Appeal Nos. 20-35346, 20-35353

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,

SAMISH INDIAN NATION,

Intervenor-Appellant,

v.

STATE OF WASHINGTON; and GOVERNOR JAY INSLEE and WASHINGTON DEPARTMENT OF FISH AND WILDLIFE DIRECTOR KELLY SUSEWIND, in their official capacities,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA
The Honorable Ronald B. Leighton, United States District Court Judge
Case No. 3:19-cv-06227-RBL

AMICUS CURIAE BRIEF OF SAUK-SUIATTLE INDIAN TRIBE IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS CURIAE

The Sauk-Suiattle Indian Tribe is a signatory to the same treaty as that signed by Chief Pat Kanim on behalf of the appellant Snoqualmie Indian Tribe on January 22, 1855.[1] *Amicus* and appellant have a shared culture in that the homelands of both were, and are, situated in upriver reaches of the Cascade Mountain range within what is now the State of Washington.

According to anthropological reports, both tribes were skilled land hunters, a major portion of whose diet was based upon the harvest of wildlife and regional vegetative resources. Both Sauk-Suiattle and Snoqualmie were recognized as tribal nations by the United States Department of the Interior *after* the 1974 decision of the United States District Court in *United States v. Washington*, popularly known as the Boldt Decision.

Amicus Sauk-Suiattle Indian Tribe was federally recognized by the United States Secretary of Interior in 1975.[2] Appellant Snoqualmie was recognized by the Secretary of Interior in 1997. Each tribe was not officially recognized by the United States government as a tribe in 1974, yet *amicus curiae* was held to possess treaty fishing rights while appellant was not. The only difference between the two appears

[1] Treaty of Point Elliott, 12 Stat. 927 (1859).

[2] *Constitution and By Laws of the Sauk-Suiattle Indian Tribe*, approved by the Commissioner of Indian Affairs pursuant to the Act of June 18, 1934, 48 Stat. 984 (September 17, 1975).

to have been that the United States held title in trust to a cemetery for the joint benefit of the Sauk-Suiattle Indian Tribe and the Upper Skagit Indian Tribe.[3]

As a result of their shared culture, numerous members of amicus and appellant are eligible for enrollment in the other's tribe. Given their similar situation culturally, geographically, and being parties to the same treaty, *amicus curiae* feels compelled to support it sister tribe.[4] Appellants Snoqualmie and Samish have consented to the filing of this brief. Appellee Washington officials do not object to the filing of this brief.

INTRODUCTION

This appeal presents the question of whether the Snoqualmie Tribe can present evidence anew demonstrating its entitlement to exercise treaty hunting rights and gather roots and berries on open and unclaimed land within the former territory of Washington.

This Court has previously held that newly recognized tribes may present a claim of treaty rights not yet adjudicated by introducing its factual evidence anew. *U.S. v. Washington*, 593 F.3d 790, 801 (9th Cir. 2010) (*en banc*) ("Washington IV"). Nevertheless, the district court determined that appellant Snoqualmie Tribe should

[3] *See, United States v. Washington*, 384 F. Supp. 312 at 376 (Finding of Fact No. 130).

[4] Consistent with FRAP 29, no other party or counsel authored this amicus brief in whole or in part, and no person or entity other than amicus contributed funds toward the preparation of this brief.

be denied that opportunity.

Notwithstanding that Congress, in the exercise of its plenary power over Indian affairs, is the only body capable of abrogating rights reserved by treaty, the district court's decision below would judicially abrogate the very rights the framers of the Constitution denominated as the Supreme Law of the Nation.

STATEMENT OF THE ISSUES

This appeal presents, *inter alia*, the following issues for review:

1. Whether the district court, in defiance of administrative agency's confirmation that appellant was the political entity and successor in interest to the Snoqualmie signatories to the Treaty of Point Elliott, erred in prohibiting appellant from proceeding with litigation to determine treaty reserved hunting and vegetative harvesting rights, on grounds that 40 years earlier Snoqualmie lacked federal recognition, a land base or reservation; and

2. Whether a district court has authority to abrogate a treaty when express Congressional intent to do so is absent.

STATEMENT OF THE CASE

Snoqualmie sued Washington officials for a declaratory judgment that it is a signatory to the Treaty of Point Elliott of 1855, that the Tribe's reserved hunting and gathering rights under the Treaty have not been abrogated by Congress, and an injunction prospectively ordering the State to comply with federal law.

