UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as parens patriae on behalf of its members, Plaintiff-Appellant, v. STATE OF WASHINGTON; et al., Defendants-Appellees, SAMISH INDIAN NATION, Intervenor.	No. 20-35346
SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as parens patriae on behalf of its members, Plaintiff, and SAMISH INDIAN NATION, Intervenor-Appellant, v. STATE OF WASHINGTON; et al., Defendants-Appellees.	No. 20-35353

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA, No. 3:19-cv-06227-RBL
The Honorable Ronald B. Leighton, U.S. District Court Judge

REPLY BRIEF OF INTERVENOR - APPELLANT SAMISH INDIAN NATION

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INTRODUCTION

The Samish Indian Nation ("Samish Tribe") submits this Reply Brief on the subject of the en banc Court's decision in *United States v. Washington*, 593 F.3d 790 (9th Cir. 2010) (en banc) ("*Samish*" or "*Washington IV*"), and how issue and claim preclusion apply to the Samish Tribe under that decision.

To avoid confusion, it is necessary for the Samish Tribe to state at the beginning what this appeal is not about. Samish is not asking this Court to declare that it has treaty hunting or gathering rights; Samish is only asking this Court to reaffirm that the Samish Tribe has the right to litigate a claim for unadjudicated treaty hunting and gathering rights in appropriate future treaty litigation.[1] That is all. Samish believes it has treaty status and has proved the required successorship twice now in non-treaty proceedings. It will also have to prove its treaty status from scratch in any future treaty litigation.

[1] The State, as well as amici curiae Tulalip Tribes and Seven Tribes ("Amici Tribes"), overstate that the Snoqualmie Tribe is seeking hunting and gathering rights "throughout the modern day State of Washington." *E.g.*, State Brief at 7, 51. This appeal will not determine the scope of any treaty hunting and gathering rights, a claim that has never been adjudicated and would potentially involve many tribes and even larger areas (Washington Territory in 1855 included all of Idaho and portions of Montana and Wyoming). The Samish Tribe believes that the treaty hunting and gathering right, in accord with the "reserved rights doctrine," is limited to treaty ceded territory and other areas where a tribe hunted and gathered in 1855. *E.g.*, *United States v. Winans*, 198 U.S. 371, 381 (1905).

Additionally, the Samish Tribe does not seek to reopen *United States v. Washington*, 476 F.Supp. 1101 (W.D. Wash. 1979) ("*Washington II*") or to relitigate off-reservation treaty fishing rights claims. Samish acknowledges that its off-reservation fishing rights were finally decided by *Samish* and are foreclosed by *Washington II*. The Samish Court did, however, specifically rule that the Samish Tribe may litigate treaty hunting and gathering rights in future treaty litigation and that this right is not foreclosed by *Washington II*. The district court erred in ruling to the contrary.

As discussed in the Samish Tribe's Opening Brief at 25, 32, Samish does not join in the Snoqualmie Tribe's other arguments. The Samish Tribe believes the district court's issue preclusion ruling must be overturned and the matter remanded to the district court for further proceedings.

The en banc Court in its decision in *Samish* was clear in ruling that while Samish cannot reopen the off-reservation treaty fishing rights decision in *Washington II*, Samish does have the right to litigate in the future unadjudicated treaty claims such as hunting and gathering. The en banc Court reached this result by creating a narrow issue preclusion exception for tribes like Samish and Snoqualmie. As the State's Response Brief and the Amici Tribes' briefs

demonstrate, however, parties still refuse to accept the en banc Court's decision.[2] In order to end continuing challenges to *Samish*, this Court must affirm it.

The Samish Tribe discussed the en banc Court's decision and reasoning in *Samish* at length in its Opening Brief at 23-30. The State disagrees with this interpretation. State Brief at 11. The Samish Tribe believes the en banc Court's decision in *Samish* is clear and straightforward while the State engages in a strained reading of that decision, distorting the words and phrases used by the Court to reach an unsustainable interpretation of the Court's decision. This Reply Brief will address specific arguments made by the State in its Response Brief, and show how the State's interpretation of *Samish* is without merit and why this Court

[2] *E.g.*, State Brief at 21 ("If it had been the intent of the en banc Court to create an exception from issue preclusion for [the Samish and Snoqualmie] Tribes, the Court could have clearly conveyed that intent. It did not."). The en banc Court did just that. The State tries to avoid this conclusion by distorting the language of the en banc Court. It argues that all the Court did in *Samish* was hold that administrative findings in federal recognition proceedings (where Samish established its successorship to the treaty Samish Tribe) "have no effect in treaty litigation." *Id.* This is not what the en banc Court said. It said the best way to avoid confusion in related treaty and recognition proceedings is "to deny any effect of federal recognition in any subsequent treaty litigation." 593 F.3d at 801. *Samish* was an appeal brought by the Samish Tribe as appellant. It involved only the Samish Tribe. If the en banc Court had intended that the "course we adopt" did not apply to the Samish Tribe, it could have said for example: "But this course we adopt does not apply to appellant Samish Tribe because its treaty status has previously been litgated and cannot be litigated again for any treaty rights claim." The en banc Court did not do so because this course clearly applied to appellant Samish Tribe.

must apply the en banc Court's decision in *Samish* to reverse the district court's ruling on issue preclusion.

