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

APPELLANT SNOQUALMIE INDIAN TRIBE'S OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules & Regulations

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure 26.1, the undersigned counsel for Plaintiff-Appellant the Snoqualmie Indian Tribe, certifies that the Tribe does not have a parent corporation and no publicly-held corporation owns stock in the Snoqualmie Indian Tribe.

INTRODUCTION

By its signature to the Treaty of Point Elliott of 1855 ("Treaty") and cession of it ancestral lands, the Snoqualmie Indian Tribe ("Snoqualmie" or "Tribe"), sduk^{w}albix^{w} in its Native language, reserved the right to continue hunting and gathering roots and berries as it has done since time immemorial. Snoqualmie now seeks to realize the benefit of that promise, requesting through this case a declaration of its treaty status for purposes of its treaty hunting and gathering rights.

Whether Snoqualmie is entitled to exercise its treaty hunting and gathering rights—a solemn promise enshrined in the Treaty—is a question that has never been litigated. Ten years ago, this *en banc* Court unequivocally allowed Snoqualmie to litigate this very question when it adopted the rule that "a newly recognized tribe" may "present a claim of treaty rights not yet adjudicated. . . . by introducing its factual evidence anew." *United States v. Washington* (*Washington IV*), 593 F.3d 790, 800-01 (9th Cir. 2010) (*en banc*).[1] This rule explicitly permits Snoqualmie's case because it is a newly recognized tribe, presenting a claim of

[1] The Court has also referred to this *en banc* decision as "*Samish*." *See Evans v. Salazar*, 604 F.3d 1120, 1121 (9th Cir. 2010). The district court refers to the *en banc* decision as "*Washington IV*." Herein, Snoqualmie refers to the decision as *Washington IV*.

treaty hunting and gathering rights not yet adjudicated, and it is prepared to introduce its factual evidence of treaty status anew at trial.

Bypassing the binding precedent of *Washington IV*, the district court erroneously dismissed Snoqualmie's case on issue preclusion grounds. The district court misapplied issue preclusion because Snoqualmie never actually litigated its treaty hunting and gathering rights in any prior proceeding. Indeed, if affirmed, the decision below abrogates the very treaty rights this Court sought to protect ten years ago, and in doing so, both upends well-settled Supreme Court precedent requiring unambiguous Congressional intent to abrogate and exceeds the scope of the district court's authority under Article III of the U.S. Constitution. Even if issue preclusion applies, *Washington IV* and a recent decision of Assistant Secretary for Indian Affairs affirming that the Treaty "remains in effect" as to Snoqualmie justify exceptions to preclusion and permit a determination of treaty status anew.

The Court should reverse the decision below and find that Snoqualmie meets the Ninth Circuit standard for treaty status. Alternatively, if the Court holds that issue preclusion does not apply, but finds that Snoqualmie has not sufficiently demonstrated treaty status, the case should be remanded for Snoqualmie to present facts "anew" on that issue at trial. As a further alternative, the Court may reverse the decision below and remand the case for resolution of subject matter jurisdiction questions, which ultimately lie in Snoqualmie's favor.

JURISDICTIONAL STATEMENT

This is an appeal from a ruling granting the state of Washington's ("State") motion for judgment on the pleadings issued by the U.S. District Court for the Western District of Washington (Leighton, J.), dated March 18, 2020, which dismissed the Tribe's treaty claims on the basis that litigation of the Tribe's treaty hunting and gathering claims is barred under the doctrine of issue preclusion. ER 2-13. The district court did not expressly rule that it had jurisdiction; however, the Tribe alleged that the court had jurisdiction pursuant to 28 U.S.C. § 1331 (Federal Question). The notice of appeal was timely filed within 30 days after the entry of judgment. Fed. R. App. P. 4(a)(1)(A); ER 20. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This appeal presents the following issues for review:

1. Whether the district court erred in applying issue preclusion to Snoqualmie's hunting and gathering treaty claim by disregarding (a) *Washington IV*'s rule explicitly permitting this suit, (b) the dispositive fact that Snoqualmie's hunting and gathering treaty rights have never been adjudicated, and (c) two applicable exceptions to preclusion under the Restatement (Second) of Judgments § 28 (1982).

2. Whether a district court has authority under Article III of the U.S. Constitution to abrogate a treaty right when unambiguous Congressional intent to abrogate a treaty, required by well-settled Supreme Court precedent, is absent.

3. Whether the district court erred by ruling on issue preclusion without first considering the State's challenges to its subject matter jurisdiction, which Snoqualmie nevertheless overcomes.

STATEMENT OF THE CASE

On December 20, 2019, the Tribe filed its complaint against the State of Washington, Governor, and Washington Department of Fish and Wildlife Director seeking a declaration that it is a signatory to the Treaty of Point Elliott of 1855 and that the Tribe's reserved hunting and gathering rights under the Treaty have not been abrogated by Congress, and an injunction to order the State to comply with federal law. ER 771-778.

After the State answered the Tribe's complaint, ER 761-770, on February 6, 2020, the State filed a motion for judgment on the pleadings, styled as a motion to dismiss, arguing that the lawsuit should be dismissed because (1) the named defendants were immune from suit; (2) the complaint failed to allege a sufficient case or controversy for standing; (3) Snoqualmie sought to litigate issues which were previously litigated and therefore barred under the doctrine of issue preclusion; and, (4) by incorporation by reference of the proposed intervenor

Tulalip Tribes' proposed (but not accepted) motion to dismiss, that Snoqualmie failed to join tribes that were indispensable under Rule 19. ER 248-264.

Without the benefit of oral argument, and only three months after the case was filed, on March 18, 2020, the district court issued an order granting the State's motion to dismiss on issue preclusion grounds only, and denying all other pending motions as moot. ER 13. The district court found that the issue of treaty status for the purpose of establishing reserved hunting and gathering rights presents the same "gateway question," i.e., whether Snoqualmie maintained an organized tribal structure, as presented in prior *United States v. Washington* litigation to establish treaty-reserved fishing rights. Thus, the district court concluded that the 1979 decision as to off-reservation treaty fishing rights precludes the current litigation concerning treaty hunting and gathering rights. ER 2-13. The district court noted that "[t]he type of rights sought is a distinction without a difference." ER 9. The district court further construed *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, rending the use of "anew" in this Court's *en banc* order surplusage. Lastly, the district court declined to adopt any exceptions to issue preclusion, sweeping aside "the inconsistency between [*United States v. Washington*] and the BIA's findings" in the 1999 federal acknowledgement decision of Snoqualmie, which resolved the organized tribal structure issue which

had impeded Snoqualmie from being able to adjudicate its treaty status as to fishing rights in 1979, as merely "disconcerting." ER 12.

This appeal timely followed. ER 20-21. Samish was granted leave to intervene for purposes of appeal. ER 17-19. Samish subsequently filed an appeal focusing solely on the district court's erroneous construction of this Court's *Washington IV* decision, which was consolidated with Snoqualmie's appeal. ER 14-16.

STATEMENT OF FACTS

1. Brief History of the Snoqualmie Indian Tribe

The Snoqualmie people have hunted and gathered on their traditional lands in the Puget Sound region since time immemorial. 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***.

ER 448 (emphasis added); ER 340. 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 on hunting." *Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians v. United States*, 372 F.2d 951, 962 (Ct. Cl. 1967) (citation omitted). They "relied on hunting for a large part of their subsistence." *Id.* at 963.

Through a series of enactments, Congress authorized the negotiation of treaties with Indian tribes to extinguish their claims to land west of the Cascade Mountains. *See United States v. Washington* (*Washington I*), 384 F. Supp. 312, 353-55 (W.D. Wash. 1974), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975). On January 22, 1855, Snoqualmie Chief Pat-ka-nam signed the Treaty along with fourteen signers who were identified as representatives of Snoqualmie. 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); *Washington I*, 384 F. Supp. at 378. "In consideration of the . . . cession" (Treaty, Art. VI) of their extensive ancestral lands, Snoqualmie expressly reserved in the Treaty "the privilege of hunting and gathering roots and berries on open and unclaimed lands." *Id.* Art. V.

