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 REPLY BRIEF

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INTRODUCTION

Snoqualmie's story is one of perseverance. Thirty-nine years ago, the Court in *Washington II* denied the treaty fishing rights of the then-unrecognized Snoqualmie and Samish tribes because, in its view, the Snoqualmie and Samish people had become too assimilated after prolonged state and federal discrimination, refused to reside on reservations far from their homelands, intermarried with non-Indians and bore descendants of mixed blood status. 641 F.2d 1368, 1373-74 (9th Cir. 1981). Following a decades long struggle for federal recognition that ended in 1999, ten years ago the Court in *Washington IV* denied Samish, and by implication Snoqualmie, the opportunity to re-litigate the treaty fishing rights denied in *Washington II*. 593 F.3d 790, 800 (9th Cir. 2010). Although *Washington IV* foreclosed their treaty fishing rights, the en banc Court expressly provided to the newly recognized Snoqualmie and Samish tribes a clear exception to issue preclusion by permitting them to present their treaty evidence "anew" for "other treaty rights." Now, Snoqualmie asks this Court to have the chance to prove its ability to exercise the hunting and gathering rights long ago reserved by their ancestors and promised by the United States.

Despite the attempts by the State and Amicus Tribes to limit and confuse the plain language of the *Washington IV* exception, its application to Snoqualmie's treaty hunting and gathering claim is clear. This is confirmed by the Court's

deliberate distinction between adjudicated treaty fishing and "other treaty rights" not yet adjudicated. It is also evident in the Court's purposeful use of the term "anew." Application of the *Washington IV* exception to Snoqualmie also is consistent with the finality considerations raised in *Washington II* and *IV*.

As the Court in *Washington IV* envisioned, the circumstances in this case do not justify the application of the discretionary doctrine of issue preclusion. The change in law pronounced in *Washington IV*; Snoqualmie's newly recognized status; and, the narrow scope of the fishing rights adjudicated in *Washington II* permit Snoqualmie to invoke an exception to issue preclusion. This Court should therefore reverse the District Court's dismissal of Snoqualmie's claim based on issue preclusion and remand with instructions to the District Court to permit Snoqualmie the opportunity to present evidence of its treaty hunting and gathering rights anew.

ARGUMENT IN REPLY

A. THE DISTRICT COURT ERRED BECAUSE ISSUE PRECLUSION DOES NOT BAR A CLAIM BROUGHT UNDER THE *WASHINGTON IV* EXCEPTION FOR NEWLY RECOGNIZED TRIBES

The State and the Amici Tribes argue that the District Court properly concluded that *Washington IV* does not create an exception to issue preclusion applicable to Snoqualmie or Samish. Appellees' Resp. Br. at 20, 26; Treaty Tribes' Br. at 11-14. The State first claims that the exception is dicta, then that it

is unclear and incompatible with *Washington II* and *IV*, and finally, that *Washington IV* did create an exception, but that it is inapplicable to Snoqualmie. Appellees' Resp. Br. 16-26. The State and Amici Tribes are wrong on all accounts.

Contrary to the State's and Amici Tribes' inconsistent arguments, this Court removed the bar of issue preclusion in *Washington IV* for newly recognized tribes seeking to establish "other treaty rights" not yet adjudicated, requiring such tribes to present the claim by introducing factual evidence "anew." 593 F.3d at 800. Snoqualmie's hunting and gathering claim falls squarely within the *Washington IV* exception to issue preclusion. This Court should therefore reverse the District Court's dismissal of Snoqualmie's claim and remand with instructions for Snoqualmie to present its evidence "anew." Indeed, this Court can end its analysis after finding Snoqualmie's claim falls within the *Washington IV* exception.

1. The *Washington IV* Exception Is Not Dicta

Although the State later admits *Washington IV* created an exception applicable to newly recognized tribes other than Snoqualmie or Samish, the State first argues that this Court should disregard the *Washington IV* exception for newly recognized tribes as dicta. Appellees' Resp. Br. at 20. To the contrary, because this Court set forth the exception while sitting en banc, the exception represents

both authoritative and binding precedent, as well as critical guidance for future courts in the Circuit, including this panel.

The en banc court possesses the "power to determine the major doctrinal trends of the future for a particular circuit," *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626 (1974) (internal quotations and citations omitted), and is "charged with the administration and development of the law of the circuit." *United States v. American–Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). It is in this supervisory role that the en banc Court in *Washington IV* offered guidance to courts in this Circuit concerning the newly recognized tribes exception.

