The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. STATE OF WASHINGTON, et al., Defendants.	NO. 3:19-cv-06227-RBL BRIEF OF AMICUS CURIAE TREATY TRIBES IN SUPPORT OF TULALIP TRIBES' MOTION TO INTERVENE AND MOTION TO DISMISS

I. INTRODUCTION

The Snoqualmie Indian Tribe (Snoqualmie) asks this Court for a declaration as to its status as a treaty tribe under the Treaty with the Duwamish, Suquamish, et al. (Treaty of Point Elliott), 12 Stat. 927 (Jan. 22, 1855), and specifically asks that the Court declare that "(1) it is a signatory to the Treaty of Point Elliott and (2) the [Snoqualmie] Tribe's reserved rights under the Treaty of Point Elliott have not been abrogated by Congress." Complaint for Declaratory Relief as to Treaty Status and Injunctive Relief (Dkt. #1) at ¶1-2. However, because Snoqualmie failed to join one or more necessary parties, including the Tulalip Tribes, the case cannot proceed.

Even if all necessary parties were present, the claim and issues Snoqualmie seeks to relitigate are barred by preclusion principles and finality concerns. In the *United States v. Washington* treaty fishing litigation, the Ninth Circuit adjudicated Snoqualmie's treaty tribe

status and issued a final judgment that Snoqualmie is not a treaty tribe and cannot exercise treaty rights. Snoqualmie now seeks to relitigate its treaty tribe status under a separate clause of the Treaty. In making its claim, it relies heavily on *United States v. Washington*, 394 F. 3d 1152 (9th Cir. 2005) (*"Washington III"*). However, that case was subsequently overruled by an *en banc* panel of the Ninth Circuit, which unanimously rejected the arguments Snoqualmie makes here in a case virtually identical to this one. *United States v. Washington*, 593 F. 3d 790, 800 (9th Cir. 2010) ("*Washington IV")*. Snoqualmie is precluded from relitigating its claim to treaty tribe status, and allowing the case to proceed would be disruptive to settled expectations in an arena in which finality concerns loom large.

II. IDENTITY AND INTERESTS OF AMICUS CURIAE

Amici are federally recognized Indian Tribes, each of which is a signatory or a successor in interest to one or more of the tribes and bands that entered into treaties with the United States in 1854-1855. In exchange for the cession of a majority of their homeland, the tribes reserved reservations and the right to continue to fish, hunt, and gather. The *Amici* tribes each have been determined by this Court in *United States v. Washington* to be treaty tribes able to exercise off-reservation hunting, fishing, and gathering rights.

A full description of *Amici*'s interest and identities are set forth in their motion for leave to file, Dkt. #26, and *Amici* file the instant brief with leave of the Court, Dkt. #26-1.

III. BACKGROUND

Amici adopt and incorporate by reference the factual background set forth in the Tulalip Tribe's Motion to Dismiss. *See generally* Tulalip Tribes' Motion to Dismiss Complaint

Pursuant to FRCP 12(b)(7) and 19 and Memorandum in Support ("Tulalip Motion") (Dkt. #17-1) at 3-7.

IV. ARGUMENT

A. Snoqualmie Has Failed to Join One or More Necessary Parties and the Case Should Not Proceed in their Absence.

As explained in the Tulalip Motion, Tulalip is an adjudicated successor in interest to the treaty Snoqualmie. *United States v. Washington*, 626 F. Supp. 1405, 1527 (W. D. Wash. 1979); *United States v. Washington*, 459 F. Supp. 1020, 1039 (W. D. Wash. 1978). *Amici* agree that Tulalip is required to be joined but cannot be compelled to join, and that this case should not proceed in its absence. As a result, the case should be dismissed.

Although not successors in interest to the treaty Snoqualmie, *Amici* also have treaty-protected interests which would be impaired if Snoqualmie is granted the relief it seeks. *Amici* Tribes are all adjudicated treaty tribes with the right to fish at usual and accustomed grounds and stations and hunt and gather on open and unclaimed lands. *See* Amicus Curiae Treaty Tribes' Motion for Leave to File (Dkt. #26 at 3). The treaties secured these rights. Finality in decisions regarding the treaty status of tribes is important because of resource management regimes. As Tulalip points out, nine tribes hold reserved hunting rights in the Treaty of Point Elliott area and under current management regimes there is not enough game for those nine tribes to harvest. Tulalip Motion (Dkt. #17-1) at 12; *see generally*, 2018 Big Game Harvest Report Western Washington Treaty Tribes, Northwest Indian Fisheries Commission, available at https://nwifc.org/publications/big-game-harvest-reports/. Treaty resources are finite and any share Snoqualmie claims would result in a dilution in shares of total harvest by the treaty tribes, harming their ability to put food on the table and earn a living from their treaty

activities. *E.g.*, *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990) (noting any increase to the Makah Tribe's fishing quota would diminish the harvest of other tribes sharing the same resource).

