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February 20, 2019

No. 8295

This opinion responds to a question from Governor Kate Brown about the off-reservation hunting rights of the Confederated Tribes of the Warm Springs Reservation of Oregon ("the Tribe"). It focuses on whether the Tribe's off-reservation hunting rights would be defined by the Treaty with the Tribes of Middle Oregon of June 25, 1855 ("1855 Treaty")—which reserved those rights—or by the Treaty with the Middle Oregon Tribes of November 15, 1865 ("1865 Treaty")—which on its face relinquished them.

QUESTION PRESENTED

Does the doctrine of issue preclusion bar the State from disputing that the 1855 Treaty governs the Warm Springs Tribe's off-reservation hunting rights?

SHORT ANSWER

Yes. Issue preclusion would bar the State from litigating whether the Tribe holds off-reservation hunting rights based on the 1855 Treaty, including from arguing that the 1865 Treaty relinquished those rights. In ***U.S. v. Oregon***, the State litigated, and lost, the issue of whether the earlier 1855 Treaty governs the Tribe's off-reservation fishing rights. The issue of whether the Tribe holds off-reservation hunting rights based on the 1855 Treaty is substantially identical to the issue earlier litigated. Therefore, the State would be precluded from litigating that hunting-rights issue with the Tribe, and accordingly, from arguing that the 1865 Treaty relinquished those rights.

Our analysis is specific to treaties, as opposed to generally applicable laws. It is also specific to potential civil litigation between the Tribe and the State construing the Tribe's off-reservation hunting rights. Issue preclusion is generally disfavored against the government where the parties are not the same as in the earlier litigation, or where preclusion would result in inequitable administration of the law. Neither of those circumstances is present here: the Tribe is the only entity whose off-reservation hunting and fishing rights are addressed by the 1855 and 1865 treaties, and both the Tribe and the State were parties to the earlier ***U.S. v. Oregon*** litigation.

As a practical matter, the Oregon Fish and Wildlife Commission adopts the rules that are criminally enforced by law enforcement officers in Oregon, and in turn by county District Attorneys. As a state agency, the Commission is guided by this opinion. Accordingly, any rules adopted by the Commission should be consistent with this opinion. And, further, the criminal enforcement of the Commission's rules should be consistent with this opinion.

This opinion does not address whether issue preclusion applies to any other issue relevant to the Tribe's off-reservation hunting rights.

DISCUSSION

I. Background

In 1855, the Tribe entered into a treaty with the federal government that ceded the Tribe's territorial interests in exchange for consideration that included a reservation and monetary compensation.[1] The Tribe also reserved certain off-reservation hunting and fishing rights: the right to take fish "at all other usual and accustomed stations, in common with citizens of the United States," as well as "the privilege of hunting * * * on unclaimed lands, in common with citizens."[2]

However, the later 1865 Treaty ostensibly relinquished those same off-reservation hunting and fishing rights.[3] The 1865 Treaty contained other unfavorable terms, such as restricting the Tribe to its reservation absent written permission from the federal superintendent of Indian affairs.[4] Examining these terms and the historical record, a United States Forest Service study later concluded that the tribal leaders' signatures were obtained by fraudulent means.[5] Despite these circumstances, this opinion focuses only on whether the State would be precluded from asserting the 1865 Treaty. It therefore does not address the validity of the 1865 Treaty.

In 1968, the Tribe and the State litigated the Tribe's off-reservation fishing rights in ***U.S. v. Oregon*** in federal district court in Oregon.[6] The Tribe contended that the State could restrict the Tribe's off-reservation fishing only in certain circumstances.[7] The State, on the other hand, argued that it could regulate the Tribe's fishing to the same extent as it could regulate the

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[1] Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat 963 (1859).

[2] *Id.* at 964.

[3] Treaty with the Middle Oregon Tribes, Nov 15, 1865, 14 Stat 751, 751 (1867) ("[I]t is hereby stipulated and agreed that * * * the right to take fish [and] hunt game * * * upon lands without the reservation * * * are hereby relinquished.").

[4] *Id.* at 751–52.

[5] Les McConnell, USDA Forest Service—Pacific Northwest Region, *The Off-Reservation Treaty Reserved Rights of the Tribes of Middle Oregon* 2 (June 20, 1997).