ARGUMENT

I. Reply to State's Response Brief.

Three brief introductory issues must be addressed. The first involves application of issue and claim preclusion. Samish agreed in its Opening Brief that the district court correctly distinguished between what is issue preclusion and what is claim preclusion, Opening Brief at 19 n.3; however, the Tribe disagrees with how the court applied those principles. The treaty "claims" involved are off-reservation treaty fishing rights, hunting rights, and gathering rights.[3] The "issue" subject to potential preclusion is treaty status, which applies to all treaty claims. The State sometimes confuses the two concepts. *See* State Brief at 11 (referring to treaty status as a treaty claim), 16 (referring to treaty hunting and gathering rights as treaty issues). The distinction must be kept clear.

Second, the State argues that in *Samish* or *Washington IV*, the en banc Court resolved the "inconsistency" between *Washington II*, *supra*, and *United States v. Washington*, 394 F.3d 1152 (9th Cir. 2005) ("*Washington III*"). State Brief at 6-7.

[3] Off-reservation hunting and gathering rights, which are exercised on "open and unclaimed lands," are separate treaty claims from off-reservation fishing rights, which take place at "usual and accustomed grounds and stations." Treaty of Point Elliott, Art. V, 12 Stat. 927 (1855). What are open and unclaimed lands has not been determined.

This assertion is incorrect. *Samish* addressed the inconsistency between *Washington III* and *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993) ("*Greene I*"), and *Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995) ("*Greene II*"). *Samish*, 593 F.3d at 793. Contrary to the State and Amici Tribes' discussion of the case, the en banc *Samish* Court did more than just address finality concerns with regard to treaty fishing claims. The State's (and Amici Tribes') purported summary of *Samish* omits the critical part of the en banc Court's ruling: the Court crafted an issue preclusion exception authorizing "newly recognized tribes" like Samish to litigate unadjudicated treaty rights claims in the future by proving their treaty status anew.

Third, the State asserts that this Court should deny judicial notice of the two public records attached to Samish's Opening Brief. State Brief at 27 n.4. The State makes no real argument against judicial notice but says that the documents are not relevant to this appeal. *Id*. But that assertation is only true if the Court were to decide this appeal in favor of the State. The referenced documents are relevant to this Court's decision making. Amici Tribes do not oppose admission of these documents.

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A. The State Distorts the Word "Anew."

The State's position is that the en banc Court's ruling about the right of "newly recognized tribes"[4] to litigate treaty rights claims not yet adjudicated only applies to tribes that have never before adjudicated any treaty right. State Brief at 24-25. It can make this argument only by completely distorting the language used by the *Samish* Court. One example is the State's unmoored attempt to reinterpret the term "anew." In its ruling providing an exception to issue preclusion for tribes with previous negative treaty claim decisions, the *Samish* Court held:

> Nothing we have said precludes a newly recognized tribe from attempting to intervene in *United States v. Washington* or other treaty rights litigation to present a claim of treaty rights not yet adjudicated. Such a tribe will have to proceed, however, by introducing its factual evidence anew; it cannot rely on a preclusive effect arising from the mere fact of recognition.

Samish, 593 F.3d at 800 (emphasis added).

The State and the Seven Tribes argue that the en banc Court's use of the term "anew" is a reference to the evidence that the relevant tribe presented in its administrative federal acknowledgment proceeding, not a reference to the evidence

[4] The State argues that the term "newly recognized tribe" used several times in linked fashion in the concluding discussion in *Samish* is only a term "use[d] to generally describe a tribe that recently obtained federal recognition." State Brief at 24. This attempted distortion of Judge Canby's careful and detailed use of this specific term, a legal term of art, is incongruous. *See Frank's Landing Ind. Cmty. v. NIGC*, 918 F.3d 610, 613 (9th Cir. 2019) ("recognition" a legal term of art).

that the relevant newly recognized tribe introduced in previous treaty rights litigation. State Brief at 25; Seven Tribes Brief at 14. These arguments are patently wrong. As the Samish Tribe discussed in its Opening Brief, tribes petitioning for federal acknowledgment after 1994 (Samish presented its federal acknowledgment petition under the more restrictive original 1978 regulations) must only prove that they have continuously existed and maintained a government since 1900. Opening Brief at 38 and n.23; 25 C.F.R. §83.11(a) (2015). By contrast, tribes seeking treaty status must prove that they have continuously existed from treaty time in 1855. *United States v. Washington*, 641 F.2d 1368, 1372-74 (9th Cir. 1981); *Greene I*, 996 F.2d at 975 ("The district court found that [Samish] had failed to maintain an organized tribal structure since signing the Treaty of Point Elliott.").