Although Snoqualmie was promised a reservation under the Treaty and by various federal officials during the post-Treaty era near Tolt, Washington, and despite Snoqualmie leaders' repeated efforts to secure a reservation, no reservation was set aside. *See, e.g.*, ER 517-521, ER 534, ER 551, ER 567. As a direct result, in the 1950s, Snoqualmie along with over 100 other tribes, unofficially lost its status as a federally recognized tribe due to its lack of a land base.[2]

[2] As explained by the U.S. 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

2. *United States v. Washington* Proceedings Involving Snoqualmie

In September 1970, the United States filed suit on behalf of seven tribes seeking declaration and enforcement of off-reservation treaty fishing rights in the now-fabled proceeding, *United States v. State of Washington*. *Washington I*, 384 F. Supp. at 327 n.1 (W.D. Wash. 1974). Seven tribes subsequently intervened in the proceeding (*id.* at 327 n.2) followed by another thirteen after the court issued its Final Decision #1 which determined that certain tribes had off-reservation treaty fishing rights. *Id.* at 343.

Snoqualmie sought to join the litigation during the time it had lost federal recognition. Applying its own separate criteria to determine treaty status for fishing rights that was far more rigid than that which that used by the U.S. Department of ("Interior") in 1978 as well as currently-applicable criteria to determine federal recognition (ER 57-60), the district court denied Snoqualmie's intervention in 1979 because the Tribe was not federally recognized and did not have a reservation. *United States v. Washington* (*Washington II*), 476 F. Supp. 1101, 1108-09 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981); Decision

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> 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.

ER 337.

of Assistant Secretary for Indian Affairs, Tara Sweeny, on Snoqualmie Fee-to-Trust Application (Mar. 18, 2020) ("U.S. Decision") at 36.[3] Despite its acknowledgment that the Tribe was "named in and a party to the Treaty of Point Elliott" the district court nonetheless held that Snoqualmie "ha[d]not maintained an organized tribal structure ***in a political sense***." *Washington II*, 476 F. Supp. at 1105, 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 case," and was not "***at this time*** a treaty tribe ***in the political sense.***" *Id.* at 1111 (emphasis added).

This Court affirmed the outcome of *Washington II*, while disagreeing with the entire basis of the decision, reasoning that "[n]onrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, but can have no impact on vested treaty rights." *United States v. Washington*, 641 F.2d at 1371 (citation omitted); *see id.* at 1375-76 (Canby, J., dissenting) (district court's dispositive findings "amounted . . . to findings that appellants lacked federal recognition or attributes necessarily dependent upon federal recognition. . . .

[3] The U.S. Decision is publically available at: https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ots/pdf/Snoqualmie_Indian_Tribe.pdf (last visited July 20, 2020).

[They] do not resolve the crucial factual issue and cannot support the judgment.").

3. Snoqualmie Regains Federal Recognition in 1997

In 1997, Assistant Secretary of Indian Affairs, Ada Deer, delivered the Summary Under the Criteria and Evidence for Final Determination for Federal Acknowledgment of the Snoqualmie Tribal Organization on August 29, 1997 ("Final Determination"). *See* Final Determination to Acknowledge the Snoqualmie Tribal Organization, 62 Fed. Reg. 45864-02 (Aug. 29, 1997). The Final Determination adopts the conclusions of the Summary Under the Criteria and Evidence for Proposed Finding for Federal Acknowledgment of the Snoqualmie Indian Tribe (Apr. 26, 1993) ("Interior Report") and concludes unequivocally Snoqualmie's status as a treaty signatory and a federally recognized tribe. ER 338. (citing 62 Fed. Reg. 45865) (the Final Determination concludes that "The Snoqualmie Tribe was acknowledged by the Treaty of Point Elliott in 1855 and continued to be acknowledged after that point"); *accord* U.S. Decision at 7 n.9.[4]

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

The Interior Report that accompanied the Final Decision provides critical perspective on *Washington II*, illuminating several severe limitations of that action. First, the evidence before the court specific to Snoqualmie was sparse:

> 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.

ER 58. Second, Interior found that the district court applied more rigid standard to determine treaty status than was required by the applicable federal recognition criteria. *Id.* In particular, the district court required the Tribe to demonstrate "'Indian governmental control' over the lives and activities of tribal members" and "political authority over a specific territory." *Id.* Third, Interior noted that the Tribe and its witnesses were ill-prepared to counter characterizations of the Tribe as a claims organization or social group from the United States and other tribes. ER 59.

Most notably, the Interior Report highlights that at the same time *United States v. Washington* was litigated, the Secretary of Interior was in the process of evaluating Snoqualmie's eligibility for federal recognition and ultimately determined that Snoqualmie met that criteria. ER 337, ER 565-568. Interior's action on the recognition determination was suspended, however, pending the

Secretary's revision of the criteria in the mid-1970s. ER 569. Snoqualmie was required to submit a new petition for recognition, which it did in 1978. ER 750.

In addition to Interior's concurrent evaluation of treaty status, at the time Snoqualmie sought intervention in *United States v. Washington*, at least three courts had already determined that Snoqualmie was a treaty-signatory. *See Snoqualmie Indian Tribe v. United States*, 9 Ind. Cl. Comm. 25, 48 (June 30, 1960); *Upper Skagit Tribe of Indians v. United States*, 13 Ind. Cl. Comm. 583, 585-86, 588 (Aug. 13, 1964); *Snoqualmie Indian Tribe v. United States*, 15 Ind. Cl. Comm. 267, 310, 314 (May 7, 1965). Snoqualmie has also been deemed "an existing organization" by the Court of Claims, (*see Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians*, 372 F.2d at 957–58), and acknowledged as a treaty tribe by the State in 1969 for hunting purposes. ER 775, ER 321.

Through the 1997 federal acknowledgment, Snoqualmie successfully proved the same facts that are required to exercise treaty rights. The hindsight provided by the Interior Report reveals that Judge Boldt's determination as to Snoqualmie was an aberrant outlier, based largely on fluctuations in United States' policies governing recognition.[5]

[5] While the impact of the loss of adjudicated treaty fishing rights for Snoqualmie sovereignty is incalculable and divests future generations of Snoqualmie people of sacred tribal cultural traditions, Snoqualmie is not re-litigating Washington II and is not seeking to reopen that decision. Its limited scope is extremely relevant, however, for issue preclusion.

4. The State Refuses to Recognize Snoqualmie's Treaty Rights

On May 7, 2019, the State Department of Fish and Wildlife ("Department") sent a notice to various tribal treaty signatories—which was not sent to Snoqualmie—indicating that the Department intended to update its guidelines for evaluating a tribe's asserted traditional hunting area and seeking input from certain tribes on those revisions. ER 775. Snoqualmie responded to that letter in late June, expressing its dismay that it was excluded from both the list of recipients of the notice and from the list of Treaty tribes with off-reservation hunting rights in Washington. ER 776. The Tribe provided information to the Department with additional factual and legal background as to the Tribe's history with respect to its treaty-reserved hunting and gathering rights in order to better inform the Department's understanding, and to prevent future exclusion of the Tribe from any conversation concerning tribal treaty hunting and gathering rights. ER 776.

