No. 21-____

IN THE

# Supreme Court of the United States

SNOQUALMIE INDIAN TRIBE,

*Petitioner*,

v.

STATE OF WASHINGTON, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

The Snoqualmie Indian Tribe is a signatory to the Treaty of Point Elliott of 1855. The Executive Branch has repeatedly confirmed Snoqualmie's status as a Treaty signatory entitled to exercise Treaty rights, and Congress has never abrogated the rights reserved by Snoqualmie and promised by the United States in the Treaty.

Longstanding precedent from this Court, rooted in the text and structure of the Constitution, recognizes two central tenets of Indian law: (1) only Congress possesses the power to abrogate Indian treaty rights; and (2) the Judiciary only has the authority to interpret Indian treaty rights—not unilaterally to abrogate an Indian treaty absent congressional action. Thus, when courts must determine whether an Indian treaty right has been abrogated, they may look only to the Acts of Congress.

In this case, the Ninth Circuit erroneously extended a holding in *United States v. Washington* applicable to off-reservation Treaty fishing rights, through the discretionary doctrine of issue preclusion, to abrogate all of Snoqualmie's Treaty rights, without congressional action. The questions presented are:

1. Whether the federal courts have the constitutional authority to unilaterally abrogate all rights guaranteed to an Indian tribe under a treaty with the United States absent congressional action.

2. Whether the Ninth Circuit erred by applying issue preclusion to hold that Snoqualmie was not a party to the Treaty even though the Executive Branch expressly recognizes Snoqualmie as a Treaty party.

## PARTIES TO THE PROCEEDING BELOW

Petitioner Snoqualmie Indian Tribe was the plaintiff in the district court and appellant in the court of appeals.

Respondents State of Washington, Governor Jay Inslee, and Washington Department of Fish and Wildlife Director Kelly Susewind were the defendants in the district court and appellees in the court of appeals.

Samish Indian Nation intervened solely for the purposes of appeal and was an appellant in the court of appeals. On February 10, 2022, the Samish Indian Nation petitioned this Court for certiorari presenting different issues. *Samish Indian Nation v. Washington*, No. 21-1127.

## CORPORATE DISCLOSURE STATEMENT

The Snoqualmie Indian Tribe is a federally recognized Indian tribe. It does not have a parent corporation, and no publicly held corporation holds stock in the Tribe.

## STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii):

*Snoqualmie Indian Tribe v. Washington*, No. 3:19-CV-06227-RBL (W.D. Wash. Mar. 23, 2020).

*Snoqualmie Indian Tribe v. Washington*, No. 20-35346, and *Samish Indian Nation v. Washington*, No. 20-35353 (9th Cir. Aug. 6, 2021), *reh'g denied* (Nov. 12, 2021).

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## PETITION FOR WRIT OF CERTIORARI

The Snoqualmie Indian Tribe ("Snoqualmie") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 8 F.4th 853 and is reproduced at App. 1a–31a. The opinion of the District Court for the Western District of Washington is unreported but is available at 2020 WL 1286010, and it is reproduced at App. 32a–46a.

## JURISDICTION

This Court possesses jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit issued its opinion on August 6, 2021, and it denied Snoqualmie's petition for rehearing en banc on November 21, 2021. App. 1a, 47a. On January 18, 2022, Justice Kagan extended the time for filing this petition to and including March 12, 2022.

## TREATY PROVISIONS INVOLVED

The Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927, is reproduced at App. 50a–65a.

## STATEMENT OF THE CASE

The Ninth Circuit's decision is irreconcilable with this Court's settled precedent governing Indian treaty rights and the limitations imposed by the Constitution on the authority of the Judiciary in Indian affairs. This Court's cases make clear that Congress, and only Congress, can abrogate an Indian treaty. Contrary to this authority, the Ninth Circuit

held that the discretionary doctrine of issue preclusion—not congressional action—may be applied to abrogate Snoqualmie's Treaty rights, based on a 1979 decision holding that Snoqualmie had insufficient political and cultural cohesion to allow it to exercise Treaty fishing rights. Moreover, the Ninth Circuit applied issue preclusion despite an intervening determination by the Department of the Interior that rejected the factual basis for the 1979 court decision and concluded that Snoqualmie was indeed a party to the Treaty and could exercise Treaty rights. The Ninth Circuit's decision not only fails to respect Congress's exclusive role in abrogating treaties and the Executive Branch's preeminent role in Indian affairs, but it creates a conflict with Interior's determination that will cause serious problems. For these reasons, this petition presents questions of exceptional importance. This Court should grant certiorari.

It is undisputed that Snoqualmie is a signatory to the Treaty of Point Elliott ("Treaty"), Jan. 22, 1855, 12 Stat. 927; *see United States v. Washington*, 641 F.2d 1368, 1370 n.1 (9th Cir. 1981) ("The … Snoqualmie Tribe[] were parties to the Treaty of Point Elliott[.]"); *Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians v. United States*, 15 Ind. Cl. Comm. 267, 310 (1965) ("Governor Stevens concluded the Treaty at Point Elliott on January 22, 1855 with … Snoqualmie.").

It is undisputed that Congress has never abrogated Snoqualmie's Treaty rights. *United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017) ("Congress has not abrogated the Stevens Treaties."),

*aff'd by an equally divided Court*, 138 S. Ct. 1832 (2018).

And it is undisputed that the Executive Branch—as recently as 2020—recognizes Snoqualmie as a Treaty signatory. *See* Final Determination to Acknowledge the Snoqualmie Tribal Organization, 62 Fed. Reg. 45,864-02, 45,865 (Aug. 29, 1997) ("Final Determination") ("The Snoqualmie Tribe was acknowledged by the Treaty of Point Elliott in 1855[.]"); Letter from Tara Sweeney, Assistant Sec'y–Indian Affairs, to Robert de los Angeles, Chairman, Snoqualmie Indian Tribe 38-39 (Mar. 18, 2020) ("Sweeney Letter")[1] (finding Snoqualmie was a Treaty signatory, and that "the Snoqualmie Tribe was clearly identified as derived from the treaty-signatory Snoqualmie").

This Court has consistently recognized two fundamental tenets of federal Indian law regarding Indian treaty rights: Congress alone has the power to abrogate an Indian treaty right; and the federal courts only have the power to interpret Indian treaties.

Contradicting these established principles of the constitutional role of the Judiciary in treaty matters, the Ninth Circuit nullified all of Snoqualmie's reserved Treaty rights—not by looking to the Acts of Congress, but by applying the discretionary doctrine of issue preclusion. By denying Snoqualmie all of the rights it reserved in the Treaty, the Ninth Circuit has overridden the Executive Branch's determination that

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[1] Available at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ots/pdf/Snoqualmie_Indian_Tribe.pdf.

Snoqualmie is a party to the Treaty entitled to exercise hunting and fishing rights, and it has done so without congressional action. The Ninth Circuit improperly usurped the constitutional authority of Congress over Indian affairs by unilaterally abrogating all rights reserved in a treaty, and it improperly usurped the constitutional authority of the Executive Branch by overriding its determination that Snoqualmie was a party to the Treaty. This Court should grant certiorari to correct the Ninth Circuit's radical departure from the settled constitutional principles that govern the role of the courts in disputes involving Indian treaty rights.

## I. Factual Background.

### A. Snoqualmie signs the Treaty of Point Elliott of 1855.

In 1855, fourteen tribes entered into the Treaty with the United States. App. 50a–65a. Snoqualmie is one of those tribal signatories. *See supra*, at 2. By its signature to the Treaty, Snoqualmie—sduk$^{w}$albix$^{w}$ in its Native language—ceded its vast ancestral homelands in exchange for the United States' promise that Snoqualmie would maintain its most sacred rights and lifeways. Among these rights, Snoqualmie reserved its ability to continue hunting and gathering roots and berries as Snoqualmie has done since time immemorial. App. 54a. The Senate ratified the Treaty in 1859, and Congress has never abrogated the Treaty.

The United States failed to honor all of its Treaty promises to Snoqualmie. Despite the Treaty promise to provide Snoqualmie with a reservation, the United States did not establish one for the Tribe. As a direct

result, Snoqualmie lost its status as a federally recognized tribe due to its lack of a land base during the "termination era" of the 1950s. *See generally* Cohen's Handbook of Federal Indian Law 84–93 (2012 ed.) ("Cohen's Handbook").

### B. The district court denies Snoqualmie off-reservation Treaty fishing rights in *United States v. Washington*.

In the 1970s, while considered unrecognized and landless, Snoqualmie sought to intervene in *United States v. Washington* to exercise the off-reservation fishing rights it reserved in the Treaty. *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979) ("*Washington II*"), *aff'd*, 641 F.2d 1368 (9th Cir. 1981) . The district court denied Snoqualmie Treaty fishing rights because, in its view, tribal members had "intermarried with non-Indians" and "took up the habits of non-Indian life, and lived as citizens of the State of Washington in non-Indian communities," and because Snoqualmie was then considered unrecognized and landless. *Id.* at 1103, 1108–09. The district court took no account of the fact that Snoqualmie lost its recognized status and that the Snoqualmie people were forced to live among non-Indians because the United States failed to establish a reservation for Snoqualmie as promised in the Treaty.

On appeal, the Ninth Circuit disagreed with the district court's reasoning, but nonetheless affirmed. Although the Snoqualmie were "descended from treaty tribes," the Ninth Circuit reasoned that the district court's decision was not clearly erroneous. Because Snoqualmie had "intermarried with non-Indians and many [were] of mixed blood" and "ha[d]

not settled in distinctively Indian residential areas," the court affirmed the district court's finding of insufficient political and cultural cohesion to allow Snoqualmie to exercise Treaty fishing rights. *United States v. Washington*, 641 F.2d 1368, 1373–74 (9th Cir. 1981).

Later, in *United States v. Washington*, 593 F.3d 790 (9th Cir. 2010) (en banc) ("*Washington IV*"), the Ninth Circuit held that, despite the Samish Indian Nation's recent federal recognition, the finality of other tribes' already-adjudicated off-reservation Treaty fishing rights counseled against reopening the decision in *Washington II* under Fed. R. Civ. P. 60(b). 593 F.3d at 800. Judge Canby, however, writing for the en banc court, noted:

> 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*. Thoughtfully avoiding impermissible judicial abrogation of treaty rights, *Washington IV* thus created an exception to the finality of *Washington II*'s findings as to Snoqualmie's unadjudicated Treaty hunting and gathering rights and permitted newly recognized tribes such as Snoqualmie to present their factual evidence "anew" in support of their claims for such rights. *Id*.

### C. The Executive Branch recognizes Snoqualmie and repeatedly confirms Snoqualmie's Treaty signatory status.

In 1997, the United States formally recognized Snoqualmie. The Interior Department unequivocally confirmed Snoqualmie's status as a Treaty signatory and federally recognized tribe, with requisite political and cultural cohesion dating back to 1855, when Snoqualmie signed the Treaty. *See* Final Determination, 62 Fed. Reg. at 45,865.

In 2020, the Executive Branch again affirmed Snoqualmie's status as a Treaty signatory when it issued a decision taking a portion of Snoqualmie's ancestral homelands into trust status. *See* Sweeney Letter. Interior relied on its 1997 determination that Snoqualmie had maintained continuity from the time it signed the Treaty in 1855 to the present. *Id.* at 7–13. Interior explicitly recognized that "*Washington II*'s holding addressed only Snoqualmie's eligibility to exercise off-reservation treaty fishing rights in 1979." *Id.* at 37. Interior confirmed that "Snoqualmie [was] a party to the Treaty," and that the Treaty "remains in effect" as to Snoqualmie, and acknowledged the United States' ongoing trust responsibility to Snoqualmie expressly arising from the Treaty. *Id.* at 7, 37–39.

## II. Procedural history.

This case arose in 2019 when Washington State, through the Washington State Department of Fish and Wildlife, informed Snoqualmie that it had determined—without consulting Snoqualmie or the United States—that "the Snoqualmie Tribe does not have off-reservation hunting and fishing rights under

the Treaty" based on *Washington II*. App. 35a. Snoqualmie initiated this case in response.

**A. District court decision.**

Snoqualmie sued Respondents in the United States District Court for the Western District of Washington, seeking a declaration that it is a signatory to the Treaty and it possesses reserved hunting and gathering rights. App. 12a–13a. Snoqualmie also sought an injunction ordering Respondents to comply with federal law. Snoqualmie argued the district court possessed jurisdiction under 28 U.S.C. §§ 1331, 1362, 1367, and 2201.

After Respondents answered Snoqualmie's complaint, they filed a motion to dismiss. They argued that Respondents were immune from suit, Snoqualmie lacked standing, issue preclusion barred issues Snoqualmie sought to litigate, and Snoqualmie failed to join other tribes that were indispensable parties under Fed. R. Civ. P. 19.

The district court granted the Respondents' motion. App. 46a. The district court did not determine whether it possessed jurisdiction, instead dismissing Snoqualmie's suit based on issue preclusion. App. 39a–46a. The district court concluded that *Washington II*'s decision applicable to off-reservation Treaty fishing rights precluded Snoqualmie's suit concerning Treaty hunting and gathering rights. *Id.* The district court declined to apply the exception from *Washington IV* applicable to Snoqualmie's Treaty hunting and gathering claim as a newly recognized tribe or any other exceptions to issue preclusion. App. 43a–46a.

The district court briefly discussed the "inconsistency" between the Executive Branch's recognition of Snoqualmie as a Treaty signatory with political and cultural cohesion dating from 1855 and the decision in *Washington II*, acknowledging "[f]ederal recognition does, of course, cast different light on the determination in *Washington II* that the Snoqualmie have not maintained an organized tribal structure since 1855." App. 44a. Without any analysis, the district court swept aside "the inconsistency between [*United States v. Washington*] and the BIA's findings" as merely "disconcerting."[2] App. 45a.