The en banc Court's exception ensures that future courts will act consistently when evaluating the potential treaty rights of newly recognized tribes in a manner that does not run afoul of the existing rights of established treaty tribes. *See Washington IV*, 593 F.3d at 800. The intra-circuit conflict between *Washington III*, 394 F.3d 1152 (9th Cir. 2005), and *Greene I*, 996 F.2d 973 (9th Cir. 1993), and *Greene II*, 64 F.3d 1266 (9th Cir. 1995) (collectively "*Greene* Cases"), necessitated resolution from the en banc Court and new guidance for future courts called upon to evaluate treaty rights of newly recognized tribes. The *Washington IV* exception is critical to the "administration and development of the law of the circuit" regarding the process for the future adjudications of treaty rights of newly recognized tribes. *See American-Foreign S.S. Corp.*, 363 U.S. at 689. As such, the

Washington IV exception must be recognized and authoritative and binding, particularly in this case.

Even if the Court deems the *Washington IV* exception dicta, "[w]ell reasoned dicta is the law of the circuit." *Enying Li v. Holder*, 738 F.3d 1160, 1164 (9th Cir. 2013) (citing *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc)). Thus, the *Washington IV* exception would represent well-reasoned dicta thoughtfully ensuring finality as to the treaty fishing rights denied in *Washington II*, while securing for Snoqualmie and Samish the ability to adjudicate "other treaty rights" by presenting evidence "anew." 593 F.3d at 800.

2. The *Washington IV* Exception To Issue Preclusion Applies To Snoqualmie's Treaty Hunting And Gathering Claim

The State next argues that because the Court denied Snoqualmie's treaty fishing rights in *Washington II*, Snoqualmie's treaty hunting and gathering claim does not fall within the exception created by *Washington IV*. *See* Appellees' Resp. Br. at 20-26. The State contends the *Washington IV* exception excludes Snoqualmie and Samish, proposing that the exception applies only to tribes newly recognized through the federal administrative process that have not had a court deny any treaty right. *Id*. at 21, 25. To do so, the State proposes the term "anew" refers not to tribes that presented evidence in prior treaty rights litigation; instead, it applies only to newly recognized tribes that presented treaty-related evidence in their administrative recognition proceeding. *Id*. at 25. The Amici Tribes make a

similar argument. Treaty Tribes' Br. at 13-14. Leaving no argument unmade, the State also claims that its reading of the exception is the only interpretation consistent with *Washington II* and *Washington IV*. Appellees' Resp. Br. at 21-24.

The State grossly misreads *Washington IV*. The *Washington IV* exception is clear in its application to Snoqualmie and Samish. The Amici and Tulalip Tribes would have this Court focus squarely on *Washington II* and largely ignore *Washington IV*. *See generally* Treaty Tribes' Br. at 8-19; Tulalip Tribes' Br. at 7-19. Further, the State and Amici Tribes attempt to undermine the *Washington IV* exception by blurring the critical distinctions this Court drew, misinterpreting intentional language employed by the Court, and extolling the finality considerations of *Washington II*. *See id.* This Court must reject the State and Amici Tribes' attempt to cast the *Washington IV* exception as unclear and inadvertent.

Although *Washington IV* foreclosed the possibility of re-opening *Washington II* to adjudicate fishing rights on the basis of their recognition, the exception provides Snoqualmie and Samish the opportunity to present a "claim" of "other treaty rights" that are "not yet adjudicated" by introducing factual evidence "anew." 594 F.3d at 800. The Court in *Washington IV* made apparent that although Samish cannot reopen *Washington II*, it could litigate "other treaty rights" not yet adjudicated, i.e., those not decided in *Washington II*, under the newly recognized

tribes exception by presenting its evidence anew. *Id*. at 800; *see also id.* at n. 12. This pathway also applies to Snoqualmie as a formerly unrecognized tribe that likewise had its treaty fishing rights denied in *Washington II*. The application of this exception to Snoqualmie also is consistent with *Washington II* and *IV*.

The Court's intent for the newly recognized tribes exception to apply to tribes like Snoqualmie and Samish is evident in the Court's separation of "*United States v. Washington*" treaty fishing claims from "other treaty rights" claims like those to hunting and gathering. *Id*. at 800. The Court's intent also is apparent in its calculated use of the term "anew" to encompass tribes that had presented evidence in prior treaty rights litigation. *Id*. The Court did not separate foreclosed treaty fishing claims from "other treaty rights" not yet abdicated, or employ the term "anew" idly or without care.

a. The Court's Distinction Between Treaty Fishing And Other Treaty Rights Indicates The Court Intended It To Apply To Snoqualmie

The State argues that because the Court denied Snoqualmie treaty fishing rights in *Washington II*, Snoqualmie cannot invoke the exception in *Washington IV* to have the District Court adjudicate its treaty hunting and gathering claims. Appellees' Resp. Br. at 16-19, 22-25. Without devoting much analysis to the *Washington IV* exception, the Tulalip and Amici Tribes likewise contend that denial of Snoqualmie's fishing rights in *Washington II* bars Snoqualmie's hunting

and gathering claim. Tulalip Tribes' Br. at 13-15; Treaty Tribes' Br. at 10-14, 17-18.

