

Attorney Mason Morisset, and the entire Skokomish Tribe, are suing the city of Tacoma over two dams they say caused \$5.8 billion worth of damage to the Skokomish River

By Cassandra Sweet

The Price of a River

When he got the first call seven years ago, Mason Morisset knew this case would be more complex, more difficult than others. And he was right.

The case of the Skokomish Tribe and the city of Tacoma spans more than 80 years and involves treaty rights, two hydroelectric dams, inadequate government regulation, devastated salmon runs, decades of environmental damage and unclear federal policies. Tacoma did not dispute that its Cushman hydroelectric project damaged the environment, but the city denied responsibility for any wrongdoing. The tribe had evidence that city officials knew the dams would damage the Skokomish River and the Indians' fishery, and omitted these details from state and federal license applications. It would be difficult to prove that acts committed in the 1920s and damage caused by licensed dams violated the tribe's 1855 treaty.

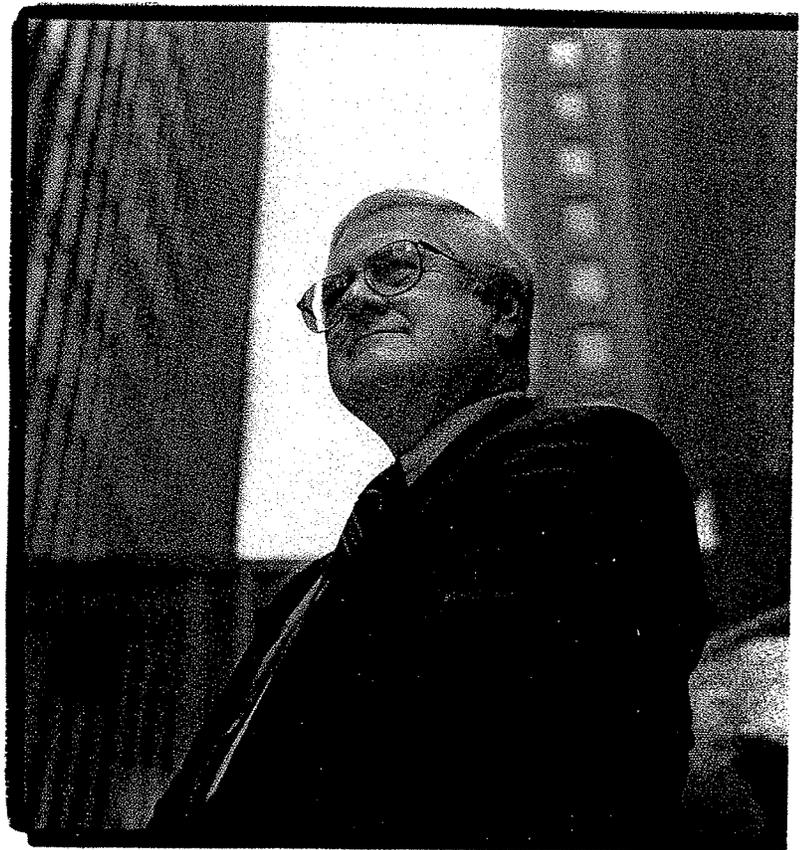
It was a challenge Morisset couldn't refuse.

NATIVE AMERICAN ART PIECES—all gifts from his clients—dominate the walls of Morisset's firm, Morisset Schlosser Ayer & Jozwiak, in downtown Seattle. In person, the 61-year-old seems more the jovial, professorial type than an intimidating legal force.

As a child growing up in Astoria, Oregon, Morisset was well acquainted with the economics of salmon. He would frequent the fishermen's docks and watch the men unload their catch. He cleaned salmon at a Portland fish plant to pay his way through Lewis & Clark College.

"In those days, fish were very important to the economy, and of course to fishermen," he says. "Fishermen were very loyal to their profession, which I later found was also true with the Indians, who had been fishing for eons."

The young Morisset didn't know any Native Americans. But he was shocked to learn in a high school history class that Native American communities had once flourished in the Columbia River region and, despite their crucial assistance to the Lewis and Clark expedition, were "eradicated." In law school at the University of California at Berkeley, in the 1960s, Morisset was drawn to Indian treaty rights.



Skokomish Tribe attorney Mason Morisset goes after the dams

"I was very taken with the fact that tribes had been promised things in what looked like pretty valid, enforceable agreements, and those agreements were being dishonored because the tribes had little political, economic or numeric power," he says. "The law seemed like the way to set things straight."

Morisset chuckles as he recalls his determination upon graduating law school to join a small Seattle firm, Ziontz, Pirtle and Fulle, that specialized in Native American treaty rights cases.