[6] *See* ***Sohappy v. Smith***, 302 F Supp 899, 903–04 (D Or 1969). The United States government and several other tribes also were parties to the litigation against the State; however, those parties are not relevant to our discussion here.

[7] *Id.* at 907.

fishing of other persons.[8] The primary issue in dispute was how to interpret the wording of the 1855 Treaty that reserved to the Tribe rights "in common with citizens of the United States."[9] However, the State also attacked the relevance of the 1855 Treaty. The State argued that the Tribe's off-reservation fishing rights had been modified by Oregon's admission to the union and then by the 1918 Columbia River Compact.[10]

The court ruled for the Tribe, noting that the United States Supreme Court had interpreted similar treaties to permit fishing regulations only if they were necessary for the conservation of fish, met appropriate standards, and did not discriminate against the Tribe.[11] The court rejected the State's arguments that the Tribe's off-reservation fishing rights had been altered by Oregon's admission to the Union or by congressional approval of the 1918 Columbia River Compact.[12]

Although the court's judgment in ***U.S. v. Oregon*** construed the Tribe's off-reservation fishing rights, it did not address the Tribe's off-reservation hunting rights—rights that were reserved by the same 1855 Treaty. The governor has asked us whether any issue resolved by that judgment would preclude the State from arguing in potential litigation with the Tribe that the 1865 Treaty relinquished those off-reservation hunting rights.

II. Issue Preclusion Standard

Issue preclusion "bars the relitigation of issues actually adjudicated in previous litigation between the same parties."[13] This "protect[s] litigants from the burden of relitigating an identical issue with the same party [and] promot[es] judicial economy by preventing needless litigation."[14] Three elements must be satisfied in order for issue preclusion to apply:

> (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.[15]

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[8] *Id.*

[9] *See id.* at 904–05.

[10] *Id.* at 912. The compact between Oregon and Washington governs the regulation, preservation, and protection of fish in the Columbia River. ORS 507.010.

[11] ***Sohappy***, 302 F Supp at 906–07; Judgment at 2–3, ***United States v. Oregon***, No 68-513 (D Or Oct 10, 1969). After the district court issued its judgment, it retained jurisdiction and "became the forum for allocating the harvest of fish that enter the Columbia River System." ***United States v. Oregon***, 913 F2d 576, 579 (9th Cir 1990). That substantial subsequent history does not affect our analysis here.

[12] ***Sohappy***, 302 F Supp at 912.

[13] ***Clark v. Bear Stearns & Co., Inc.***, 966 F2d 1318, 1320 (9th Cir 1992). Because the preclusive issue involved here was resolved by a federal district court in litigation based on a federal question, we look to federal common law. *See* ***Taylor v. Sturgell***, 553 US 880, 891, 128 S Ct 2161, 171 L Ed 2d 155 (2008) ("The preclusive effect of a federal-court judgment is determined by federal common law.").

[14] ***Parklane Hosiery Co., Inc. v. Shore***, 439 US 322, 326, 99 S Ct 645, 58 L Ed 2d 552 (1979).

[15] ***Clark***, 966 F2d at 1320. Issue preclusion does not apply when the party "did not have a 'full and fair opportunity' to litigate" the issue in the earlier litigation. ***Allen v. McCurry***, 449 US 90, 95, 101

The relevant issue does not necessarily have to be expressly mentioned in the prior litigation: "[n]ecessary inferences from the judgment, pleadings and evidence will be given preclusive effect."[16]

The Ninth Circuit Court of Appeals has recognized that properly defining the relevant issues can be a "murky area."[17] To resolve close cases, that court looks to four factors from the *Restatement (Second) of Judgments*:

> (1) is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? (2) does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? (3) could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? (4) how closely related are the claims involved in the two proceedings?[18]

These factors "are not applied mechanistically."[19] They seek to balance "a desire not to deprive a litigant of an adequate day in court" against "a desire to prevent repetitious litigation of what is essentially the same dispute."[20]

Although issue preclusion typically applies when both the parties in the subsequent suit are identical, it can also apply where the party asserting preclusion was not involved in the earlier suit.[21] However, the United States Supreme Court has been skeptical of applying this nonmutual issue preclusion when the party defending against preclusion is the federal government.[22] And federal appellate courts have applied the same reasoning to state governments defending against preclusion.[23] Applying nonmutual issue preclusion against the government in the criminal context is also disfavored.[24]

S Ct 411, 66 L Ed 2d 308 (1980). Nothing in the record available to us suggests that the State did not have that opportunity in ***U.S. v. Oregon***.