In addition to this "potential disruption and possible injury," the Ninth Circuit has recognized there may be broader impacts for absent tribes. *See Washington IV*, 593 F.3d 790, 800. Several decisions of this Court have recognized that absent treaty tribes may have a "legally-protected interest in how the Treaty is interpreted and enforced." *Skokomish v. Goldmark*, 994 F. Supp. 2d 1168, 1187 (W.D. Wash. 2014); *see also Skokomish Indian Tribe v. Forsman*, Case No. 16-5639-RBL, 2017 U.S. Dist. LEXIS 42730 (W.D. Wash. 2017); *aff'd* 738 Fed. Appx. 406 (9th Cir. 2018).

Amici are also concerned about future implications if Snoqualmie is successful. Snoqualmie is not the only entity that has attempted to relitigate a failed claim of treaty tribe status, or that may attempt to do so in the future. Four other entities were denied treaty tribe status in the same proceedings as Snoqualmie: Snohomish, Steilacoom, Duwamish, and Samish. *United States v. Washington*, 476 F. Supp. 1101, 1104 (W.D. Wash. 1979) (*"Washington I")*. Any one of those entities might seek, as Snoqualmie does here, to re-litigate its treaty status at some point in the future. In fact, one (the Samish) already has, in a series of cases discussed in Part B. If relitigation of treaty tribe status were allowed any time an entity gains recognition, it would unnecessarily complicate two processes – recognition and determination of treaty tribe status – that *Washington IV* said are independent of each other. "[T]reaty litigation and recognition proceedings [are] 'fundamentally different' and [have] no effect on one another." *Washington IV*, 593 F. 3d at 800 (quoting *Greene v. Babbitt*, 64 F.3d

1266, 1270 (9th Cir. 1995)). Reintroducing uncertainty into the law by allowing this case to proceed "would not allow an orderly process of protecting the rights of existing treaty tribes on the one hand, and groups seeking recognition on the other." *Washington IV*, 593 F. 3d at 801. For these reasons and for the reasons given in Tulalip's Motion, including the failure to join Tulalip and any other necessary parties, this case should be dismissed.

B. Even if the case could proceed, the claims and issues the Snoqualmie seek to relitigate are barred by preclusion principles and finality concerns.

The Snoqualmie ask this Court for a declaration that it is a signatory to the Treaty of Point Elliott, that its treaty reserved rights have not been abrogated by Congress, and that it is entitled to participate in the treaty hunt. However, after extensive proceedings this Court has already found, and the Ninth Circuit affirmed, that Snoqualmie is not a treaty tribe. *Washington I*, 476 F. Supp. at 1104, 1108-09. Therefore, there were never any treaty rights for Congress to abrogate.

The threshold question for any group claiming to be a tribe entitled to exercise treaty rights is whether that group is a "treaty tribe"— that is, a modern-day political successor in interest to one or more of the tribes and bands that participated in one or more treaties reserving usufructuary rights. The critical inquiry is whether the tribe has maintained an organized tribal structure from treaty time forward. *Washington IV*, 593 F. 3d at 799; *United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir. 1981) (*"Washington II")* (citing *United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975)).

a. Snoqualmie has already litigated its treaty tribe status and lost.

Snoqualmie moved to intervene in *United States v. Washington* seeking a determination of its treaty tribe status under the Treaty of Point Elliott and of its right to participate in treaty

fishing activities.[1] Judge Boldt granted intervention, *United States v. Washington*, Dkt. #772 (Sept. 13, 1974) (attached as Exhibit A), and a five-day evidentiary hearing was held before a magistrate judge. The magistrate determined that Snoqualmie was not "a treaty tribe or a political successor," based on a finding that "the Intervenor Snoqualmie Indian Tribe exercises no attributes of sovereignty over its members or any territory." *United States v. Washington*, Dkt. #1023 (Mar. 5, 1975) (attached as Exhibit B).

Judge Boldt then reviewed the issue de novo, and likewise found that Snoqualmie was not a treaty tribe based on a finding that the "Intervenor Snoqualmie Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott." *Washington I*, 476 F. Supp. at 1109. In particular, the court found that the critical requirement for treaty tribe status—maintenance of an organized tribal political structure from treaty time forward—was not satisfied. *Id.* ("The citizens comprising the Intervenor Snoqualmie Tribe have not maintained an organized tribal structure in a political sense.").

