes Act applies a narrow category of certain major crimes against Indians); *see generally*, William C. Canby, Jr., *American Indian Law in a Nutshell*, Ch. VII.D at 162-69 (4th Ed. 2004).

⁸ *See* 2008-2017 *United States v. Oregon* Management Agreement, Section I.E.4, approved by the court in *United States v. Oregon*, Civil No. 68-513-KI (D. Or. Aug. 11, 2008) (Docket Entry No. 2546).

As a result of the Court of Appeals' holding, non-federal or non-major crimes occurring at TFASs such as Indian assaults against Indians and property crimes would not be subject to state jurisdiction, tribal jurisdiction, or federal jurisdiction. Such a jurisdictional gap unfairly jeopardizes the safety and well-being of the Indians and their families who use the sites, a result that could not have been intended by the legislature or by Congress. The Court of Appeals' exclusion of state criminal enforcement authority on numerous in-lieu fishing sites and TFASs presents an issue of substantial public interest warranting acceptance of review under RAP 13.4(b)(4).

C. This Court Should Accept Review to Overrule *State v. Sohappy*

In *Sohappy*, a tribal member assaulted a police officer at a fishing access site along the Columbia River known as Cooks Landing. *State v. Sohappy*, 110 Wn.2d 907, 757 P.2d 509 (1988). Cooks Landing is one of several "in-lieu" sites, which are similar to treaty fishing access sites, but which were created under a different federal law. Like TFASs, in-lieu sites are off-reservation locations managed by BIA for the benefit of

multiple tribes holding treaty fishing rights in the area.⁹ The *Sohappy* court stated that Cooks Landing “obviously is not within the original boundaries of the reservation itself described in the [Yakama Nation] 1855 treaty; however, it is part of a reservation for purposes of application of our state jurisdiction statute.” *Id.* at 911. The court did not address the other statutory requirements that the land be either tribal land or allotted lands, or that the land be held in trust or be restricted from alienation, in order to qualify for the exception to state jurisdiction. Instead, the court erroneously relied on a federal case analyzing the conceptually and legally distinct question of whether the same fishing site constituted “Indian country” for purposes of federal jurisdiction under 16 U.S.C. § 3372. *Id.* at 910-11 (citing *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985), *cert. denied*, 477 U.S. 906, 106 S. Ct. 3278, 91 L. Ed. 2d 568 (1986)).

Under the principle of stare decisis, a holding of an earlier case can be abandoned upon a clear showing that it is incorrect and harmful. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d

⁹ Both in-lieu sites and treaty fishing access sites are waterfront properties purchased by the federal government to replace off-reservation usual and accustomed fishing places inundated by dams, but different legislation applies to each. *See* Act of March 2, 1945, Pub. L. 79-14, 59 Stat. 10, 22 (in-lieu sites); Act of Nov. 1, 1988, Pub. L. 100-581, § 401, 102 Stat. 2938, 2944-45 (treaty fishing access sites). The BIA promulgated different rules for each category of site. *See* 25 C.F.R. Part 247 (treaty fishing access sites); Part 248 (in-lieu sites). TFASs are reserved for four tribes—the Yakama, Warm Springs, Nez Perce, and Umatilla Indian Tribes. 25 C.F.R. 247.2(b). In-lieu sites are reserved for three of those four Tribes, with the Nez Perce omitted from the list. 25 C.F.R. 248.2.

1092 (2009) (citations omitted). “[O]verruling prior precedent should not be taken lightly.” *Id.*

The errors within *Sohappy* are demonstrated by the analysis of RCW 37.12.010 set forth under Section A of the argument above. The State legislature asserted broad State jurisdiction over Indians in Indian country, carving out a narrow jurisdictional exception applicable only when three separate elements are present. One of the three elements requires the site of the crime to be “within an established Indian reservation.” RCW 37.12.010. The holding in *Sohappy* eviscerated this requirement by excepting State jurisdiction over an admittedly non-reservation site owned by the federal government and held for the use of three separate tribes.¹⁰ The court’s statement that the site must be considered part of the Yakama reservation “for purposes of application of our state jurisdiction statute” rested on an incomplete, and thus erroneous, application of RCW 37.12.010.

The *Sohappy* court appears to have recognized the potential fallibility of its analysis. The court pointed out that the prosecutor’s brief was just four pages long and had cited no cases in support of its argument. *Sohappy*, 110 Wn.2d at 909. As a result, the court did not have the benefit

¹⁰ Each of the three tribes having traditional fishing rights at the in-lieu area have separate, established Indian reservations in Washington and Oregon, and the Cooks Landing site is not within any of those three established Indian reservations.

of substantive briefing opposing the defendant's arguments.¹¹ The court also expressly stated that its holding "is narrowly limited to the in-lieu site here involved." It appears the court never intended its application of RCW 37.12.010 to have precedential import.