In *Washington IV*, this Court en banc resolved the conflict between *Washington III* and the *Greene* Cases by denying tribes that seek to protect their treaty rights the ability to intervene in recognition proceedings, and denying any "presumptive" effect of recognition in subsequent treaty litigation. 593 F.3d at 801. In so doing, the Court fashioned "an orderly means of protecting the rights of existing treaty tribes on the one hand, and groups seeking recognition on the other," by preventing Samish recognition from having the improper effect of reopening *Washington II* while leaving the door open to "other treaty rights" not yet adjudicated. *Id*. at 800-01. Within the parameters of this framework, the Court drew a deliberate distinction in *Washington IV* between *United States v. Washington* fishing rights and "other treaty rights" not yet adjudicated. *Id*. at 800.

b. The Court's Use Of The Term "Anew" Indicates The Court Intended It Apply to Snoqualmie

The State proposes that the term "anew" as used in the language of the *Washington IV* exception refers to the treaty-related evidence the newly recognized tribe would have presented during the federal administrative recognition proceeding. Appellees' Resp. Br. at 25. The State contends "the most logical interpretation" of "anew" as used in the *Washington IV* exception is that it applies only to a tribe that has been "'newly recognized' through the federal administrative

process, but that had not yet had its treaty rights adjudicated and denied." *Id*. at 25. The Amici Tribes set forth a similar argument. Treaty Tribes' Br. at 14. The State claims the term "anew" must refer to the evidence the newly recognized tribe presented in the administrative recognition proceeding, which would then be presented "anew" in subsequent treaty litigation. Appellees' Resp. Br. at 25.

The State's interpretation of the term "anew" and the recognition process reveals the State's flawed misreading of *Washington IV*. The State's argument fails because it proceeds from the faulty assumption that a tribe presents treaty-rights related evidence in the administrative process and that the administrative process is the only means by which a tribe may achieve federal recognition. Indeed, the current federal regulations do not require a tribe seeking recognition through the administrative process to present evidence that it "maintained an organized tribal structure" since the signing of a treaty or that it reserved rights in a treaty. *Compare* 25 C.F.R. § 83.11 (2015) *with Washington II*, 541 F.2d at 1372. The regulations, which were amended in 2015, require the petitioning tribe only to demonstrate that it existed as a community and maintained political influence or authority over its members as an autonomous entity from 1900 to the present. 25 C.F.R. § 83.11(b), (c) (2015). Similarly, the recognition regulations in effect at the time the Court

decided *Washington IV*, which also governed the recognition of Snoqualmie,[1] did not require a petitioning tribe to establish "treaty status". *Compare* 25 C.F.R. 83.7 (1994) *with Washington II*, 541 F.2d at 1372. Rather, the regulations in effect at that time required the petitioning tribe only to present evidence that it has "existed as a community" and "maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. 83.7(b), (c) (1994).

Thus, newly recognized tribes would have no treaty-status related evidence to present "anew" in post-recognition treaty litigation, unless the newly recognized tribe used the administrative process to bolster their treaty claim, which the Court in *Washington IV* prohibited. *See* 593 F.3d at 800-801. The State's position regarding application of the term "anew" simply makes no sense.

The State's position that "anew" as used in the *Washington IV* exception applies to the treaty evidence presented in administrative recognition proceedings

[1] In the case of Snoqualmie's 1997 recognition, the United States evaluated only whether it had identified Snoqualmie as the same Indian entity it had last identified in 1953 and whether Snoqualmie had demonstrated a modern community from 1981 to the present. 62 Fed. Reg. 45864-02 (1997).

by newly recognized tribes who have never had treaty rights denied is illogical.[2] The only rational reading of the term "anew" and the only reading that comports with the context of *Washington II* and *IV* is that the Court used this term with the expectation that a "newly recognized tribe" would be one like Snoqualmie or Samish that had presented factual evidence in prior treaty rights litigation.