The district court granted the State's motion to dismiss, concluding that the issue of treaty status for the purpose of establishing reserved treaty hunting and gathering rights presents the same issue—whether Snoqualmie maintained an organized tribal structure or reservation, as was presented forty years earlier in *United States v. Washington.*[5]

Rather than defer to the federal agencies directly responsible for Indian affairs, the district court ignored discrepancies between the 1979 decision in *United States v. Washington* denying Snoqualmie's intervention in the litigation and the United States Department of the Interior's 1997 federal recognition of Snoqualmie which confirmed Snoqualmie's status as a treaty signatory and concluded that the tribe *had* historically maintained an organized tribal political structure.

STATEMENT OF FACTS

The Snoqualmie hunted and gathered in their traditional territory since time immemorial. Situated in the Snoqualmie Valley near the crest of a mountain range that extended from Canada to what is now northern California, the Snoqualmie maintained kinship ties to tribes situated on both the eastern and western sides of what would later be named the Cascade Mountains. As stated in the 1854 Annual

[5] The district court read *Washington IV* to mean that only Indian tribes that have *never* sought treaty rights of *any* kind in the past can litigate claims to treaty hunting and gathering rights, thus rendering the use of "anew" in this Court's order surplusage.

Report of the Commissioner of Indian Affairs:[6]

> [U]pon the main branch of the [Sin-a-ho-mish] river is another band, not under the same rule, the Sno-qual-moos, amounting to about two hundred souls. Their chief, Pat-ka-nam, has rather an evil celebrity among the whites, and two of his brothers have been hung for their misdeeds. This band are especially connected with the Yakamas, or, as they are called on the sound, Klickatats.

Their identity as a distinct tribal entity and their continuous relationship with the federal government is well-settled:

> Documentary sources have clearly and consistently identified a body of Snoqualmie Indians living in the general vicinity of the Snoqualmie River Valley of western Washington from at least 1844 . . . *Federal identification has continued unbroken to the present time*.

See, report cited at n. 11, *infra* (emphasis added). Like *amicus curiae* Sauk-Suiattle Indian Tribe, whose territory was also situated in the Cascade Mountains, the Snoqualmie people were "land hunters" who "were rated as one of the better hunting tribes" and who "wandered and roamed through the Cascade Mountains hunting". *Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians v. United States*, 372 F.2d 951, 962 (Ct. Cl. 1967). They "relied on hunting for a large part of their subsistence". *Id.* at 963.[7]

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[6] *Annual Report of the Commissioner of Indian Aff*airs (1854), p. 246, digicoll.library.wisc.edu/cgi-bin/History-idx?type=article&did=History.annRep54.i0012&id=History.AnnRep54&isize=M

[7] In this regard, the culture of the Snoqualmie is strikingly similar to that of *amicus curiae*. See *United States v. Washington*, 384 F. Supp. 312 at 375-76 (Finding of Facts nos. 129-132).

On January 22, 1855, Snoqualmie Chief Pat-ka-nam signed the Treaty along with fourteen signers who were identified as representatives of Snoqualmie.[8] In return for cession of their extensive ancestral lands, Snoqualmie reserved the right of hunting and gathering roots and berries on open and unclaimed lands, in common with citizens of Washington.

In the 1950s, in the midst of another of the United States' ever-changing Indian policies[9] known as the "Termination Era", Snoqualmie along with over 100 other tribes, lost its status as a federally-recognized tribe.[10] The Department of Interior later found that, while Tribal membership had narrowed throughout the

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[8] Treaty Between the United States & the Dwamish, Suquamish, & Other Allied & Subordinate Tribes of Indians in Washington Territory, 12 Stat 927 (U.S. Treaty Apr. 11, 1859); *id.* at 378; *U.S. v. Washington*, 98 F.3d 1159, 1161 n.2 (9th Cir. 1996).

[9] Federal policies have varied from removal of Indians to the Indian Territory in the 1830's known as the "Trail of Tears" to segregating them upon reservations distant from areas of white settlement where the tribes could continue to exercise their communal ways (the Treaty-Making Era of the 1850's), which was followed by the 1887 enactment of the Indian General Allotment Act which attempted to "civilize" them and , later, by the Indian Reorganization Act of 1934 which halted alienation of tribal lands held in trust for Indians by the United States government until 1953 when Congress commenced a policy of "termination" of federal recognition of tribal nations. 1968 began the era of "self-determination" and educational assistance for Indian tribes. A more dizzying array of conflicting federal policies toward one group of citizens cannot be imagined.

[10] As explained by the Department of the Interior:

> During the termination era of the 1950's, Government policy makers in the Northwest began to scrutinize the status of non-reservation tribal entities under Federal jurisdiction more closely. In 1955, the BIA's Portland Area Director suggested that the Government's trust responsibility in western Washington should be limited to reservation-based tribes. By 1961, the BIA made it clear that the Snoqualmie were not recognized as being an "organized tribe," that is, one that had a reservation or owned tribal property in which members had a beneficial interest.