**B. Ninth Circuit decision.**

The Ninth Circuit affirmed the district court's dismissal on issue preclusion grounds. App. 4a. The Ninth Circuit believed the decision in *Washington II* regarding Snoqualmie's off-reservation Treaty fishing rights precluded a finding that Snoqualmie has *any* reserved Treaty rights. *Id.*

The Ninth Circuit also disregarded the binding en banc precedent in *Washington IV* when it failed to apply the issue preclusion exception for newly recognized tribes like Snoqualmie when asserting unadjudicated hunting and gathering rights. App. 24a–27a. Because *Washington IV* supposedly reaffirmed the factual findings of *Washington II*, the Ninth Circuit reasoned that "there is no basis to undo" the finality of the finding in *Washington II* that Snoqualmie "had not functioned since treaty times as continuous separate, distinct and cohesive cultural or

[2] The district court granted the Samish Indian Nation leave to intervene for purposes of appeal, and the Ninth Circuit consolidated the appeals.

political communities," which "justif[ied] the denial of treaty rights." App. 26a–27a. The Ninth Circuit opined that applying the *Washington IV* exception "would allow for the incongruous result that a tribe could have treaty-tribe status with respect to some treaty rights but not with respect to others." App. 27a.

The Ninth Circuit refused to apply other exceptions to issue preclusion. App. 27a–30a. Among other things, the court rejected Snoqualmie's reliance on the Interior Department's decision as requiring a departure from issue preclusion, contending that its argument "is simply a repackaged attempt to give administrative rulings effect in subsequent treaty rights litigation, which *Washington IV* explicitly forbids." App. 29a.

Finally, misunderstanding the significant implications of its decision, the Ninth Circuit briefly addressed Snoqualmie's judicial abrogation concerns in a footnote, stating that "[t]his argument puts the cart before the horse, assuming the very issue on appeal—namely, whether the Snoqualmie has treaty-tribe status under the Treaty." App. 21a–22a n.6.

The Ninth Circuit denied Snoqualmie's petition for rehearing en banc. App. 47a–49a.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit's abrogation of Snoqualmie's Treaty rights absent congressional action is an unconstitutional intrusion by the Ninth Circuit into Congress's and the Executive Branch's authority over Indian affairs. This Court's cases are clear: only Congress—and not the Ninth Circuit—can abrogate a treaty. Moreover, the Ninth Circuit has impermissibly overridden the Executive Branch's decision—recently

reaffirmed—that Snoqualmie is a Treaty tribe. In so doing, the Ninth Circuit has created an anomalous—and untenable—situation in which the Executive Branch recognizes Snoqualmie as a Treaty tribe but the Ninth Circuit does not. This Court should grant certiorari to correct these errors.

## I. The Ninth Circuit's decision conflicts with the precedents of this Court.

This Court has long recognized two fundamental tenets of federal Indian law that control the United States' treaty relations with Indian tribes: Congress alone has the power to *abrogate* an Indian treaty; and the Judiciary only has the power to *interpret* an Indian treaty. The courts cannot usurp the constitutional authority of the Legislative Branch in Indian affairs by unilaterally abrogating an Indian treaty absent congressional action. As other circuits properly recognize, "it is not the province of courts to declare treaties abrogated." *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 690 F.2d 303, 311 n.26 (2d Cir. 1982), *aff'd*, 466 U.S. 243 (1984). The Ninth Circuit's decision warrants review because it constitutes an impermissible judicial abolition of all of Snoqualmie's Treaty rights without congressional abrogation.

### A. Courts may interpret Indian treaties—not unilaterally abrogate them absent congressional action.

The primacy of Congress with respect to Indian affairs is rooted in the Constitution. *See* U.S. Const., art. I, § 8, cl. 3 (empowering Congress "[t]o regulate Commerce … with the Indian Tribes"); U.S. Const., art. II, § 2, cl. 2 (empowering the Senate to ratify

treaties with Indian tribes); *see also* 25 U.S.C. § 72 (delegating authority to Executive to abrogate Indian treaties). The Constitution likewise vests the Senate with the power to ratify Indian treaties. U.S. Const., art. II, § 2, cl. 2. In stark contrast, the Constitution vests no power in the Judiciary to make or abrogate Indian treaties, nor does it provide the courts with any role in Indian affairs. *See* U.S. Const., art. III.

This Court has long recognized that Congress alone possesses plenary authority over Indian affairs, including the power to eliminate treaty rights. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). For over a century, the Court has acknowledged that the "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). The Executive Branch possesses significant authority in Indian affairs, but this authority results from delegations by Congress. *See, e.g.*, 25 U.S.C. § 2 (delegating to Executive "management of all Indian affairs and of all matters arising out of Indian relations"); *id.* § 9 (delegating to the Executive power to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs …").

Consistent with the text and structure of the Constitution, this Court has consistently honored Congress's primacy with respect to Indian affairs and treaties. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800–03 (2014) (declining to replace Congress's considered judgment with the Court's

contrary opinion); *United States v. Lara*, 541 U.S. 193, 200–07 (2004) (upholding congressional statute correcting earlier court decision). The Judiciary therefore "tread[s] lightly" and must pay "proper respect" to the judgment of Congress in matters concerning Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Recognizing this fundamental separation of powers principle, the Court just two years ago affirmed that "the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *But that power, this Court has cautioned, belongs to Congress alone*." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (emphasis added) (citations omitted).

The constitutional provisions vesting Congress with primacy in Indian affairs do not, however, deny the courts any role related to Indian treaties. When the treaties of the United States are at issue, the role of the courts is limited to interpreting those treaties—not abrogating or modifying their terms. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (holding that "the courts have the authority to construe treaties"); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) ("Our role is limited to giving effect to the intent of the Treaty parties."). This is especially true regarding treaties between the United States and Indian tribes.

This Court has set clear boundaries for the courts on matters involving Indian treaties by consistently holding that courts cannot annul or re-write an Indian treaty; instead, courts may only interpret and give effect to the terms of Indian treaties. *See Fellows v.*

*Blacksmith*, 60 U.S. 366, 372 (1856) (an Indian "treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can go behind an act of Congress"); *see also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) ("But where the text [of the treaty] is clear, … [courts] have no power to insert an amendment."); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947) (courts cannot "rewrite congressional acts"); *Tulee v. Washington*, 315 U.S. 681, 684–85 (1942) (the courts are compelled "to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council").

This Court long ago identified the requirement for abrogation of Indian treaty rights: congressional action. In *Lone Wolf*, the Court explained that Congress has the power "to abrogate the provisions of an Indian treaty." 187 U.S. at 566. Thus, Indian treaty rights remain extant unless Congress expressly abrogates those rights, and courts must preserve Indian treaty rights unless Congress's intent to the contrary is clear and unambiguous. *See United States v. Dion*, 476 U.S. 734, 738–39 (1986) ("requir[ing] that Congress's intention to abrogate Indian treaty rights be clear and plain"); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); *see also McGirt*, 140 S. Ct. at 2462; *Minnesota v. Mille Lacs*

*Band of Chippewa Indians*, 526 U.S. 172, 196–201 (1999).

### B. The Ninth Circuit radically departed from this Court's precedent when it abrogated all of Snoqualmie's Treaty rights absent congressional action.

The Ninth Circuit departed from these long-standing principles by erroneously extending a holding in *United States v. Washington* applicable to off-reservation Treaty fishing rights under the guise of issue preclusion to abrogate all of Snoqualmie's Treaty rights. By failing to look to the Acts of Congress to determine whether Snoqualmie possesses Treaty hunting and gathering rights, the Ninth Circuit impermissibly usurped the role of the Legislative Branch in determining the relationship between the United States and Indian tribes—an unprecedented departure from the central tenets of Indian law that requires this Court's intervention. The Ninth Circuit's decision below is irreconcilable with the decisions of this Court.

Failing to rely on any congressional action as the basis for its decision, the Ninth Circuit took the unprecedented step of abrogating *all* of Snoqualmie's rights under the Treaty based on issue preclusion. The Ninth Circuit's decision stands in stark contrast to the Court's century-old standard that clear and explicit congressional action is required to abrogate an Indian treaty right. *See, e.g., McGirt*, 140 S. Ct. at 2462; *Mille Lacs*, 526 U.S. at 196–201; *South Dakota v. Bourland*, 508 U.S. 679, 689–91 (1993); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 421–25 (1989); *Dion*, 476 U.S. at 738–39; *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443

U.S. at 690; *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–13 (1968); *Lone Wolf*, 187 U.S. at 565.

The Ninth Circuit also departed from this Court's precedent by failing to resolve in favor of Snoqualmie any perceived conflict between Snoqualmie's Treaty rights and issue preclusion. The precedent of this Court indicates that any ambiguity regarding the application of issue preclusion to nullify all of Snoqualmie's Treaty rights must be resolved in favor of Snoqualmie alone. *See, e.g., Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995) ("'[T]reaties should be construed liberally in favor of the Indians.'"); *Oneida Cnty. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985) ("[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.") (internal citation omitted); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) ("[I]f there [is] ambiguity ... the doubt would benefit the Tribe, for '[a]mbiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'") (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44 (1980)). The circumstances of Snoqualmie's Treaty hunting and gathering rights claim—particularly the lack of congressional action, Snoqualmie's newly recognized status, and the Executive Branch's repeated recognition of Snoqualmie as a Treaty signatory—implicate several common law exceptions to issue preclusion, and

ultimately counsel against applying issue preclusion to abrogate all of Snoqualmie's Treaty rights to avoid a manifest injustice. *See infra*, at 21–26. The Court's precedent, coupled with the unique circumstances of this case, compelled the Ninth Circuit to resolve any conflict in Snoqualmie's favor, but the Ninth Circuit did just the opposite.

The Ninth Circuit further ran afoul of this Court's precedent by erroneously extending *United States v. Washington* to all rights reserved in Indian treaties. For the first time in the nearly fifty-year history of *United States v. Washington*, the Ninth Circuit in this case determined that the holding in *Washington II* precluding Snoqualmie's exercise of off-reservation Treaty fishing rights nullifies all rights reserved to Snoqualmie by the United States under the Treaty.

*United States v. Washington* has only ever been about off-reservation Treaty fishing rights. *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974) ("The ultimate objective of this decision is to determine … treaty right fishing."), *aff'd*, 520 F.2d 676 (9th Cir. 1975); *see also Washington II*, 641 F.2d at 1370. When this Court has taken up *United States v. Washington* previously, it has never applied the case to anything other than off-reservation Treaty fishing rights. *See Washington v. United States*, 138 S. Ct. 1832 (2018); *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). In fact, it appears that outside of the Ninth Circuit's decision below, no court has extended *United States v. Washington* to anything other than off-reservation Treaty fishing rights.

Unlike the off-reservation fishing rights in *United States v. Washington*, the hunting and gathering

rights guaranteed by the Treaty have never been adjudicated. *See*, *e.g.*, *Skokomish Indian Tribe v. Forsman*, 738 F. App'x 406, 408 (9th Cir. 2018) ("No plausible reading of [*Washington I*] 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."); *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"). Nevertheless, the Ninth Circuit applied, without hesitation and for the first time, the holding in *Washington II* with respect to off-reservation Treaty fishing rights that Snoqualmie is not "*at this time* a treaty tribe *in the political sense* within the meaning of [*United States v. Washington*]," *Washington II*, 476 F. Supp. at 1111 (emphasis added), to the separate issue of hunting and gathering Treaty rights asserted by a now-recognized Indian tribe.

The Ninth Circuit's decision "denying [Snoqualmie] treaty-tribe status under the Treaty" ignores the fact that Snoqualmie signed the Treaty and that the Treaty itself established the "treaty status" of Snoqualmie. The Ninth Circuit's decision also ignores the fact that Snoqualmie's Treaty rights vested more than 150 years ago. *See United States v. Oregon,* 29 F.3d 481, 484 (9th Cir.), *modified*, 43 F.3d 1284 (9th. Cir. 1994); *United States v. Washington*, 384 F. Supp. At 378, 380–81. Most importantly, the Ninth Circuit's decision ignores the fact that the Senate ratified Snoqualmie's Treaty in 1859, and Congress has never abrogated that Treaty. As demonstrated by this Court's decisions, it is Congress—not the courts—that determines whether

Treaty rights exist. The Court should not permit the Ninth Circuit to undermine long-standing precedent by replacing its judgment for that of Congress and the Executive Branch regarding Snoqualmie's Treaty rights and the United States' relationship with Snoqualmie. *See Bay Mills Indian Cmty.*, 572 U.S. at 803 ("As in *Kiowa*, … we decline to revisit our case law, and choose instead to defer to Congress.") (internal quotations and citations omitted).

### C. The Ninth Circuit's failure to follow Interior's decision conflicts with decisions of other circuits.

The conduct of the Legislative and Executive Branches assumes "controlling importance" in the Judiciary's evaluation of matters involving the United States' treaty obligations. *Baker v. Carr*, 369 U.S. 186, 212 (1962); *accord Blake v. Am. Airlines, Inc.*, 245 F.3d 1213, 1215–16 (11th Cir. 2001) (recognizing the "controlling importance" of governmental conduct in determining whether treaty remains in effect); *N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 954 F.2d 847, 852 (2d Cir. 1992) ("It is well settled that 'on the question whether [a] treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance.'").

In this case, the Executive Branch has squarely determined that Snoqualmie is a party to the Treaty. The Ninth Circuit's decision overriding that judgment is not only improper, as explained above, but also conflicts with the approach of other circuits.