3. Application of The *Washington IV* Exception Is Consistent With *Washington II* and *Washington IV*

The State next argues that applying the *Washington IV* exception to Snoqualmie's treaty hunting and gathering claim is inconsistent with *Washington II* and *IV*. Appellees' Resp. Br. at 21-24. Despite the State's misrepresentation, Snoqualmie does not claim that "*Washington IV* overwrote *Washington II*." *Id*. at 15. And, contrary to the State's position, application of the *Washington IV* exception to Snoqualmie is appropriate in the context of *Washington IV*. Nothing in *Washington II* precludes newly recognized tribes who have previously had their treaty fishing rights denied from seeking to adjudicate other treaty claims. Reading *Washington IV* to include an exception for newly recognized tribes and

[2] The State's position also is flawed because it assumes the administrative process is the only means by which a tribe may achieve federal recognition. *See* Appellees' Resp. Br. at 25. Indian tribes may, however, obtain federal recognition by (1) Congressional act; (2) Secretarial acknowledgement; or (3) a decision of a United States court. *Id*. at 614. *Frank's Landing Indian Cmty. v. Nat'l Indian Gaming Comm'n*, 918 F.3d 610 (9th Cir. 2019). Applying the *Washington IV* exception as the State proposes also would erroneously exclude tribes who obtained recognition via Congressional act or court decision.

applying that *Washington IV* exception to Snoqualmie's other treaty claims also is consistent with the law and policy considerations of *Washington II* and *IV*.

As the Court in *Washington IV* noted, the treaty fishing rights governed by *United States v. Washington* implicate unique finality considerations that caused it to separate foreclosed treaty fishing rights from "other treaty rights" in the language of the newly recognized tribes exception. 593 F.3d at 800. The Court deliberately referred to "other treaty rights" as those "not yet adjudicated," again distinguishing the adjudicated treaty fishing claims foreclosed from the "yet adjudicated" treaty claims it would permit Snoqualmie and Samish to raise in the future. *Id*. The Court's purposeful separation of foreclosed fishing rights from "other treaty rights" that were "not yet adjudicated" in the *Washington IV* exception demonstrates that the Court intended Snoqualmie and Samish to invoke this exception to adjudicate "other treaty rights" like a hunting and gathering claim.

The application of the *Washington IV* exception to Snoqualmie's claim also is consistent with the policy considerations explained in *Washington IV*. This Court's resolution of the *Washington III—Greene* conflict in *Washington IV* was motivated by the finality considerations unique to *United States v. Washington* treaty fishing. In *Washington IV*, the Court explained that "considerations of finality loom especially large in this case, in which a detailed regime for regulating

and dividing fishing rights has been created in reliance on the framework of *Washington I*." 593 F.3d at 800. Turning to Samish in particular, the Court reasoned that the potential disruption and injury to existing treaty rights posed by litigating Samish fishing rights was not confined to "dilution of the shares of total harvest of all tribes" and Samish fishing would have a "severe impact" on the treaty tribes held to be a successor in interest to the Samish.[3] *Id*.

The finality concerns cited by the Court in support of its decision to foreclose Samish's treaty fishing rights are not present in this case. Snoqualmie's potential exercise of its not yet adjudicated treaty hunting and gathering rights pose no threat

[3] The Tulalip Tribes argues that it is a successor in interest to any treaty rights Snoqualmie can assert. *See* Tulalip Tribes' Br. at 5-13. In *United States v. Suquamish*, 901 F.2d 772 (1990), the Ninth Circuit adopted a test for successorship in light of the the Suquamish Tribe's claim of successorship to the usual and accustomed fishing areas of the Duwamish Tribe. The Ninth Circuit found that "for a signatory tribe to obtain treaty tribe status from another signatory tribe, it must first show that the two tribes or cohesive bands thereof consolidated or merged and demonstrate also that together they maintain an organized tribal structure." *Id*. at 776. Despite Tulalip's successorship claim to Snoqualmie's treaty fishing rights, Tulalip has never been required to present evidence showing that Snoqualmie had merged or consolidated with its political structure as to hunting and gathering. The Ninth Circuit had not articulated the test for successorship at the time Tulalip's successorship was assumed by Judge Boldt. Indeed, Snoqualmie's federal acknowledgment in 1997 calls into question how Tulalip could possibly be a successor to, at least, Snoqualmie's adjudicated hunting and gathering rights. *See United States v. Washington*, 394 F.3d 1152, 1160-61 (9th Cir. 2005), *overruled in later appeal*, 593 F.3d 790 (9th Cir. 2010) (finding that federal acknowledgement of the Samish Tribe "clearly inconsistent" with the finding that Samish had merged or combined with Lummi and Swinomish).

to the detailed fishing regime forged in *United States v. Washington*. No tribes' fishing rights will be either disrupted or injured. And, while Tulalip and Amici Tribes claim that a determination by this Court Snoqualmie possessed treaty hunting status would disrupt the State hunting system, such a claim is overstated. Tulalip Tribes' Br. at 16-22; Treaty Tribes' Br. at 14. There is no carefully forged co-management regime, and any decision by the Court in this case would not automatically vest Snoqualmie or Samish with treaty hunting or gathering rights. At most, reversal of the District Court's dismissal of Snoqualmie's claim would allow Snoqualmie only the opportunity to present its evidence "anew" to the District Court.