1940s and 1950s, "there is strong evidence that the [T]ribe maintained a distinct social community during this period." 61 Fed. Reg. at 27163.

In September 1970, the United States filed suit on behalf of seven tribes seeking a declaration of treaty fishing rights in *United States v. State of Washington* (Washington I*)*, 384 F.Supp. 312 (W.D. Wash. 1974). This was followed by another thirteen after the court issued its Final Decision #1. *Id.* at 343.

To determine whether Snoqualmie's intervention should be granted, the district court applied a more stringent test than that which would have been applied at the time by the Department of Interior to determine federal recognition. The district court denied Snoqualmie's intervention in the case on grounds that Snoqualmie was not a federally recognized and did not have a reservation. *Washington II*, 476 F.Supp. at 1108.[11] Despite its acknowledgment that the Tribe was a party to the Treaty of Point Elliott" the district court held that Snoqualmie "ha[d]not maintained an organized tribal structure *in a political sense*." *Washington II*, 476 F.Supp. at 1108–09 (emphasis added). Notably, the court temporally qualified its decision regarding Snoqualmie, finding that Snoqualmie was not "*at this time* a treaty tribe", that it did not "*presently hold[]*. . . fishing rights . . . in this

[11] *See,* Decision of Assistant Secretary for Indian Affairs, Tara Sweeny, on Snoqualmie Fee-to-Trust Application (Mar. 18, 2020) ("U.S. Decision") at 36. The U.S. Decision is publically available at: https://www.bia.gov/bia/ots/fee-to-trust/fee-to-trust-decisions (last visited July 20, 2020).

case", and was not "*at this time* a treaty tribe *in the political sense*". *Id.* at 1111 (emphasis added). Essentially, intervention of Snoqualmie in the litigation was unripe.

This Court in 1981 affirmed the outcome of the district court's 1979 decision, yet disagreed with the basis of the decision, reasoning that nonrecognition of a tribe by the federal government may result in loss of statutory benefits, but can have no impact on vested treaty rights. *U.S. v. Washington*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied* 454 U.S. 1143 (1982). In affirming the district court's conclusion regarding political cohesion, this Circuit held that the Snoqualmie did not meet this requirement, citing a lack of government control of tribal members, absence of "continuous informal cultural influence," intermarriage with non-Indians, and settlement in non-Indian residential areas. Id. at 1373-74. Judge Boldt contemplated and provided for the decisions in the case to be revisited. *See, e.g.*, *United States v. Washington*, 384 F. Supp. 312 at 332 (W.D. Wash. 1974). Noting the impossibility of identifying a complete inventory of each tribe's customary fishing grounds (id. At 335), he provided for the district court to retain continuing jurisdiction. 384 F. Supp. At 419. Just as Judge Boldt in his wisdom provided for decisions in the case to be revisited, this Court should revisit its culturally insensitive 1981 holding that Snoqualmie's rights were incapable of recognition:

> [T]he district court specifically found that the appellants had not functioned since treaty times as "continuous separate, distinct and

> cohesive Indian cultural or political communit[ies]. After close scrutiny, we conclude that the evidence supports this finding of fact. Although the appellants now have constitutions and formal governments, the governments have not controlled the lives of the members. Nor have the appellants clearly established the continuous informal cultural influence they concede is required. The appellants' members are descended from treaty tribes, but they have intermarried with non-Indians and many are of mixed blood. That may be true of some members of tribes whose treaty status has been established. But unlike those persons, those who comprise the groups of appellants have not settled in distinctively Indian residential areas.

641 F. 2d at 1373-74. The passage ignores the history of governmental relations with tribal nations. Shifting federal policies made it difficult to maintain "distinctively Indian residential areas." *See, e.g.*, Act of February 8, 1887, 49th Cong., 2d Sess, Ch. 119 (attempting to civilize Indians by reducing reservations to agricultural allotments); the Indian Removal Act of 1956, Public Law 959 (encouraging American Indians to leave reservations and settle in urban areas); Act of August 1, 1953 (providing for termination of recognition of certain tribal nations and subjection to state jurisdiction). The implication that members of treaty tribes who intermarried with non-Indians could even be among the factors resulting in loss of constitutionally protected rights should be just as vehemently rejected in this Circuit as the Supreme Court unanimously did in *Loving v. Virginia*, 388 U.S. 1 (1967).[12] It is difficult to perceive how Snoqualmie's lack of a readily identifiable

[12] In *Loving*, the Supreme Court applied "strict" scrutiny rather than the more relaxed standard of "close" scrutiny used in *Washington II*. Since tribal treaty rights are protected by Article VI of the U.S. Constitution, strict scrutiny of the district court's 1979 decision would have been more consistent with the Canons of Construction for tribal treaties that provides for all doubts

political structure or cultural practices distinguishing the tribe from non-tribal communities is any different from the tribe's for whom the treaty litigation in *Washington I* was originally brought. As noted of the tribes in the case in 1970, Judge Bold found that:

> Acculturation of Western Washington Indians into western culture began prior to treaty times and has continued to the present day. Today most Indians wear traditional western clothing, speak English, utilize the western economic system and western technology, share western religious traditions and participate in the western socio-political organization. Traditional religious rites and ceremonies are no longer widely observed by most tribes.