On September 24, 2019, the Department replied; in the letter, signed by Director Susewind, the State indicates that "the Snoqualmie Tribe does not have off-reservation hunting and fishing rights under the Treaty of Point Elliott." ER 743-745. The conclusion was based solely on the on the fact that the Tribe was denied intervention to have its Treaty fishing rights adjudicated in *United States*

v. Washington. *Id.* The letter also rejected the Tribe's request for government-to-government consultation to discuss the matter. *Id.*

In a subsequent letter dated October 15, 2019, Director Susewind invited various Tribal leaders to an "October 30, 2019 meeting regarding WDFW's procedural guidelines to evaluate treaty tribes' asserted traditional hunting areas" and "to also discuss a process at the meeting on how best to consult with you on those guidelines." The letter was not sent to the Snoqualmie and contained an attachment that did not list the Tribe as a Tribe with Treaty status. ER 776.

On December 11, 2019, representatives from the Tribe met with Director Susewind and other representatives from the Department in an effort to avoid litigation. ER 776. On December 17, 2019, the State reiterated its position disclaiming Snoqualmie's treaty hunting and gathering rights. ER 776. This case was filed in response on December 20, 2020. ER 771-778.

5. The United States Re-Affirms Snoqualmie's Treaty Status on the Same Day as the Case Is Dismissed

On the same day that the district court issued its decision rejecting Snoqualmie's treaty status on issue preclusion grounds, Assistant Secretary-Indian Affairs Tara Sweeney issued a fee-to-trust 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. As is relevant to this case, the U.S.

Decision: (1) confirms that the Treaty "remains in effect" as to Snoqualmie and acknowledges the ongoing "trust responsibility" of the United States to Snoqualmie arising from the Treaty; (2) distinguishes and limits *Washington II* to off-reservation fishing rights; and (3) lends additional credence to the 1999 Final Determination and Interior Report to affirm the Tribe's political continuity from Treaty times forward.

The U.S. Decision concludes 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, the Assistant Secretary concludes that, as to Snoqualmie, "[t]he Treaty of Point Elliot . . . ***remains in effect today***." U.S. Decision 36, 39 (emphasis added).

The Assistant Secretary also cabins *Washington II* to Snoqualmie's eligibility to exercise off-reservation treaty fishing rights. *Id.* at 37. Like the Interior Report, the U.S. Decision echoes the Ninth Circuit's correction of Judge Boldt's holding that only federally recognized tribes may exercise treaty rights as "clearly contrary to . . . and . . . foreclosed by well-settled precedent" and further clarifies that the Tribe's temporary loss of recognition after 1953 reflected a time-

limited policy with respect to tribes without trust land holdings and did not disturb the fact that Snoqualmie maintained its political continuity. *Id.* The U.S. Decision concludes that "[o]nce a government-to-government relationship is established between a tribe and the United States, the absence of probative evidence of termination or loss of a tribe's jurisdictional status suggests that the status is retained." *Id.* at 36.

SUMMARY OF ARGUMENT

1. The two central questions for this Court are: (1) whether this Court's 2010 *en banc* decision in *Washington IV* explicitly permits litigation of Snoqualmie's hunting and gathering rights under the Treaty anew; and, if not (2) whether the hunting and gathering treaty status claims Snoqualmie now presents were "actually litigated" as part of the fishing rights decision in *United States v. Washington* for preclusion to apply.

The answer to the first question is yes: this Court's *en banc* decision in *Washington IV* explicitly permits Snoqualmie to seek a declaration of its treaty status to exercise its reserved hunting and gathering rights. Snoqualmie is a "newly recognized tribe" presenting a claim of hunting and gathering rights not yet adjudicated, and is prepared to introduce its evidence of treaty status and treaty hunting "anew." The district court erroneously gives no credence to *Washington IV*'s removal of the bar of preclusion for newly recognized tribes that satisfy its

rule and dismisses Snoqualmie's satisfaction of the three essential conditions of that rule out-of-hand.

The answer to the second question is no. It is undisputed that Snoqualmie's treaty status for hunting and gathering rights was never "actually litigated" in *Washington II*. No court has ever adjudicated it. The scope of the litigation in *Washington II* was limited to off-reservation treaty fishing rights and what was actually litigated were Snoqualmie's lack of recognition and lack of reservation. Issue preclusion does not apply.

Even if this Court determines that issue preclusion applies, two exceptions under the Restatement (Second) of Judgments § 28 (1982) nonetheless permit Snoqualmie's claims to proceed. First, *Washington IV* and the U.S. Decision present intervening changes in the applicable legal context warranting a new determination, and a new determination is further warranted to "avoid inequitable administration of the laws." Restatement (Second) of Judgments § 28. Second, a new determination is warranted by differences in the quality and extensiveness of the procedures followed in *Washington II* versus those which would be followed by the district court in this case.

2. In addition, 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.

3. Finally, the district court erred when it failed to determine it had subject matter jurisdiction and resolve the State's challenges based on Eleventh Amendment Immunity and Article III standing. As this Court has an independent obligation to determine whether it has jurisdiction, the Court should conclude there are no jurisdictional obstacles to Snoqualmie bringing the instant claim.

The district court's decision should be reversed and the case remanded.

STANDARD OF REVIEW

Dismissal on the pleadings pursuant to Rule 12(c) is reviewed de novo. *Daewoo Elecs. Am. Inc. v. Opta Corp.*, 875 F.3d 1241, 1246 (9th Cir. 2017). Because a Rule 12(c) motion is "functionally identical" to a Rule 12(b)(6) motion, "'the same standard of review' applies to motions brought under either rule." *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (quoting *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)). A judgment on the pleadings is properly granted when, "taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir. 1998).

Questions regarding issue preclusion (collateral estoppel) are reviewed de novo. *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 854 (9th Cir. 2016).

ARGUMENT

I. SNOQUALMIE'S NEVER-LITIGATED TREATY STATUS HUNTING AND GATHERING CLAIMS ARE PERMITTED BY *WASHINGTON IV*

This *en banc* Court's rule unequivocally removed the bar of issue preclusion for a sub-set of newly recognized tribes, such as Snoqualmie, seeking to litigate treaty rights "not yet adjudicated" such as Snoqualmie. By erroneously applying issue preclusion, the district court disregarded *stare decisis* and dramatically expanded the scope of *Washington II* beyond treaty fishing to foreclose ***all*** of Snoqualmie's rights reserved under the Treaty.

A. *Washington IV* Removes the Bar of Preclusion in Cases That Meet Its Three Requirements

In *Washington IV*, the *en banc* Court ruled that despite Samish's recent federal recognition, the finality of other tribes' already-adjudicated treaty fishing rights in *United States v. Washington* counseled against reopening the decision in *Washington II* under Rule 60(b). *Washington IV*, 593 F.3d at 800. The rule of *Washington IV* applicable in this case represents the resolution of conflicting lines of cases within the Ninth Circuit: *United States v. Washington* (*Washington III*), 394 F.3d 1152, 1161 (9th Cir. 2005), which held that federal recognition justified the reopening of *Washington II*, on the one hand, and *Green v. Babbitt* (*Green I*),

996 F.2d 973 (9th Cir. 1993), and *Green v. Babbitt* (*Green II*), 64 F.3d 1266, 1270-71 (9th Cir. 1995), holding that federal recognition is an independent process that has no effect on treaty rights, on the other hand. 593 F.3d at 793. To resolve the conflict, the Court identified "the course we adopt" (*id.* at 801) as follows:

> ***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). This rule is best synthesized as follows: (1) a "newly recognized tribe," (2) may present a claim of "treaty rights not yet adjudicated," (3) and will be required to introduce factual evidence "anew." *Id.* The meaning of the rule, in terms of to whom and how it is intended to apply, is easily derived by its plain text and relationship to other critical aspects of the decision.