B. THE DISTRICT COURT ERRED BECAUSE EXCEPTIONS TO ISSUE PRECLUSION APPLY TO SNOQUALMIE'S CLAIM

This Court need look no further than *Washington IV* to reverse the District Court. Even if the Court were to reach traditional issue preclusion, however, Snoqualmie still prevails.

Here, the State argues that no exception to issue preclusion applies. Appellees' Resp. Br. at 26. The State claims that the second Restatement exception to issue preclusion does not apply because *Washington IV* did not create a change-in-law applicable to Snoqualmie and that Snoqualmie's newly recognized status has no effect on treaty rights. *Id*. at 27-29. The State also claims that the third Restatement exception to issue preclusion does not apply because this Court upheld

the findings in *Washington II* and again in *Washington IV*. *Id*. at 29-31. The State's arguments fail to preclude the application of either exception to Snoqualmie's claim.

Washington IV created an exception that represents a change-in-law and Snoqualmie's newly recognized status represents a change-in-fact that permits it to invoke the *Washington IV* exception, which allows for the application of the second Restatement exception. The scope of *Washington II* was only treaty fishing rights, which alternatively allows for the application the Third Restatement exception. In fact, in *Washington IV*, the Court specifically noted that collateral estoppel is a "discretionary doctrine" that did not apply under the circumstances presented in *Washington IV*. 593 F.3d at 801, n. 13 (citing *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Cir. 2007)).

The State uses the terms issue preclusion and res judicata interchangeably while the District Court used the term "issue preclusion." Appellees' Resp. Br. 26-31; ER 10.[4] Issue preclusion is collateral estoppel, and the Court considered it so

[4] Res judicata and collateral estoppel are related doctrines. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Id*. (citing *Cromwell v. Cty. of Sac*, 94 U.S. 351, 352 (1876)). "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id*. (citing *Montana v. United States*, 440 U.S. 147, 153 (1979)).

at the time it decided *Washington IV*. *C.f. Scafidi v. Las Vegas Metro. Police Dep't*, 966 F.3d 960, 963 (9th Cir. 2020) ("Issue preclusion, or collateral estoppel…"); *United States v. Park Place Associates, Ltd.*, 563 F.3d 907, 925, n. 11 (9th Cir. 2009) ("The doctrine of 'collateral estoppel,' or issue preclusion…").

The Court made a point in *Washington IV* to explain that collateral estoppel is a "discretionary doctrine" and the circumstances of *Washington IV* "justify denying its effect." 593 F.3d at 801, n. 13. This demonstrates the Court intended *Washington IV* to provide an exception to issue preclusion. This Court should therefore find that an exception to issue preclusion applies, whether that be the *Washington IV* exception itself or one of the Restatement exceptions.

1. Issue Preclusion Does Not Bar Snoqualmie's Claim Because *Washington IV* And Snoqualmie's Recognition Represent Changes In Both Fact And Law

The State argues the change-in-law exception to issue preclusion does not apply to Snoqualmie's claim because *Washington IV* is not a change in law and Snoqualmie's recognition is not a change in fact that is sufficient to invoke the exception. *See* Appellees' Resp. Br. 26-29. The State first contends that *Washington IV* did not create an exception available to Snoqualmie because "the Court's en banc decision in *Washington IV* 'denies any effect of recognition in any subsequent treaty litigation.'" *Id*. at 28 (quoting *Washington IV*, 593 F.3d at 801). The State also claims that according deference to DOI decisions regarding

Snoqualmie is inappropriate because *Washington IV* held that facts determined in administrative proceedings "do not have a preclusive effect in treaty rights litigation" and administrative decisions are "fundamentally different from adjudication of tribal treaty status in the federal courts." *Id*. at 28.

Contrary to the State's representations, *Washington IV* is a change in law following *Washington II* that permits newly recognized tribes that have previously had some treaty rights denied to pursue "other treaty rights" not yet adjudicated by presenting their evidence "anew." 593 F.3d at 800. Although Snoqualmie's newly recognized status does not presumptively confer upon it treaty hunting and gathering rights, *see id.* at 800-801, the change in fact of Snoqualmie's recognition status does permit it to invoke the *Washington IV* exception. In other words, but for Snoqualmie's newly recognized status, the *Washington IV* exception is inapplicable.

