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STATE OF WASHINGTON

No. 84716-9

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SUPREME COURT

OF THE STATE OF WASHINGTON

CLERK

STATE OF WASHINGTON, Petitioner,

v.

LESTER RAY JIM, Respondent.

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STATE OF WASHINGTON

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

The Petitioner State of Washington fails to persuasively argue that the decision of the court below merits review by this Court under RAP 13.4(b). The State contends that the court below erred in its holding that the Maryhill Treaty Fishing Access Site (TFAS) is excluded from State criminal jurisdiction under RCW 37.12.010, and that such holding conflicts both with this Court's decision in *State v. Cooper*, 130 Wn.2d 770, 928 P.2d 406 (1996), and with the Court of Appeals' decision in *State v. Boyd*, 109 Wn.App. 244, 34 P.3d 912 (2001). However, the court below correctly ruled that the purpose of the TFAS as established by Congress should control the jurisdictional question in favor of exclusive tribal and federal authority, and that this qualified the site as a "reservation" for purposes of state criminal jurisdiction under RCW 37.12.010. In addition, whether the lands are formally designated as "held in trust" by Congress is not determinative if the Legislature intended to avoid State interference with tribal and federal

interests. Under this framework, neither *Cooper* nor *Boyd* can be regarded as controlling authority because of their readily distinguishable facts. Although the State argues that there will be an “enforcement gap” if the decision is allowed to stand, this claim does not have any evidentiary or legal basis and is therefore not an issue of substantial public interest. The State also asks the Court to overrule *State v. Sohappy*, 110 Wn.2d 907, 757 P.2d 509 (1988), but provides no persuasive legal authority that *Sohappy* was incorrect, or that it has been harmful as precedent during the years since it was decided in 1988. The Court should therefore decline to review the decision of the court below.

B. STATEMENT OF THE CASE

Respondent largely concurs with the State of Washington’s Statement of the Case, facts and procedural history, with two exceptions. First, for the record Mr. Jim was cited but never arrested by state enforcement officers at the

Maryhill TFAS. Petition for Review (“PFR”) at 3. Second, the State continues to characterize Maryhill and other TFAS as “not part of any reservation” or “not designated as part of any Indian reservation.” PFR at 3, 4. However, as the State concedes, the Maryhill site was validly set apart by Congress for the exclusive use of four Indian tribes as treaty fishing sites, and they are owned and operated by the Bureau of Indian Affairs. PFR at 4. It is therefore an “established Indian reservation” by federal statute, even though it is not part of the “Yakama Reservation.”

C. REASONS WHY REVIEW SHOULD BE DENIED

- 1. The decision of the court below does not conflict with *State v. Cooper* or *State v. Boyd*.**

The origin and purpose of the fishing site in this case are not disputed. One of twenty-three “Columbia River Treaty Fishing Access Sites,” the fishing place where the Respondent was cited was established by the U.S. Army Corps of Engineers under authority of Title IV of Public Law 100-581, which

authorized the Corps to improve federally owned lands adjacent to the Columbia River “to provide access to usual and accustomed fishing areas and ancillary fishing facilities for members of the Nez Perce Tribe, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakima Indian Nation.” Pub. L. No. 100-581, § 401(a) (102 Stat. 2938, 2944) (1988). Congress directed the Corps to transfer the fishing sites to the U.S. Department of the Interior, which now maintains the Maryhill TFAS. *Id.*, § 401(b)(2). In 1997, the Bureau of Indian Affairs promulgated regulations regarding these sites, restricting their use to enrolled members of the four Columbia River treaty tribes, including the Yakama Nation. 25 CFR § 247.3. Under these regulations the TFAS were placed under the direct control of the Portland Area Director of the Bureau of Indian Affairs (now the Northwest Area Director). 25 CFR § 247.2(c).

In its opinion, the court below correctly reasoned that the facts of this case look remarkably like those in *State v. Sohappy*

in which this Court held that a federally controlled Indian “in-lieu” fishing site was a “reservation” not subject to State criminal jurisdiction under RCW 37.12.010. Slip Op. at 5. This conclusion was based on the Ninth Circuit decision in *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986), which reasoned that the very same site was “reservation land” subject to federal criminal jurisdiction. Slip Op. at 3. Although the Court in *Sohappy* had noted that “our holding is limited to the in-lieu site here involved,” the Court of Appeals in this case made the logical conclusion that *Sohappy* “did not intend no other treaty site could ever be exempt from State criminal jurisdiction under our facts.” *Id.* at 5. Although the Cooks Landing site in *Sohappy* was established under a different congressional statute, its purpose is virtually the same, and has similar restrictions that exclude all individuals who are not enrolled members of certain Indian tribes with treaty reserved fishing rights. *Sohappy*, 110 Wn.2d at 908.