The first prong of *Washington IV*'s new rule governs the question which "newly recognized" tribes the rule applies. Footnote 12 clarifies and states in relevant part: "it would potentially disturb treaty fishing of the tribes now exercising Samish treaty rights to have the newly recognized Samish Tribe join them." *Washington IV*, 593 F.3d at 800 n.12. By this footnote, the Court clearly identifies Samish as one "newly recognized" to whom preclusion would not apply if it met the second and third requirements of the rule. *Id.* Second, a "newly recognized" tribe may meet the requirements of the rule "***whether or not that tribe***

has previously been the subject of a treaty rights decision." *Id.* at 801 (emphasis added).

The second prong of *Washington IV*'s new rule governs which rights may be litigated. Newly recognized tribes are not precluded only if they present treaty rights "not yet adjudicated." To this critical point, footnote 12 clarifies that permitting a newly recognized tribe to litigate "treaty rights not yet adjudicated" would not "disturb treaty fishing . . . rights." *Id.* at 800 n.12. By contrasting future litigation of treaty hunting and gathering rights with the treaty fishing rights litigated to finality in *United States v. Washington* that cannot be reopened the *en banc* Court highlighted the crux of Snoqualmie argument—litigation of treaty hunting and gathering rights cannot be precluded by its prior litigation of treaty fishing rights.

The third prong of *Washington IV*'s new rule governs how newly recognized tribes may litigate their treaty rights not yet adjudicated. A newly recognized tribe as described above, which seeks to litigate treaty rights not yet litigated, must still satisfy the requirement that it "introduc[e] its factual evidence anew." The Court's choice of the term "anew" is significant. The plain meaning of "anew" is (1) "for an additional time: AGAIN" and (2) "in a new or different form." *See Anew*, Merriam-Webster, https://www.merriam-webster.com/dictionary/anew (last visited July 22, 2020) (capitalization altered); *Anew*, Black's Law Dictionary (11th ed.

2019) (defining "anew" to mean "1. Over again; once more; afresh <let's start anew>. 2. In a new and changed form <let's fashion this book anew>. • The word always implies some previous act or activity of the same kind."). Use of the term "anew" indicates this Court's expectation that a "newly recognized tribe" would be one that had presented factual evidence in prior treaty rights litigation.

Thus, the rule encompasses only two tribes, Snoqualmie and Samish, who are "newly recognized" and were both previously subject of a treaty rights decision in *United States v. Washington* in which they presented factual evidence as to treaty status for fishing.

This interpretation of *Washington IV* is consistent with Judge Boldt's own design for *United States v. Washington.* Not only did he limit the scope of that case to treaty fishing, he envisioned tribes' treaty status as mutable. *Washington II*, 476 F. Supp. at 1111. Judge Boldt temporally qualified his ruling, finding that Snoqualmie was "***at this time*** not a treaty tribe ***in the political sense.***" *Id.* 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. Judge Boldt's powerful word choice foreshadowed the *en banc* Court's decision to leave the door open for Snoqualmie to establish its treaty status "anew."

B. The District Court Disregarded Snoqualmie's Satisfaction of All Three Requirements of *Washington IV*

Snoqualmie satisfies all three requirements of the applicable rule from *Washington IV*. First, recognized in 1997, one year after Samish, Snoqualmie is a "newly recognized tribe." Second, Snoqualmie presents a claim of "treaty rights not yet adjudicated"—hunting and gathering rights as distinguished from fishing rights.[6] Third, Snoqualmie is prepared to present factual evidence "anew," i.e., "again"—this time for the purpose of establishing its treaty status to hunt and gather. That evidence will look different from the evidence presented in *Washington II* due in part to the sheer volume of ethnographic data now available to the Tribe and the focuses on land-based activities. Therefore, Snoqualmie exactly satisfies the rule laid down in *Washington IV* specifically for a case such as this one and issue preclusion poses no bar.

The district court disregards and distorts the applicable rule, dedicating to it just a single sentence: "And while the Ninth Circuit's statement in *Washington IV* invites litigation from tribes that have not sought treaty rights in the past, it does not apply to tribes like Snoqualmie that have adjudicated the essential issue for determining treaty status." ER 12. The court's interpretation of *Washington IV* makes no sense. First, it excludes the very tribes the *en banc* Court sought to

[6] The district court agreed that "*Washington II* does not determine the scope of hunting and gathering rights" ER 9.

protect and is unsupported by the language of the decision itself. If the district court's interpretation of *Washington IV* were correct, there would be no way for "tribes that have not sought treaty rights in the past" to "present" evidence "anew"—i.e., "again." After all, it is only tribes that ***have*** sought treaty rights previously that can introduce evidence "anew." The district court cannot write "anew" out of *Washington IV* in order to erroneously foreclose the opportunity to litigate treaty status for hunting and gathering rights "not yet adjudicated." Second, *Washington IV* explicitly permits a newly recognized tribe to "present a ***claim*** of treaty rights not yet adjudicated" and anticipates that such tribe will introduce factual evidence of the ***issue*** of treaty status "anew." Emphasis added.

C. The Court Below and This Court Are Bound to Follow *Washington IV* Under Law of the Circuit Doctrine (*Stare Decisis*)

The district court's failure to apply *Washington IV* was erroneous under the doctrine of *stare decisis*. Under the "law of the circuit rule," published decisions of this Court become law of the circuit, which is binding authority that panels and district courts must follow until overruled. *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (*en banc*) (citation omitted); *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 637 (9th Cir. 1993) (holding that the Ninth Circuit is "'bound by decisions of prior panels' unless an *en banc* decision, Supreme Court decision, or subsequent legislation undermines those decisions" (citations omitted)). In the absence of overruling authority, the law of the Circuit doctrine binds this Court to

follow the *en banc* ruling in *Washington IV* to ensure that decision is faithfully followed.

This Court should reverse the district court and hold that *Washington IV* controls, thereby permitting Snoqualmie's case to proceed notwithstanding *Washington II*.

II. SNOQUALMIE'S HUNTING AND GATHERING CLAIMS HAVE NEVER BEEN LITIGATED; THUS, THEY ARE NOT PRECLUDED

If the Court determines that *Washington IV* does not explicitly permit this case, it still must determine whether the case meets the requirements for issue preclusion to apply.

In its dismissal of the Tribe's complaint on the basis of issue preclusion, the district court determined, "[d]espite the Snoqualmie's novel claims, the factual issues that determined the Tribe's fishing rights in *Washington II* is *the same gateway question* that the Court would face here when determining hunting and gathering rights under the Treaty of Point Elliott," noting further that ***"[t]he type of rights sought is a distinction without a difference.***" ER 9 (emphasis added). As a result, the district court concludes that the "factual issues necessary to determine signatory status with respect to fishing rights" "do not differ" "from those required to determine hunting and gathering rights." *Id.* The district court's conclusions are incorrect as a matter of law and fact.

The Treaty right being adjudicated absolutely matters because it determines the issues and evidence presented to the court for issue preclusion purposes. The district court's sweeping conclusion lays bare its superficial treatment of the record in this case, which demonstrates that the issues "actually litigated" in *Washington II* are wholly distinct from those central to Snoqualmie's current claims. If the district court is correct and hunting and gathering and fishing share the same inquiry, the scope of *United States v. Washington* is far, far broader than any court has ever held, with potentially disastrous consequences.

Ultimately, the district court asked the wrong question; issue preclusion bars relitigation only of "issues actually adjudicated in previous litigation between the same parties." *Littlejohn v. United States*, 321 F.3d 915, 923 (9th Cir. 2003). Accordingly, this Court must inquire whether Snoqualmie actually litigated issues in *Washington II* that are identical to those it seeks to litigate now. The answer is no for two reasons: (1) *Washington II* concerned fishing, not hunting and gathering rights; and (2) the legal issues adjudicated in *Washington II* concerned Snoqualmie's lack of federal recognition and lack of reservation—not its "maintenance of an organized tribal structure" of which evidence will be presented "anew" in this case along with affirmative evidence of treaty-time hunting and gathering. Issue preclusion does not apply.

