

8 F.4th 853

United States Court of Appeals, 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.

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.

No. 20-35346, No. 20-35353

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Argued and Submitted February 5, 2021 Seattle, Washington

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Filed August 6, 2021

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

## OPINION

McKEOWN, Circuit Judge:

\*856 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 \*857 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).<sup>1</sup> *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).<sup>2</sup> 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 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 \*858 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 \*859 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, \*860 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.<sup>3</sup>

## \*861 ANALYSIS

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

[<sup>1</sup>] [<sup>2</sup>] 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.<sup>4</sup> 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, 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

[<sup>3</sup>] 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, 127 S.Ct. 1184 (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 is because “[j]urisdiction is vital only if the court proposes to issue a judgment on the merits.” *Id.* at 431, 127 S.Ct. 1184 (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, 127 S.Ct. 1184 (alteration in original) (quoting *Tenet v. Doe*, 544 U.S. 1, 7, n.4, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005)).

**\*862** <sup>[4]</sup> 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, 127 S.Ct. 1184 (quoting *Ruhrgas*, 526 U.S. at 584–85, 119 S.Ct. 1563). 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.*

<sup>[5]</sup> 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, 127 S.Ct. 1184 (“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.

<sup>[6]</sup> 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, 127 S.Ct. 1184 (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, 127 S.Ct. 1184.

\*863 <sup>[7]</sup> <sup>[8]</sup> <sup>[9]</sup> 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, 127 S.Ct. 1184. 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, 127 S.Ct. 1184. 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, 127 S.Ct. 1184.

<sup>[10]</sup> 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, 119 S.Ct. 1563). 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, 127 S.Ct. 1184. 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, 127 S.Ct. 1184; *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, 127 S.Ct. 1184 (“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*.”).

\*864 <sup>[11]</sup> 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.<sup>5</sup> 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.<sup>6</sup>

#### **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 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.

\*865 <sup>[12]</sup> 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 \*866 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 \*867 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](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.<sup>7</sup> 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.”).<sup>8</sup>

\*868 <sup>[13]</sup> 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 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.<sup>9</sup>

## All Citations

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## Footnotes

- \* The Honorable William Horsley Orrick, United States District Judge for the Northern District of California, sitting by designation.
- <sup>1</sup> 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.
- <sup>2</sup> 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.
- <sup>3</sup> 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*.
- <sup>4</sup> 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).
- <sup>5</sup> 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)).

<sup>6</sup> 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.

<sup>7</sup> 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*.

<sup>8</sup> 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).

<sup>9</sup> 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.