This means that a tribe seeking federal acknowledgment since 1994 will not present any factual evidence related to treaty status from 1855 to 1900 in its federal acknowledgment proceeding.[5] The Ninth Circuit in other Samish appeals has repeatedly held that "the issues of tribal treaty status and federal acknowledgment [are] fundamentally different," that determinations of federal acknowledgment and

[5] This is a critical distinction and one likely not lost on Judge Canby, a distinguished authority on Federal Indian law and author of the *Samish* en banc decision. *See* William C. Canby, Jr., American Indian Law in a Nutshell, 5th ed. (West Publishing Co., 2009) at 7 ("A group seeking acknowledgment must, among other things, have been idenitified as an American Indian entity on a substantially continuous basis since 1900."). The same quote appears in the 2020 7th edition. Judge Canby wrote the *Samish* en banc decision in 2010.

treaty status "serve[] a different legal purpose and ha[ve] an independent legal effect," and that the question of federal recognition "did not implicate treaty claims." *Greene II*, 64 F.3d at 1270-71, quoting *Greene I*, 996 F.2d at 975-77.

There is no treaty status evidence for a tribe that has "recently obtained federal recognition" under the 1994 federal acknowledgment regulations to present "anew" in subsequent treaty litigation, as the State argues, because such evidence was never presented to begin with. *See* State Brief at 25 ("newly recognized" tribe "would have to present the same factual evidence used in the administrative process to a court in asserting treaty rights"). Given the recognition requirements of 25 C.F.R. Part 83, the State's argument regarding interpretation of the word "anew" in *Samish* makes no logical sense and must be rejected; that term can only apply to tribes reorganized under the regulations that previously litigated a treaty rights claim and presented treaty status evidence in that prior proceeding.

The State's argument on this issue is also foreclosed by the *Samish* Court's careful distinction between newly recognized tribes that had previously litigated a specific treaty rights claim and those that had never adjudicated any treaty claims. After all, *United States v. Washington* involved only off-reservation treaty fishing claims, and not, as the State asserts, "claims to treaty rights" generally. State Brief at 28. The Court in *Samish* precluded the Samish Tribe from reopening and relitigating *Washington II* based substantially on considerations of finality that

"loom[ed] especially large" in Samish's Rule 60(b)(6) motion to reopen because of detailed, long-standing regimes that had been developed by many parties for regulating and dividing fishing rights. *Samish*, 593 F.3d at 799-800. The Court stated immediately thereafter, however, that such finality concerns do not exist for unadjudicated treaty rights claims. *Id.* at 800.

The Samish Court also specifically acknowledged the separate legal status of newly recognized tribes that had never before litigated any treaty rights claim. It held that finality concerns, like those that militated against allowing previously adjudicated treaty rights claims to be reopened, would "not preclude a new entrant who presents a new case for recognition of treaty rights," *id.* at 800, from litigating any treaty right claim. Such a tribe can litigate off-reservation treaty fishing rights as well as treaty hunting and gathering rights.

Later in *Samish*, the en banc Court reiterated that it knows the distinction between newly recognized tribes that have previously litigated treaty claims and newly recognized tribes that have never litigated such claims in resolving with finality whether existing treaty tribes should ever be allowed to intervene in federal recognition decisions "to protect against possible future assertions of treaty rights by the newly recognized tribe." 593 F.3d at 801. The *Samish* Court ruled that

existing treaty tribes cannot, "whether or not that [newly reorganized] tribe has previously been the subject of a treaty rights decision." *Id.* [6] This statement clearly encompasses both classes of newly recognized tribes – those with previous adverse treaty rights decisions and those without. The *Samish* Court's holding that newly recognized tribes can litigate unadjudicated treaty rights claims cannot logically or legally be applied only to "recently" recognized tribes that have never litigated any treaty right, as the State argues it can, because factual evidence establishing such a tribe's connection to treaty times would necessarily be introduced for the first time, rather than anew.[7]

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[6] Ignoring this clear distinction, the Tulalip Tribes immediately sought to distinguish the *Samish* decision and intervene in the Snohomish Tribe's federal recognition proceeding. *Evans v. Salazar*, 604 F.3d 1120 (9th Cir. 2010). Judge Canby rejected that attempt: "The problem presented by the Tulalip Tribes is precisely the problem we addressed in our en banc decision in *Samish* . . . ." *Id.* at 1123. The Snohomish Tribe was also a party in *Washington II*, and in *Evans* Judge Canby reaffirmed the right of those tribes, if they successfully achieved federal recognition, to litigate unadjudicated treaty rights. *Id.*

[7] As expected, the State argues that this ruling by the *Samish* Court was not a "holding" and was only "dicta." State Brief at 20-21. The Samish Tribe preemptively addressed and refuted this argument in its Opening Brief at 20 n.15, citing *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc). *Johnson* is the law of the Circuit. The *Samish* Court resolved disputes and provided guidance for future cases on two specific issues: 1. Under what circumstances can a newly recognized tribe with a previous negative treaty rights claim litigate another, unajudicated treaty rights claim; and 2. When can a treaty tribe intervene in a federal recognition proceeding by another tribal group to protect against future possible assertion of treaty rights. The *Samish* Court's holdings on these two issues were reasoned and considered, and are not dicta.