Even if issue preclusion did apply, *Washington IV* and the U.S. Decision present intervening changes in the applicable legal context warranting a new determination, and a new determination is further necessary to "avoid inequitable administration of the laws" in part a result of differences in the quality and extensiveness of the procedures followed by the court in *Washington II* and the district court below. Restatement (Second) of Judgments § 28 (1982).

A. Issue Preclusion Requires the Court to Determine that Identical Issues Were Actually Litigated in the Prior Proceeding

Unlike claim preclusion, also known as res judicata, issue preclusion requires that an issue must have been "actually and necessarily determined by a court of competent jurisdiction" to be conclusive in a subsequent suit. *Montana v. United States*, 440 U.S. 147, 153 (1979). All four of the following conditions must be met: "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Oyeniran v. Holder*, 672 F.3d 800, 806 (9th Cir. 2012), *as amended* (May 3, 2012); *see also Howard v. City of Coos Bay*, 871 F.3d 1032, 1041 (9th Cir. 2017) (reciting the four conditions). The inquiry in this case centers on conditions (1) and (2) above, whether the issue at stake in this proceeding—Snoqualmie's treaty status for hunting and gathering rights—is identical to that in *Washington II*

and whether Snoqualmie's hunting and gathering rights were actually litigated in *Washington II*.

The Supreme Court has clarified that issue preclusion does not apply to those issues that could have been raised, but were not: "the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'" *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 593 (1974) (quoting *Comm'r v. Sunnen*, 333 U.S. 591, 598 (1948) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876))) (emphasis added), superseded on other grounds by statute as stated in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30 n.1 (1990).

Accordingly, when applying issue preclusion, this Court has consistently looked to the record of the prior proceeding to determine whether an issue was in fact raised, contested, and submitted for determination. *See Oyeniran*, 672 F.3d at 804, 806 (explaining that the question of whether petitioner's father was tortured in Nigeria was "actually litigated" because petitioner presented evidence on the issue, the IJ specifically found so, and the government challenged that claim "[a]t every stage of the administrative proceedings"); *Disimone v. Browner*, 121 F.3d 1262, 1268 (9th Cir. 1997) (explaining that the issue was actually litigated, even though the prior court did not explicitly address it in its decision, because the parties had

raised and contested the issue and the district court had necessarily decided the issue by reaching its decision); *see also Montana*, 440 U.S. at 156-58 (applying issue preclusion and explaining that "[a] review of the record in [the first adjudication] dispels any doubt that the plaintiff there raised and the Montana Supreme Court there decided the precise constitutional claim that the United States advances here" and therefore "the 'question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged' adversely to the Government in state court" (citation omitted)).

Just last fall, this Court joined its sister Circuits to plainly "hold that an issue is actually litigated when an issue is raised, contested, and submitted for determination." *Janjua v. Neufeld*, 933 F.3d 1061, 1066 (9th Cir. 2019) (holding that issue preclusion did not apply because the issue was not actually litigated previously). In Janjua, this Court expressly rejected the idea that issue preclusion could bar an issue "implicitly raised"7 and that an issue is "actually litigated" only

[7] This was one of the many errors made by the district court. The district court mistook Snoqualmie's claim for something it is not. The court made reference to the fact that Snoqualmie's claim was barred because it has "adjudicated the essential issue for determining treaty status before." ER 12. This is a misapplication of the Ninth Circuit's rule. "Essential" and "implicit" are no different in this context, and they ask the wrong question. The focus should have been on whether the question of hunting and gathering was raised, contested, and submitted for determination previously. As this Court in *Janjua* noted, "While Janjua's work for the MQM was addressed in the asylum proceedings, the specific issue of whether he was inadmissible based on that work was not raised, contested, or submitted for determination." 933 F.3d at 1068. The fact that treaty

so long as there was a "fair opportunity" to litigate the issue. *Id.* at 1067. Thus, the rule in this Circuit is that issue preclusion only applies when the issue was raised, contested by the parties, and submitted for determination in the prior proceeding.

As explained below, because the issue of whether Snoqualmie has treaty status to exercise its reserved hunting and gathering rights was not raised, contested, or submitted for determination previously, it was not actually litigated. Rather, the pleadings, evidence, testimony and court decision reveals that the issues that were "actually litigated" consisted of Snoqualmie tribal fishing, federal recognition and a reservation—none of which now bear on hunting and gathering. The district court's decision cannot be squared with preclusion's strict requirements.

B. *United States v. Washington* Was Explicitly Limited to Fishing

There is no credible dispute that, in *United States v. Washington*, the United States limited its claims to off-reservation fishing rights, and not the full panoply of treaty rights. ER 272-318; *see United States v. Washington*, 384 F. Supp. 312

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status arose *Washington II* does not trigger issue preclusion because the specific issue as to treaty status for hunting and gathering was never raised, contested or submitted. The district court's findings that "the type of rights sought" by Snoqualmie is a "distinction without a difference" lead to an erroneously overbroad embrace of issue preclusion. ER 9.

(W.D. Wash. 1974). The district court's contrary finding sorely mischaracterizes the pleadings and decision, and subsequent courts' understanding of the case.

First, the United States and the district court limited the scope of *United States v. Washington* to treaty fishing from the start. The court plainly identified the United States' purpose in filing suit: "The United states . . . filed suit against the State of Washington . . . seeking declaratory and injunctive relief concerning off-reservation treaty right fishing" and restricted its ruling accordingly: ***"This case is limited to the claimed treaty-secured off-reservation fishing rights of the Plaintiff tribes*** as they apply to areas of the Western District of Washington . . . ." *Washington I*, 384 F. Supp. at 400 (emphasis added).

Across thirty-five separate paragraphs regarding "Treaty Status of Plaintiff Tribes" the court elaborately depicts treaty-time fishing, illustrating the inseparable nature of tribes' treaty fishing and their treaty status. *Id.* at 350-54, 357. Contrary to the district court's portrayal of treaty status as the predominant issue in the fishing case, treaty status figured only minimally in the court's findings in comparison to the questions when, where and how the tribes fished at treaty time. *Id.* at 353, 359-70 (discussing each tribes' "usual and accustomed fishing grounds and stations" and fishing activities). Most importantly, none of Judge Boldt's findings consider, much less analyze or determine, treaty status related to hunting or gathering practices.

Furthermore, this Court and two other judges at the district court have expressly held that *United States v. Washington* does not extend beyond fishing rights. *See, e.g.*, *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1174 (W.D. Wash 2014) (noting that "the scope of the hunting and gathering provision has not been previously litigated in federal court"); *Skokomish Indian Tribe v. Forsman*, 738 F. App'x 406, 408 (9th Cir. 2018) ("No plausible reading of the original injunction decision or subsequent proceedings and appeals to this court supports the conclusion that the [*United States v. Washington*] litigation decided anything other than treaty fishing rights."); *see also Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (disagreeing with district court's suggestion that Makah Indian Tribe should have brought its ocean fishing action under *United States v. Washington* on the basis that "[t]he suit concerns only fishing regulations promulgated by the State of Washington"). The district court ignored these rulings entirely. Inexplicably, the district court found that these rulings "say nothing about" whether tribes denied fishing rights "nonetheless have other treaty rights." ER 9. This feeble reasoning ignores that all of these courts agree with Snoqualmie's basic premise that the scope of *United States v. Washington* was limited to fishing and they belie the conclusion that *United States v. Washington* ended with a final judgment on the merits of Snoqualmie's hunting and gathering rights.

C. The Issues Actually Litigated in *United States v. Washington* Were Specific to Fishing, Federal Recognition and Reservation

A review of the evidence introduced and the transcript from Snoqualmie's hearing on the issue of treaty fishing supports the conclusion that the issues in *United States v. Washington* are not identical to the issues presented here. The district court erred in substituting what the court thought should have been adjudicated —"maintenance of an organized tribal structure"—with what was actually adjudicated—fishing activities, federal recognition and reservation status.