In determining whether this decision was in error, the State cannot have it both ways by first conceding that the TFAS is within "Indian country" for purposes of RCW 37.12.010, but then arguing that the site is not an Indian reservation. See 18 U.S.C. § 1151 (definition of "Indian country" includes only "reservations," "dependent Indian communities," and "Indian allotments"). The Ninth Circuit *Sohappy* decision relied on a U.S. Supreme Court definition of an "Indian reservation" as land that "had been validly set apart for the use of the Indians as such, under the superintendence of the Government." *U.S. v. Sohappy*, 770 F.2d at 822 (citing *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676, 679 (1914)). Given the congressional establishment of the TFAS as exclusive Indian fishing areas governed by treaty with the United States, the State simply cannot persuasively claim that they do not meet those qualifications.

Although the State argues that RCW 37.12.010 and its interpretations in *Cooper* and *Boyd* establish a strict

requirement that Indian land be formally designated as held "in trust" or with "restrictions on alienation," the intent of the Legislature should not be construed so narrowly. The only U.S. Supreme Court case to interpret RCW 37.12.010 is instructive on this point. See *Washington, et. al. v. Confederated Tribes and Bands of the Yakima Indian Nation*, 439 U.S. 463, 502, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). In the *Yakima* case the court held that the State's interest in limiting its geographical jurisdiction was "providing protection to non-Indian citizens living within the boundaries of a reservation while at the same time allowing for tribal self-government on trust or restricted lands." *Yakima Indian Nation*, 439 U.S. at 502. The issue of equal protection in that case concerned the checkerboard nature of the Yakama Reservation, which has both tribal and federal lands as well as significant non-Indian fee ownership. *Id.* The court held that "the land tenure classification made by the State is neither an irrational nor an arbitrary means of identifying those areas within a reservation in which tribal members have

the greatest interest in being free of state police power”
(emphasis added). *Id.*

Based on this legislative intent, the fact that the Maryhill TFAS is neither formally designated as “held in trust” nor as a “restricted allotment” is a distinction without a difference. The Legislature could not possibly have intended that the State assume criminal jurisdiction over an area where the federal government has ownership of lands for the exclusive purpose of Indian treaty fishing, over which the Yakama Nation and other tribes have “the greatest interest in being free of state police power.” *Id.* Congress intended that the TFAS be owned by the United States for exclusive benefit and use of the Yakamas and three other tribes, and so for purposes of RCW 37.12.010 the sites are certainly held in “trust” even though there is no explicit statutory directive saying so. Pub. L. No. 100-581, § 401. All of the necessary elements of a common-law trust are present: a trustee (the United States), beneficiaries (the four Columbia River treaty tribes), and a trust corpus (Indian treaty

fishing sites, *i.e.*, "trust property"). See *United States v. Mitchell*, 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). The U.S. Supreme Court has expressed this principle as follows:

Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorization or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Id. In a situation as here, where the reservation is a federally owned fishing site where only Indians are permitted access under federal statute and regulations, any state criminal jurisdiction over Indian activity would be an unwarranted intrusion upon federal and tribal jurisdiction. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). If the purpose of the statute is to affirm the ability of tribes to govern themselves on their own lands within reservations established by Congress, then the legislature's intent in RCW 37.12.010 should be construed

broadly to include the Treaty Fishing Access Sites as “tribal lands held in trust.” The Court of Appeals therefore did not err by holding that the TFAS is excluded from State authority.

In light of this principle, it is clear that the cases cited by the State have virtually no weight as legal authority. Although the State argues that *State v. Cooper* controls this case, the crime committed by Nooksack tribal members in *Cooper* took place on an individual Indian trust allotment outside of the Nooksack Indian Reservation, which was “established” by the Acting Secretary of the Interior in 1973. *Cooper*, 130 Wn.2d at 772, 775. It was undisputed in *Cooper* that the allotment was “Indian country,” but it was not within an expressly established reservation, and the State therefore correctly assumed criminal jurisdiction under RCW 37.12.010. *Id.* at 776. Significantly (as the court below pointed out), this allotment was “not subject to exclusive use by Indian tribes for a particular purpose mandated by Congress and reserved by treaties.” Slip Op. at 4. As a result, the court concluded that “our case is distinguished

from *Cooper* and is more like the state and federal *Sohappy* cases.” *Id.* at 5.