[16] ***Davis & Cox v. Summa Corp.***, 751 F2d 1507, 1518 (9th Cir 1985).

[17] ***Starker v. United States***, 602 F2d 1341, 1344 (9th Cir 1979).

[18] *See* ***Kamilche Co. v. United States***, 53 F3d 1059, 1062 (9th Cir 1995) (quoting *Restatement (Second) of Judgments* § 27 cmt c (1982)), *amended by* 75 F3d 1391 (9th Cir 1996).

[19] ***Howard v. City of Coos Bay***, 871 F3d 1032, 1041 (9th Cir 2017).

[20] *Restatement* § 27 cmt c.

[21] ***Parklane***, 439 US at 331–32.

[22] ***United States v. Mendoza***, 464 US 154, 162–63, 104 S Ct 568, 78 L Ed 2d 379 (1984) (distinguishing the conduct of government litigation from the conduct of private civil litigation).

[23] ***Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.***, 425 F3d 708, 713–14 (9th Cir 2005) (applying ***Mendoza*** reasoning to protect state agency from nonmutual issue preclusion); ***Hercules Carriers, Inc. v. Claimant State of Fla.***, 768 F2d 1558, 1579 (11th Cir 1985) (recognizing that ***Mendoza*** reasoning applies to state governments as well).

[24] ***Standefer v. United States***, 447 US 10, 21–25, 100 S Ct 1999, 64 L Ed 2d 689 (1980).

Similar concerns underlie the exception that issue preclusion will not apply if it would result in the inequitable administration of the law.[25] This exception typically disfavors applying issue preclusion against governments that are enforcing generally applicable laws, that is, laws "that affect[] members of the public generally."[26] Allowing issue preclusion in such cases could "give one person a favored position in current administration of a law."[27]

III. Issue Preclusion Analysis

The court's judgment in ***U.S. v. Oregon*** construed the Tribe's off-reservation fishing rights to allow State regulation only in certain circumstances.[28] The judgment and the court's opinion make clear that to reach this result, the court necessarily determined that the Tribe holds off-reservation fishing rights based on the 1855 Treaty. For example, the court repeatedly stated that its reasoning was based on precedent concerning regulation of federal treaty rights.[29] And the only treaty before the court that could have been the source of the Tribe's rights was the 1855 Treaty.[30]

In addition, the parties actually litigated this fishing-rights issue: the State argued that any 1855 Treaty off-reservation fishing rights were altered both by Oregon's admission to the union and by congressional approval of the 1918 Columbia River Compact.[31]

U.S. v. Oregon focused only on the Tribe's off-reservation fishing rights, not on off-reservation hunting rights. However, the Ninth Circuit has recognized that in narrow circumstances, issues pertaining to different rights may be so similar as to allow issue preclusion. For example, in ***Kamilche Co. v. United States***, the court held that the federal government was precluded from litigating the ownership of a disputed parcel of land, even though the specific acres at issue had not been at issue in the earlier suit.[32] The court applied the *Restatement* factors discussed above, emphasizing that the evidence and arguments necessary to prove ownership of the earlier-litigated acres were identical to the evidence and arguments necessary to prove ownership of the subsequently litigated acres.[33]

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[25] *Restatement* § 28(2).

[26] *Id.* § 28 cmt c.

[27] *Id.*

[28] Judgment at 2–3, ***U.S. v. Oregon***, No 68-513.

[29] ***Sohappy***, 302 F Supp at 906 (relying on Supreme Court case that "restated the nature of the non-exclusive off-reservation fishing rights secured by these Indian treaties"); *id.* at 908 ("I believe that these contentions of the plaintiffs and the tribes correctly state the law applicable to state regulation of the Indians' federal treaty right."). The judgment repeatedly referred to treaties, treaty tribes, treaty fishing, and treaty fisheries. Judgment at 2–3, ***U.S. v. Oregon***, No 68-513.