1. Evidence and Testimony at Trial Concerned Fishing

In his referral of Snoqualmie's case to Master Cooper, Judge Boldt explicitly instructed that treaty status should be determined as "***defined in Final Decision No. I***"—i.e., limited to treaty fishing. ER 62 (emphasis added). In accordance with the court's limitation, Snoqualmie presented dozens of exhibits relating to fishing, such as the Tribe's fishing identification cards, fishing regulations, and correspondence between the Tribe and federal officials regarding "the fishing case." ER 180-181, ER 196-197, ER 138-139. Likewise, the interrogatories propounded on Snoqualmie largely related to fishing. ER 65-89. Equally demonstrative is a letter from an attorney retained by Snoqualmie to represent them in "the fish case" (ER 192-193) as well as references to the fishing case as a "test case" as opposed to the full adjudication all rights retained by

tribes under the treaties that would have included hunting and gathering. (ER 194-195)

Snoqualmie's attorney averred in opening argument that the case would demonstrate that the Tribe was "entitled to exercise their treaty right to fish." ER 92; *United States v. Washington*, Case No. 9213 (W.D.Wash. Dec. 8, 1977). Likewise, testimony by Snoqualmie's witnesses centered on fishing, for example, the leadership of Snoqualmie tribal elder Jerry Kanim in defending Snoqualmie fishermen facing criminal charges by county game wardens (ER 93) and Snoqualmie Tribal Council's authorization of the issuance of tribal identification cards to treaty fishers by Snoqualmie Tribe's Fish Commission. ER 94. Snoqualmie's attorney also clarified that the United States' expert's opinion on the issue of successorship was being specifically elicited to determine the existence of only Snoqualmie's treaty fishing rights. ER 98.

Therefore, based on (1) the parties' own representations, (2) courts' characterizations of the scope of *United States v. Washington*, (3) the evidence, and (4) testimony presented at Snoqualmie's hearing, the factual issues actually litigated concerned fishing. Hunting and gathering was never raised, contested by the parties, or submitted for determination.

2. The Legal Issues "Actually Litigated" Related to Snoqualmie's Lack of Federal Recognition and Reservation, Which Have No Bearing on This Case

The district court erred in asking how the factual issues for treaty status "could differ". ER 9. This is the wrong question. Issue preclusion is not hypothetical; the question is what was "actually litigated" in the prior proceeding. The issues "actually litigated" in *Washington II* concerned Snoqualmie's lack of federal recognition and lack of a reservation, which have no bearing on and are certainly not identical to, the issues in the instant case.

Judge Boldt's stated legal standard was whether the intervenor tribes were a "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. A close review of the record reveals, however, that the dispositive issue for Judge Boldt was, erroneously, federal recognition. ER 57-59; U.S. Decision at 37. This case does not seek to rectify the error of that court, nor can it. What this case does show, however, is that federal recognition is what was "actually litigated" for the purpose of preclusion.

The other issue "actually litigated" was Snoqualmie's lack of a reservation, an issue that has no bearing on the instant case in no small part because Snoqualmie has had a Reservation since 2006. U.S. Decision at 12. One of the United States' witnesses testified that "The position that the United States has

taken to this point is that . . . the tribes on the reservation were the groups that succeed to everything that related to that treaty." ER 99. The United States also argued that a treaty tribe "do[es] not include descendants of formerly active tribes who live outside of Indian territorial communities (reservations)." ER 246. In its post-trial brief, the United States continued to argue against treaty status for fishing based in part on the fact that "None [of the Intervenors] has a reservation." *Id.* None of these issues apply to the now federally-recognized Snoqualmie with a Reservation's ability to litigate its treaty status for hunting and gathering anew.

Collateral estoppel "is an equitable doctrine," not an inexorable command. 46 Am. Jur. 2d *Judgments* § 469 (2018). The issues that were "actually litigated" and "necessarily decided" for the purpose of determining treaty status primarily focused on fishing, federal recognition, and reservation status. As treaty status for hunting and gathering was never "actually litigated" or even at issue in *United States v. Washington*, issue preclusion cannot and does not apply. *Eureka Fed. Sav. & Loan Ass'n v. Am. Cas. Co. of Reading*, 873 F.2d 229, 233 (9th Cir. 1989) (issue preclusion "inappropriate if there is any doubt as to whether an issue was actually litigated in a prior proceeding").

D. If Preclusion Bars Snoqualmie's Claims, Two Exceptions Apply

Even if the district court was correct in finding that Snoqualmie had actually litigated the same issues before, the district court still erred in applying issue

preclusion because it should have found that two exceptions to issue preclusion nonetheless apply.

The Restatement (Second) of Judgments § 28 (1982) permits an issue actually litigated and determined by valid final judgment to be relitigated under four exceptions, of which the second and third apply here, to wit: (2)(b) "a new determination is warranted in order to take account of an intervening change in the applicable legal context ***or*** otherwise to avoid inequitable administration of the laws" (emphasis added); (3) "A new determination is warranted by differences in the quality or extensiveness of the procedures followed in the two courts . . . ." Courts, including the Supreme Court, are not afraid to decline to apply issue preclusion when one of these exceptions apply. *See Sunnen*, 333 U.S. at 599 (declining to apply issue preclusion and explaining applicability of the exception where "a change or development in the controlling legal principles" may make a prior judicial determination "obsolete or erroneous, at least for future purposes").

1. *Washington IV* and the U.S. Decision Change the Applicable Legal Context for Establishing Treaty Rights

Snoqualmie avers that *Washington IV* removes the bar of preclusion altogether for tribes that meet its three criteria. In the alternative, *Washington IV* provides the basis for applying the exception to preclusion under the Restatement.

Washington IV constitutes a change in the applicable legal context, adding a new rule to benefit certain newly recognized tribes. This Court narrowly, yet

carefully, distinguished between a newly recognized tribe which chooses to assert treaty rights based on the "mere *fact* of recognition," without more, from a tribe that presents its evidence "anew" after recognition. *Washington IV*, 593 F.3d at 801 (emphasis added). The rule thus accedes that federal recognition is a significant change of circumstance for a tribe seeking to adjudicate treaty rights not yet litigated. By paving this new pathway for a "newly recognized tribe" to follow, *Washington IV* altered the legal context for litigation of such future treaty rights claims by tribes like Snoqualmie.

Snoqualmie does not seek automatic confirmation of its treaty status based on the "mere fact of recognition" or because it now has a Reservation. Instead, Snoqualmie is prepared to lay out evidence anew specific to its treaty hunting and gathering. Such body of evidence was never reviewed in *Washington II*.

In addition, the U.S. Decision (1) crystalizes the continuing effect of the Treaty, (2) confirms Snoqualmie's signature to it, and (3) along with the Final Determination, resolves the "political sense" problem central to the denial of its fishing rights in *Washington II*. *See Washington II*, 476 F. Supp. at 1108–09. Assistant Secretary Sweeney concludes first 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." U.S. Decision at 38-39 (emphasis added). As a matter of logic, a treaty

that "remains in effect" simply cannot be abrogated as to not-yet litigated treaty rights.