The facts in *Boyd* are even more distinguishable, and should therefore have even less weight than *Cooper* as controlling precedent.¹ Despite being within the boundaries of the Colville Reservation, the federal parcel at issue in *Boyd* was owned by the U.S. Bureau of Reclamation (BOR) and was intended to “accomplish the purposes of the Grand Coulee Dam project.” *Boyd*, 109 Wn.App. at 253. After the land was condemned by the government for the dam’s operation there was never any intent, by either Congress or the BOR, to allow the Colville Tribe to use the site for its own exclusive purposes guaranteed by treaty. *Id.* It is therefore clear that *Boyd* does not control this case despite what the State argues.

2. **There is no evidence or legal basis for the assumption that there will be an “enforcement gap” at the Treaty Fishing Access Sites because of the decision below.**

¹ The State has not previously cited *State v. Boyd* before either the court below or the Superior Court. The Court of Appeals did not even mention *Boyd* in its opinion, even though two of the judges on the panel were also on the court that decided that case.

Although the State alleges that there will be an "enforcement gap" at the Maryhill and other TFAS if the WDFW and other state law enforcement do not have criminal jurisdiction, the State provided absolutely no evidence in the trial court that tribal or federal law enforcement is inadequate or non-existent. This allegation is all the more striking because the Cooks Landing in-lieu site (also known as "Little White Salmon") has been excluded from State criminal jurisdiction for the past twenty-two years since the *State v. Sohapp* decision. If there really were any serious issues reflecting a criminal "enforcement gap," one would expect them to have arisen at that particular site. However, the State has failed to provide any documentation that its lack of criminal jurisdiction at Cooks Landing has endangered Indians or non-Indians, and there are no factual findings as such.

Under BIA rules governing the TFAS, tribal members are subject to laws of the Indian tribes in which they are enrolled as

well as federal laws and regulations. 25 CFR § 247.5(a) (“You may not use any of the sites for any activity that is contrary to the provisions of your tribe or contrary to federal law or regulation”). Because the fishing sites are recognized by both the State and federal government as being within “Indian country,” Indians using them are subject to federal prosecution under the Indian General Crimes Act (IGCA) and the Indian Major Crimes Act. 18 U.S.C. §§ 1152, 1153; see also *United States v. Bruce*, 394 F.3d 1215, 1219 (9th Cir. 2005). They may be charged under the federal Lacey Act for crimes involving fish and wildlife. 16 U.S.C. § 3372(a)(1); *U.S. v. Sohapp*, 770 F.2d at 822. In addition, federal criminal laws of general applicability are enforceable against tribal members unless there is a treaty exemption. *Bruce*, 394 F.3d at 1220.

The exception in the IGCA for crimes committed by Indians against other Indians, noted by the State in its Petition for Review, has been interpreted as “manifesting a broad congressional respect for tribal sovereignty in matters affecting

only Indians.” *Id.* at 1219. The State’s assertion that the tribes have “limited jurisdiction” over criminal activities of their own members or other Indians completely ignores the principle that tribes have substantial authority within “Indian country,” of which the State has conceded that Maryhill TFAS is a part. *Id.* (within Indian country “tribal courts may generally punish offenses committed by members of the tribe and may prosecute misdemeanors against Indians who are not members of the tribe”). The State’s calamitous prediction of a jurisdictional vacuum resulting from the Court of Appeals decision is therefore not supportable either factually or legally.

3. The Court should not overrule *State v. Sohappy*.

The State also asks the Court to accept review to take an extraordinary step – overrule its own judicial precedent as established in *State v. Sohappy*. In making this argument the State’s Petition correctly cites the Court’s own admonition that “overruling prior precedent should not be taken lightly.”

Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). *Lunsford* explains why this rule is so important: “Stare decisis does not require....that we never alter our prior decisions, but merely that we take seriously our responsibility to do so carefully and clearly in order to cause as little hardship as possible to those who may have relied on our prior decisions.” *Id.* Overturning a prior decision therefore requires “a clear showing” that it is both incorrect and harmful. *Id.*

The State has failed to make this clear showing. First, the ruling in *Sohappy* was not incorrect in light of the legislative intent of RCW 37.12.010, outlined *supra*. Because the Legislature never defined the terms “established reservation” or “held in trust” in the statute, state courts should look to federal law definitions, and that is exactly what the Court did in *State v. Sohappy*. Although the federal decisions that *Sohappy* uses in its analysis involved whether certain Indian lands were “Indian country” for purposes of federal

criminal jurisdiction, the court focuses on the definition of “reservation” because the term has no legal reference point under state law – it is a concept rooted only in federal law. Federal decisions from almost a century ago were clear that the term embraces not only those aboriginal lands reserved by treaty or executive order, but also lands “set apart as an Indian reservation out of the public domain, and not previously occupied by Indians.” *Donnelly v. United States*, 228 U.S. 243, 268-269, 33 S.Ct. 449, 457-458, 57 L.Ed. 820 (1913); *United States v. Pelican*, 232 U.S. at 449. Contrary to what the State argues, the definition of “reservation” is broad enough to include all those lands “set apart for the exclusive use” of Indians; the Legislature is presumed to have understood this at the time it enacted its statute in 1963, fifty years after *Donnelly* and *Pelican*. Cooks Landing, the in-lieu fishing site in *Sohappy*, was carved out of the public domain for exclusive Indian treaty use through the Rivers and Harbors Act of 1945,

almost two decades before the state statute at RCW 37.12.010 was enacted. Pub. L. No. 79-14, § 2, 59 Stat. 22.

Moreover, because Cooks Landing has been controlled, operated and regulated exclusively by the Bureau of Indian Affairs at the direction of Congress for over sixty years, the site should be considered as being "held in trust by the United States" for the exclusive benefit of the Columbia River treaty tribes despite any formal designation as such. 25 CFR Part 248. The Court noted this fact in its decision. *State v. Sohapp*, 110 Wn.2d at 910.

Nevertheless, the State claims that "the errors contained within the *Sohapp* analysis are harmful in that they continue to cause confusion by courts and litigants." Petition for Review at 19. Again, as the Respondent has noted *supra*, the State has offered absolutely no evidence in this case to show that the *Sohapp* ruling has caused any confusion for anyone, Indian or non-Indian, in more than two decades since Cooks Landing was declared by this Court to be excluded from State criminal

jurisdiction. If anything, the Court's overruling of *Sohappy* would upset a long held understanding by Yakama tribal members that the statutory in-lieu fishing sites within Washington are governed exclusively by federal and tribal law enforcement authorities. The only alleged "harmful effect of *Sohappy*" that the State can specifically cite is the Court of Appeals decision in this case, which only extends the rule in *Sohappy* to sites that have virtually the same purpose. The State does not explain how overturning that case will not "cause as little hardship as possible" to tribal and federal authorities that have relied upon it for many years. *Lunsford*, 166 Wn.2d at 278.

In addition, since the 1988 *Sohappy* decision the Legislature has had two decades to amend the statutory language to clarify its meaning in relation to both in-lieu and treaty fishing access sites, but has declined to do so. The Legislature is "presumed to be aware of judicial interpretation of its enactments," and if it wished the state criminal

jurisdiction statute at RCW 37.12.010 to apply to Cooks Landing or other federal Indian sites, it would have expressly said so in subsequent amendments. *Friends of Snoqualmie Valley v. King County Boundary Review Board*, 118 Wn.2d 488, 496-497, 825 P.2d 300 (1992). The contention by the State that *Sohappy* is in conflict with legislative intent is therefore not persuasive and must be rejected.

D. CONCLUSION

This Court should deny review of the decision of the Court of Appeals in this case for the reasons indicated in Part C.

DATED this 26th day of July, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'THOMAS ZEILMAN', written over a horizontal line.

THOMAS ZEILMAN

WSBA # 28470

Attorney for Respondent Lester Ray Jim

NO. 84716-9

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STATE OF WASHINGTON, Petitioner,

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LESTER RAY JIM, Respondent.

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On the 26th day of July, 2010, I caused to be served on counsel of record a copy of the ANSWER TO PETITION FOR REVIEW by sending the same via U.S. Mail, first class, postage prepaid to each of the following:

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I certify or declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Patricia D. Siebol
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Dear Sir or Madam:

Enclosed for filing please find ***Answer to Petition for Review*** filed on behalf of Respondent Lester Ray Jim, together with ***Certificate of Service*** for same.

Your assistance is appreciated.

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