The change-in-law exception applies when a change in controlling facts or legal principles has occurred. Application of issue preclusion by courts "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948). Thus, even when the elements of issue preclusion are met, an exception may be warranted if there has been an intervening "'change in the

applicable legal context.'" *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (quoting Restatement (Second) of Judgments § 28, cmt. c (1980)).

The change-in-law exception applies here because Snoqualmie's treaty hunting and gathering claim is not identical in all respects to its treaty fishing claim decided by *Washington II* in 1979, and Snoqualmie's newly recognized status allows it to invoke the recently created *Washington IV* exception for newly recognized tribes to adjudicate "other" treaty claims. These changes in both fact and law fall squarely within the change-in-law exception to issue preclusion.

The State appears to misunderstand Snoqualmie's argument when it claims that *Washington IV* does not present a change in law because this Court "'deni[ed] any effect of recognition in any subsequent treaty litigation.'" Appellees' Resp. Br. at 28. Snoqualmie is not claiming that its recognition automatically vests it with treaty hunting and gathering rights. That, of course, would be inconsistent with the Court's holding in *Washington IV* that recognition has no presumptive weight in subsequent treaty litigation. 593 F.3d at 801. Rather, Snoqualmie raises the change in fact—its newly recognized status—for the sole purpose of invoking the change-in-law—the "newly recognized tribes" exception in *Washington IV*—and nothing more.

Particularly important in this case, "[t]he change-in-law exception recognizes that applying issue preclusion in changed circumstances may not

'advance the equitable administration of the law.'" *Herrera v. Wyoming*, 139 S.Ct. 1686, 1698 (2019) (quoting *Bobby*, 556 U.S. at 836-37)). Again, although *Washington IV* prevented Samish and Snoqualmie from re-opening *Washington II* to re-litigate treaty fishing rights, it deliberately crafted a means by which these now-recognized tribes could pursue "other" treaty rights not yet adjudicated by presenting treaty evidence "anew." 593 F.3d at 800. The Court artfully recognized the interests of established treaty tribes while permitting newly recognized tribes whose treaty fishing rights were denied based on historical assimilation, refusal to reside on reservations far from their homelands, intermarriage with non-Indians and mixed blood status, *Washington II*, 641 F.2d at 1373-74, the opportunity to present their evidence "anew" to possibly exercise the "other" treaty rights the United States promised their ancestors. Honoring the change-in-law thoughtfully set forth in *Washington IV* and recognizing Snoqualmie's change-in-facts demands application of this exception to issue preclusion in this case.

2. Issue Preclusion Does Not Bar Snoqualmie's Claim Because *Washington II* Decided Only Treaty Fishing Rights

The State argues that "the Restatement exception to issue preclusion for 'differences in the quality or extensiveness of the procedures followed in the two courts'" does not apply to Snoqualmie's claim. Appellees' Resp. Br. at 29-30. The State appears to contend that the Court's observations in *Washington IV* regarding the procedure in *Washington II*, which were made in the context of a Rule 60(b)

motion denial, likewise support the District Court's failure to apply this issue preclusion exception to Snoqualmie's claim. *Id*. at 30.

In *Washington IV*, Samish sought to reopen *Washington II* treaty fishing litigation under Rule 60(b) on "the ground that an administrative body has come to a conclusion inconsistent with the factual finding finally adjudicated by this Court in *Washington II*. 593 F.3d at 759. The Court denied reopening *Washington II* on these grounds as "inconsistent with the considerations of finality." *Id*. The Court's discussion of the procedure involved in *Washington II* the State relies upon did not evaluate the procedure in the context of an issue preclusion exception, but rather the basis upon which this Court affirmed the "clearly contrary" conclusions of the district court for the purposes denying re-opening of *Washington II*. *Id*.

The State also claims that because this Court in *Washington II* accorded "close scrutiny" to the district court's findings, it should apply those findings to Snoqualmie in this separate and distinct proceeding to prevent application of the exception to issue preclusion. Appellees' Resp. Br. at 30. The State's claim of "close scrutiny" does not, however, fully represent the review the Court in *Washington II* gave to the district court's findings. This Court employed a "clearly erroneous" review standard to the district court's factual findings in *Washington II*. 641 F.2d at 1371. Under the clearly erroneous standard of review for a trial court's findings of fact, the reviewing court cannot reverse just because it would have

decided the matter differently, and a finding that is plausible in light of the full record, even if another is equally or more so, must govern. *Cooper v. Harris*, 137 S.Ct. 1455, 1465 (2017). Just because the Court in *Washington II* held that the findings of the district court were not clearly erroneous does not mean that those treaty fishing findings preclude application of this exception to issue preclusion, particularly where the Court noted in *Washington IV* that the circumstances here did not "justify" application of the "discretionary doctrine." 593 F.3d at 801, n. 13.