Second, she concludes that "I concur with conclusion [*sic*] reached by the Department in the Snoqualmie federal acknowledgment determination . . . that the Snoqualmie Tribe was ***clearly identified as derived of from the treaty-signatory Snoqualmie."*** *Id.* at 39 (emphasis added). This conclusion literally satisfies the standard for treaty status: whether a "group asserting treaty rights [is the same] as the group named in the treaty[:] maintenance of a tribal structure." *United States v. Washington*, 641 F.2d at 1372, 1374 ("They may [exercise treaty rights] only if they are the tribes that signed the treaties."). These two conclusions markedly alter the applicable legal context for Snoqualmie's assertion of treaty rights under the new rule of *Washington IV*.[8] Moreover, the U.S. Decision confirms that the 1997

[8] The Court should take judicial notice of the U.S. Decision. As a decision of the Assistant Secretary, the Decision itself is not subject to dispute or its accuracy questioned. Fed. R. Evid. 201(b)(1), (2). It is proper for the Court to take judicial notice of the U.S. Decision "[a]t any stage of the proceeding," including on appeal. *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 207 n.5 (9th Cir. 1995), *rev'd on other grounds*, 520 U.S. 548 (1997). The U.S. Decision advances the three "adjudicative facts" discussed in this Part (Snoqualmie's status as a "newly recognized tribe," prior litigation limited to fishing rights, and the wealth of evidence Snoqualmie would present "anew" including the Assistant Secretary's determination that the Treaty "remains in effect" as to Snoqualmie), each of which "have a direct relation to the matters at issue" in Snoqualmie's claim and this appeal. *United States ex rel. Robinson Rancheria Citizen's Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Given the contemporaneous nature of the U.S. Decision with the district court's decision, the Tribe further requests that this Court allow the U.S. Decision to supplement the record under

Final Determination is far more than a mere "inconsistency" to be casually tossed aside as it was the district court (ER 12); rather, it fundamentally resolves the basis for denying Snoqualmie treaty status—that it was not a tribe in the "political sense" at the time it sought intervention in the fishing case. 476 F. Supp. at 1111; U.S. Decision at 25, 27-28, 38 (interpreting "recognition" as recognition in the "political-legal sense").

Compounding its error, the district court should have deferred to Interior's Final Determination and Interior Report 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). The Final Determination, comprising more than 550 pages, provides a comprehensive ethnographic study of Snoqualmie and its over 100-year relationship to the federal government. Likewise, in her 43-page U.S. Decision, the Assistant Secretary meticulously traces the historical development of federal understandings of the term "recognition" and its application to Snoqualmie. *See* U.S. Decision at 13-38. These documents demonstrate unparalleled expertise in the laws and regulations governing federal recognition and Snoqualmie ethnography, U.S. Decision at 7-38, and "constitute[]

Federal Rule of Appellate Procedure 10(e)(3).

a body of experience and informed judgment to which courts and litigants may properly resort for guidance" deserving of deference. *Skidmore*, 323 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*, 858 F.3d 1281, 1285 (9th Cir. 2017) (applying *Skidmore* deference to Internal Revenue ruling); *c.f. Sierra Club v. Trump*, 929 F.3d 670, 693-94 (9th Cir. 2019) (denying *Skidmore* deference where Department of Defense was "conclusory," "merely parrots the statute without analysis," and "fails to rest on the sort of expertise that might inspire deference").

Finally, the Restatement permits an exception to preclusion where "other circumstances[] are such that preclusion would result in a manifestly inequitable administration of the laws." Restatement (Second) of Judgments § 28. This requirement is clearly met here where, precluding the Tribe's claims would mean that ***all*** of Snoqualmie's treaty rights were lost in 1979 causing irreparable harm to the Tribe's property rights and its sovereign interest in exercising and protecting those rights for future generations.

2. The Third Exception Under the Restatement Applies Due to Inadequate Focus on Snoqualmie's Case in *Washington II*

The district court noted that the third exception to preclusion under the Restatement could apply if Snoqualmie could demonstrate qualitative defects in *Washington II* proceedings. ER 11. Looking no further than the fact that five intervenor tribes had five days to present their evidence, the district court summarily concludes that the exception does not apply. ER 11-12. The district court erroneously looks past the facts.

In its trial on fishing rights before Master Cooper, Snoqualmie had approximately half of one day to present its case regarding fishing rights treaty status; the Tribe offered 87 exhibits and Master Cooper dedicated merely one page to Snoqualmie in his report. ER 138-139. In the subsequent trial before Judge Boldt, all five intervenor tribes presented their cases with Snoqualmie receiving less than one day to do so. ER 94. The dearth of evidence offered, coupled with the cursory analysis of Snoqualmie's treaty fishing rights claim, certainly calls into question the quality or extensiveness of the procedures in *Washington II* such that issue preclusion should not apply.

In sum, the district court erred in its application of issue preclusion and its decision should be reversed.

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

The district court adopted the State's extreme position that because the Tribe did not establish its fishing right in 1979, it is forever barred from exercising ***all*** of its rights reserved under the Treaty. ER 8. This position exponentially expands *Washington II*, giving it a preclusive effect that is unsupported by the express language of the order and contradicts the well-settled rule that "treaty rights are to be construed in favor, not against, tribal rights." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2470 (2020) (quoting *Solemn v. Bartlett*, 465 U.S. 463, 472 (1984)). As recently as July 2020, the Supreme Court reaffirmed the rule that the "Legislature wields significant constitutional authority to breach its own promises and treaties." *McGirt*, 140 S. Ct. 2452, 2462 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556-58 (1903)). "But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach . . . ." *Id.* (citing *Solem*, 465 at 470. Allowing a federal judge to renounce federal property rights reserved under a Treaty, without saying so explicitly and absent any express abrogation by Congress, directly contravenes this long-standing precedent.

The fact that Snoqualmie is a signatory to the Treaty is simply unassailable and confirmed by myriad prior federal cases acknowledging it as a treaty signatory. *E.g.*, *United States v. Washington*, 641 F. 2d at 1370, n.1 ("The . . .

Snoqualmie Tribe[] [was] part[y] to the Treaty of Point Elliott."); *see also Snoqualmie Indian Tribe*, 9 Ind. Cl. Comm. at 48 (recognizing Snoqualmie title to lands ceded under the Treaty); *Snoqualmie Indian Tribe*, 15 Ind. Cl. Comm. at 310, 314 (finding that "Governor Stevens concluded the Treaty at Point Elliott on January 22, 1855 with . . . Snoqualmie"); *Upper Skagit Tribe of Indians*, 13 Ind. Cl. Comm. at 585-86, 588 (finding that "Snoqualmie" were among the signatories to the Treaty).

It is axiomatic that, as a treaty signatory, Snoqualmie necessarily holds certain rights under the Treaty. In the Treaty, Snoqualmie ceded, relinquished and conveyed to the United States "all their right, title, and interest in and to the lands and country occupied by them," in return for which they received 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). Treaty rights are also 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)). Accordingly, 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) (intention by Congress to abrogate treaty rights must be "clear and plain").

While courts may be called upon to interpret a provision of a treaty, Snoqualmie can find no case involving an Indian tribe 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.'" *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019) (citing *Minnesota 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 County v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985); *Santa Fe Pac. R.R. Co.*, 314 U.S. at 346, 354; *Dion*, 476 U.S. at 738. No one here argues that Congress abrogated Snoqualmie's treaty rights. In fact, the United States as recently as March acknowledged the continuing vitality of the Treaty as to Snoqualmie. *See* U.S. Decision. Nonetheless, Snoqualmie has been denied the benefit of its Treaty bargain in reserving hunting and gathering rights. Only here, that abrogation as to hunting and gathering rights has come via judicial fiat.

This Court should remain consistent with precedent limiting courts' authority with regard treaties generally. In reference to a treaty with Germany, in

Clark v. Allen, 331 U.S. 503, 509-10 (1947), the Supreme Court indicated that courts must play a limited role in decisions regarding treaties, noting:

> Congress may enact an inconsistent rule, which will control the action of the courts. The treaty of peace itself may set up new relations, and terminate earlier compacts, either tacitly or expressly. * * * But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, ***the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, en bloc.***

(emphasis added) (citation omitted). Closer to home, in a case challenging the denial of a permit to fish in Lummi Nation's treaty fishing grounds, the same district court as decided the instant case stated: "The Court is unaware of any such authority which would allow the Corps, ***or this Court***, to take action ***impinging on Indian treaty rights*** for potential mistakes in a permitting process." *Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1524 n.15 (W.D. Wash. 1996) (emphasis added).