PHOTOGRAPHY BY CASSANDRA SWEET

Joseph Pavel, Skokomish Tribal Council

"I think when you're younger you tend to be very idealistic and imbued with a sense of right and wrong, which fortunately hasn't left me," he says.

In November 1999 Morisset and the Skokomish Tribe filed a lawsuit against the United States and the city of Tacoma, seeking \$5.8 billion in damages for violations of the tribe's treaty-protected fishing and water rights. The hefty price tag reflected the extent to which Tacoma's two Cushman hydroelectric dams had destroyed the environment over more than 70 years and the impact of that loss on the tribe. In the lawsuit, the Skokomish accused Tacoma of violating their rights to the Skokomish River by taking more water than it had a right to, obliterating salmon and steelhead runs, hurting elk and other wildlife, turning acres of tribal reservation land into swamp and damaging other natural and cultural resources.

The case is being closely watched by Indian tribes, the hydropower industry, the commercial fishing industry and environmental groups. If the Skokomish case is successful, it will set an important new precedent by giving treaty-holding tribes greater power over natural resources.

To the ambitious Morisset, the Skokomish case resembles the landmark Indian fishing-rights case he won in federal district court in 1974 and in the U.S. Supreme Court in 1979.

In 1974 U.S. District Court Judge George Boldt ruled that, contrary to Washington state law, treaty tribes have the right to fish at all their usual and accustomed fishing grounds and to take half the catch. The dispute polarized the coastal Northwest in much the same way that the civil rights movement divided the South. Controversy over Indian fishing rights raged during the 1960s and '70s with spirited demonstrations, police arrests, tear gas, "fish-ins" and celebrity activists. "I'm just fishing with some friends," Marlon Brando famously remarked as state police arrested him at a Nisqually River fish-in.

The Skokomish Indians don't have celebrities advocating their cause, but their allies include prominent fishing groups, such as Trout Unlimited and the Puget Sound

Gillnetters Association, and a host of environmental groups. American Rivers placed the Skokomish River on its annual list of "America's Most Endangered Rivers" from 1993 to 1996 and has lobbied the government for more stringent environmental restrictions on Tacoma's Cushman project. Native American groups have also rallied behind the tribe: In 1999 the National Congress of American Indians formally asked Congress to protect the Skokomish Tribe from ongoing environmental damage caused by the Cushman dams.

FROM THE TIME HE WAS A BOY, Joseph Pavel knew that the Skokomish River, whose tributaries wrap like great watery limbs around the reservation of his people, had at one time been a giant force. Puget Sound chinook salmon the size of cattle were said to have climbed the 12-foot Big Falls of the North Fork on their way home to spawn after lives spent at sea.

"You'd hear the stories about how [the Skokomish people] used to go upstream on the North Fork to the lower falls and the upper falls and be able to camp and gather and harvest fish," says Pavel, who is vice chairman of the Skokomish Tribal Council and also a habitat policy analyst for the Northwest Indian Fisheries Commission. "There were houses along the river. But gradually, over the years, people have moved away from there because of the flooding. In my lifetime, I've seen places where we used to gather hay turn into cattail swamps."

The Skokomish, whose name means "people of the river" in their native Twana language, have revered the salmon for hundreds or perhaps thousands of years. The ancient Skokomish believed that salmon were immortals from underwater kingdoms who transformed into fish during journeys to the surface. While later generations of Skokomish became more modern in their lifestyles, their economic reliance on the salmon and their cultural and spiritual attachment to the fish did not change. The Skokomish are, and always have been, fishermen.

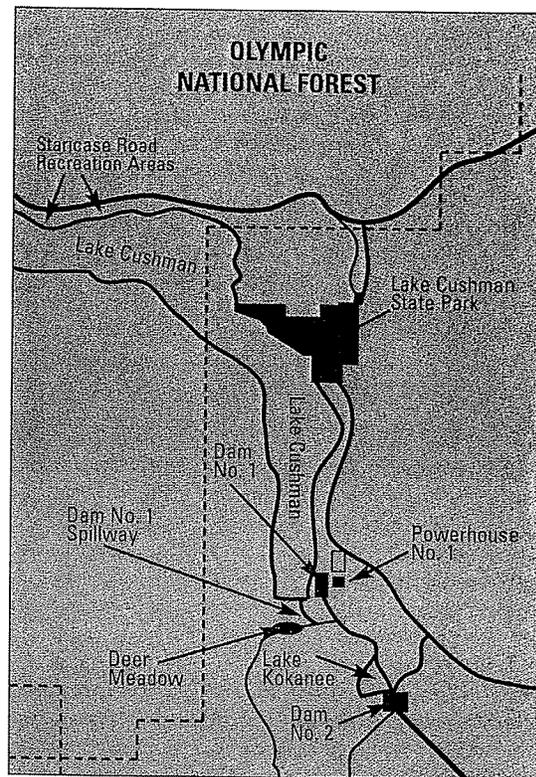
For Pavel, the legal fight his tribe is waging against the city of Tacoma is not just about getting compensated for the things that were taken away: water diverted from the riverbed, salmon and steelhead stocks that disappeared, acres of farmland consumed by a rising water table, the resulting deprivation and humiliation. It's about getting justice and exercising legal rights that were denied to Pavel's great-grandfather, George Adams, who filed the Skokomish Tribe's first lawsuit against the city of Tacoma in an attempt to prevent the damage that was to come.