This Court has cautioned courts to refrain from determining whether a treaty has lapsed, and to instead defer to the Executive and Legislative

Branches. *See Whitney v. Robertson*, 124 U.S. 190, 194–95 (1888). Consistent with this Court's instructions, the federal courts of appeals regularly defer to the judgment of those Branches in determining whether a treaty remains in effect. *See*, *e.g.*, *N.Y. Chinese TV Programs*, 954 F.2d at 852 ("[T]he judiciary should refrain from determining whether a treaty has lapsed, and instead should defer to the wishes of the elected branches of government."); *Arias Leiva v. Warden*, 928 F.3d 1281, 1288 (11th Cir. 2019); *Ice. S.S. Co., Ltd.-Eimskip v. U.S. Dept. of Army*, 201 F.3d 451, 453 (D.C. Cir. 2000). As the Second Circuit put it, "it is not the province of courts to declare treaties abrogated or to afford relief to those (including the parties) who wish to escape their terms. These are not matters for 'judicial cognizance.'" *Franklin Mint*, 690 F.2d at 311 n.26 (quoting *Whitney*, 124 U.S. at 194). But that is precisely what the Ninth Circuit did below.

Further, when the meaning of a treaty is before a court, "the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott v. Abbott*, 560 U.S. 1, 15 (2010); *accord Pierre v. Gonzales*, 502 F.3d 109, 116 (2d Cir. 2007) ("[I]n construing treaty language, [r]espect is ordinarily due the reasonable views of the Executive Branch.") (brackets in the original); *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1146–47 (9th Cir. 1999) (Executive Branch's position on treaty matters "is entitled to deference"); *Sabatier v. Dabrowski*, 586 F.2d 866, 868 (1st Cir. 1978) (court must give "great" deference to the conduct of the parties when deciding a treaty's applicability); *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004); *United States v. Al-Hamdi*, 356 F.3d 564, 571 (4th Cir. 2004); *Collins v.*

*Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1251 (D.C. Cir. 2003).

Indeed, following the guidance of this Court, the courts of appeals treat the question of "[w]hether a treaty remains in force after a change in the sovereign status of one of the signatories" as a "political question better left to the executive branch of government." *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 171 (3d Cir. 1997); *see also Then v. Melendez*, 92 F.3d 851, 854 (9th Cir. 1996) ("The continuing validity of the Treaty after Singapore's independence from the United Kingdom presents a political question, and we must defer to the intentions of the State Departments of the two countries."). Thus, the other circuits—contrary to the Ninth Circuit below—answer questions regarding the status of treaty rights by deferring to the Executive and Legislative Branches.

## II. The Ninth Circuit erred by applying issue preclusion to nullify all of Snoqualmie's Treaty rights following the Executive Branch's recognition of Snoqualmie as a Treaty signatory.

The Ninth Circuit also erred in applying the discretionary doctrine of issue preclusion to nullify Snoqualmie's Treaty hunting and gathering rights. After *Washington II*, the Executive Branch—exercising its substantial constitutional authority in the arena of Indian affairs and the United States' treaty relations—determined that Snoqualmie was a Treaty signatory with Treaty rights. The Executive Branch also reasonably interpreted *Washington II* as applying only to Snoqualmie's eligibility to exercise off-reservation Treaty fishing rights in 1979. In light of the deference the courts owe to the Executive

Branch in the area of Indian affairs in general and Indian treaties in particular, the Ninth Circuit should have applied recognized exceptions to issue preclusion.

### A. Issue preclusion is a discretionary common law doctrine that does not apply following a significant change in circumstances or where compelling policy considerations exist.

Under the doctrine of issue preclusion, "a prior judgment … foreclose[es] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire v. Maine*, 532 U.S. 742, 748–49 (2001); *see also Comm'r v. Sunnen*, 333 U.S. 591, 599 (1948) (issue preclusion "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally"). Even when the elements of issue preclusion are met, however, issue preclusion does not stand as an absolute bar. Courts decline to apply the doctrine if there has been an intervening change in the applicable factual or legal context or where compelling policy considerations outweigh the economy concerns that underlie the doctrine. *See Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019); *Bobby v. Bies*, 556 U.S. 825, 834 (2009); *Standefer v. United States*, 447 U.S. 10, 22 (1980); *see also Montana v. United States*, 440 U.S. 147, 155 (1979) (asking "whether controlling facts or legal principles ha[d] changed significantly" since a judgment before giving it preclusive effect). As the Restatement explains, "the policy supporting issue preclusion is not so unyielding that it must

invariably be applied, even in the face of strong competing considerations. There are instances in which the interests supporting a new determination of an issue already determined outweigh the resulting burden on the other party and on the courts." Restatement (Second) of Judgments § 28, cmt. g (1982); *see also id.* cmt. c.

The circuits have long exercised their discretion by declining to apply equitable common law doctrines similar to issue preclusion to defeat Indian treaty rights. *See Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) ("Laches or estoppel is not available to defeat Indian treaty rights") (citing *Bd. of Comm'rs v. United States*, 308 U.S. 343, 351 (1939); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956)); *see also Cramer v. United States*, 261 U.S. 219, 234 (1923). This is particularly true where application of those common law doctrines is inconsistent with federal policy. *Oneida Cnty.*, 470 U.S. at 240–41 (holding that state statute of limitations did not bar claim because application would be inconsistent with federal policy regarding Indian land claims).

### B. The Ninth Circuit erred by applying issue preclusion without giving any deference to the Executive Branch or considering the policy implications of its decision.

Tribal treaty rights as guaranteed by the United States through the Executive and Legislative Branches should prevail over the application of discretionary judge-made legal doctrines like issue preclusion under the circumstances in which Snoqualmie now stands. Application of issue

preclusion in this case does "not 'advance the equitable administration of the law.'" *Herrera*, 139 S. Ct. at 1697 (quoting *Bobby*, 556 U.S. at 836–37).

The Ninth Circuit rejected Snoqualmie's contention that the Executive Branch's declaration of Snoqualmie's Treaty signatory status justified applying exceptions to issue preclusion. App. 28a–29a. But the Ninth Circuit failed to accord *any* deference or give the requisite "great weight" to the Executive Branch's recognition of Snoqualmie as a Treaty signatory, the Executive Branch's determination that the Treaty "remains in effect today" as to Snoqualmie, or the Executive's reasonable interpretation of *Washington II* as "only addressing Snoqualmie's eligibility to exercise off-reservation Treaty fishing rights in 1979." *Id*. The Ninth Circuit also failed to accord *any* deference or give "great weight" to Congress's decision not to abrogate Snoqualmie's Treaty hunting and gathering rights. *Id*.

Thus, as instructed by this Court and followed by the other courts of appeals, the Ninth Circuit should have refrained from relying upon its own judgment, and instead deferred to the actions and interpretations of the Legislative and Executive Branches by ultimately declining to apply issue preclusion. *See Abbott*, 560 U.S. at 15; *Baker*, 369 U.S. at 212; *Whitney*, 124 U.S. at 194–95. The Ninth Circuit failed to do so. The Ninth Circuit should have identified the significant change in legal and factual context—the Executive Branch's proclamation that Snoqualmie is a Treaty signatory with Treaty rights—and the compelling policy considerations at issue—upholding the primacy of the Legislative and

Executive Branches in managing the United States' treaty relations with Indian tribes—that demanded application of an exception to issue preclusion. *See Bobby*, 556 U.S. at 834; *see also Standefer*, 447 U.S. at 22; Restatement § 28, cmt. g. The Ninth Circuit failed to do so. Snoqualmie's "treaty rights are too fundamental to be easily cast aside" on the basis of issue preclusion, especially when the Executive and Legislative Branches continue to recognize Snoqualmie as possessing its Treaty hunting and gathering rights. *Dion*, 476 U.S. at 739.

Instead, the Ninth Circuit relied on its own judgment as to Snoqualmie's Treaty status to override that of the Executive Branch. App. 23a (Snoqualmie "had not maintained an organized tribal structure and thus was not entitled to exercise rights under the Treaty because it lacked treaty-tribe status."). The Ninth Circuit's holding that Snoqualmie lacks "treaty-tribe status" is based on a finding in *Washington II* that Snoqualmie "had not maintained an organized tribal structure" sufficient to exercise off-reservation treaty fishing rights. *Id.* The Ninth Circuit's re-affirmation of the factual findings of *Washington II* directly contradicts the Executive Branch's determinations and actions since 1979. Unlike the Ninth Circuit, the Executive Branch recognizes Snoqualmie as a Treaty signatory, confirms that the Treaty remains in effect as to Snoqualmie, and interprets *Washington II* as applying only to Snoqualmie's eligibility to exercise off-reservation fishing rights in 1979. The contradiction between the Executive Branch and the Ninth Circuit threatens the significant constitutional authority vested only in the Executive Branch with regard to Indian affairs. *See,*

*e.g.*, 25 U.S.C. § 5108 (trust land acquisitions); *Carcieri v. Salazar*, 555 U.S. 379, 390 (2009).

## III. The questions presented are exceptionally important.

The Court should grant certiorari because of the importance of the questions presented and because of the conflict that the Ninth Circuit has created with the Executive Branch's determination that Snoqualmie is a party to the Treaty entitled to exercise its hunting and gathering rights.

**a.** The relative constitutional roles of the Judicial, Legislative, and Executive Branches in the administration of Indian affairs is a question of exceptional importance, particularly in matters involving Indian treaty rights. The Ninth Circuit's nullification of all of Snoqualmie's reserved Treaty rights through issue preclusion cannot be reconciled with the proper role of the courts in our system of government. This Court should reaffirm the limited role of the Judiciary in the administration of Indian affairs and Indian treaty rights.

This Court has long recognized that "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty." *Bay Mills Indian Cmty.*, 572 U.S. at 803; *see also Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo*, 436 U.S. at 60; Cohen's Handbook 110 ("Judicial deference to the paramount authority of Congress in matters concerning Indian treaties remains a central and indispensable principle in federal Indian law."). Indeed, "'Indian law' draws principally upon the treaties drawn and executed by

the Executive Branch and legislation passed by Congress." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). And this Court frequently resolves matters involving Indian treaty rights. *See, e.g., McGirt*, 140 S. Ct. at 2462; *Herrera*, 139 S. Ct. at 1691–92; *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011 (2019); *Mille Lacs*, 526 U.S. at 196–201; *Bourland*, 508 U.S. at 689–91; *Brendale*, 492 U.S. at 421–25; *Dion*, 476 U.S. at 738–39; *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 690; *Menominee Tribe*, 391 U.S. at 412–13. Thus, ensuring the Judiciary maintains its constitutional role in approaching issues involving Indian treaties is of paramount significance.

To leave the Ninth Circuit's judicial abrogation of all Snoqualmie's Treaty rights unchecked "would be practically to recognize an authority in the courts … to determine questions of mere policy in the treatment of the Indians which it is the function alone of the legislative branch of the government to determine." *United States v. Choctaw Nation*, 179 U.S. 494, 535 (1900).

Not only does the Ninth Circuit's decision below radically expand the authority of the Judiciary in Indian affairs, but it also introduces a new and unprecedented means by which treaty rights may be abrogated absent congressional action that threatens Indian treaty rights across the Nation. Now, issue preclusion may be wielded against individual Indian treaty rights to nullify entire treaties. This Court should grant certiorari to confirm that congressional action remains necessary to abrogate an Indian treaty.

Further, the Ninth Circuit failed to account for the centuries of injustice wrought upon the Snoqualmie people by the United States and the significance of the changed circumstances in which Snoqualmie now stands when it applied issue preclusion to abrogate all of Snoqualmie's Treaty rights. Just as this Court has prevented other equitable common law doctrines from defeating Indian treaty rights, it should prohibit courts from abrogating treaty rights based on issue preclusion alone in these unique circumstances and instead maintain the standard the Court has long adhered to: congressional action. Given the clear federal policy honoring Indian treaty rights and the fundamental injustice that results from denying Snoqualmie all of the Treaty rights its ancestors reserved and that were promised by the United States, application of issue preclusion should yield to the plenary authority of the Legislative Branch and the policy determinations of the Executive Branch in Indian affairs.

**b.** This Court's review is also necessary because, by flouting the determinations of the Executive Branch, the Ninth Circuit has created a plainly untenable conflict. After the decision below, in the view of the United States, Snoqualmie is a party to the Treaty entitled to exercise its hunting and gathering rights; by contrast, according to the Ninth Circuit, Snoqualmie is *not* a Treaty party and *cannot* exercise hunting and gathering rights. Further, the Ninth Circuit flatly refused to consider the position of the Executive Branch in making the latter determinations.

This irreconcilable conflict presents an impossible situation for Snoqualmie. It dramatically undermines

the effect of the federal recognition of its Treaty-tribe status, even though this Court's cases confirm that the Executive Branch is exclusively entitled to make this determination. It requires the Tribe to simultaneously operate under two opposite legal determinations—often unsure which one will be binding in any particular circumstance. And it allows others to weaponize the Ninth Circuit's determination to attempt to deprive Snoqualmie of a host of other rights and benefits to which a federally recognized tribe and Treaty signatory is entitled. This Court should grant certiorari to resolve the conflict between the Executive Branch and the Ninth Circuit over Snoqualmie's Treaty-tribe status.

**c.** Finally, given the important federal interest implicated by the Ninth Circuit's decision, the Court should call for the views of the Solicitor General. The Ninth Circuit's decision below conflicts with the Executive Branch's position that (1) Snoqualmie is a Treaty signatory, (2) the Treaty "remains in effect today" as to Snoqualmie, and (3) *Washington II* "only address[es] Snoqualmie's eligibility to exercise off-reservation Treaty fishing rights in 1979." *See* Sweeney Letter at 7, 37–39; Final Determination, 62 Fed. Reg. at 45,865. The Ninth Circuit's decision below also conflicts with Congress's decision not to abrogate Snoqualmie's Treaty. It is therefore appropriate for the Court to solicit the views of Snoqualmie's trustee and fellow Treaty signatory—the United States. *See Solem v. Bartlett*, 465 U.S. 463, 473 (1984) (the United States serves as a "guardian and trustee for the Indians").