The district court ruled that only a tribe that has never litigated and lost any treaty right can litigate treaty hunting and gathering claims under *Samish*. Order at 11, ER12, State Brief at 24. The district court's ruling errs as a matter of law and fact and must be reversed.

B. The State Misconstrues the Terms "Close Scrutiny," "Presently," "At This Time," and "Finality."

The State's arguments employ a gross misreading of *Samish*; the Amici Tribes are in lock step. First, the State and Amici Tribes spend much of their briefs extolling the legal merits of the district court's treaty rights decision in *Washington II*, referring in particular to the "close scrutiny" this Court gave to the district court's findings on appeal as grounds for why the treaty fishing rights conclusion in *Washington II*, 641 F.2d at 1373, should also be applied to treaty hunting and gathering. *See* ER at 10. They cite the term "close scrutiny" many times. State Brief at 1, 5, 11, 14, 19, 22, 30, 32; Tulalip Brief at 9, 12, 14; Seven Tribes Brief at 2, 7, 15. In the appeal of *Washington II*, this Court reviewed the record that had been developed in the district court under an incorrect legal standard and "other purported considerations." *Id.* at 1371-72 ("The district court's statement that federal nonrecognition is decisive, together with its listing of other purported considerations, makes it difficult for us to determine the precise basis for the court's holding that the tribes may not exercise treaty rights. Moreover, although

some of the other considerations mentioned by the district court may be relevant, they do not adequately define the controlling principles.").

The State and Amici Tribes rely on the Ninth Circuit's "close scrutiny" of the district court's factual findings to argue that *Washington II* cannot be questioned, and in doing so omit the context of how that term actually appears in the decision. After setting out the proper inquiry under which the district court should have analyzed Samish and Snoqualmie's treaty status, and after noting that the district court had engaged in the "ordinarily disfavored" process of adopting verbatim the United States' proposed findings and conclusions (which "calls for close scrutiny by an appellate court"), the Court stated that "the district court's findings still must be upheld unless clearly erroneous." *Id.* at 1371. Applying close scrutiny to the factual record developed by the district court in *Washington II*, the Court concluded: "We cannot say, then, that the finding of insufficient political and cultural cohesion is clearly erroneous." *Id.* at 1374.

A "clearly erroneous" review standard is completely different than that represented by the State and Amici Tribes by repeatedly stating that the Court gave "close scrutiny" to the record in *Washington II*. "Close scrutiny" of the record before a court does not mean that the record was necessarily adequate or fully developed under the correct legal standard. The Samish Tribe's success in proving

the same factual evidence required to exercise treaty rights in its federal recognition proceeding strongly indicates that the record in *Washington II* was not adequate. The district court in *Washington II* developed the factual record under the incorrect legal standard, adopted findings of fact and conclusions of law verbatim from those drafted by the United States, and then applied the wrong legal standard to that limited factual record. These factors militate against applying too broad a brush to the district court's ruling.[8]

[8] The Court of Appeals in *Washington II* noted that if the district court's application of an incorrect legal standard left the appellate court with an inadequate factual record on which to affirm, the case must be remanded, 641 F.2d at 1371 (citing *Amador Beltran v. United States*, 302 F.2d 48, 52 (1st Cir. 1962)), but then analyzed the district court's flawed factual record under the correct legal principle to uphold the district court's decision. A few months later, the U.S. Supreme Court announced a much more restrictive rule on when an appellate court may make its own factual findings under the correct legal standard, requiring remand in almost all cases. *Pullman-Standard v. Swint*, 456 U.S. 273, 293 (1982) ("Proceeding in this manner seems to us incredible unless the Court of Appeals construed its own well-established Circuit rule . . . to permit it to examine the record and make its own independent findings with respect to those issues on which the district court's findings are set aside for an error of law. . . . It follows that when a district court's finding on such an ultimate fact is set aside for an error of law, the court of appeals is not relieved of the usual requirement of remanding for further proceedings to the tribunal charged with the task of factfinding in the first instance."). *See Grimm v. City of Portland*, 971 F.3d 1060, 1068 (9th Cir. 2020) (quoting *Zetwick v. County of Yolo*, 850 F.3d 436, 442 (9th Cir. 2017)) ("where application of incorrect legal standard may have influenced the district court's conclusion, remand is appropriate."). This change in the law supports a narrow application of the Court's ruling in *Washington II* to other claims. This is what Judge Canby recommended in *Washington II* in dissent. 641 F.2d at 1374-76. As he noted in the en banc *Samish* decision, 593 F.3d at 794 n.4, the majority did not accept his view at that time.