384 F. Supp. at 358 (Finding of Fact No. 33).

The district court below dismissed Snoqualmie's claims on grounds that Snoqualmie in 1979 lacked "maintenance of an organized tribal structure." Id., docket 39, at p. 10. Yet there is no explanation as to how the circumstances of Snoqualmie were any different from, for example, that of the Stillaguamish—which the Court in 1974 determined *did* possess treaty standing. As to the *Stillaguamish*, for whom Chief Pat Kanim signed the very same treaty that he signed for Snoqualmie, Judge Boldt stated:

> No signatory is identified as belonging to that group, but *they were designated as subordinate to Patkanam who signed the treaty as head chief for the Snoqualmoo* and associated tribes.

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to be resolved in favor of the treaty signatories.

> *No separate reservation was established for the Stoluch-wha-mish* Indians. They were allowed to move to reservations established in the general area near them and some moved to the Tulalip Reservation, but the majority remained in the aboriginal area along the Stillaguamish River. The membership of the Stillaguamish Tribe is determined in accordance with the tribal Constitution and Bylaws which have been approved by the tribe but have not been approved by a representative of the Secretary of the Interior. *The Stillaguamish Tribe is not recognized as an Indian governmental entity by the federal government*. Its enrollment has not been approved by the Secretary of the Interior or his representative and the tribe does not have a reservation

384 F. Supp. at 378-79 (Findings of Fact Nos. 144, 145) (emphasis added).

On August 29, 1997, the Assistant Secretary of Indian Affairs delivered a Final Determination for Federal Acknowledgment of the Snoqualmie Tribal Organization ("Final Determination").[13] The Final Determination confirmed Snoqualmie's status as a treaty signatory and a federally recognized Tribe (Dkt. 15 at 6 citing 62 Fed. Reg. 45865.[14]

The Final Determination was critical of the decision made in *Washington II*, illuminating several severe limitations impacting the district court's decision. First, the evidence before the court specific to Snoqualmie was limited:

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[13] The Final Determination adopted an earlier Conclusions Summary Under the Criteria and Evidence for Proposed Finding for Federal Acknowledgment of the Snoqualmie Indian Tribe (Apr. 26, 1993).

[14] Interior subsequently denied Tulalip Tribes' petition for reconsideration of the Final Determination (*In re Fed. Acknowl. of the Snoqualmie Tr. Org.*, 31 IBIA 298 (1997)) and the Interior Board of Indian Appeals affirmed it in 1999. *In re Federal Acknowl. of the Snoqualmie Tr. Org.*, 34 IBIA 22, 36 (1999). The federal acknowledgment thus did not become final until October 1999.

> Unlike the present evaluation by the Branch of Acknowledgment Research (BAR), the Court did not have the benefit of anthropological, genealogical, and historical field work focusing on the broad scope of the tribe's social and political existence. The exhibits before the Court included less than 100 documents specific to the Snoqualmie in contrast to the more than 1500 pertinent documents reviewed by BAR researchers to date in evaluating the Snoqualmie petition for acknowledgment.

Dkt 34-2 at 26. In contrast, Snoqualmie in 1979 had a mere *one day* to present evidence supporting its motion to intervene before a special master, lacked the resources to expend upon expert witnesses and faced opposition from the United States and other tribal parties to the litigation. The five tribes which had sought intervention were then given a combined total of *three* days before Judge Boldt. It cannot be said that Snoqualmie was given the requisite "full and fair opportunity" for an evidentiary hearing. In contrast to the single day of the court's attention given to the Snoqualmie, as to the *original* named parties to Judge Boldt's landmark 1974 decision, he noted that:

> *For more than three years*, at the expenditure by many people of great time, effort and expense, plaintiffs and defendants have conducted exhaustive research in anthropology, biology, fishery management and other fields of expertise, and also have made extreme efforts to find and present by witnesses and exhibits as much information as possible that pertains directly or indirectly to each issue in the case.