Even when the United States is not a party, the Court frequently requests its views on whether to

grant petitions raising federal Indian law issues. *See, e.g.,* Brief for United States as Amicus Curiae, *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (No. 17-532), 2018 WL 4381220; Brief for United States as Amicus Curiae, *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019) (No. 16-1498), 2018 WL 3969557; Brief for United States as Amicus Curiae, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 576 U.S. 1021 (2015) (No. 13-1496), 2015 WL 6445774; Brief for United States as Amicus Curiae, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (No. 12-515), 2013 WL 5863581.

Indeed, in *Ysleta del Sur Pueblo v. Texas,* this Court recently called for the views of the Solicitor General—and, in response, the United States urged this Court to grant certiorari because the decision below "disadvantaged two Indian tribes" and undermined the federal government's "strong interest in supporting Indian self-government." Brief for United States as Amicus Curiae at 19, 22, *Ysleta del Sur Pueblo v. Texas* (No. 20-493), 2021 WL 3884290 . Those same considerations favor a grant here.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 6, 2021**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

February 5, 2021, Argued and Submitted, Seattle, Washington; August 6, 2021, Filed

No. 20-35346

SNOQUALMIE INDIAN TRIBE, A FEDERALLY RECOGNIZED INDIAN TRIBE ON ITS OWN BEHALF AND AS PARENS PATRIAE ON BEHALF OF ITS MEMBERS,

*Plaintiff-Appellant,*

v.

STATE OF WASHINGTON; JAY ROBERT INSLEE, GOVERNOR; KELLY SUSEWIND, WASHINGTON DEPARTMENT OF FISH & WILDLIFE DIRECTOR,

*Defendants-Appellees,*

SAMISH INDIAN NATION,

*Intervenor.*

*Appendix A*

No. 20-35353

SNOQUALMIE INDIAN TRIBE, A FEDERALLY RECOGNIZED INDIAN TRIBE ON ITS OWN BEHALF AND AS PARENS PATRIAE ON BEHALF OF ITS MEMBERS,

*Plaintiff,*

and

SAMISH INDIAN NATION,

*Intervenor-Appellant,*

v.

STATE OF WASHINGTON; JAY ROBERT INSLEE, GOVERNOR; KELLY SUSEWIND, WASHINGTON DEPARTMENT OF FISH & WILDLIFE DIRECTOR,

*Defendants-Appellees.*

Before: M. Margaret McKeown and Richard A. Paez, Circuit Judges, and William Horsley Orrick,[*] District Judge.

Opinion by Judge McKeown.

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[*] The Honorable William Horsley Orrick, United States District Judge for the Northern District of California, sitting by designation.

*Appendix A*

## SUMMARY**

### Indian Treaty Rights

The panel affirmed the district court's dismissal, on the ground of issue preclusion, of the Snoqualmie Indian Tribe's complaint seeking a declaration that it is a signatory to the Treaty of Point Elliott and that its reserved off-reservation hunting and gathering rights under the Treaty continue.

The panel held that it was within the district court's discretion to dismiss on the ground of issue preclusion without first establishing subject matter jurisdiction because the dismissal was a non-merits dismissal, and it was reasonable for the district court to conclude that dismissal on the ground of issue preclusion was the less burdensome course.

The panel affirmed the district court's conclusion that the determination in *United States v. Washington* ("*Washington II*"), 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), that the Snoqualmie has no fishing rights under the Treaty precluded a finding that the Tribe has any hunting and gathering rights under the same Treaty. The panel concluded that in *Washington II*, the Snoqualmie actually litigated the identical issue of treaty-tribe status. Further, *United States v. Washington*

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

("*Washington IV*"), 593 F.3d 790 (9th Cir. 2010) (en banc), did not create an exception to issue preclusion, and no other exception applied.

**OPINION**

McKEOWN, Circuit Judge:

This appeal presents yet another chapter in the litigation of Indian treaty rights in the Pacific Northwest. It involves some of the same tribes—the Snoqualmie Indian Tribe (the "Snoqualmie" or the "Tribe") and the Samish Indian Nation (the "Samish" or the "Nation")—that have been disputing the same treaty—the Treaty of Point Elliott (the "Treaty")—in this court and the district courts for decades. The Snoqualmie's complaint asks the district court to declare that the Tribe is a signatory to the Treaty and that its reserved off-reservation hunting and gathering rights under the Treaty continue.

The only difference between the present appeal and the several prior appeals we have considered over the last nearly half-century is the treaty right at issue: here, hunting and gathering rights; in prior appeals, fishing rights. The factual question underlying both this and prior appeals—whether the Snoqualmie is a treaty tribe under the Treaty—is the same. Because this question was asked and answered—in the negative—40 years ago, we affirm the district court's dismissal of the Snoqualmie's complaint on the ground of issue preclusion.

*Appendix A*

## FACTUAL AND LEGAL BACKGROUND

The Treaty has been the subject of extensive litigation. Because the Treaty lies at the heart of the parties' dispute and because the parties' prior litigation foretells the result here, we recount the history of this litigation at some length.

### *The Treaty and Reserved Rights*

In the Treaty, which was negotiated between several Indian tribes and federal representatives in the Washington territory, signatory tribes agreed to relinquish much of their land but reserved for themselves fishing, hunting, and gathering rights. Article V of the Treaty provides:

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

Treaty Between the United States & the Dwamish, Suquamish, & Other Allied & Subordinate Tribes of Indians in Washington Territory, 12 Stat. 927, Article V (U.S. Treaty Apr. 11, 1859).

*Appendix A*

***Washington I: Litigating Treaty Fishing Rights***

In 1970, the United States filed suit against the State of Washington on behalf of several tribes seeking the declaration and enforcement of off-reservation fishing rights under the Treaty. *See United States v. Washington* ("*Washington I*"), 384 F. Supp. 312, 327 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).[1] *Washington I* "establish[ed] the treaty status" of plaintiff tribes—including seven tribes that the United States initially represented and seven additional tribes that intervened in the litigation—and therefore also established "the right of their members to fish off reservation in common with the citizens of the state." *Id.* at 333.

***Washington II: The Snoqualmie and Samish Intervene to Assert Treaty Fishing Rights***

In 1979, the Snoqualmie and the Samish—which were not parties to *Washington I*—sought to intervene in the litigation to assert their own treaty fishing rights. *See United States v. Washington* ("*Washington II*"), 476 F. Supp. 1101, 1104 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981).[2] In *Washington II*, the district court

1. We refer to both the district court opinion and its accompanying appeal as *Washington I* and differentiate between the two by the Federal Reporter volumes in which they appear.

2. As with *Washington I*, we refer to both the district court opinion and its accompanying appeal as *Washington II* and differentiate between the two by the Federal Reporter volumes in which they appear.

concluded that the Snoqualmie and the Samish "do not have and may not confer upon their members fishing rights under the Treat[y] of Point Elliott." *Id.* at 1111. The court's conclusion followed from its findings that neither tribe was "at th[at] time a treaty tribe in the political sense" because neither was "at th[at] time a political continuation of or political successor in interest to any of the tribes or bands of Indians with whom the United States treated in the [T]reat[y] of . . . Point Elliott." *Id.* at 1104, 1111.

With respect to the Snoqualmie, the district court found that the Tribe "is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Snoqualmoo Indians[, and who] . . . were named in and a party to the Treaty of Point Elliott." *Id.* at 1108. However, it went on to find that the Tribe "exercises no attributes of sovereignty over its members or any territory" and "is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government over any individuals or territory." *Id.* Critically, the district court found that "members of the . . . Snoqualmie Tribe and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community" and that "members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the [Snoqualmie]." *Id.* at 1109.

The district court's findings with respect to the Samish were similar. It found that the Nation "is composed primarily of persons who are descendants in some degree

of Indians who in 1855 were known as Samish Indians and who were party to the Treaty of Point Elliott." *Id.* at 1106. However, the court went on to find that the Nation "exercises no attributes of sovereignty over its members or any territory" and "is not recognized by the United States as an Indian governmental or political entity possessing any political powers of government over any individuals or territory." *Id.* Critically, as with the Snoqualmie, the district court again found that "members of the . . . Samish Tribe and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community" and that "members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the [Samish]." *Id.*

We affirmed the district court's decision in *Washington II*. As an initial matter, we noted that the district court had incorrectly concluded that "[o]nly tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States." *Washington II*, 641 F.2d at 1371 (quoting *Washington II*, 476 F. Supp. at 1111). We clarified that federal recognition is *not* a prerequisite for the exercise of treaty rights. *Id.* at 1372. We then identified the "proper inquiry" for determining treaty-tribe status: the "single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory" is that "the group must have maintained an organized tribal structure." *Id.* After examining the record in light of this controlling principle, we concluded that the

district court's factual "finding of insufficient political and cultural cohesion" with respect to the intervening tribes was not "clearly erroneous." *Id.* at 1374; *see also id.* ("[M]aintenance of tribal structure is a factual question, and we have concluded that the district court correctly resolved this question despite its failure to apply the proper standard.").

***Greene I and II: Litigating Federal Recognition***

Following our affirmance in *Washington II*, both the Snoqualmie and the Samish sought federal recognition.

The Samish's petition for recognition was the subject of litigation in which the Tulalip Tribes—amicus curiae in this appeal—sought to intervene, arguing that their fishing rights under the Treaty would be diluted by the later recognition of the Samish. *See Greene v. United States* ("*Greene I*"), 996 F.2d 973, 976-78 (9th Cir. 1993). We affirmed the district court's denial of the Tulalip Tribes' motion, noting that while the treaty rights and federal recognition inquiries are "similar," "each determination serves a different legal purpose and has an independent legal effect." *Id.* at 976. In other words, "[f]ederal recognition does not self-execute treaty rights claims," and thus, we explained, even if the Samish were to obtain federal recognition, it would still separately have to confront the decisions in *Washington I* and *II* before it could claim fishing rights under the Treaty. *Id.* at 977. For this reason, dilution of the Tulalip Tribes' *treaty fishing rights* was not a protectable interest that justified intervention in the Samish's separate *recognition* proceedings.

In a follow-on appeal, again regarding the Samish's petition for recognition, the Tulalip Tribes appeared as amicus curiae to argue that the Samish was precluded by *Washington II* from litigating any issue of tribal recognition. *Greene v. Babbitt* ("*Greene II*"), 64 F.3d 1266, 1269 (9th Cir. 1995). In *Greene II*, we reiterated that "the recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights." *Id.* at 1270. Because "our court regards the issues of tribal treaty status and federal [recognition] as fundamentally different," we denied *Washington II* any preclusive effect in the consideration of the Samish's petition for recognition. *Id.* at 1270-71.

The Samish ultimately succeeded in regaining federal recognition in 1996, and the Snoqualmie succeeded one year later.

***Washington III: The Samish Seeks Reopening of Washington II and Reexamination of its Treaty Fishing Rights in Light of Recognition***

In 2001, the Samish filed a motion in the district court to reopen the judgment in *Washington II* on the basis of its recognition. The district court denied this motion, but we reversed on appeal. Despite our prior articulation in *Greene I* and *II* of the clear distinction between the treaty rights and federal recognition inquiries—and their independence from one another—we held that "federal recognition is a sufficient condition for the exercise of treaty rights." *United States v. Washington* ("*Washington III*"), 394 F.3d 1152, 1158 (9th Cir. 2005), *overruled in later appeal*, 593 F.3d 790 (9th Cir. 2010) (en banc). In light

of this change of position, we concluded that the Nation's subsequent federal recognition was an extraordinary circumstance that justified reexamining its treaty fishing rights. *Id.* at 1161.

***Washington IV: Overruling Washington III***

On remand, the district court again denied the Samish's motion to reopen the judgment in *Washington II*, thus "clearly violat[ing] the mandate of *Washington III*." *United States v. Washington* ("*Washington IV*"), 593 F.3d 790, 798 (9th Cir. 2010) (en banc). The Samish again appealed this second denial.

In *Washington IV*, we convened en banc to address the fundamental inconsistency that had arisen between *Washington III* and the *Greene* cases:

> On the one hand, we have *Greene I* and *II*, which denied treaty tribes the right to intervene in the Samish Tribe's recognition proceedings because recognition could have no effect on treaty rights. On the other hand, we have *Washington III*, which ruled that the fact of recognition of the Samish Tribe was an extraordinary circumstance that justified reopening *Washington II*. *Washington II*. *I* further opined that recognition of the Samish Tribe was a *sufficient* condition for the establishment of treaty fishing rights.

*Id.*

After acknowledging that these "conflicting lines of authority" could not "coexist," we concluded in *Washington IV* "that *Washington III* must yield" and resolved this conflict "in favor of the *Greene* proposition: recognition proceedings and the fact of recognition have no effect on the establishment of treaty rights." *Id.* at 793, 798-99. We elaborated upon this principle, explaining that "treaty adjudications have no estoppel effect on recognition proceedings, and recognition has no preclusive effect on treaty rights litigation." *Id.* at 800. Consistency with *Greene II*, we resolved, requires that the "fact of recognition []not be given *even presumptive weight* in subsequent treaty litigation." *Id.* at 801 (emphasis added). With the significance of the Samish's subsequent recognition finally resolved, we overruled *Washington III* and affirmed the district court's denial of the Nation's motion to reopen the judgment in *Washington II*.