In 1926 Tacoma built the first Cushman hydroelectric dam on the North Fork Skokomish River. The 275-foot-high, 1,111-

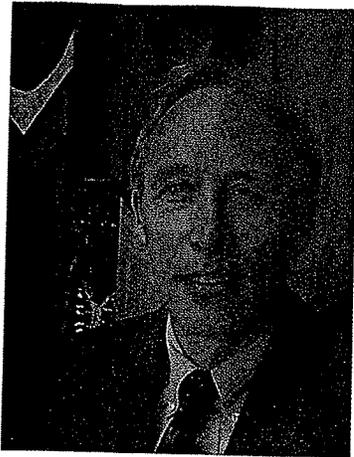
foot-long dam was lauded by President Calvin Coolidge as a great engineering feat and public service. Public officials at the time did not seem concerned that the dam had no fish passages, though state law required them.

In 1930 Tacoma built the second Cushman dam, which diverted virtually the entire North Fork out of its watershed into steel pipes connected to a powerhouse on Hood Canal. Adams, who was tribal chairman and also a longtime Democratic state legislator, lobbied the federal government to stop the diversion and protect the tribe's fishery. But government officials declined to get involved. Adams and a group of tribal leaders filed lawsuits in state and federal court to stop the diversion. Both 1930 cases were dismissed. The courts ruled that the tribe could not legally represent itself. The Indian Reorganization Act of 1934 restored tribal rights to self-representation, but by then the tribe was out of money, and luck.

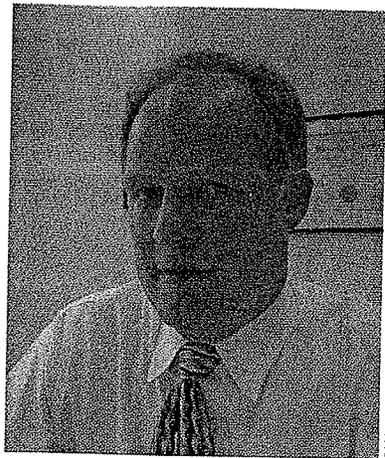
Before the dams, the North Fork was home to runs of steelhead and Chinook, coho, sockeye and chum salmon. The fishery was one of the Skokomish Tribe's primary food and economic resources. Now the Skokomish River salmon runs are greatly diminished; some are gone completely, and others are propped up by hatcheries. Three species of Skokomish River fish are listed as "threatened" under the Endangered Species Act: Puget Sound Chinook and Hood Canal



Skokomish River Area



Steve Klein



Ron Leighton

PHOTOGRAPHY BY CASSANDRA SWEET

summer-run chum salmon, and Coastal Puget Sound bull trout.

"The tribe's highest priority is restoring the river," says Pavel. "Tacoma might say we're just trying to squeeze a few bucks out of them. But the highest priority is restoration of the river."

IT IS CLEAR FROM GOVERNMENT documents that Tacoma cut a lot of corners in its rush to obtain the 1924 federal license to build the Cushman dams. In its original license application, Tacoma omitted the fact that the dams would affect the Skokomish Tribe and its fishery, and that the project's powerhouse and transmission lines would be on Skokomish Reservation land the city did not yet own. Tacoma condemned Indian land on which to build the powerhouse and transmission lines, an act sanctioned by courts at the time but later ruled unlawful by a federal judge. Tacoma violated state law by not providing fish passages at the dams. But in documents filed with the federal government, the city asserted that the dams complied with all state laws.

None of these inconsistencies appeared to concern federal and state agencies at the time. The Federal Power Commission granted Tacoma a 50-year license for the Cushman project with few questions asked. The United States was fighting its first world war, and developing new sources of power was a top federal priority.