384 F. Supp. at 328 (emphasis added). The district court itself in its dismissal order notes that:

> The Snoqualmie correctly point out that the Bureau of Indian Affairs (BIA) acknowledged the Tribe's participation in the Treaty of Point

> Elliott when approving its petition for federal recognition in 1997. *See Final Determination To Acknowledge the Snoqualmie Tribal Organization*, 62 Fed. Reg. 45864-02, 45865 (1997) ("The Snoqualmie tribe was acknowledged by the Treaty of Point Elliott in 1855 and continued to be acknowledged after that point.").

Docket 39, pp. 2-3. At the time that Snoqualmie intervened in *U.S. v. Washington*, at least three courts had determined that Snoqualmie was a treaty-signatory *Snoqualmie Indian Tribe, et al. v. United States*, 9 Ind. Cl. Comm. 25, 48 (June 30, 1960), *Upper Skagit Tribe of Indians, et al. v. United States*, 13 Ind. Cl. Comm. 583, 585-86, 588 (Aug. 13, 1964), and Snoqualmie *Indian Tribe, et al. v. United States*, 15 Ind. Cl. Comm. 267, 310, 314 (May 7, 1965); it was deemed an existing organization by the Court of Claims (*see Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians v. United States*, 372 F.2d 951, 957–58 (Ct. Cl. 1967)), and it was deemed eligible for federal recognition and acknowledged as a treaty tribe by the State of Washington. Dkt. 1 at ¶ 17; Dkt. 22 at 3.[15]

The Assistant Secretary of Interior also distinguished *Washington II* as

[15] Notably, on the same day that the district court issued its decision rejecting Snoqualmie's intervention to litigate its treaty status, Assistant Secretary-Indian Affairs Tara Sweeney issued a fee-to-trust final decision pursuant to Section 5 of the Indian Reorganization Act accepting acquisition of certain land in trust on behalf of the Tribe. *See* U.S. Decision. Among other things, the U.S. Decision concluded that, "[a]ccording to Solicitor's Guidance, ratified treaties still in effect in 1934 presumptively demonstrate the establishment of a political-legal relationship with a tribe and 'may be taken as establishing a rebuttable presumption that the applicant tribe remained under federal supervision or authority through 1934'". U.S. Decision at 35. Applying this rule to the Treaty of Point Elliot, the Assistant Secretary concludes that as to Snoqualmie, "[t]he Treaty of Point Elliot . . . *remains in effect today*."

specific to Snoqualmie's eligibility to exercise off-reservation treaty *fishing* rights in 1979. *Id.* at 37. The Secretary's Decision echoes the Ninth Circuit's correction of Judge Boldt's holding that only federally recognized tribes may exercise treaty rights clarifies that the Tribe's temporary loss of recognition after the 1953 Termination Act reflected a time-limited policy with respect to tribes without trust land holdings and did not disturb the fact that Snoqualmie was recognized between 1855 to 1953. Final Decision at 37.

SUMMARY OF ARGUMENT

Neither issue nor claim preclusion apply to the litigation commenced by Snoqualmie, and the unilateral determination by the district court that Snoqualmie can never litigate to protect its treaty-reserved hunting and gathering rights effects a judicial abrogation of Snoqualmie's treaty rights. In the absence of express congressional intent that is required to abrogate treaty rights, the district court's decision exceeds its authority under Article III of the U.S. Constitution.

ARGUMENT

ADJUDICATION OF SNOQUALMIE'S HUNTING AND GATHERING RIGHT CLAIMS ARE NOT BARRED BY PRINCIPLES OF FORMER ADJUDICATION.

This *en banc* Court's 2010 ruling[16] removed the bar of issue preclusion

[16] *U.S. v. Washington*, 593 F.3d 790, 801 (9th Cir. 2010).

altogether for newly recognized tribes seeking to litigate treaty rights not yet adjudicated such as Snoqualmie. By erroneously applying issue preclusion, the district court disregarded *stare decisis* and *sua sponte* extended the scope of *Washington II* beyond treaty fishing to foreclose *all* of Snoqualmie's rights reserved under the Treaty.

In *Washington IV*, the *en banc* Court opined that despite the Samish Tribe's recent federal recognition, the finality of other tribes' already-adjudicated treaty fishing rights in *U.S. v. Washington* counseled against reopening the decision in *Washington II* under Rule 60(b). *U.S. v. Washington*, 593 F.3d at 800. That the Court perceived Samish's intervention as affecting other tribes' adjudicated fishing rights manifests a lack of understanding of how tribal citizenship works. The overall number of fish which treaty tribes have the opportunity to take under the 1974 district court's "in common" permanent injunction would not have resulted in a reduction of the overall tribal harvest nor of the take of any individual tribal citizen. Among the tribes party to *Washington I* in order to secure cooperative relations and access to resources, kinship and intermarriage was the norm.[17] Consequently, there rarely exist discrete bloodline barriers between tribes. A person of tribal descent