The Samish recognizes that, given our holding in *Washington IV*, it may not revisit *Washington II*'s ruling on treaty fishing rights. And though the Snoqualmie was not a party to *Washington IV*, the Tribe agrees that it, too, is barred by our decision in that case from relitigating its entitlement to exercise fishing rights under the Treaty.

***The Present Appeal: Litigating Treaty Hunting and Gathering Rights***

The Snoqualmie maintains, however, that nothing prevents it from litigating its entitlement to exercise *hunting and gathering rights* under the Treaty. Thus, on December 20, 2019, the Snoqualmie filed the complaint at

issue here against the State of Washington, the Governor of Washington, and the Washington Department of Fish and Wildlife Director (together, the "State"). The complaint, which purports to focus "solely" on the Snoqualmie's "[t]reaty status in the context of hunting and gathering," seeks a declaration that the Snoqualmie is a signatory to the Treaty and that its reserved off-reservation hunting and gathering rights under the Treaty continue against the United States, Washington State, and its counties, as well as their grantees.

In dismissing the complaint, the district court concluded that *Washington II*'s determination that the Snoqualmie has no fishing rights under the Treaty precluded a finding that the Tribe has any hunting and gathering rights under the same Treaty. The district court reasoned that the factual issue that determined whether the Snoqualmie was entitled to exercise fishing rights under the Treaty in *Washington II*—its maintenance of an organized tribal structure from the time of treaty execution—"is the same gateway question that the [district court] would face . . . when determining hunting and gathering rights." Finding that we had "unequivocally addressed" and resolved that issue against the Snoqualmie in *Washington II*, the district court held that issue preclusion applied to the Snoqualmie's treaty hunting and gathering rights claims. After assuring itself that no exception applied, the district court dismissed the Snoqualmie's complaint on the ground of issue preclusion and declined to reach the State's other asserted grounds for dismissal. The Snoqualmie timely appealed this dismissal.

Though the Samish was not a party in the district court, it sought leave to intervene for the limited purpose of appeal. Leave was granted, and the Samish also timely appealed the district court's dismissal of the Snoqualmie's complaint. Though the Samish's treaty rights are not directly at issue in this appeal, it argues that the district court's decision, if affirmed, would adversely affect its rights to raise unadjudicated treaty rights under the Treaty in the future. We granted the parties' joint motion to consolidate their appeals and treat them together here.[3]

## ANALYSIS

### I. The District Court Did Not Err in Dismissing this Case on the Ground of Issue Preclusion Without First Establishing Subject Matter Jurisdiction

As an initial matter, we consider whether the district court erred in dismissing this case on the ground of issue preclusion without first addressing the threshold issue of subject matter jurisdiction.[4] Whether it was within the

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3. The Samish joins only the argument addressed in Section II.B below because it already litigated the other issues the Snoqualmie raises in this appeal in *Washington III* and *IV*.

4. The Snoqualmie's characterization of both the State's Eleventh Amendment sovereign immunity and Article III standing arguments as jurisdictional is only partly correct. Article III standing is, of course, jurisdictional in nature. *See, e.g., Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (noting that the "lack of Article III standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)"). However, with respect to state sovereign immunity, "the Eleventh

district court's discretion to dismiss the Snoqualmie's complaint on the ground of issue preclusion depends on the answers to two questions: first, whether such a dismissal is a non-merits dismissal, and second, whether jurisdictional issues would have been "difficult to determine" such that the district court reasonably invoked issue preclusion as "the less burdensome course." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007); *see Yokeno v. Sekiguchi*, 754 F.3d 649, 651 n.2 (9th Cir. 2014) (explaining that the Supreme Court has supplied courts with "discretionary leeway" to address other threshold issues before subject matter jurisdiction (internal quotation marks and citation omitted)). We answer both questions in the affirmative.

### A. Dismissal on the Ground of Issue Preclusion is a Non-Merits Dismissal

Whether dismissal on the ground of issue preclusion is a merits or non-merits dismissal is significant. Although "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)," such a court does have "leeway 'to choose among threshold grounds for *denying audience to a case on the merits*.'" *Sinochem*, 549 U.S. at 430-31 (emphases added) (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)). The reason courts are permitted such leeway in the case of non-merits dismissals

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Amendment is not a true limitation upon the court's subject matter jurisdiction." *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir.), *amended on denial of reh'g*, 201 F.3d 1186 (9th Cir. 1999).

is because "[j]urisdiction is vital only if the court proposes to issue a judgment on the merits." *Id.* at 431 (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)).

We acknowledge that the Supreme Court has not expressly identified issue preclusion as a threshold ground for denying audience to a case on the merits, nor have we previously identified it as such. *Cf. Yokeno*, 754 F.3d at 651 n.2 (noting that we have not previously identified claim preclusion—a doctrinal cousin of issue preclusion—as a threshold ground for denying audience to a case on the merits and declining to do so). However, the Court's guidance with respect to related doctrines provides us with sufficient indication that issue preclusion "represents the sort of 'threshold question' [that] . . . may be resolved before addressing jurisdiction." *Sinochem*, 549 U.S. at 431 (alteration in original) (quoting *Tenet v. Doe*, 544 U.S. 1, 7, n.4, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005)).

The first indication comes from the Court's previous characterization of the doctrine of res judicata—a doctrine that comprises both claim and issue preclusion. As the Court has explained, this doctrine allows courts to dispose of cases "*without reaching the merits of the controversy.*" *See C.I.R. v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 92 L. Ed. 898 (1948) (emphasis added). This language provides a strong indication that issue (and claim) preclusion dismissals are non-merits dismissals.

Additional support comes from the Court's opinion in *Sinochem*, which was decided in the context of a *forum non conveniens* dismissal but announced principles of

broader applicability. In *Sinochem*, the Court counseled that whether a dismissal is on the merits depends on whether resolution of the dismissal motion "entail[s] any assumption by the court of substantive 'law-declaring power.'" 549 U.S. at 433 (quoting *Ruhrgas*, 526 U.S. at 584-85). Because resolving a *forum non conveniens* motion does not entail such assumption, the Court concluded that a *forum non conveniens* dismissal is not on the merits. *Id.*

Resolution of an issue preclusion motion likewise does not require the court to assume substantive law-declaring power. Just as a *forum non conveniens* dismissal is a determination that the merits should be adjudicated by a different court, an issue preclusion dismissal is a determination that the merits (of at least one issue) *have already been* adjudicated by a different court. *Id.* at 432 ("A *forum non conveniens* dismissal 'den[ies] audience to a case on the merits'; it is a determination that the merits should be adjudicated elsewhere." (alteration in original) (citation omitted)); *cf. Hoffman v. Nordic Nats., Inc.*, 837 F.3d 272, 277 (3d Cir. 2016) (describing claim preclusion as "a determination that the merits have already been adjudicated elsewhere" and concluding that the district court was permitted to "'bypass' the jurisdictional inquiry in favor of a non-merits dismissal on claim preclusion grounds" (citations and alteration omitted)). In each case, the power to declare the substantive law lies—or lay, as the case may be—elsewhere.

In *Sinochem*, the Court also made clear that whether a dismissal is on the merits does *not* necessarily depend on whether the district court considered the merits of

the underlying dispute in ruling on the dismissal motion. Indeed, resolution of several threshold issues—including personal jurisdiction and *forum non conveniens*—may "involve a brush with 'factual and legal issues of the underlying dispute.'" *Sinochem*, 549 U.S. at 433 (citation omitted). The "critical point" remains whether the district court was required to assume substantive law-declaring power to resolve the dismissal motion. *Id.* Here, as in *Sinochem*, it was not. Accordingly, we now conclude, as a matter of first impression, that an issue preclusion dismissal is a non-merits dismissal, and thus issue preclusion may be resolved by a federal court before it addresses its jurisdiction.

### B. Jurisdictional Issues Would Have Been "Difficult to Determine," and Dismissing on the Ground of Issue Preclusion was "the Less Burdensome Course"

Our conclusion that issue preclusion dismissals are non-merits dismissals does not end our inquiry. Rather, we must also consider whether jurisdictional issues would have been "difficult to determine" such that dismissing on the ground of issue preclusion was "the less burdensome course." *Id.* at 436.

The leeway courts are afforded in choosing among threshold non-merits grounds for dismissal amounts to an "exception to the general rule that federal courts normally must resolve questions of subject matter jurisdiction *before* reaching other threshold issues." *Potter v. Hughes*, 546 F.3d 1051, 1056 n.2 (9th Cir. 2008) (emphasis added) (internal quotation marks omitted). The contours of this

exception are carefully circumscribed. The Court in *Sinochem* admonished district courts that they should avail themselves of this exception only "where subject-matter or personal jurisdiction is difficult to determine," and dismissal on another threshold ground is clear. 549 U.S. at 436. Under such circumstances, judicial economy is served by the court "tak[ing] the less burdensome course" of dismissing on a clear, non-jurisdictional, non-merits ground rather than wading into murkier jurisdictional issues. *Id.* at 435-36. Conversely, a court ought not apply this exception where it "can readily determine that it lacks jurisdiction over the cause or the defendant." *Id.* at 436.

Here, resolving the threshold jurisdictional issues before the district court would have "involve[d an] arduous inquiry." *Id.* (quoting *Ruhrgas*, 526 U.S. at 587-88). The Snoqualmie's response to the State's facial motion to dismiss included a request to amend its complaint, which would have ultimately triggered a flurry of motions burdening the parties "with expense and delay," and "all to scant purpose: The [d]istrict [c]ourt inevitably would dismiss the case without reaching the merits, given its well-considered [issue preclusion] appraisal." *Id.* at 435. The district court thus acted within its discretion when it took the "less burdensome course" of dismissing on the ground of issue preclusion. *Id.* at 436; *cf. Env't Conservation Org. v. City of Dallas*, 529 F.3d 519, 525 (5th Cir. 2008) (recognizing that a federal court may have leeway to dismiss on the ground of res judicata prior to determining standing, but concluding that the court did not have such leeway because "the res judicata analysis [was] no less burdensome than the standing inquiry"). Indeed, the district court's dismissal was consonant with

the considerations of judicial economy that motivated the Court's decision in *Sinochem. See* 549 U.S. at 435 ("Judicial economy is disserved by continuing litigation in the [district court] given the proceedings long launched in China."); *see also Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1088 (9th Cir. 2009) ("In *Sinochem*, the Supreme Court offered the lower courts a practical mechanism for resolving a case that would ultimately be dismissed.").

Because issue preclusion dismissals are non-merits dismissals, and it was reasonable for the district court to conclude that dismissing on the ground of issue preclusion was "the less burdensome course," the district court did not abuse its discretion in dismissing the Snoqualmie's complaint before first establishing its subject matter jurisdiction over the Snoqualmie's claims.

## II. The Snoqualmie and the Samish are Precluded by this Court's Decision in *Washington II* from Litigating their Treaty Hunting and Gathering Rights Under the Treaty of Point Elliott

We now turn to *de novo* review of the district court's dismissal based on issue preclusion. *See Garity v. APWU Nat'l Lab. Org.*, 828 F.3d 848, 854 (9th Cir. 2016) ("We . . . review the district court's ruling on issue preclusion *de novo*.").

Issue preclusion, which "bars the relitigation of issues actually adjudicated in previous litigation," applies where four conditions are 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.

*Janjua v. Neufeld*, 933 F.3d 1061, 1065 (9th Cir. 2019) (citations omitted).

The parties dispute only the first and second conditions.[5] The Snoqualmie argues that issue preclusion does not apply because its treaty hunting and gathering rights were not "actually litigated" in *Washington II*, and, even if issue preclusion were otherwise to apply, exceptions to that doctrine nonetheless permit its claims to proceed. We disagree on both counts and accordingly affirm the district court's issue preclusion dismissal.[6]

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5. While the State cites *Garity* and identifies a slightly different issue preclusion standard, both parties agree that the only conditions challenged on appeal address whether the Snoqualmie seeks to litigate an issue identical to that actually litigated and decided in *Washington II*. *See Garity*, 828 F.3d at 858 n.8 (noting that issue preclusion applies if "(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom [issue preclusion] is asserted was a party or in privity with a party at the first proceeding" (alteration in original) (citation omitted)).

6. Our conclusion that the district court's factual finding made in *Washington II* has preclusive effect forecloses the Snoqualmie's argument that the district court exceeded its constitutional authority by abrogating the Tribe's treaty rights. This argument puts the

### A. In *Washington II*, the Snoqualmie Actually Litigated the Identical Issue It Now Seeks to Litigate: Treaty-Tribe Status

The issue the Snoqualmie now seeks to litigate is identical to that actually litigated and decided in *Washington II*. In its complaint, the Snoqualmie seeks a declaration that it "is a signatory to the Treaty of Point Elliott," "has maintained a continuous organized structure since," and is thus "entitled to exercise rights"—including the hunting and gathering rights at issue here—under the Treaty. In other words, the Snoqualmie seeks to litigate its treaty-tribe status under the Treaty, a point it makes explicit in its description of its first cause of action: "Declaration of Treaty Status." Absent treaty-tribe status, the Snoqualmie has no claim to any rights under the Treaty.

In *Washington II*, the district court—and this court on appeal—considered and decided this exact issue. In *Washington II*, the Snoqualmie sought to exercise treaty fishing rights under the Treaty, and we made explicit that they could do so only if they had treaty-tribe status. 641 F.2d at 1372-73. We reiterated that treaty-tribe status is established when a group of Indians is "descended from a treaty signatory" and has "maintained an organized tribal structure," and we noted that whether these conditions are met "is a factual question which a district court is competent to determine." *Id.* at 1371 (quoting *Washington*

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cart before the horse, assuming the very issue on appeal—namely, whether the Snoqualmie has treaty-tribe status under the Treaty.