The Restatement (Second) of Judgments § 28 (1982), also explains the "compelling reasons why preclusion should not apply" under the exception for "differences in the quality or extensiveness of the procedures followed in the two courts." *Id*., cmt. d. These compelling reasons include cases where "[t]he scope of review in the first action may have been very narrow." *Id*. In this case, the scope of review in *Washington II* was narrow indeed: it applied only to treaty fishing rights—not to treaty hunting and gathering rights. 641 F.2d at 1370; *see also Skokomish Indian Tribe v. Forsman*, 738 Fed. Appx. 406, 408 (9th Cir. 2018) ("[n]o plausible reading of [*Washington I*] or subsequent proceedings and appeals to this court supports the conclusion that the litigation decided anything other than treaty *fishing* rights."); *Skokomish Indian Tribe*, 994 F.Supp.2d 1168, 1174 (W.D. Wash. 2014). Because the scope of *Washington II* narrowly determined only

Snoqualmie's treaty *fishing* rights, an exception to issue preclusion applies to Snoqualmie's treaty hunting and gathering claim.

C. THE DISTRICT COURT ERRED BY DISMISSING SNOQUALMIE'S COMPLAINT BASED ON ISSUE PRECLUSION BEFORE DETERMINING ITS JURISDICTION

The State argues that the District Court did not err when it failed to determine whether it possessed jurisdiction over Snoqualmie's complaint, reasoning the District Court's decision to take "the most judicially efficient path to correctly conclude the litigation" was permissible. Appellees' Resp. Br. at 33. Although the State acknowledges that courts must generally first address jurisdictional issues, the State claims that res judicata (issue preclusion) is a "threshold ground" exception that falls within the District Court's discretion. *Id*. at 33-34. This violates Ninth Circuit precedent and U.S. Supreme Court guidance. Contrary to the State's contention, even if issue preclusion was "straightforward and dispositive to all claims in the case," *id*. at 34-35, this did not excused the District Court from its obligation to first determine whether it possessed jurisdiction.

In *Steel Co v. Citizens for Better Environment*, 523 U.S. 83 (1998), the U.S. Supreme Court "clarified that a federal 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) and the parties (personal jurisdiction)." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007). Although the U.S. Supreme Court has defined certain exceptions to this rule by

supplying federal courts discretionary "leeway to choose among threshold grounds for denying audience to a case on the merits," *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), "[n]either the Supreme Court nor [the Ninth Circuit] have previously identified res judicata as such a 'threshold ground,'" and the Ninth Circuit has specifically declined to do so. *Yokeno v. Sekiguchi*, 754 F.3d 649, 651, n.2 (9th Cir. 2014).[5] For this reason alone the Court should reverse the District Court.

The State cites to *Sinochem* in support of its position that the District Court properly dismissed the case before determining whether it possessed jurisdiction. Appellees' Resp. Br. at 33-34. But, the case is inapposite. In *Sinochem*, the court was faced with "a textbook case for immediate *forum non conveniens* dismissal," while the jurisdiction issue presented represented "an issue of first impression," and "[d]iscovery concerning personal jurisdiction would have burdened [the defendant] with expense and delay." 549 U.S. at 436. In *Sinochem*, the plaintiff,

[5] The State cites *Graboff v. Am. Ass'n of Orthopedic Surgeons*, 559 F. App'x 191 (3d Cir. 2014) and *SBC Communications Inc. v. F.C.C.*, 407 F.3d 1223 (D.C. Cir. 2005) in support of its contention that a court may dismiss a case on res judicata grounds without first resolving jurisdictional issues. Appellees' Resp. Br. at 34. However, in light of the Ninth Circuit's decision in *Yokeno* declining to find res judicata among the "threshold grounds" exceptions, this Court is not free to disregard circuit precedent in favor of out-of-circuit precedent, particularly an unpublished opinion. *See San Remo Hotel, L.P. v. San Francisco City and Cty.*, 364 F.3d 1088, 1095 (9th Cir. 2015).

a shipping company, filed suit against a Chinese company, whose products the plaintiff shipped, after the Chinese company had brought an action in Chinese Admiralty Court. It was not in the "mine run of cases" and personal jurisdiction in that case was unusually "difficult to determine." *Id*.