On appeal, the Ninth Circuit affirmed the District Court's findings and conclusion that Snoqualmie is not a treaty tribe. *Washington II*, 641 F.2d 1368. In *Washington II*, the Court explained what was at issue in the appeal: Snoqualmie's, and the four other proposed intervenors' claims to treaty tribe status and to "exercise treaty rights." *Id.* at 1372. After close scrutiny, the Ninth Circuit rejected these claims. It noted that the only tribes that may

[1]Contrary to its positions here, in a memorandum to the Court, the Snoqualmie plainly stated what it litigated before Judge Boldt: "It is the contention of [Snoqualmie] that upon a proper showing that **[it is] the successor[] in interest to signatories to the Treaty of Point Elliott**." *United States v. Washington*, Dkt. #898 at 1 (Dec. 4, 1974) (emphasis added) (attached as Exhibit C). Moreover, Snoqualmie acknowledged that the "right to fish is one which derives from the Treaty alone and is in no way connected or dependent upon 'federal recognition.'" *Id.* For the Court's convenience, copies of this and other *United States v. Washington* trial court filings cited in this brief are included as attachments to the brief.

exercise treaty rights "are the tribes that signed the treaties." *Id.* Reiterating a prior decision the Court held that there is a "single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure." *Id.* (citing *United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975)). Because Snoqualmie had not done so, it was not a treaty tribe. *Id.* at 1374. That continues to remain true today.

b. Snoqualmie's attempt to relitigate its treaty tribe status based on its subsequent recognition is foreclosed by Ninth Circuit precedent.

Despite the Ninth Circuit's binding judgment that it is not a treaty tribe, Snoqualmie has now come back to this Court in an attempt to relitigate its treaty tribe status, based not on the fishing clause but on the hunting and gathering clause of the Treaty of Point Elliott. However, the specific clause of the treaty under which such rights are claimed to arise has no impact on the Ninth Circuit's unequivocal decision: Snoqualmie is not a treaty tribe and is therefore not entitled to "exercise treaty rights[.]" *Washington II*, 641 F.2d at 1372, 1374. Stated another way, while the Ninth Circuit's determination in *Washington II* was made in the context of Snoqualmie's desire to engage in the treaty fishery, that determination was not limited to treaty fishing rights.

For treaty tribe status to be determined by the courts on a clause by clause basis, or for some tribes to be party to the treaties for some purposes but not others, is both illogical and inconsistent with the textual structure of the treaties. The treaty fishing clause and the treaty hunting clause appear in the same sentence of the same article of the treaties, which in Article 5 of the Treaty of Point Elliott reads:

> The **right of taking fish at all usual and accustomed fishing grounds and stations** is further secured to said Indians in common with the all citizens of the Territory, and of erecting temporary houses for the purposes of curing, **together with the privilege of hunting and gathering roots and berries on open and unclaimed lands**. Provided, however, that they shall not take shell-fish from any beds staked and cultivated by citizens.

12 Stat. 927, Art. 5 (emphasis added). As with a contract, the tribal entities that signed the treaties, signed the entire treaty and are therefore entitled to exercise all of the rights reserved by the treaty and receive all the benefits granted by the treaty. Indian treaties "are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.'" *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) (citing *Tulee* v. *Washington*, 315 U.S. 681, 684-85 (1942)). Snoqualmie's argument here that its case may proceed because it is hunting rights that are at issue rather than fishing rights does not align with contract law or treaty interpretation. A final judgment as to treaty tribe status holds as true for hunting as it does for fishing, or any of the other rights listed in the many other clauses that appear in the treaties.

Nevertheless, in an effort to avoid the preclusive effects of an adverse prior judgment and underlying factual findings on its treaty tribe status, Snoqualmie makes a number of arguments. If this case proceeds to the merits, there is much to say in response, but for now the *Amici* simply note several things.

The primary argument Snoqualmie makes is that its subsequent federal recognition justifies relitigating its treaty tribe status. *See, e.g.*, Snoqualmie Tribe's Motion for Partial Summary Judgment and Memorandum in Support Thereof ("Snoqualmie Motion") (Dkt #14)

at 9-10 (recognizing a "necessary political continuity link" to establish treaty tribe status and arguing that the administrative determination to recognize Snoqualmie found such a link); 11 (arguing that because it was unrecognized at the time of the Boldt decision, Snoqualmie was "not … able to assert treaty status in court"); 12 (arguing that recognition is a changed circumstance). To support its position, Snoqualmie relies extensively on *Washington III*, 394 F.3d 1152. Quoting that opinion, it argues:

- That "[F]ederal recognition is determinative of the issue of tribal organization," Snoqualmie Motion at 11 (quoting *Washington III*, 394 F.3d at 1161);
- That Judge Boldt, instead of ruling that the proposed intervenors (including the Samish and the Snoqualmie) "no longer held treaty fishing rights," actually ruled only that they "'presently' did not hold such rights.'" *Id*. (quoting *Washington III*, 394 F.3d at 1155, n.4); and
- That the Snoqualmie "'would almost certainly have won the right to exercise its treaty fishing rights had [it] been federally recognized at the time…'" *Id*. (quoting *Washington III*, 394 F. 3d at 1159).