*I*, 520 F.2d at 693). We then affirmed the district court's factual finding that the Snoqualmie, though descended from a treaty-signatory tribe, *see id.* at 1370, had not maintained an organized tribal structure and thus was not entitled to exercise rights under the Treaty because it lacked treaty-tribe status, *id.* at 1374.

Given our holding in *Washington II*, it was no leap for the district court to conclude that the factual issue actually litigated and decided in that case—the Snoqualmie's treaty-tribe status—is identical to the issue the Snoqualmie now seeks to litigate. The difference in treaty rights at issue—fishing rights in *Washington II*, hunting and gathering rights here—is immaterial to this conclusion. Though only treaty fishing rights claims were asserted in *Washington II*, the treaty-tribe status of the Snoqualmie, among others, was the predicate issue actually litigated and decided in order to resolve those claims. And though only treaty hunting and gathering rights claims have been asserted in this litigation, the Snoqualmie's treaty-tribe status "is the same gateway question" any court would face when determining its entitlement to exercise those rights under the Treaty.

### B. *Washington IV* did not Create an Exception to Issue Preclusion

The Snoqualmie and the Samish (together, the "Tribes") also argue that even if issue preclusion were ordinarily to apply, it does not apply here because our en banc decision in *Washington IV* announced an exception to issue preclusion for newly recognized tribes. This

argument fails for the simple reason that *Washington IV* announced no such exception.

The Tribes locate their purported exception in two sentences in *Washington IV*:

> 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.

593 F.3d at 800. They parse these sentences and endeavor to derive a rule: (1) a "newly recognized tribe" (2) may present a claim of "treaty rights not yet adjudicated," (3) and, in proving its claim, it will be required to introduce factual evidence "anew." The Tribes claim that they come within this exception because they are newly recognized tribes and their treaty hunting and gathering rights have not yet been adjudicated. Thus, they argue, they are permitted in this litigation to establish their entitlement to exercise these unadjudicated treaty rights by introducing factual evidence anew.

The Tribes' argument finds no support in *Washington IV*. First, our opinion in *Washington IV* is devoted to reaffirming our prior holdings in *Greene I* and *II* that the treaty rights and federal recognition inquiries are distinct and independent. *See Washington IV*, 593 F.3d

at 793 (overruling *Washington III* and holding that "recognition proceedings and the fact of recognition have no effect on the establishment of treaty rights"). Indeed, we convened the court en banc in *Washington IV for the express purpose* of addressing the fundamental inconsistency between *Washington III* and the *Greene* cases—an inconsistency we ultimately resolved "in favor of the *Greene* proposition." *Id.*

The remainder of the paragraph in which the Tribes' purported exception is situated confirms the scope of our holding:

> In *Greene II*, we denied any estoppel effect of *Washington II* on the Samish Tribe's recognition proceeding, because treaty litigation and recognition proceedings were "fundamentally different" and had no effect on one another. Our ruling was part of a two-way street: treaty adjudications have no estoppel effect on recognition proceedings, and recognition has no preclusive effect on treaty rights litigation. Indeed, to enforce the assurance in *Greene II* that treaty rights were "not affected" by recognition proceedings, the fact of recognition cannot be given even presumptive weight in subsequent treaty litigation. To rule otherwise would not allow an orderly means of protecting the rights of existing treaty tribes on the one hand, and groups seeking recognition on the other.

*Id.* at 800-01 (citations omitted).

Reading the entire paragraph in context, it is clear that the focus of the sentences the Tribes rely on is *not* the preclusive effect—or lack thereof, as they argue—of their prior treaty rights litigation in subsequent treaty rights litigation, but rather the preclusive effect—or lack thereof, as we concluded—of *federal recognition* in subsequent treaty rights litigation. This context serves only to underscore the fact that the exception the Tribes seek here—which would grant them an issue preclusion exception in future treaty rights litigation *on the basis of their newly recognized statuses*—turns on its head the *Washington IV* holding that treaty rights litigation and federal recognition proceedings "[have] no effect on one another." *Id.* at 800. We decline—indeed, we are unable—to countenance an exception that adopts a principle *Washington IV* repudiated.

Second, and more specifically, *Washington IV* explicitly reaffirms that the "the Samish tribe"—and the Snoqualmie by extension—"had a factual determination finally adjudicated against [them] in *Washington II*." *Id.* As we explained, this "crucial finding of fact"—"that the [Tribes] had not functioned since treaty times as 'continuous separate, distinct and cohesive cultural or political communities,'" *id.* at 799 (alteration omitted) (quoting *Washington II*, 641 F.2d at 1373)—"justif[ied] the denial of treaty rights" under the Treaty, *id.* We thus recognized that the factual findings affirmed in *Washington II* had the effect of denying the Tribes treaty-tribe status under the Treaty. Given *Washington*

*IV*'s explicit reaffirmation of the finality of these factual findings, there is no basis to undo that finality by adopting the Tribes' purported exception.

Finally, we consider the practical consequences of the Tribes' purported exception. Embracing this exception would allow for the incongruous result that a tribe could have treaty-tribe status with respect to some treaty rights but not with respect to others—even where, as here, those rights appear in the *very same article* of the treaty. *See* Treaty Between the United States & the Dwamish, Suquamish, & Other Allied & Subordinate Tribes of Indians in Washington Territory, 12 Stat. 927, Article V (U.S. Treaty Apr. 11, 1859) (reserving, for the signatory tribes, both fishing and hunting and gathering rights). While our opinion in *Washington IV* was intended to ensure an "orderly means of protecting" treaty rights, recognizing the Tribes' purported exception would have the opposite effect. *See* 593 F.3d at 801. Accordingly, we decline to derive from *Washington IV* an exception that would inject incongruity into the treaty rights regime in Washington.

### C. No Other Exception to Issue Preclusion Applies

The Snoqualmie finally argues that even if *Washington IV* does not create an exception, two exceptions identified in the Restatement (Second) of Judgments apply. We disagree.

The Restatement (Second) of Judgments identifies several exceptions to the general rule of issue preclusion.

The two exceptions offered by the Snoqualmie provide that "relitigation of [an] issue in a subsequent action between the parties is not precluded" where:

> [1] The issue is one of law and . . . 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; or
>
> [2] A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them[.]

Restatement (Second) of Judgments § 28 (1982).

The Snoqualmie's claim to the first of these exceptions fails for the simple reason that the issue the Snoqualmie seeks to relitigate is a *factual* issue, and this exception applies only to issues of law. *See id.* The Snoqualmie's claim to this exception further fails because it is tethered to *Washington IV*, which the Tribe argues "constitutes a change in the applicable legal context" such that issue preclusion does not apply. But, for reasons we have already articulated, *Washington IV* did not announce an exception to issue preclusion for newly recognized tribes, and thus the applicable legal context remains unchanged.

The Snoqualmie also unsuccessfully stakes its claim to this exception in the decision of the Assistant Secretary of

Indian Affairs to take land into trust on its behalf. *See* U.S. Dep't of Interior, Fee-to-Trust Decision (Mar. 18, 2020), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ots/pdf/ Snoqualmie_Indian_Tribe.pdf (last visited June 24, 2021). This decision recognizes that the Snoqualmie was a signatory to the Treaty and that the Treaty "remains in effect today." *See id.* at 36, 39. It further recognizes that "the Snoqualmie Tribe was clearly identified as derived from the treaty-signatory Snoqualmie." *Id.* at 39. These conclusions, the Snoqualmie argues, "markedly alter the applicable legal context for [its] assertion of treaty rights under the new rule of *Washington IV*." Setting to one side whether these *factual* conclusions change the applicable *legal* context, this argument fails because it is simply a repackaged attempt to give administrative rulings effect in subsequent treaty rights litigation, which *Washington IV* explicitly forbids.[7] *See Washington IV*, 593 F.3d at 800 ("The fact that a subsequent administrative ruling for another purpose may have made underlying inconsistent findings is no reason for undoing the finality of the *Washington II* factual determinations.").[8]

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7. The Snoqualmie's suggestion that the district court should have deferred to determinations made in the Tribe's federal recognition decision and that we should defer to determinations made in the fee-to-trust decision would likewise run afoul of our holding in *Washington IV*.

8. We also reject the Snoqualmie's suggestion that this exception should apply because preclusion "would result in a manifestly inequitable administration of the laws." Restatement (Second) of Judgments § 28. The Tribe argues that preclusion of all of its treaty rights claims under the Treaty on the basis of factual findings made by the district court in *Washington II* in 1979 would cause

The Snoqualmie's claim to the second exception is grounded in the allegedly questionable quality and extensiveness of the procedures employed in *Washington II* to determine the factual issue of the Tribe's treaty-tribe status. But as we pointed out in *Washington IV*, the factual finding that lies at the heart of this appeal was "made by a special master after a five-day trial, and . . . again by the district judge de novo after an evidentiary hearing." 593 F.3d at 799. And the Samish—and, by extension, the Snoqualmie, too—had no reason "to hold back any evidence" at those hearings, nor did they lack incentive "to present in *Washington II* all of [their] evidence supporting [their] right to successor treaty status." *Id.* In the face of these conclusions, we cannot countenance the Snoqualmie's argument that "[a] new determination of the issue [of its treaty-tribe status] is warranted by differences in the quality or extensiveness of the procedures followed" in *Washington II*. *See* Restatement (Second) of Judgments § 28.

## CONCLUSION

We affirm the district court's issue preclusion dismissal because the issue the Snoqualmie now seeks

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it irreparable harm. Accepting the Snoqualmie's argument would open the floodgates of relitigation; finality would become elusive as parties continued to relitigate facts whenever future interests were threatened by prior determinations. Elevating parties' claims of harm, valid though they may be, over the finality of legitimate court decisions would deal a fatal blow to principles of res judicata: "If relitigation were permitted whenever it might result in a more accurate determination, in the name of 'justice,' the very values served by preclusion would be quickly destroyed." 18 Charles Alan Wright et al., Federal Practice and Procedure § 4426 (3d ed. 2005).

to litigate—its treaty-tribe status under the Treaty of Point Elliott—is identical to the issue actually litigated and decided in *Washington II*, and no issue preclusion exception applies.

**AFFIRMED**.[9]

9. We **DENY** the Tribes' requests that we take judicial notice of—and with respect to one request also supplement the record on appeal with—the administrative decisions and a district court judgment.

**APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON AT TACOMA, FILED MARCH 18, 2020**

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. 3:19-CV-06227-RBL

SNOQUALMIE INDIAN TRIBE,

*Plaintiff,*

v.

STATE OF WASHINGTON, *et al.*,

*Defendant.*

ORDER GRANTING DEFENDANT STATE OF WASHINGTON'S MOTION TO DISMISS AND DENYING PENDING MOTIONS AS MOOT

DKT. ## 17, 26, 28, 29

March 18, 2020, Decided
March 18, 2020, Filed

**INTRODUCTION**

THIS MATTER is before the Court on Defendants State of Washington, Governor Jay Inslee, and Washington

*Appendix B*

Department of Fish & Wildlife Director Kelly Susewind's Motion to Dismiss under Rule 12(c). Dkt. # 29. In 1855, members of several Washington tribes signed the Treaty of Point Elliott, which ceded Indian-owned land in exchange for various rights. Plaintiff Snoqualmie Indian Tribe claims it is a signatory to the Treaty and therefore holds hunting and gathering rights under it. Complaint, Dkt. # 1, at 6-8. However, a previous case adjudicating fishing rights found that the Snoqualmie Tribe was not a successor in interest to the Treaty signatories because it had not maintained an organized structure since 1855. *See United States v. State of Wash.*, 476 F. Supp. 1101, 1104 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981). The State now moves to dismiss by arguing, among other things, that this prior determination precludes the Snoqualmie's claims in this case. The Court agrees and GRANTS the State's Motion. All other pending motions are DENIED AS MOOT.

## BACKGROUND

### 1. The Snoqualmie Tribe's Allegations regarding its Rights under the Treaty of Point Elliott

The Snoqualmie Tribe is a federally-recognized Native American tribe with a reservation near Snoqualmie, Washington. Complaint, Dkt. # 1, at 2. For generations, the Snoqualmie people have engaged in hunting and gathering to sustain themselves. *Id.* at 3. The Snoqualmie currently regulate hunting and gathering pursuant to tribal code. *Id.* at 2.

*Appendix B*

In 1854 and 1855, the United States and a number of tribes executed treaties known as the "Stevens Treaties" in which tribes relinquished their claims to most territory in Washington State but reserved certain rights for themselves. *Id.* at 3-4. One of these treaties was the Treaty of Point Elliott, Article V of which stated:

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

*Id.* at 4.

The Snoqualmie Tribe alleges that it is a signatory to the Treaty of Point Elliott through several members of the "winter villages" that made up the Tribe in 1855, including Chief Pat Kanim. *Id.* The Snoqualmie correctly point out that the Bureau of Indian Affairs (BIA) acknowledged the Tribe's participation in the Treaty of Point Elliott when approving its petition for federal recognition in 1997. *See Final Determination To Acknowledge the Snoqualmie Tribal Organization*, 62 Fed. Reg. 45864-02, 45865 (1997) ("The Snoqualmie tribe was acknowledged by the Treaty of Point Elliott in 1855 and continued to be acknowledged after that point.").

*Appendix B*

The Washington Department of Fish and Wildlife (WDFW) provides a process by which Native American tribes who are signatories to the Stevens Treaties can obtain traditional area hunting designations from the State. *Id.* at 5. In 2019, WDFW informed tribes who were signatories to the Stevens Treaties that WDFW intended to update its procedures for evaluating tribes' asserted hunting and gathering rights, but the Snoqualmie were not contacted. *Id.* at 5. The Snoqualmie reached out to WDFW with evidence of their treaty status, but WDFW responded with a letter stating that "the Snoqualmie Tribe does not have off-reservation hunting and fishing rights under the Treaty of Point Elliott." *Id.* at 6.