[30] *See* ***Sohappy***, 302 F Supp at 904.

[31] *Id.* at 912.

[32] 53 F3d at 1062–63.

[33] *Id.* at 1062.

We see a similarly close connection here between the issues of whether the Tribe holds off-reservation hunting rights based on the 1855 Treaty and whether the tribe holds off-reservation fishing rights based on that treaty.[34] Both these rights were reserved by the Tribe in the same clause in the 1855 Treaty.[35] And the ***U.S. v. Oregon*** court relied on evidence concerning both: For example, the court noted that during negotiations over the 1855 Treaty, "the tribal leaders expressed great concern over their right to continue to resort to their fishing places and *hunting grounds*."[36] The court added that the leaders "were reluctant to sign the treaties until given assurances that they could continue to go to such places and take fish and *game* there."[37]

Because of these similarities, the evidence and arguments necessary to prove that the Tribe holds off-reservation hunting rights based on the 1855 Treaty would substantially overlap with the evidence and arguments in ***U.S. v. Oregon***. For example, in the potential hunting-rights litigation, the Tribe would likely point to the text of the 1855 Treaty as having reserved those rights, and to the historical circumstances surrounding the negotiation of those rights. The Tribe would also argue that Oregon's admission to the union did not modify those rights.

In addition, we see nothing to indicate that the legal analysis relevant to determining whether the Tribe reserved off-reservation hunting rights in the 1855 Treaty would differ from the analysis in ***U.S. v. Oregon***. Or that the legal analysis relevant to the effect of Oregon's admission to the union on those hunting rights would differ from the analysis in the earlier matter.

The above similarities also indicate that litigating whether the Tribe holds off-reservation hunting rights based on the 1855 Treaty would be essentially the same dispute as was resolved earlier in ***U.S. v. Oregon***. Applying issue preclusion would therefore serve the underlying goals of increasing judicial economy and not unnecessarily burdening prevailing parties.

Because the identical issue was actually litigated in ***U.S. v. Oregon***, and was critical and necessary to the court's judgment, the State would therefore be precluded from litigating with the Tribe the issue of whether the 1855 Treaty controls the Tribe's off-reservation hunting rights. That conclusion would also preclude the State from making any legal arguments inconsistent with the court's resolution of the issue.[38] Accordingly, the State would be precluded from arguing that the 1865 Treaty relinquished the Tribe's off-reservation hunting rights.

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[34] Our conclusion—that the issues surrounding whether the Tribe holds off-reservation fishing and hunting treaty rights are identical—does not mean that every issue concerning fishing rights is the same as every issue concerning hunting rights. As an illustrative example, the geographic scope of the tribe's off-reservation fishing rights is not coterminous with the geographic scope of its off-reservation hunting rights. *See* 1855 Treaty, 12 Stat at 964 (reserving the right to take fish at "usual and accustomed stations," while reserving the right to hunt "on unclaimed lands").

[35] *Id.*

[36] ***Sohappy***, 302 F Supp at 906 (emphasis added).

[37] *Id.* (emphasis added).

[38] *See* ***Kamilche***, 53 F3d at 1063 ("[O]nce an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." (Italics in original; internal quotation marks omitted.)).

Essential to our reasoning is that there are no arguments unique to off-reservation hunting rights—as distinct from off-reservation fishing rights—that indicate those rights were relinquished or modified. The existence of such arguments would likely mean that the State did not have a full and fair opportunity to litigate the issue in ***U.S. v. Oregon***.[39]

Furthermore, none of the concerns exist here with applying preclusion against a government. First, we are dealing with mutual issue preclusion because the State and the Tribe were both parties to ***U.S. v. Oregon***. This eliminates the concerns with applying nonmutual issue preclusion. And second, preclusion will not result in the inequitable administration of the law because the 1855 and 1865 treaties are not generally applicable laws: the Tribe is the only entity whose off-reservation hunting and fishing rights are addressed by these treaties.

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[39] *See* ***Maciel v. Comm'r***, 489 F3d 1018, 1023 (9th Cir 2007) (issue preclusion does not apply when a party "had good reason not to contest an issue vigorously during the first action"). The existence of unique arguments might also suggest that the relevant issues are not identical.