[17] *E.g.*, 384 F. Supp. at 359, (FF No. 38) (Quileute and Hoh were one people); 384 F. Supp. at 375 (FF No. 130) (Sauk-Suiattle intermarriage with Upper Skagit and Stillaguamish); 384 F. Supp. at 380 (FF No. 153) (Yakamas intermarried as far north as Skokomish and controlled them to a certain extent).

may possess the necessary fractionated tribal blood quantum to be eligible for membership in more than one federally recognized tribe. Voluntary "relinquishment" of membership in one tribe for the purpose of becoming an enrolled member of another is common. Judge Boldt took care to expressly hold that a person may exercise treaty fishing rights as a member of *only* one tribe. 384 F. Supp. at 411 (Rulings on Fisheries Questions per Reconsideration Motion, No. 17). Consequently, in order to exercise Snoqualmie treaty rights, a member of whose ancestors enrolled as a member of tribes of the Tulalip Reservation, for example, must relinquish enrollment in the latter. This does not affect nor reduce the overall available tribal harvest share of the in-common fishery.

Washington IV involved the resolution of conflicting cases within the Ninth Circuit: *United States v. Washington*, 394 F.3d 1152, 1161 (9th Cir. 2005) (*Washington III*) which held that federal recognition justified the reopening of *Washington II* and *Green v. Babbitt*, 996 F.2d 973 (9th Cir. 1993) (*Green I*) and *Green v. Babbitt*, 64 F.3d 1266, 1270-71 (9th Cir. 1995) (*Green II*), holding that federal recognition is an independent process that has no effect on treaty rights. This Court resolved this by stating:

> 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.

Id. at 800 (emphasis added).

Confusingly, footnote 12 sated that it would potentially disturb treaty fishing of the tribes now exercising Samish treaty rights to have the newly recognized Samish Tribe join them. The Court therefore implicitly identified Samish as a newly recognized tribe to which preclusion would not apply if it met the second and third requirements of the rule. Thus, the rule encompasses a newly recognized tribe such as Snoqualmie as well and, as stated *post*, any "disturbance" of another tribe's treaty fishing would be no more disturbed than when one tribal member disenrolls and enrolls in another tribe, for example one operating a large casino, in order to avail themselves of greater economic benefit. The adjustment is minor, and equitable that the fisheries take of a tribe whose population decreases should experience a concomitant decrease of its overall fisheries harvest.

Overall, the rule only applies to such newly recognized tribes if they present treaty rights "not yet adjudicated." To this point, footnote 12 clarifies that permitting a newly recognized tribe to litigate "treaty rights not yet litigated" would not disturb treaty *fishing* rights. A critical distinction between hunting and fishing is that, because fish are confined to a fixed migratory path within watercourses, they are vulnerable to overharvesting potentially resulting in decreased spawning stock causing decline of the species. Wildlife, however, are not so confined. They wander at large and, so long as the species are not so in decline as to raise

conservation concerns, are not subject to any specific allocation for each particular tribal entity. So long as the tribal treaty take does not exceed the overall in-common (50%) available to be taken by tribal and non-tribal hunters, the harvest of game by one tribe cannot realistically be said to reduce the treaty right of another. Wild game animals are *ferae naturae*. As to *ferae naturae*, no person—tribal or nontribal—has a property interest in them until reduced to possession.[18] The district court's confusion, although erroneous, is understandable, as navigating between American case law regarding *ferae naturae*, or wild game, and the law governing rights of *piscary*, or fishing rights, both of which are grounded in English common law is a difficult task.

The district court's pronouncement that the tribe's earlier attempt to intervene for the purpose of litigating its treaty fishing rights is the "same" issue as whether the appellant possesses treaty hunting rights is difficult to square with this Court's opinion in *United States v. Confederated Tribes*, 470 F. 3d 809 (9th Cir. 2006), where the panel stated that:

> The res judicata ruling by the district court in this action was not based on issue preclusion; rather, it was based on claim preclusion. Under claim preclusion, a subsequent action is precluded if the same *claim* was previously litigated. *Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1404 (9th Cir.1993). As such, claim preclusion requires an identity of claims. *Tahoe Sierra Preservation Council, Inc. v. Tahoe*

[18] 2 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, Part Second, Chap. 1 (1803). *See also, Pierson v. Post*, 3 Caines 175, 179 (N.Y. Supreme Court, 1805).

> *Regional Planning Agency*, 322 F.3d 1064, 1077 (9th Cir.2003). A claim is also precluded if that claim could have been asserted in the prior litigation. *Id.* at 1078. In this case, the claim litigated in the intervention proceeding was whether the five tribes had 1855 Treaty rights. The rights of the Wenatchi Tribe under the 1894 Agreement were not litigated, nor could they have been brought in that proceeding because, as we have discussed, the condition for intervention was not met.