After another attempt to resolve the issue, the Snoqualmie sued the State on December 20, 2019. Their Complaint seeks a declaration that the Snoqualmie Tribe has "maintained a continuous organized structure" since its members signed the Treaty of Point Elliott in 1855, making the present Tribe a signatory. *Id.* at 6, 8. The Snoqualmie thus ask that the Court recognize their hunting and gathering rights under Article V of the Treaty and order the State to treat the Snoqualmie equally with other signatory tribes. *Id.* at 7-9.

**2. Judge Boldt's Determination of the Snoqualmie's Treaty Status in *Washington II***

This is not the first time a court has evaluated the Snoqualmie's rights under the Treaty of Point Elliott. In 1974, Judge Boldt issued a decision granting fishing rights to fourteen tribes that were signatories to the

Stevens Treaties. *See United States v. Washington*, 384 F. Supp. 312, 406 (W.D. Wash. 1974) (*Washington I*). The Snoqualmie were not included. Later that year, the Snoqualmie and four other tribes intervened in the case, arguing that they were also signatories to the Stevens Treaties and entitled to fishing rights. *United States v. State of Wash.*, 98 F.3d 1159, 1161 (9th Cir. 1996) (recounting history of 1970's proceedings). Judge Boldt referred the matter to Magistrate Judge Robert Cooper, who determined that the five tribes had no rights under the Stevens Treaties because they had not maintained political cohesion since 1855. *Id.*

The Snoqualmie (along with the four other tribes) objected to Judge Cooper's report and recommendation, and Judge Boldt held a three-day de novo evidentiary hearing. *Id.* However, Judge Boldt ultimately agreed with Judge Cooper, concluding that the Snoqualmie had "not lived as a continuous separate, distinct and cohesive Indian cultural or political community" and "not maintained an organized tribal structure in a political sense." *United States v. State of Wash.*, 476 F. Supp. 1101, 1109 (W.D. Wash. 1979) (*Washington II*). Consequently, Judge Boldt held that the Snoqualmie Tribe was "not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott" and had no fishing rights as a result. *Id.*

The Snoqualmie appealed, but the Ninth Circuit affirmed the district court's decision. *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981). The court noted that, because Judge Boldt had adopted much of

the United States' proposed findings of fact, it would apply "close scrutiny" to the lower court's decision. *Id.* at 1371. Although the Ninth Circuit rejected Judge Boldt's statement that tribal treaty rights were contingent on federal recognition, it nonetheless held that the record supported the district court's outcome. *Id.* at 1372. The court explained that there is "a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure." *Id.* (citing *United States v. State of Wash.*, 520 F.2d 676, 693 (9th Cir. 1975)). The court held that the Snoqualmie did not meet this requirement, citing a lack of government control of tribal members, absence of "continuous informal cultural influence," intermarriage with non-Indians, and settlement in non-Indian residential areas. *Id.* at 1373-74. The tribes appealed to the Supreme Court but were denied certiorari. *Duwamish, Samish, Snohomish, Snoqualmie & Steilacoom Indian Tribes v. Washington*, 454 U.S. 1143, 102 S. Ct. 1001, 71 L. Ed. 2d 294 (1982).

Although the panel upheld Judge Boldt's decision in *Washington II*, Judge Canby wrote in dissent that Judge Boldt's erroneous belief that federal recognition was necessary for treaty rights had "permeated the entire factual inquiry." 641 F.2d at 1375. Specifically, Judge Canby explained that Judge Boldt's factual determinations were designed to meet a "more stringent requirement" derived from the BIA's federal recognition standard, rather than "the proper requirement that 'some defining characteristic of the original tribes persist in an evolving

tribal community.'" *Id.* (quoting majority opinion). The dissent therefore concluded that a new factual determination was warranted. *Id.*

### 3. The Impact of *Washington II*

Judge Boldt's decision in *Washington II* and the Ninth Circuit's affirmation have cast a long shadow. In *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993), the Tulalip Tribe attempted to intervene in the Samish Tribe's federal recognition proceedings by arguing that federal recognition of the Samish could undermine the finality of *Washington II*. The Ninth Circuit rejected this because federal recognition "serves a different legal purpose and has an independent legal effect" and "is not a threshold condition a tribe must establish to fish under the Treaty of Point Elliott." *Id.* at 976-77. The Tulalip then tried to argue that the Samish's petition for recognition was precluded by the factual determination in *Washington II*, but the Ninth Circuit was similarly unpersuaded that the rights at issue in that case had any impact on recognition proceedings before the BIA. *Greene v. Babbitt*, 64 F.3d 1266, 1271 (9th Cir. 1995).

There have also been several unsuccessful attempts to reopen Judge Boldt's decision in *Washington II*. In 1996, the Ninth Circuit rejected a motion by the Duwamish, Snohomish, and Steilacoom Tribes to reopen the case based on allegations that Judge Boldt was suffering from Alzheimer's Disease at the time of his ruling. *United States v. State of Wash.*, 98 F.3d 1159, 1163 (9th Cir. 1996) (*Washington III*). According to the court, the tribes'

evidence that Judge Boldt had been an incompetent factfinder, which consisted only of his death certificate and a *Seattle Post-Intelligencer* article, did not cast doubt on the 1979 case's outcome. *Id.*

Then, in 2002, the Samish Tribe moved to reopen *Washington II* based on the tribe's successful application for federal recognition. *United States v. Washington*, 394 F.3d 1152, 1156 (9th Cir. 2005). After multiple appeals, an en banc Ninth Circuit panel affirmed the district court's denial of the motion. *United States v. Washington*, 593 F.3d 790, 793 (9th Cir. 2010) (*Washington IV*). In a decision written by Judge Canby, the court concluded that its holding in *Greene* was a "two-way street: treaty adjudications have no estoppel effect on recognition proceedings, and recognition has no preclusive effect on treaty rights litigation." *Id.* at 800. Consequently, although the Samish's federal recognition was likely based on findings inconsistent with *Washington II*, that did not justify "undoing the finality of the *Washington II* factual determinations." *Id.* That said, the court pointed out that nothing in its holding "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." *Id.* at 801.

## DISCUSSION

Although the effects of Judge Boldt's 1979 decision have been thoroughly litigated, this case presents a new question: does the determination in *Washington II* that the Snoqualmie have no fishing rights under the Treaty of

Point Elliott preclude a finding that the Tribe has hunting and gathering rights? Issue preclusion "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 858 n.8 (9th Cir. 2016) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)). The doctrine applies if: "(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom [issue preclusion] is asserted was a party or in privity with a party at the first proceeding." *Id.* at 858 n.8.

Here, the second and third elements are clearly met; the Snoqualmie are the same tribal entity that intervened in *Washington II*, and the Ninth Circuit's decision affirming the district court was a final judgment on the merits. This is no less true simply because the judgment concerned fishing rights. Issue preclusion only requires that the issue decided was essential to a final judgment about *something*; the relevant issue may be broader than the claim that was adjudicated. *See Sturgell*, 553 U.S. at 892. Otherwise, issue and claim preclusion would be the same.

The parties mainly dispute the first element. The State argues that the Snoqualmie's claims are barred because, although the *Washington* line of cases concern fishing rights and not hunting and gathering, the decisive question

of tribal continuity since treaty execution precedes the possibility of *any* treaty rights. The Snoqualmie resist this conclusion, emphasizing that *Washington II* did not extend beyond fishing rights. The Snoqualmie also assert that the factual issues in *Washington II* were different than the current case because of Judge Boldt's erroneous focus on federal recognition. Finally, if issue preclusion would normally apply, the Snoqualmie contend that the Court should make an exception here and allow their claims to go forward.

**1. Identity of Issues**

Despite the Snoqualmie's novel claims, the factual issue 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. The type of rights sought is a distinction without a difference. The Ninth Circuit's decision affirming *Washington II* unequivocally addressed the "single condition" necessary for determining whether a "group asserting treaty rights [is the same] as the group named in the treaty[:]" maintenance of an organized tribal structure. 641 F.2d at 1372. The Snoqualmie do not explain how the factual issues necessary to determine signatory status with respect to fishing rights could differ from those required to determine hunting and gathering rights, all of which are described in the same article of the Treaty. This is because they do not differ; as the Ninth Circuit recognized, both issues hinge on the same question of identity between the original signatories and the present-day tribe. *See id.* at 1372.

The Snoqualmie insist that Judge Boldt and subsequent courts explicitly limited the *Washington* line of cases to fishing rights. *See, e.g.*, *Goldmark*, 994 F. Supp. 2d at 1174 (noting that "the scope of the hunting and gathering provision has not been previously litigated in federal court"); *Skokomish Indian Tribe v. Forsman*, 738 Fed. Appx. 406, 408 (9th Cir. 2018) ("No plausible reading" of the *U.S. v. Washington* litigation "supports the conclusion that [it] decided anything other than treaty fishing rights."). But while *Washington II* does not determine the scope of hunting and gathering rights, this says nothing about whether tribes that lack fishing rights because they lack successorship to any treaty signatories could nonetheless have other treaty rights. The Ninth Circuit's broad holding implicitly answers that question in the negative. 641 F.2d at 1372. As for Judge Boldt's statements, his focus on fishing rights does not change the implications of his factual finding.

Finally, the Snoqualmie's argument that this case raises new factual issues because Judge Boldt focused on federal recognition simply repeats the position from Judge Canby's dissent. *See id.* at 1375. If this could carry the day, the Snoqualmie and the other four intervening tribes from *Washington II* may possess *all* the rights from the Stevens Treaties, including fishing. But unfortunately for the Snoqualmie, Judge Canby's dissent was only a dissent; the majority addressed Judge Boldt's erroneous focus on recognition but still affirmed his factual determination based on the record. *Id.* at 1373. Because that determination is imperative for all treaty rights, including hunting and gathering, the requirements for issue preclusion are met.

**2. Exceptions to Issue Preclusion**

If issue preclusion applies, the Snoqualmie argue that the Tribe's federal recognition in 1997 justifies an exception. They specifically point to two exceptions described in Section 28 of the *Restatement (Second) of Judgments*: one that applies if the "issue is one of law" and there has been an "an intervening change in the applicable legal context," and a second that is relevant when there are "differences in the quality or extensiveness of the procedures followed in the two courts." Courts may, for example, circumvent issue preclusion if the decisive legal principle in the former case was overturned. *See Segal v. Am. Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979). The second exception is used more rarely, but one court applied it where the relevant issue was previously decided in small claims court, which lacks many procedural protections. *Clusiau v. Clusiau Enterprises, Inc.*, 225 Ariz. 247, 251, 236 P.3d 1194 (Ct. App. 2010). On the other hand, the mere fact that the issue was previously decided in state rather than federal court does not demonstrate inadequate procedures. *See Gilbert v. Constitution State Serv.*, Co., 101 F. Supp. 2d 782, 787 (S.D. Iowa 2000).

Here, these exceptions can only apply if: (1) the Ninth Circuit used the wrong standard in affirming *Washington II*, or (2) the Snoqualmie can demonstrate qualitative defects in the proceedings surrounding Judge Boldt's decision. Neither of these are the case. There is no indication that the standard requiring maintenance of an organized tribal structure has been overruled or altered since the decision upholding *Washington II*. Rather, courts

have continued to apply it. *See, e.g., Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1033 (E.D. Cal. 2012); *United States v. Confederated Tribes of Colville Indian Reservation*, 606 F.3d 698, 706 (9th Cir. 2010). The Snoqualmie also suggest that their federal recognition in 1997 creates a new legal context, but this is incorrect. Nothing about federal recognition constitutes a "change or development in the controlling legal principles" for determining treaty status. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1948).

Federal recognition does, of course, cast different light on the determination in *Washington II* that the Snoqualmie have not maintained an organized tribal structure since 1855. The BIA's Proposed Finding, which was largely adopted in the Final Determination regarding recognition, concluded that the Snoqualmie maintained a distinct political and cultural community from 1855 onward. *Proposed Finding for Federal Acknowledgment of the Snoqualmie Indian Tribe*, 58 Fed. Reg. 27162-01, 27163 (1993); *see also Final Determination*, 62 Fed. Reg. at 45865.

But the fact that the BIA reached a different conclusion about the Snoqualmie's political continuity does not mean the proceedings in *Washington II* were inadequate. As multiple courts have observed, the five intervening tribes had an opportunity to argue their positions and present evidence during hearings before Magistrate Judge Cooper, a three-day de novo hearing before Judge Boldt, and finally a hearing before the Ninth Circuit. *See Washington III*, 98 F.3d 1159 at 1161; *Washington IV*, 593

F.3d at 799. The Snoqualmie do not identify any specific facts that were not and could not have been presented in those prior proceedings. Indeed, as was true for the Samish, the Snoqualmie Tribe had every "incentive to present in *Washington II* all of its evidence supporting its right to successor treaty status." *Washington IV*, 593 F.3d at 799.

While the inconsistency between *Washington II* and the BIA's findings is disconcerting, that alone is not enough to dispense with issue preclusion. The Snoqualmie point out that Judge Boldt made several comments in his decision suggesting that it was temporally-limited and could change with a successful application for federal recognition. *See Washington II*, 476 F. Supp. at 1111 (concluding that the tribes were not political successors to the treaty signatories "at this time"). The Tribe also interprets the Ninth Circuit's observation in *Washington IV* that "a newly recognized tribe [is not precluded from] present[ing] a claim of treaty rights not yet adjudicated" as suggesting that issue preclusion should not apply if a tribe seeks a treaty right other than fishing. 593 F.3d at 801. But Judge Boldt's statements limiting his holding were premised on his belief that recognition status was dispositive. The reviewing panel that disabused him of that notion did not mention temporal limitations. 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 the Snoqualmie that *have* adjudicated the essential issue for determining treaty status.