The district court in *Washington II* qualified its own decision by concluding that the Samish Tribe "is [not] at this time a treaty tribe in the political sense within the meaning of Final Decision No. I and related Orders of the Court in this case," and does not "presently hold[] for itself or its members fishing rights secured by any of the Stevens treaties identified in Final Decision No. I in this case." *Washington II*, 476 F.Supp. at 1111 (emphasis added). Why the court qualified its decision in this manner is not specifically stated; the question of "recognition" and the fact that the court and United States knew that the Samish Tribe was administratively petitioning for confirmation of its federal recognition status at the same time it was litigating its treaty status was clearly a factor.[9]

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[9] *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1360 (Fed. Cir. 2005) (Samish filed recognition petition in 1979). State Brief at 4 ("In denying treaty status, the district court also relied on the fact that, at the time, the Snoqualmie and other tribes had not obtained federal recognition."). For example, the Jamestown Clallam (now S'Klallam) Tribe obtained federal recognition first and then applied for treaty status, with recognition being a major factor in the court's decision. 45 Fed. Reg. 81890 (Dec. 12, 1980) (Jamestown federal acknowledgment); *United States v. Washington*, 626 F.Supp. 1405, 1433-34 (W.D.Wash. 1981) (Jamestown treaty status). *See Samish*, 593 F.3d at 797, summarizing the holding in *Washington III*, 394 F.3d at 1159 ("We noted that, if the Samish Tribe had been recognized at the time it first sought an adjudication of treaty rights, it 'almost certainly' would have succeeded."). In its opposition to a petition for certiorari in 1981 in *Washington II*, the federal government took the position "that future federal recognition might justify revisiting the treaty rights issue." *Duwamish Tribe et al. v. Washington*, No. 81-509, Brief of the United States in Opposition to Petition for Certiorari, December 1981 at 12 n.7 ("While recent cases have indicated that the federal government's failure to recognize a tribe is not dispositive, . . .positive recognition by the United States is accorded great deference and may well be controlling. (citations omitted). Accordingly, should

Second, the State argues that to apply the dictionary definition of "presently" and "at this time" to the district court's use of those terms in *Washington II* is a "gross misreading of *Washington II*," State Brief at 18 n.2, and that the court meant to say that "whatever treaty rights the signatories to the Treaty enjoyed at the time of the signing, the modern day Snoqualmie (and Samish) no longer enjoys them." To the contrary, ignoring the plain language of the Court as the State advocates would be a gross misreading. *See* meriam-webster.com/dictionary/presently (definition of "presently": "at the present time: NOW"). The *Samish* Court's inclusion of those terms in quoting from *Washington II* highlights that they are not surplusage, but rather were intended to have meaning. *See Samish*, 593 F.3d at 794. As the quote above in n.9 from the United States' December 1981 Supreme Court brief in *Washington II* makes clear, the United States took the position at the time that recognition was dispositive of treaty status and that success in obtaining federal recognition by any of the five tribes in *Washington II* might merit revisiting that tribe's treaty status. The district court's use of the terms "presently" or "at this

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petitioners (or some of them) succeed in obtaining 'acknowledgment' of their current status as 'Indian tribes' in the pending administrative (federal acknowledgment) proceedings (*see* Pet. 22-23), this might justify an application to re-open the present judgment against them.").

Samish is not arguing that these deficiencies merit reopening of *Washington II*. Treaty fishing rights have been finally determined for Samish. But they do partially explain the en banc Court's narrow application of issue preclusion for other unadjudicated treaty claims.

time" was a clear reference to potential future federal recognition of the affected tribes. The State's alternative interpretation of these terms has no merit.

The last term the State relies on heavily to support its position that the district court's treaty fishing rights decision in *Washington II* cannot be questioned is the *Samish* Court's reference to the "finality" of the district court's factual determinations in *Washington II*, which the State cites seven times. State Brief at 1, 6, 7, 11, 21, 22, 26. The State takes this reference out of context; viewed in context, it is abundantly clear that the Court's finality concerns do not apply outside of treaty fishing.

The *Samish* Court decided that an administrative determination that the Samish Tribe has continuously existed and maintained a tribal government from treaty times to the present was not a sufficient circumstance to justify reopening *Washington II* under a Fed.R.Civ.P. 60(b)(6) motion. 593 F.3d at 800. Central to the Court's decision was the concern for potential disruption to the "detailed regime for regulating and dividing fishing rights," and possible injury to tribes already fishing as adjudicated fishing successors to the treaty Samish. *Id.* The Court noted the inconsistent findings made in Samish's federal recognition proceeding but held that "considerations of finality" counseled against reopening *Washington II* because the parties were entitled to rely on the finality of that

decades-old treaty fishing decree.[10] *Id.* at 799-800. This was what the Court meant by "finality"; those concerns simply do not apply to treaty hunting and gathering.