The issue of whether the Snoqualmie Tribe may present its claim of treaty *hunting* rights was not raised in prior litigation, nor could it have been. The Complaint filed by the United States in *Washington I* was confined to *fishing* rights (C-70-9213, docket entry no. 1). Nowhere therein did that Complaint encompass treaty *hunting* or gathering roots and berries.

This interpretation of *Washington IV* is consistent with Judge Boldt's design for *U.S. v. Washington.* Not only did he limit the scope of that case to treaty fishing, he anticipated that tribes' treaty status as mutable. *Washington II*, 476 F. Supp. at 1111. Judge Boldt temporarily qualified his ruling, finding that Snoqualmie was "at this time a treaty tribe in the political sense". The phrase "at this time" is susceptible to only one meaning: that Snoqualmie could be determined to be a treaty tribe for hunting and gathering rights at some future time. This is consistent with Judge Boldt's caution expressed throughout his decision that his rulings were not exclusive nor intended to bar presentation of future evidence. He did not attempt "to anticipate each and every problem or question which may arise" (384 F. Supp. at 413), just as he candidly noted that his list of customary fishing areas of each tribe was not

exhaustive.[19]

Judge Boldt's stated legal standard in 1979 was whether the intervenor tribes were "political continuation of or political successor in interest to any of the tribes or bands of Indians with whom the United States treated". *Washington II*, 476 F. Supp. at 1104. Assistant Secretary Sweeney concluded in 1997 that "a ratified treaty *still in effect* in 1934 presumptively demonstrates the establishment of a political-legal relationship between the United States and the signatory tribe the treaty remains in effect today.

The district court should have deferred to Interior's Final Determination and Proposed Finding adopted therein – as this Court should as to the U.S. Decision – because "the rulings, interpretations and opinions" of the Assistant Secretary "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under our Constitutional system there are three branches of government. Among them, it is Congress, not the courts, that has plenary power over Indian Affairs. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Congress, in the exercise of such authority, has delegated determinations of the status and recognition of tribal

[19] "[N]o complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be compiled today, the areas identified in the Findings of Fact herein for each of the Plaintiff tribes in general describe some of the freshwater systems and marine areas within which the respective tribes fished at the time of the treaties." *Washington I*, 384 F. Supp. at 402 (Conclusion of Law No. 26).

nations to the Secretary of Interior. *See, e.g.*, 25 U.S.C. § 5131.

For the district court to effectively foreclose for all time the ability of Snoqualmie to assert treaty rights *sub silento* and *de jure* abrogates the tribe's treaty *in toto*—a matter exclusively within the domain of Congress according to Article I, § 8 rather than within the Article III parameters applicable to United States courts. The overarching, and overreaching decision of the district court extrapolates from the tribe's intervention denial in a case specific to fishing rights some twenty years before the Interior Secretary's decision and purports to bar for all time the tribe's assertion of the rights confirmed by the Secretary to whom Congress delegated sole authority. This runs afoul of longstanding principles of Separation of Powers imbedded in the United States Constitution. *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579 (1952) (presidential executive order intruded upon authority Congress delegated to Secretary of Labor).

The Final Determination, comprising more than 550 pages, provides a comprehensive study of Snoqualmie and its relationship to the federal government. These documents demonstrate "a body of experience and informed judgment to which courts and litigants may properly resort for guidance" deserving of deference. *Id.* 323 U.S. at 140. Based on their "thoroughness, logic, and expertness [and] its fit with prior interpretations" (*United States v. Mead Corp.*, 533 U.S. 218, 235 (2001)) this Court should accord "persuasive, if not decisive, force . . . warrant[ing] judicial

deference" to the Final Determination and U.S. Decision. *Seaview Trading, LLC v. Comm'r of Internal Revenue*, 858 F.3d 1281, 1285 (9th Cir. 2017).

The other issue at trial in 1979 was Snoqualmie's lack of a reservation, an issue that has no bearing on the establishment of the Tribe's hunting and gathering rights today. The United States argued that a treaty tribe does not include descendants of formerly active tribes who live outside of Indian territorial communities unless such descendants are of one-half or more Indian blood." ER - Dkt. 1531 at 26. Such antiquated thinking, like the phrase still presently used that a person is "off the reservation" when acting outside the norm, should be relegated to this nation's distant, and less enlightened past. Congress for example, as recently as 1978, acknowledged that enrolled Indians may reside or be domiciled beyond reservation boundaries in enacting the Indian Child Welfare Act[20] which provides for certain cases involving tribal children arising beyond reservation boundaries to be transferred to the Tribal Court.