The Ninth Circuit has made it clear that "treaty litigation and recognition proceedings [are] 'fundamentally different' and [have] no effect on one another." *Id.* at 800 (quoting *Greene*, 64 F.3d at 1270). While this statement was made in the context of reopening *Washington II*, its logic applies equally to issue preclusion. Judge Boldt's decision, as affirmed by the Ninth Circuit, was a final judgment concluding that the Snoqualmie are not political successors to the Treaty of Point Elliott signatories. That issue is dispositive for all claims in this case.

**CONCLUSION**

Because the factual issue at the heart of the Snoqualmie's claims has been resolved against them in a previous proceeding, this case must be DISMISSED with prejudice. The State's Motion is GRANTED, and all other pending motions are DENIED AS MOOT.

IT IS SO ORDERED.

Dated this 18th day of March, 2020.

/s/ Ronald B. Leighton
Ronald B. Leighton
United States District Judge

**APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED NOVEMBER 12, 2021**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35346 D.C. No. 3:19-cv-06227-RBL
Western District of Washington, Tacoma

SNOQUALMIE INDIAN TRIBE, A FEDERALLY RECOGNIZED INDIAN TRIBE ON ITS OWN BEHALF AND AS PARENS PATRIAE ON BEHALF OF ITS MEMBERS,

*Plaintiff-Appellant,*

v.

STATE OF WASHINGTON; JAY ROBERT INSLEE, GOVERNOR; KELLY SUSEWIND, WASHINGTON DEPARTMENT OF FISH & WILDLIFE DIRECTOR,

*Defendants-Appellees,*

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SAMISH INDIAN NATION,

*Intervenor.*

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*Appendix C*

No. 20-35353 D.C. No. 3:19-cv-06227-RBL

SNOQUALMIE INDIAN TRIBE, A FEDERALLY RECOGNIZED INDIAN TRIBE ON ITS OWN BEHALF AND AS PARENS PATRIAE ON BEHALF OF ITS MEMBERS,

*Plaintiff,*

and

SAMISH INDIAN NATION,

*Intervenor-Appellant,*

v.

STATE OF WASHINGTON; JAY ROBERT INSLEE, GOVERNOR; KELLY SUSEWIND, WASHINGTON DEPARTMENT OF FISH & WILDLIFE DIRECTOR,

*Defendants-Appellees.*

**ORDER**

Before: McKEOWN and PAEZ, Circuit Judges, and ORRICK*, District Judge.

* The Honorable William Horsley Orrick, United States District Judge for the Northern District of California, sitting by designation.

*Appendix C*

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

## APPENDIX D — TREATY WITH THE DWÁMISH &c. INDIANS, JANUARY 22, 1855

### TREATIES.

*Treaty between the United States and the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory. Concluded at Point Elliott, Washington Territory, January 22, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.*

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Jan. 22, 1855.

Preamble.

WHEREAS a treaty was made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh-kahmish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-

mish, Sah-ku-méhu, Noo-whá-há, Nook-wa-cháh-mish, Mee-see-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by them; which treaty is in the words and figures following to wit:

Contracting Parties.

Articles of agreement and convention made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh-kamish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-ha, Nook-wa-cháh-mish, Mee-sée-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

Cession of lands to the United States.
Boundaries.
Vol. x. p. 1132.

Article I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their

right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running alone, the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence round the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

Reservation.
Whites not to reside thereon unless, &c.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or

twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island called Sháis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the months emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

Further reservation for school.

ARTICLE III. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. Provided, however, that the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

Tribes to settle on reservation within one year.

ARTICLE IV. The said tribes and bands agree to remove to and settle upon the said first above mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

Rights and privileges secured to Indians.

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

Payment by the United States.
How to be applied.

ARTICLE VI. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner— that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for

the next four years, seven thousand five hundred dollars each year; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Indians may be removed to reservation, etc.
Lots may be assigned to individuals.
Vol. x. p. 1044.

Article VII. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations herein before made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article

of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Tribes to preserve friendly relations.
to pay for depredations.
not to make war except, &c.
to surrender offenders.

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said

tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Annuities to be withheld from those who drink etc., ardent spirits.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Tribes to free all slaves and not to acquire others. not to trade out of the United States.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

$15,000 appropriated for expenses of removal and resettlement.

ARTICLE XIII. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

United States to establish school and provide instructors, furnish mechanics, shops, physicians, &c.

ARTICLE XIV. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

*Appendix D*

Treaty when to take effect.

ARTICLE XV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Signatures, Jan, 22, 1855.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, *Governor and Superintendent,* [L. S.]
SEATTLE, *Chief of the Dwámish and Suquamish tribes.* his x mark. [L. S.]
PAT-KA-NAM, *Chief of the Snoqualmoo, Snohomish and other tribes.* his x mark. [L. S.]
CHOW-ITS-HOOT, *Chief of the Lummi and other tribes.* his x mark. [L. S.]
GOLIAH, *Chief of the Skagits and other allied tribes.* his x mark. [L. S.]
KWALLATTUM, or General Pierce, *Sub-chief of the Skagit tribe.* his x mark. [L. S.]
S'HOOTST-HOOT, *Sub-chief of Snohomish.* his x mark. [L. S.]
SHAH-TALC, or Bonaparte, *Sub-chief of Snohomish.* his x mark. [L. S.]
SQUUSH-UM, or The Smoke, *Sub-chief of the Snoqualmoo.* his x mark. [L. S.]

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SEE-ALLA-PA-HAN, or The Priest, *Sub-chief of Sk-tah-le-jum.* his x mark. [L. S.]
HE-UCH-KA-NAM, or George Bonaparte, *Sub-chief of Snohomish.* his x mark. [L. S.]
TSE-NAH-TALC, or Joseph Bonaparte, *Sub-chief of Snohomish.* his x mark. [L. S.]
NS'SKI-OOS, or Jackson, *Sub-chief of Snohomish.* his x mark. [L. S.]
WATS-KA-LAH-TCHIE, or John Hobtst-hoot, *Sub-chief of Snohomish.* his x mark. [L. S.]
SMEH-MAI-HU, *Sub-chief of Skai-wha-mish.* his x mark. [L. S.]
SLAT-EAH-KA-NAM, *Sub-chief of Snoqualmoo.* his x mark. [L. S.]
ST'HAU-AI, *Sub-chief of Snoqualmoo.* his x mark. [L. S.]
LUGS-KEN, *Sub-chief of Skai-wha-mish.* his x mark. [L. S.]
S'HEHT-SOOLT, or Peter, *Sub-chief of Snohomish.* his x mark. [L. S.]
DO-QUEH-OO-SATL, *Snoqualmoo tribe.* his x mark. [L. S.]
JOHN KANAM, *Snoqualmoo sub-chief.* his x mark. [L. S.]
KLEMSH-KA-NAM, *Snoqualmoo.* his x mark. [L. S.]
TS'HUAHNTL, *Dwa-mish sub-chief.* his x mark. [L. S.]
KWUSS-KA-NAM, or George Snatelum, Sen., *Skagit tribe.* his x mark. [L. S.]
HEL-MITS, or George Snatelum, *Skagit sub-chief.* his x mark. [L. S.]
S'KWAI-KWI, *Skagit tribe, sub-chief.* his x mark. [L. S.]

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SEH-LEK-QU, *Sub-chief Lummi tribe.* his x mark. [L. S.]
S'H'-CHEH-OOS, or General Washington, *Sub-chief of Lummi tribe.* his x mark. [L. S.]
WHAI-LAN-HU, or Davy Crockett, *Sub-chief of Lummi tribe.* his x mark. [L. S.]
SHE-AH-DELT-HU, *Sub-chief of Lummi tribe.* his x mark. [L. S.]
KWULT-SEH, *Sub-chief of Lummi tribe.* his x mark. [L. S.]
KWULL-ET-HU, *Lummi tribe.* his x mark. [L. S.]
KLEH-KENT-SOOT, *Skagit tribe.* his x mark. [L. S.]
SOHN-HEH-OVS, *Skagit tribe.* his x mark. [L. S.]
S'DEH-AP-KAN, or General Warren, *Skagit tribe.* his x mark. [L. S.]
CHUL-WHIL-TAN, *Sub-chief of Suquamish tribe.* his x mark. [L. S.]
SKE-EH-TUM, *Skagit tribe.* his x mark. [L. S.]
PATCHKANAM, or Dome, *Skagit tribe.* his x mark. [L. S.]
SATS-KANAM, *Squin-ah-nush tribe.* his x mark. [L. S.]
SD-ZO-MAHTL, *Kik-ial-lus band.* his x mark. [L. S.]
DAHTL-DE-MIN, *Sub-chief of Sah-ku-meh-hu.* his x mark. [L. S.]
SD'ZEK-DU-NUM, *Me-sek-wi-guilse sub-chief.* his x mark. [L. S.]
NOW-A-CHAIS, *Sub-chief of Dwamish.* his x mark. [L. S.]
MIS-LO-TCHE, or Wah-hehl-tchoo, *Sub-chief of Suquamish.* his x mark. [L. S.]
SLOO-NOKSH-TAN, or Jim, *Suquamish tribe.* his x mark. [L. S.]

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MOO-WHAH-LAD-HU, or Jack, *Suquamish tribe.* his x mark. [L. S.]
TOO-LEH-PLAN, *Suquamish tribe.* his x mark. [L. S.]
IIA-SEH-DOO-AN, or Keo-kuck, *Dwamish tribe.* his x mark. [L. S.]
HOOVILT-MEH-TUM, *Sub-chief of Suquamish.* his x mark. [L. S.]
WE-AI-PAH, *Skaiwhamish tribe.* his x mark. [L. S.]
S'AH-AN-HU, or Hallam, *Snohomish tribe.* his x mark. [L. S.]
SHE-HOPE, or General Pierce, *Skagit tribe.* his x mark. [L. S.]
HWN-LAH-LAKQ, or Thomas Jefferson, *Lummi tribe.* his x mark. [L. S.]
CHT-SIMPT, *Lummi tribe.* his x mark. [L. S.]
TSE-SUM-TEN, *Lummi tribe.* his x mark. [L. S.]
KLT-HAHL-TEN, *Lummi tribe.* his x mark. [L. S.]
KUT-TA-KANAM, or John, *Lummi tribe.* his x mark. [L. S.]
CH-LAH-BEN, *Noo-qua-cha-mish band.* his x mark. [L. S.]
NOO-HEH-OOS, *Snoqualmoo tribe.* his x mark. [L. S.]
HWEH-UK, *Snoqualmoo tribe.* his x mark. [L. S.]
PEH-NUS, *Skai-whamish tribe.* his x mark. [L. S.]
YIM-KA-NAM, *Snoqualmoo tribe.* his x mark. [L. S.]
TWOOI-AS-KUT, *Skaiwhamish tribe.* his x mark. [L. S.]
LUCH-AL-KANAM, *Snoqualmoo tribe.* his x mark. [L. S.]
S'HOOT-KANAM, *Snoqualmoo tribe.* his x mark. [L. S.]
SME-A-KANAM, *Snoqualmoo tribe.* his x mark. [L. S.]
SAD-ZIS-KEH, *Snoqualmoo.* his x mark. [L. S.]
HEH-MAHL, *Skaiwhamish band.* his x mark. [L. S.]

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CHARLEY, *Skagit tribe.* his x mark. [L. S.]
SAMPSON, *Skagit tribe.* his x mark. [L. S.]
JOHN TAYLOR, *Snohomish tribe.* his x mark. [L. S.]
HATCH-KWENTUM, *Skagit tribe.* his x mark. [L. S.]
YO-I-KUM, *Skagit tribe.* his x mark. [L. S.]
T'KWA-MA-HAN, *Skagit tribe.* his x mark. [L. S.]
STO-DUM-KAN, *Swinamish band.* his x mark. [L. S.]
BE-LOLE, *Swinamish band.* his x mark. [L. S.]
D'ZO-LOLE-GWAM-HU, *Skagit tribe.* his x mark. [L. S.]
STEH-SNAIL, William, *Skaiwhamish band.* his x mark. [L. S.]
KEL-KAHL-TSOOT, *Swinamish tribe.* his x mark. [L. S.]
PAT-SEN, *Skagit tribe.* his x mark. [L. S.]
PAT-TEH-US, *Noo-wha-ah sub-chief.* his x mark. [L. S.]
S'HOOLK-KA-NAM, *Lummi sub-chief.* his x mark. [L. S.]
CH-LOK-SUTS, *Lummi sub-chief.* his x mark. [L. S.]

Executed in the presence of us —
M.T. Simmons, *Indian Agent.*
C. H. Mason, *Secretary of Washington Territory.*
Benj. F. Shaw, *Interpreter.*
Chas. M. Hitchcock.
H. A. Goldsborough.
George Gibbs.
John H. Scranton.
Henry D. Cock.
S. S. Ford, Jr.
Orrington Cushman.
Ellis Barnes.

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R. S. Bailey.
S. M. Collins.
Lafayetee Balch.
E. S. Fowler.
J. H. Hall.
Rob't Davis.

Consent of Senate, March 8, 1859.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES,
March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen and delegates of the Dwámish, Suquámish and other allied and subordinate tribes of Indians occupying certain lands situated in Washington Territory, signed the 22d day of January, 1855.

"Attest: "ASBURY DICKINS, *Secretary.*"

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Proclamation, April 11, 1859.

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

[SEAL.]

Done at the city of Washington, this eleventh day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*