Leighton, Tacoma's attorney in the Skokomish lawsuit, concedes that city, state and federal officials knew the Cushman dams would damage the river, destroy fish runs and create problems for the Skokomish Tribe. But, he argues, Tacoma should not be punished for deeds done long ago by people who are long dead.

"It is difficult and dangerous to judge ancient history by current norms," Leighton says. Figuring out how to compensate the Skokomish people for damage caused by the Cushman dams would be as difficult as determining reparations for Africa-Americans whose ancestors were enslaved, he says.

The city argues that the federal government, not Tacoma, was responsible for protecting the tribe and its fishery. If damage was done

by the federally licensed Cushman dams, the argument goes, the federal government alone is liable for the tribe's loss.

Morrisset agrees with Leighton to an extent. "I think a lot of the problem was that they felt they were doing God's work in bringing electricity to the masses," he says. "It was important that electrical generating facilities were being developed—there's no question about that—but to do that by destroying the

Skokomish Indian people was wrong."

Federal District Court Judge Franklin Burgess dismissed the lawsuit in August 2001. He ruled that the tribe could not seek monetary damages for treaty violations and that treaty rights must necessarily "adapt" to changing societal circumstances, such as the public need to develop hydropower. The Skokomish Tribe has appealed the ruling in the 9th Circuit Court of Appeals in San Francisco.

The ruling was influenced by another source of conflict between the tribe and the city. In 1998 the Cushman project received a new federal license containing a lengthy list of conditions for operating the dams. At least four times the current amount of water would have to be released from the dams into the riverbed. Fish passages would have to be installed, built-up silt removed,

and salmon and steelhead populations restored. The new license was bound to have steep conditions, as the original license had virtually none, and environmental laws had accumulated over the years. Aggressive lobbying by the Skokomish Tribe and pressure from federal and state agencies ensured license conditions that would go farther than Tacoma was willing to go to rescue the river and its wildlife from damage done by its dams. Tacoma has appealed the new license in court, calling the conditions too costly.

The Skokomish believe the Cushman dams—virtually unregulated until 1998—have been sucking energy out of the river at the expense of the environment and the tribe. The dams generate about 360 million kilowatt hours per year. At an average customer rate of 2.5 cents per kwh—among the lowest rates regionally and nationwide—the dams could bring in about \$9 million a year. Tacoma Power superintendent Steve Klein cautions against this estimate, yet declines to provide one. He insists Tacoma doesn't profit from the dams, but merely passes on their bounty to its citizens and businesses.

BOTH SIDES SAY THEY WANT TO settle out of court, but negotiations have gone poorly.

Klein believes that negotiations have failed because the Skokomish are being unreasonable and view Tacoma as an adversary rather than "a partner on the river."

"The goal has become punishment, not solving the environmental problems," he says.

Pavel and tribal chairman Denny Hurtado say the money is not the primary issue.

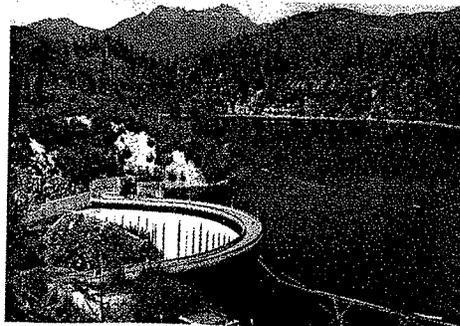
"What we hope is that [the city of] Tacoma will sit down and seriously try to negotiate the issues here and try to redress some of the wrongs instead of denying them, denying it ever happened, denying they've ever hurt anybody, denying their responsibility," says Pavel.

The Tacoma City Council has not participated in the negotiations to date, but this could change. Councilmember Bill Evans says he wants to help negotiate a compromise, though he knows little about the details of the lawsuit or the Cushman project. "It's important to resolve this issue with justice to all parties," Evans says. "We can't become victims of history; we have to make it right and move on."

Morrisset and the Skokomish Tribe are disappointed with the Burgess ruling but not surprised. They had unsuccessfully urged Burgess, a Tacoma ratepayer and former Tacoma assistant city attorney, to remove himself from the case. Morrisset is confident the 9th Circuit Court holds more promise.

"We believe that if the full story gets out there, the case will be successful," Morrisset says. "Until that's done here, this battle is going to continue." **L&P**

—Gig Harbor freelancer Cassandra Sweet has written for the Associated Press, the Puget Sound Business Journal and worth.com.



Top: The Cushman project floods 4,000 acres of Olympic National Forest every year. Bottom: Cushman Dam No. 1.