FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as parens patriae on behalf of its members, *Plaintiff-Appellant*, v. STATE OF WASHINGTON; JAY ROBERT INSLEE, Governor; KELLY SUSEWIND, Washington Department of Fish & Wildlife Director, *Defendants-Appellees*, SAMISH INDIAN NATION, *Intervenor.*	No. 20-35346 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*, SAMISH INDIAN NATION, *Intervenor-Appellant,* v.	No. 20-35353 D.C. No. 3:19-cv-06227-RBL OPINION

STATE OF WASHINGTON; JAY ROBERT INSLEE, Governor; KELLY SUSEWIND, Washington Department of Fish & Wildlife Director,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted February 5, 2021
Seattle, Washington

Filed August 6, 2021

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

Opinion by Judge McKeown

[Summary Omitted]

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

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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.

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).

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 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

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[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.

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 III* 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

[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*.

threshold issue of subject matter jurisdiction.[4] Whether it was within the 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 (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.

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[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 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).

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 (1999)). The reason courts are permitted such leeway in the case of non-merits dismissals 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 (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 (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

[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

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]

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

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

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 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]

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,

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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 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).

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 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.

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SNOQUALMIE INDIAN TRIBE, Plaintiff, v. STATE OF WASHINGTON, et al., Defendant.	CASE NO. 3:19-CV-06227-RBL ORDER GRANTING DEFENDANT STATE OF WASHINGTON'S MOTION TO DISMISS AND DENYING PENDING MOTIONS AS MOOT DKT. ## 17, 26, 28, 29 (Filed Mar. 18, 2020)

INTRODUCTION

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

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.").

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 (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

(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.3d 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"); *Skokmish 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.3d 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 (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 (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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its own behalf and as parens patriae on behalf of its members, Plaintiff-Appellant, v. STATE OF WASHINGTON; JAY ROBERT INSLEE, Governor; KELLY SUSEWIND, Washington Department of Fish & Wildlife Director, Defendants-Appellees, SAMISH INDIAN NATION, Intervenor.	No. 20-35346 D.C. No. 3:19-cv-06227-RBL Western District of Washington, Tacoma ORDER (Filed Nov. 12, 2021)
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.	No. 20-35353 D.C. No. 3:19-cv-06227-RBL

STATE OF WASHINGTON;
JAY ROBERT INSLEE, Governor;
KELLY SUSEWIND, Washington Department of Fish & Wildlife Director,

Defendants-Appellees.

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

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.

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