Here, Snoqualmie does not rely solely on the mere fact of recognition, and is prepared to present evidence anew of its treaty status.

THE DISTRICT COURT EXCEEDED ITS CONSTITUTIONAL AUTHORITY BY ABROGATING SNOQUALMIE'S TREATY RIGHTS

The district court adopted the position that since the Tribe did not meet the

[20] 25 U.S.C. § 1901, *et seq.*

burden required to intervene in *United States v. Washington* to establish its fishing right in 1979, it is forever barred from claiming it possesses any treaty rights. This ruling expands *Washington II* beyond its terms and is contrary well-settled canons of construction applicable to Indian treaties that "treaty rights are to be construed in favor, not against, tribal rights." *McGirt v. Oklahoma*, No. 18-9526, 2020 WL 3848063, at *11 (U.S. July 9, 2020) (quoting *Solemn v. Bartlett*, 465 U.S. 463, 472 (1984)). The Supreme Court in *McGirt, supra,* confirmed that only Congress has authority to abrogate treaties. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556-558 (1903). But that power, "this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach". *McGirt*, No. 18-9526, 2020 WL 3848063, at 5. Allowing a judge to renounce federal property rights reserved under a Treaty,[21] without saying so explicitly, and absent any express abrogation by Congress, contravenes over a century of established case law. *See, e.g.*, *Jones v. Meeham*, 175 U.S. 1 (1899); *see also, United States v. Winans*, 198 U.S. 371 (1905). The district court's 2020 conclusion that, because a finding in 1979 litigation determined that, at that time, Snoqualmie lacked a federally recognized political structure or land base, the tribe currently—following 1ts 1997 federal recognition—lacked treaty rights is difficult to square with this Circuit's opinion in *Kimball v. Callahan*, 590 F. 2d 768

[21] Treaty rights are property rights protected by the Fifth Amendment to the U.S. Constitution. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 n.12 (1968).

(9th Cir. 1979), which expressly held that treaty fishing rights of the Klamath Indians reserved in the Treaty of October 14, 1864[22] survived termination of the tribe's federal recognition and reservation.

Appellant is unquestionable a treaty signatory with a federal recognition decision showing political continuity that possesses rights reserved in under the Treaty. By Treaty, Snoqualmie conveyed to the United States "all their right, title, and interest in and to the lands and country occupied by them," in return for certain rights. The treaties signed with Washington tribes in the 1850s were not a grant rights to Indians, but rather serve as a "grant of right from them—a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). These rights cannot be abrogated or diminished except by "plain and unambiguous" explicit congressional authorization. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346, 354 (1941); *United States v. Dion*, 476 U.S. 734, 738 (1986).

While courts may be called upon to interpret a *provision* of a treaty, Amicus can find no case in which a court unilaterally abrogates or terminates treaty rights as to a tribe of its own accord – until the decision below. This may be because the Supreme Court has been absolute in its application of the rule: "If Congress seeks to abrogate treaty rights, "it must clearly express its intent to do so." *United States v. Dion*, 476 U.S. 734 (1986); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019)

[22] 16 Stat. 707.

(citing *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)). Stated otherwise, "[a]bsent explicit statutory language . . . this Court accordingly has refused to find that Congress has abrogated Indian treaty rights." *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985); *U.S. v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346, 354 (1941); *U.S. v. Dion*, 476 U.S. 734, 738 (1986). In this case, abrogation as to hunting and gathering rights has come solely via judicial fiat.

By ignoring the strict rule governing treaty abrogation, the district court undertook Congress's sole authority to abrogate treaties. This Court should find that the district court's decision was in excess of its authority under Article III of the Constitution, reverse and remand for further proceedings including, but not limited to an evidentiary hearing at which appellant may present its evidence anew.[23]

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court and remand for a determination of the scope and extent of Snoqualmie's reserved treaty hunting and gathering rights.

[23] As to appellees' argument, that Snoqualmie's suit is barred by the Eleventh Amendment, appellant's complaint merely seeks a declaration that the state defendants, by barring the tribe's exercise of treaty rights, are acting contrary to the Supreme Law of the nation embodied in U.S. Const. Art. VI, cl. 2 and prospective injunctive relief enjoining such conduct. *See, Ex Parte Young*, 209 U.S. 123 (1908).

DATED: August 3, 2020

Respectfully submitted,

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By:

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STATEMENT OF RELATED CASES

Appellee knows of no cases pending in this Court that would be deemed related under Circuit Rule 28-2.6.

DATED: August 3, 2020

S/Jack W. Fiander

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,489 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This 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 2016 and is 14-point font, Times New Roman.

DATED: August 3, 2020

S/JACK W. FIANDER

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, 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.

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.

s/ Jack W. Fiander