It is in this context that the en banc *Samish* Court held there was not sufficient reason for undoing the finality of the factual determinations in *Washington II*. *Id.* at 800. It was not a general statement that the treaty fishing decision in *Washington II* should be applied in all contexts. The *Samish* Court immediately went on to state in great detail how a newly recognized tribe subject to *Washington II* was not bound by that decision for unadjudicated treaty rights claims. *Id.* at 800-01. This is because the same considerations of finality do not exist for such treaty claims. Hunting and gathering treaty rights of the Puget Sound Indian tribes have never been litigated or judicially established so there are no long-standing regimes, agreements or decisions upon which parties have relied. The *Samish* Court could have stated that the factual findings in *Washington II* extend beyond treaty fishing to all other treaty claims as well, but it did not. Instead, it adopted a detailed scheme for allowing tribes like Samish and

[10] The district court in the present case was also troubled by these inconsisent findings, but ultimately held – incorrectly – that it could not avoid the strict confines of issue preclusion. Order at 11 ("While the inconsistency between *Washington II* and the BIA's findings is disconcerting, that alone is not enough to dispense with issue preclusion."), 6, 10 ("Federal recognition does, of course, cast a different light on the determination in *Washington II* that the Snoqualmie have not maintained an organized tribal structure since 1855."). ER 7, 11, 12.

Snoqualmie to raise unadjudicated treaty claims in subsequent treaty litigation. The State's unmoored reliance on the Court's mention of the finality of the *Washington II* factual findings as applying to all other treaty rights claims is plainly mistaken.

Most importantly, while the district court in *Washington II* or the Ninth Circuit on appeal could easily have said that its decision permanently cut off any and all future treaty rights that the Samish and Snoqualmie Tribes might claim, it did not do so. Instead, the district court determined the tribes were not "at this time" treaty tribes in the political sense. 476 F.Supp. at 1111. The State presents multiple arguments to twist the court's decision in *Washington II* into something it does not say. As the Samish Tribe demonstrated in its Opening Brief, all of the relevant judicial decisions expressly limit the reach of the *Washington II* decision to off-reservation treaty fishing rights. *E.g.*, Opening Brief at 18 n.12. There has never been a reference in any of Samish's judicial decisions to any other treaty rights claims, and there has never been a statement cutting off such claims.

II. Response to Amicus Briefs.

Several tribes filed amicus briefs in this appeal. Tulalip Tribes Amicus Brief, Dkt. #33, Sept. 25, 2020 ("Tulalip Brief"); Treaty Tribes' Amicus Brief, Dkt. #34, Sept. 25, 2020 ("Seven Tribes Brief"). The two briefs substantially overlap. Both go to great lengths to argue that their treaty hunting rights have been determined

without the need for litigation, *e.g.*, Seven Tribes Brief at 19 (no need for "subsequent litigation" to establish treaty hunting rights), and that long-standing regulatory hunting schemes exist that would be disrupted should Samish and Snoqualmie be found to have treaty status to exercise treaty hunting and gathering rights. Tulalip Brief at 15, 22; Seven Tribes Brief at 3-5. These arguments are made up out of whole cloth. No judicial decision has ever confirmed, established, allocated[11] or determined the nature and scope of any Washington tribe's treaty hunting and gathering rights.[12] As discussed *supra* with regard to the State, the

[11] Both amicus briefs cite *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558-59 (9th Cir. 1990) to argue that acknowledging Samish treaty status will necessarily reduce the amount of hunting they can exercise. Tulalip Brief at 17-18; Seven Tribes Brief at 5. But *Verity* was an allocation case, with Makah seeking a greater share of fish, and was not a treaty status case. Under *Verity*, any claim of future diminishment is speculative. 910 F.2d at 558. Tulalip argues that it would cause the State "chaos and confusion" if the State had to address both Snoqualmie and Tulalip hunting rights based on Snoqualmie successorship. Tulalip Brief at 20-22. But that already routinely occurs, without chaos or confusion, where for example three S'Klallam tribes – Jamestown, Port Gamble and Lower Elwha – share S'Klallam's treaty rights, or for Lummi and Swinomish, which share Samish treaty fishing rights. Seven Tribes Brief at 4.

[12] Tulalip cites *United States v. Washington*, 19 F.Supp.3d 1252, 1256 (W.D.Wash. 1997) to assert that longstanding "game" management agreements exist that would be disrupted (would "create chaos and confusion") if Samish treaty hunting status is confirmed. Tulalip Brief at 21. This *U.S. v. Washington* decision addresses fishing rights, not hunting rights. It could not involve hunting rights, since two other cases cited by Tulalip, *Skokomish Indian Tribe v. Goldmark*, 994 F.Supp.2d 1168 (W.D. Wash. 2014) and *Skokomish Indian Tribe v. Forsman*, 738 Fed.Appx. 406 (9th Cir. 2018), Tulalip Brief at 16, say hunting rights are not part of *U.S. v. Washington*. *See* Samish Opening Brief at 24-25 n.6. The district court's opinion in the present case stated the same thing. Order at 8, ER 9.