The errors contained within the *Sohappy* analysis are harmful in that they continue to cause confusion by courts and litigants. In this case, *Sohappy* prompted a misapplication of RCW 37.12.010 so as to preclude State jurisdiction over off-reservation criminal conduct of Indians. The Court of Appeals and the district court in the present matter ignored or misunderstood *Sohappy*'s explicit limitation to Cooks Landing and applied *Sohappy* to the present case. This result demonstrates the harmful effect of *Sohappy*. As acknowledged in *State v. Cooper*, 130 Wn.2d at 778, the *Sohappy* interpretation of RCW 37.12.010 allows a narrow exception to State jurisdiction to swallow the rule, leading to the removal of State criminal jurisdiction from numerous off-reservation sites along the Columbia River, as occurred here.

Sohappy should be overruled as part of this Court's resolution of this case.

¹¹ A review of the *Sohappy* case files suggests that the prosecutor's four-page brief referenced by the Court was probably the response brief submitted to the Court of Appeals, because the file does not show any response by the prosecutor to the petition for review, nor does the file show that the prosecutor submitted a supplemental brief after the Supreme Court accepted review.

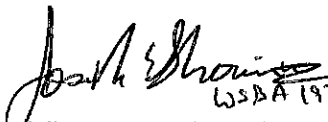
VI. CONCLUSION

The State of Washington respectfully requests that this Petition for Review be granted.

SUBMITTED this 10th day of June, 2010.

ROBERT M. MCKENNA
Attorney General


MICHAEL S. GROSSMANN
WSBA 15293
Senior Counsel


JOSEPH V. PANESKO
WSBA 25289
Assistant Attorney General
Attorneys for State of Washington
1125 Washington Street SE
Olympia, Washington 98504-0100

Appendix 1

FILED

MAY 11 2010

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 28079-9-III
	)	
Respondent,	)	
	)	Division Three
v.	)	
	)	
LESTER RAY JIM,	)	PUBLISHED OPINION
	)	
Appellant.	)	

BROWN, A.C.J. — Lester R. Jim, an enrolled member of the Yakama Nation, appeals a superior court decision reversing the district court's dismissal of his fishing citations for lack of jurisdiction over the Maryhill Treaty Fishing Access Site (MTFAS). This court granted Mr. Jim discretionary review. We reverse the superior court because the State of Washington lacks jurisdiction to cite Mr. Jim at the MTFAS.

FACTS

The MTFAS is located in Klickitat County in Indian Country. While it is not on an Indian reservation, the site was acquired for the Indians use and benefit "in-lieu" of treaty fishing grounds submerged or destroyed by dam construction on the Columbia River. *Sohappy v. Hodel*, 911 F.2d 1312, 1315 (9th Cir. 1990). On June 25, 2008, Mr. Jim, an enrolled member of the Yakama Nation was commercially fishing on the

Columbia River. After he docked his boat at the MTFAS, Washington Department of Fish and Wildlife officers approached him. An officer cited Mr. Jim for second degree unlawful use of a net and retaining undersized sturgeon. Mr. Jim pleaded not guilty and successfully requested dismissal on jurisdictional grounds. The State successfully appealed to the superior court. This court granted discretionary review.

ANALYSIS

The issue is whether the State has criminal jurisdiction over an enrolled member of the Yakama Nation for fishing violations allegedly occurring at the MTFAS.

"RALJ 9.1 governs appellate review of a superior court decision reviewing a decision of a district court." *State v. Brokman*, 84 Wn. App. 848, 850, 930 P.2d 354 (1997). We review the district court's decision to determine whether that court committed any errors of law, accepting its factual determinations that are supported by substantial evidence and reviewing alleged errors of law de novo. RALJ 9.1. Because jurisdiction is a matter of law, we review such issues de novo when the location of a crime is not in dispute. *State v. Eriksen*, 166 Wn.2d 953, 959, 216 P.3d 382 (2009).

"Treaties, agreements, and statutes must be liberally construed in favor of the tribe, and all ambiguities are to be resolved in its favor." *Id.* (citing *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32, 63 S. Ct. 672, 87 L. Ed. 877 (1943)). In 1855, several treaties were negotiated with Pacific Northwest Indian tribes for the setting aside of land for Indian reservations. *Sohappy*, 911 F.2d at 1314. Some of this land was lost with the subsequent building of dams along the Columbia River. *Id.* at

1315. The Maryhill site resulted from congressional legislation authorizing the acquisition of lands to provide facilities in Washington to replace Indian fishing grounds submerged or destroyed by the construction of dams. *State v. Sohappy*, 110 Wn.2d 907, 908, 757 P.2d 509 (1988). The use of these sites is limited to tribal members; indeed, "it is unlawful for a person who is not a treaty Indian fisherman to participate in the taking of fish or shellfish in a treaty Indian fishery." RCW 77.15.570(1).