This case does not present the same difficult jurisdictional questions at issue in *Sinochem* that justified departing from the well-established rule that federal courts must first determine their own jurisdiction. For instance, federal courts regularly address the jurisdictional issues in this case—such as standing —that the District Court failed to address. Treaty rights disputes, as well as the jurisdictional issues routinely presented in these kind of cases, fall within the "mine run of cases" that come before and are decided by the District Court. *See, e.g., Skokomish Indian Tribe v. Goldmark*, 994 F.Supp.2d 1168 (2014) (deciding motion to dismiss based on standing, Eleventh Amendment sovereign immunity and failure to join indispensable parties); *Skokomish Indian Tribe v. Forsman*, No. C16-5639-RBL, 2017 WL 1093294 (W.D. Wash. Mar. 23, 2017) (deciding motion to dismiss based on failure to join indispensable parties).

Under the circumstances of this case, which present no exceptionally difficult jurisdictional questions, particularly burdensome personal jurisdiction queries, or issues of first impression, the District Court erred in not first determining its own jurisdiction before deciding the issue of issue preclusion. This

Court should reverse the District Court's dismissal of Snoqualmie's claim based on issue preclusion, and remand with instructions.

D. THE COURT SHOULD REJECT THE STATE'S SUGGESTION THAT THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL OF SNOQUALMIE'S COMPLAINT BASED ON UNADDRESSED JURISDICTIONAL ISSUES

The State argues that the Court may affirm the District Court's dismissal based on "other threshold issues." Appellees' Resp. Br. at 28. Although this Court may generally affirm a district court on any ground, affirmation on the Rule 19 grounds in this case is neither supported by the record or the authority cited by the State. Recall that the District Court erred by failing to address all these threshold jurisdictional issues before dismissing Snoqualmie's complaint based on issue preclusion. *See* Section D, *supra*; *see also Yokeno*, 754 F.3d at 651, n. 2.

As argued in the opening brief, Snoqualmie believes that the Court could, but is not required to, decide the briefed issues of standing and Eleventh Amendment immunity in Snoqualmie's favor based on the record below, should it be so inclined. Appellant's Op. Br. at 47-52. The Court must, however, reject the State's invitation to affirm the District Court's dismissal on the completely unaddressed Rule 19 joinder question as the record does not adequately support dismissal.

The State cites *Gingerly v. City of Glendale*, 831 F.3d 1222 (9th Cir. 2016). Appellees' Resp. Br. at 37. There, the district court granted the defendant's motion to dismiss for lack of jurisdiction and for failure to state a claim. On review, the

Ninth Circuit determined the district court erred because it held the plaintiff indeed possessed standing, but agreed with the district court's determination that the plaintiff had failed to state a claim and affirmed on that ground. 831 F.3d at 1228. Unlike the present case, the issues of standing and failure to state a claim in *Gingerly* were directly before the district court, briefed by the parties, and ruled upon by the district court. Thus, the issues in *Gingerly* were supported by the record under the circumstances.

Here, on the other hand, the joinder issue under Rule 19 was not fully before the District Court, was not adequately briefed by the State and Snoqualmie, and was expressly not even considered by the District Court. *See* ER 2-3. The pending Tulalip motion that squarely raised Rule 19 was denied as moot. *Id*; ER 13.

The State also cites to *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064 (9th Cir. 2003), in support of its invitation to this Court to affirm the District Court's dismissal on unaddressed jurisdictional grounds. Appellees' Resp. Br. at 28. In *Tahoe-Sierra*, the district court dismissed the complaint based on the statute of limitations. 322 F.3d at 1076. Upon review, the Ninth Circuit affirmed dismissal because the records in the previous cases when combined with the record on appeal provided enough support to apply the bar of res judicata, and because the record supported dismissal of remaining claims based on

ripeness. *Id*. 1076-77. The parties briefed the issue of ripeness in the district court, which provided an adequate record on appeal. *Id*. at 1078-79, 1085.

Unlike *Sierra-Tahoe*, this case presents no prior appellate record specifically addressing Snoqualmie's hunting and gathering treaty claim or Rule 19 in this context. The same critical distinctions present in *Gingerly* are also likewise present in *Tahoe-Sierra.* The issue the reviewing court alternatively affirmed on appeal—ripeness—was briefed by the parties at the district court level and was addressed by the district court.

Although the Court should remand to the district court to make a thorough jurisdiction determination, *Yokeno*, 754 F.3d at 651, n. 2, the record is sufficient to allow the Court to consider only standing and Eleventh Amendment immunity. This Court must decline the State's invitation to affirm the District Court's dismissal on the unaddressed and not fully briefed Rule 19 question.

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 District Court's dismissal of Snoqualmie's complaint and remand with instructions that allow Snoqualmie to present evidence anew regarding it's not yet adjudicated treaty hunting and gathering claims.

DATED: November 9, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Ninth Circuit Rule 32-1 because this brief contains 6,534 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(5) and (6).

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 November 9, 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.

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