Amici Tribes' attempts to clothe themselves with the same "finality" considerations that the *Samish* Court found controlling with regard to treaty fishing rights are unavailing.

There are no such finality concerns with regard to treaty hunting and gathering rights. While Samish agrees that a treaty hunting right exists under the Treaty of Point Elliott, issues including the treaty rights status of any specific tribe,[13] the scope of the treaty hunting and gathering right, who gets to exercise that right, how the right is allocated among all the eligible tribes, the existence of any management regime,[14] and others have never been litigated or established. This is exactly the distinction the *Samish* Court made by confirming finality for off-reservation treaty fishing and denying finality for unadjudicated treaty claims, including hunting.

The two briefs of the Amici Tribes share another common thread: Neither brief responds to Samish's main argument, omitting any reference to or discussion

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[13] For example, Amicus Tribes are parties to three separate treaties – the Point No Point Treaty, the Medicine Creek Treaty, and the Point Elliott Treaty. Seven Tribes Brief at 3. No judicial decision has addressed the scope or allocation of treaty hunting rights between those or other ratified treaties, and there is significant disagreement among tribes regarding their scope.

[14] The Seven Tribes assert the existence of "management regimes," Seven Tribes Brief at 4-5, but such regimes are not factually established, are not the result of any judicial decision and have never been judicially sanctioned. By contrast, the *Samish* Court's "finality" ruling was based on 40 year old fishing management regimes created in reliance on over 72 judicial decisions. 593 F.3d at 800.

of the *Samish* Court's establishment of a narrow issue preclusion exception for Samish and Snoqualmie. Instead, they argue that *Samish* held only that the decision in *Washington II* is final against the Samish Tribe, for all purposes. Tulalip Brief at 4, 9, 19-20; Seven Tribes Brief at 2-3, 11-16. That interpretation of *Samish* is wrong.

A. Seven Tribes Amicus Brief.

One serious defect in the Seven Tribes' argument must be corrected. The Seven Tribes assert that the Samish Tribe argues that this is a "treaty abrogation case." Seven Tribes Brief at 2, 17. This assertion with respect to Samish is patently false. Only the Snoqualmie Tribe argues that the State's refusal to presently recognize its asserted treaty hunting right abrogates those rights.

The Samish Tribe does not join Snoqualmie's legal theory and said so in its Opening Brief at 3. The Samish Tribe does not believe that it currently has legally established treaty rights. The Samish Tribe's position is that the en banc Court in *Samish* expressly authorized the Samish Tribe to litigate anew its asserted treaty rights status for unadjudicated treaty claims such as hunting and gathering rights.

The Seven Tribes incorrectly assert that the Federal Claims Court in 2003 "rejected a similar argument" to the *Samish* Court's ruling that inconsistent administrative findings in Samish's federal recognition proceeding did not justify

reopening the final decision in *Washington II*. Seven Tribes Brief at 16-17. This statement is factually and legally incorrect. After successfully achieving federal re-recognition[15] in 1996, the Samish Tribe sued the United States for the federal services and funding it should have received if it had not been wrongfully dropped as a federally recognized tribe in 1969. *Samish Indian Nation v. United States*, 58 Fed.Cl. 114, 116 (Ct.Cl. 2003); 82 Fed.Cl. 54, 56 (Ct.Cl. 2008). One of the claims Samish made was for funding to administer treaty rights between 1969 and 1996, since as discussed *supra* at 14 n.9, 22 n.15, federal recognition was often considered to be determinative of treaty status and the United States improperly dropped Samish from its list of federally recognized tribes in 1969. *See* W*ashington III*, 394 F.3d at 1159. The Court of Federal Claims declined to

[15] Samish uses this term because the evidence in previous judicial proceedings was that the Samish Tribe was federally recognized by the federal government up to the late 1960s, and was only considered unrecognized after that point because of federal misconduct. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1358 (Fed. Cir. 2005) ("*Samish Indian Nation*"). In 1969, the Samish Tribe was dropped from an internal Department of Interior list of Indian tribes that was used by the Department to determine which tribes were federally-recognized. *Id.* at 1359; *Greene v. Babbitt*, 943 F.Supp. 1278, 1284 (W.D.Wash. 1996) (No. C89-645Z) ("*Greene III*"); Judgment, No. C89-645Z, Nov. 1, 1996, ¶3(3), attached as Ex. 1 to Samish Opening Brief. The first federal references to Samish being unrecognized appeared in the early 1970s. *Greene III*, 943 F.Supp. at 1284; *Samish Nation*, 419 F.3d at 1359-60. The Federal Circuit concluded that the Samish Tribe should have been federally-recognized between 1969 and 1996, *id.* at 1374, and that the government's action in dropping Samish from the Department's list of federally-recognized tribes in 1969 and "refusing" Samish federal recognition before 1996 was "wrongful" and "arbitrary and capricious." *Id.* at 1373-74.

consider Samish's treaty compensation claim because of "application of the statute of limitations and collateral estoppel [of *Washington II*]." 58 Fed.Cl. at 120-22. As discussed below, this is not a "similar" ruling.