The bright-line rule governing abrogation and the lack of any congressional intent to abrogate the Treaty as to Snoqualmie, weighs strongly in favor of the continued existence of those rights in the Tribe. By ignoring the strict rule governing treaty abrogation, the district court usurps 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 and reverse.

IV. THE COURT SHOULD RESOLVE THE STATE'S JURISDICTIONAL CHALLENGES IN THE TRIBE'S FAVOR

In its motion below, the State advanced two jurisdictional arguments—Eleventh Amendment Immunity and Article III standing—in addition to their substantive argument on issue preclusion. ER 248-264. However, the district court passed on these arguments entirely,[9] moving straight to the State's non-jurisdictional argument of issue preclusion. ER 2-13. The district erred by abdicating its responsibility to determine that it had subject matter jurisdiction to hear the case before proceeding to erroneously dismiss the case on issue preclusion grounds.

A. The District Court Erred When It Failed to Address the State's Jurisdictional Challenges

A court "generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction)." *Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007). Orders made without jurisdiction are void. *Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1165 (9th Cir. 2016) (lack of jurisdiction "depriv[es] the court of the authority to rule on the merits").

[9] Standing is a jurisdictional question that concerns "the power of the court to entertain th[at] suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Sovereign immunity is a jurisdictional issue requiring resolution before the federal court can entertain a lawsuit. *Goldmark*, 994 F. Supp. 2d at 1183-84, 1193 (W.D. Wash. 2014) (State 11th Amendment immunity requires dismissal of suit).

To rectify this procedural error, this Court may either remand to the district court to consider the jurisdictional challenges or consider them itself based on the pleadings. *Aloe Vera of Am., Inc. v. United States*, 580 F.3d 867, 873 (9th Cir. 2009). Snoqualmie believes the record is sufficient to allow this Court to consider the jurisdictional issues presented to the district court in the first instance. *See Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016).

As explained below, *Ex parte Young* permits this suit because Snoqualmie sued Defendants for prospective, declaratory relief, and because the Governor and Director of the Department of Fish and Wildlife maintain a "fairly direct" connection with the enforcement of the unlawful treaty rights determination. The Tribe also sufficiently alleged an injury in fact for Article III standing. The State's jurisdictional challenges are, thus, easily dispensed with.

1. *Ex parte Young* Permits This Suit Against the State

"[T]he test for when *Ex parte Young* allows suits against officials to proceed is quite simple: 'In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1189 (9th Cir. 2003) (citation omitted). The Tribe's complaint

making claims against the State, the Governor and the Director of the Department of Fish and Wildlife easily satisfies this test.

a. The Director Is Not Entitled to Immunity

Director Susewind signed the letter wrongfully denying Snoqualmie treaty status, which is a question of federal law, (ER 776) and confirmed that denial in a subsequent meeting (ER 776). And, the relief the Tribe seeks is prospective. Tellingly, in another recent treaty hunting case, the district court in *Goldmark*, 994 F. Supp. 2d at 1182-83, rejected the claim of Eleventh Amendment immunity to the Director of the Department of Fish and Wildlife (then Mr. Anderson). The same result holds true here.

b. The Governor Is Not Entitled to Immunity

In the State of Washington, the Governor has been responsible for compliance with the treaties since before statehood. Thus, it is not by coincidence, but rather by design that the policy and practice of government-to-government relations between the State and Washington tribes was vested in the governor. *See* RCW 43.376 *et seq*.

This Court, when considering such gubernatorial oversight, refuses to allow sovereign immunity to bar suit. *See L.A. Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 699 (9th Cir. 1992) (denying 11th Amendment immunity); *Miranda B.*, 328 F.3d at 1189 (denying 11th Amendment immunity to the Governor in suit alleging claims

under the Americans with Disabilities Act for failures involving programs which the Governor had oversight but no direct involvement).

Asking these State officials to comply with federal law—here, the Treaty—is in line with the fundamental purpose of *Ex parte* Young, namely: to provide a federal forum to "vindicate federal rights and hold state officials responsible 'to the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)). The Court should reject the State's immunity arguments.

2. The Tribe Has Standing Based on Defendants' Deprivation of Treaty Rights

To satisfy Article III's standing requirements, a plaintiff must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and [(]3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The State challenged only the first two prongs of this test—injury and causation. ER 257.

On a motion to dismiss for want of standing, the "court[] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth*, 422 U.S. at 501 (citation omitted); *see also*

Cardenas v. Anzai, 311 F.3d 929, 933 (9th Cir. 2002). Thus, "[a]t the pleading stage," as in this case, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Cardenas*, 311 F.3d at 933. This standard is easily met with respect to Snoqualmie's claims.

3. The Injuries Are Directly Traceable to State Conduct

The injuries alleged in this case flow directly from a letter to Snoqualmie dated September 24, 2019, signed by Defendant Susewind, in which he declared, on behalf of WDFW and the State, that "the Snoqualmie Tribe does not have off-reservation hunting and fishing rights under the Treaty of Point Elliot." ER 776. Defendant Susewind later reiterated this position in person at a meeting on December 11, 2019. *Id.* Through this single letter, without any hearing or other due process and subsequent payment of just compensation for taking this property right, the State unilaterally deprived Snoqualmie of its hunting and gathering rights and waived its obligation to comply with the Treaty. A favorable decision by this Court would require the State to recognize Snoqualmie hunting and gathering rights, and include Snoqualmie in the hunting area designation process, thus satisfying this prong of Article III standing analysis. *See Friends of the Earth, Inc.*, 528 U.S. at 180-81.

4. The Tribe Has Suffered an Injury in Fact

Snoqualmie expressly alleged, and the State is well aware, treaty rights are federal property rights protected by Article V of the United States Constitution as applied through the Fourteenth Amendment which may not be taken without due process of law and just compensation. ER 776; *see Menominee Tribe of Indians*, 391 U.S. at 413; *Shoshone Tribe of Indians of Wind River Reservation in Wyo. v. United States*, 299 U.S. 476, 497 (1937). This deprivation of such a valuable property right is sufficient by itself to establish standing. *Skokomish Indian Tribe*, 994 F. Supp. 2d at 1178-79 (holding that Skokomish "would demonstrate an injury in fact for purposed of establishing Article III standing by alleging . . . that Washington State officials have expressly disclaimed" its hunting rights).

The Tribe alleged facts that are more than sufficient to demonstrate a concrete and particularized injuries flowing from Defendants' disclaimer of its treaty rights to hunt and gather, that the harm is actual and directly traceable to the determination and the exclusion from the State's traditional hunting area designation process. Article III standing is not legitimately in question.

In sum, the Court may remand to the district court to make a jurisdiction determination; however, the record is sufficient to allow the Court to decide the issue. The Court should find that it has jurisdiction to reach Snoqualmie's treaty hunting and gathering claims and reverse the district court on issue preclusion.

CONCLUSION

The Court should stand by its word in *Washington IV* and open the door for Snoqualmie's hunting and gathering case to proceed. For the foregoing reasons, this Court should reverse the decision below and find that Snoqualmie meets the Ninth Circuit standard for treaty status. Alternatively, if the Court holds that issue preclusion does not apply but finds that Snoqualmie has not sufficiently demonstrated treaty status, the case should be remanded for Snoqualmie to present facts "anew" on that issue at trial. As a further alternative, the Court may reverse the decision below and remand the case for resolution of subject matter jurisdiction questions, which ultimately lie in Snoqualmie's favor.

DATED: July 31, 2020

Respectfully submitted,

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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: July 31, 2020.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,399 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.

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 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/ Rebecca Horst
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