What Snoqualmie inexplicably fails to inform the Court is that *Washington III* was unanimously overruled by an *en banc* panel of the Ninth Circuit, which explicitly considered and rejected the very arguments Snoqualmie makes here.[2] In *United States v. Washington*, 593 F.3d 790 (9th Cir. 2009) (en banc) (*"Washington IV"),* Samish tried to relitigate the Ninth Circuit's binding judgment that it was not a treaty tribe by relying on its subsequent grant of

[2] This failure is difficult to understand, given that Snoqualmie is aware of and cites the subsequent *en banc* opinion overruling *Washington III*, as discussed below.

federal recognition. The Ninth Circuit rejected this attempt, holding that "**recognition proceedings** and the fact of recognition **have no effect on the establishment of treaty rights** at issue in this case." *Washington IV*, 593 F.3d at 793 (emphasis added); *see also id.* at 800 ("[T]reaty adjudications have no estoppel effect on recognition proceedings, and recognition has no preclusive effect on treaty rights litigation. Indeed … the fact of recognition cannot be given even presumptive weight in subsequent treaty litigation.").

Like the Snoqualmie now, Samish had argued in *Washington IV* that the administrative determinations underlying its recognition decision would, in Snoqualmie's words in the present case, provide the "necessary political continuity link" to establish treaty tribe status. Snoqualmie Motion at 9. The Court rejected this argument, reasoning that the critical finding justifying the denial of treaty rights was Judge Boldt's finding that Samish, Snoqualmie, and the other proposed intervenors had not "functioned since treaty times as continuous separate, distinct and cohesive cultural or political communit[ies]." *Washington IV*, 593 F.3d at 799 (quoting *Washington II*, 641 F.2d at 1373) (internal quotations removed). It found that the proceedings in the trial court had been extensive, and that after close scrutiny the Ninth Circuit had concluded that the evidence supported this finding of fact. And although Samish sought to relitigate its treaty tribe status "on the ground that an administrative body [had] come to a conclusion inconsistent with the factual finding finally adjudicated by [the Ninth Circuit]," there was "no authority upholding relief from judgment under Rule 60(b) on such a ground." *Washington IV*, 593 F.3d at 799. This precedent bars Snoqualmie's claims here.

The Ninth Circuit also stated in *Washington IV* that it found no reason "why the Samish Tribe lacked incentive to present in [United States v. Washington] all of its evidence

supporting its right to successor treaty status." *Id.* The same is true here. While Snoqualmie claims that it was "not … able to assert treaty status in court" while it was unrecognized and that it had few resources to do so, Snoqualmie Motion at 11, it in fact did just that in the lengthy proceedings described above. The fact that Snoqualmie dislikes the outcome of that litigation does not mean that the litigation failed to provide an adequate opportunity for Snoqualmie to litigate its claim to treaty tribe status or that it should be allowed to relitigate its claim now.[3]

Snoqualmie also argues—relying, perplexingly, on the very decision that overruled Snoqualmie's oft-cited *Washington III*—that "newly recognized tribe[s]" are not precluded from "attempting to intervene in *United States v. Washington* or other treaty rights litigation to present a claim of treaty rights not yet adjudicated." Snoqualmie Motion at 13 (quoting *Washington IV*, 593 F.3d at 800-801(litigant emphasis removed) (italics original). But this case, like the Samish case, does not involve a claim of treaty rights not yet adjudicated; the Ninth Circuit has already ruled that none of the five proposed intervenors in *United States v. Washington* was a treaty tribe. And as was the case for the Samish in *Washington IV*, the Snoqualmie cannot relitigate its treaty tribe status now.

In addition to preclusion principles, finality concerns also counsel against allowing the case to proceed. The Ninth Circuit has found that "considerations of finality loom especially large in [*United States v. Washington*], in which a detailed regime for regulating and dividing fishing rights has been created…. Although such a complex regime does not preclude a new

[3] This argument is also belied by the fact that most, if not all, of the treaty tribes lacked significant resources at the time of the *United States v. Washington* decision, and the fact that two of the original tribal plaintiffs (Stillaguamish and Upper Skagit) were unrecognized at the time and nevertheless successfully proved their treaty tribe status. *United States v. Washington*, 384 F. Supp. 312, 379 (W.D. Wash. 1974).

entrant who presents a new case for recognition of treaty rights, it certainly cautions against relitigating rights that were established or denied in decisions upon which many subsequent actions have been based." *Washington IV*, 593 F.3d at 800.

V. CONCLUSION

Amici Tribes respectfully request that the Court grant Tulalip's Motion to Intervene and Motion to Dismiss Snoqualmie's cause of action.

Dated this 31st day of January 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties that are registered with CM/ECF system.

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