Public Law 280 allows states, with the consent of a tribe, to extend state jurisdiction over matters involving tribal members and arising on Indian reservations. Washington has limited its jurisdiction, however, by not retaining jurisdiction over "Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States." RCW 37.12.010.

In *State v. Sohappy*, our Supreme Court examined whether a different treaty site was exempt from our State's jurisdiction as though it was a reservation site. The Court held the State did not have jurisdiction for criminal prosecution of an enrolled Yakima Nation member for assaults committed at the treaty site. 110 Wn.2d at 911. The court wrote, "Our holding is narrowly limited to the in-lieu site here involved." *Id.* at 909. The court limited its holding partly relying on a Ninth Circuit case that specifically stated that the fishing site in question was considered part of an Indian reservation. *Id.* at 909 (referring to *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985)).

In *United States v. Sohappy*, the Ninth Circuit held the Cooks Landing fishing site amounted to "reservation land" for jurisdictional purposes. 770 F.2d at 823. Relying on

United State v. John, 437 U.S. 634, 649, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978) and *United States v. Pelican*, 232 U.S. 442, 449, 34 S. Ct. 396, 58 L. Ed. 676 (1914), the Ninth Circuit reasoned that when land is declared by Congress to be for the benefit of the Indians it is a reservation for the purposes of federal criminal jurisdiction. *Id.* at 822.

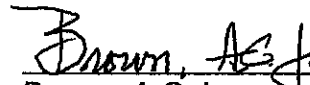
The court's holding in *State v. Sohappy* was limited to a particular in-lieu fishing site. *State v. Cooper*, 130 Wn.2d 770, 928 P.2d 406 (1996). The *Cooper* court explained, "[*State v. Sohappy* does not, as Cooper suggests, hold that 'reservation' includes all lands held in trust for the benefit of Indians." *Id.* at 778. In *Cooper*, a Nooksack Indian was prosecuted under state law for child molestation on a trust allotment not part of any congressionally established Indian off-reservation fishing site. *Cooper*, 130 Wn.2d at 772. Compared to the facts in Mr. Jim's case, the land in *Cooper* was not subject to exclusive use by Indian tribes for a particular purpose mandated by Congress and reserved by treaties. Language used by the Washington Supreme Court, "must always be appraised in the light of the facts of the particular case and the specific issues which were before the court." *Johnson v. Ottomeier*, 45 Wn.2d 419, 421, 275 P.2d 723 (1954).

Mr. Jim offers persuasive arguments. Regarding the use of Columbia River treaty fishing access sites, the Federal Register states the Bureau of Indian Affairs, "agreed that the States do not have regulatory jurisdiction or authority over the in-lieu fishing sites." 62 FR 50867-01 (Sept. 29, 1997). Furthermore, as discussed above, an 1855 treaty reserved Yakama Nation fishing rights at off-reservation sites. Treaty with

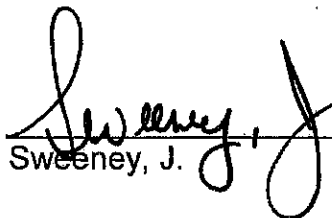
the Yakamas, art. III, 12 Stat. 951, 953 (1855). The federal government acquired access sites for the Yakama Nation (and three other tribes) at those usual and accustomed fishing areas to replace treaty recognized areas submerged by dam construction. While the MTFAS is not on Yakama reservation land, it is in Indian country and, we conclude the MTFAS is entitled to reservation status.

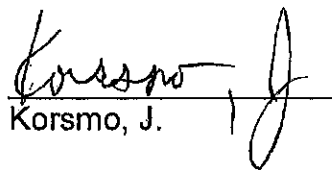
While *State v. Sohapp* merits a narrow construction, we reason that court did not intend no other treaty site could ever be exempt from State criminal jurisdiction under our facts. Considering, that our case is distinguished from *Cooper* and is more like the state and federal *Sohappy* cases, we hold the State does not have jurisdiction to prosecute Mr. Jim for fishing violations at the MTFAS. Accordingly, the superior court erred when reversing the dismissal entered by the district court. So holding, we do not reach Mr. Jim's additional argument that fishing, in general, is a protected activity.

Reversed.


Brown, A.C.J.

WE CONCUR:


Sweeney, J.


Korsmo, J.

Appendix 2

RCW 37.12.010

Assumption of criminal and civil jurisdiction by state.

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and
- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted.

[1963 c 36 § 1; 1957 c 240 § 1.]

Notes:

***Reviser's note:** Chapter 36, Laws of 1963, which became effective on March 13, 1963, amended RCW 37.12.010, 37.12.030, 37.12.040, and 37.12.060, repealed RCW 37.12.020, and enacted a new section codified herein as RCW 37.12.021.