The Seven Tribes argue the Court of Federal Claims' collateral estoppel ruling was not reversed on appeal because "the Federal Circuit had no occasion to address and did not disturb" it. Seven Tribes Brief at 17 n.6. That argument is obviously wrong when viewed in the context of the Federal Circuit's opinion, as a reviewing court may certainly overrule a lower court without explicitly saying so by doing it implicitly or *sub silentio*. The Federal Circuit reversed the Court of Federal Claims and remanded for further proceedings to determine whether remaining statutes under one of Samish's claims were money-mandating. *Samish Indian Nation*, 419 F.3d at 1357. This action necessarily reversed the lower court's collateral estoppel ruling, or else the Court of Federal Claims would have lacked subject matter jurisdiction on remand. *See Lowe v. United States*, 79 Fed.Cl. 218, 228 (2007) ("It is beyond cavil that the issue of collateral estoppel goes to subject matter jurisdiction.") (citing *Schwasinger v. United States*, 49 Fed.Appx. 888 (Fed. Cir. 2002)). This is because Samish's remaining claims, which were based on its rightful federal recognition between 1969 and 1996, were rooted in its status as a signatory to the Treaty of Point Elliott. Moreover, the Federal Circuit entered

several findings which confirm its overruling of the Court of Federal Claims on this issue.[16] Finally, as the Seven Tribes acknowledge, proceedings continued in that case for seven years on the question the Federal Circuit put before the Court of Federal Claims on remand. Seven Tribes Brief at 17 n.6. The Court of Federal Claims' collateral estoppel ruling did not hinder any of these later stages of the proceedings – not because it was undisturbed, as the Seven Tribes argue, but because it was reversed.

Additionally, the Seven Tribes must be consistent in their reliance on federal claims court cases for determination of treaty status. The Ninth Circuit in *Washington II* ruled that claims court cases "involved compensation for individual,

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[16] *Samish Indian Nation*, 419 F.3d at 1359 and n.2 ("The facts relevant to Samish recognition date to a treaty signed in 1855. The Samish descend from a signatory tribal party to the 1855 Treaty of Point Elliott, 12 Stat. 927, by which several tribes in the Pacific Northwest ceded land to the United States but retained various fishing rights. *See United States v. Washington*, 641 F.2d 1368, 1373-74 (9th Cir. 1981) [FN2] (fn 2: In *Washington* the Ninth Circuit affirmed a district court finding, (*Washington II,* 476 F.Supp. at 1106), that the Samish, through assimilation, had lost the degree of "political and cultural cohesion" needed to claim rights under the Treaty of Point Elliott. *Washington,* 641 F.2d at 1373-74. The Ninth Circuit, however, recently reversed a decision denying a Samish motion, under Rule 60(b)(6), to reopen the underlying district court judgment, at 476 F.Supp. 1101, in view of the Samish federal acknowledgment in 1996. *See Washington III,* 394 F.3d at 1161) (holding "[f]ederal recognition is determinative of the issue of tribal organization," and characterizing the judgment denying the Samish treaty fishing rights as depending on findings that the Samish had not maintained an organized tribal structure); *see generally id.* at 1159-61 (discussing relation between federal recognition and criteria for signatory descendants to assert treaty rights).)"). This quote overruled the Court of Federal Claims' dictum ruling on this issue.

not fishing rights for tribal units[, that t]he causes of action and factual issues litigated were different, and the doctrines of res judicata and collateral estoppel are therefore inapplicable." 641 F.2d at 1374. Since the Seven Tribes now assert that claims cases are relevant and applicable to treaty status, the Indian Claims Commission's determination in *Samish Tribe of Indians v. United States*, 6 Ind.Cl.Comm'n 169, 172 (1958) (Dkt. #261), should also apply:

> We conclude that petitioner, which alleges it is a tribal organization recognized by the Secretary of Interior of the United States, has shown itself to be the descendants and successors in interest of the Samish Indians of aboriginal times.

This conclusion resolved the issue of continuous existence of a tribal government from treaty times to the present and successorship, 21 years before *Washington II*.

The Seven Tribes also assert that Snoqualmie or Samish treaty status would impair Tulalip's, Lummi's and Swinomish's "sovereign interests and identity." Seven Tribes Brief at 4. This exact argument was raised by Tulalip and rejected by Judge Canby in *Evans*, 604 F.3d at 1123-24.

CONCLUSION

Based on the Samish Tribe's Opening Brief and this Reply Brief, the district court's decision that the treaty status conclusion in *Washington II* also applies to treaty hunting and gathering rights, and its interpretation of *Samish* or *Washington IV*, are wrong. The decision of the district court must be reversed and this case

remanded for further proceedings in accordance with *Samish*.

Dated: November 6, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6986 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

I certify that his brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Times New Roman 14 Point Font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 6, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 6, 2020.

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