

Nos. 20-35346, 20-35353

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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SNOQUALMIE INDIAN TRIBE, a federally recognized Indian tribe on its  
own behalf and as parens patriae on behalf of its members

*Plaintiff-Appellant,*

SAMISH INDIAN NATION,

*Intervenor-Appellant,*

v.

STATE OF WASHINGTON; and GOVERNOR JAY INSLEE and  
WASHINGTON DEPARTMENT OF FISH AND WILDLIFE DIRECTOR  
KELLY SUSEWIND, in their official capacities,

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. 3:19-cv-06227-RBL

The Honorable Ronald B. Leighton  
United States District Court Judge

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**DEFENDANTS-APPELLEES' RESPONSE BRIEF**

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## I. INTRODUCTION

Plaintiff-Appellant Snoqualmie Indian Tribe (“Snoqualmie”) seeks a declaration (and injunction) through this litigation that the Snoqualmie has hunting and gathering rights under the Treaty of Point Elliott. While the State is sympathetic to the Snoqualmie’s desire to have this claim addressed by a federal court, the decisive factual issue for this case was previously adjudicated by this Court in *United States v. Washington*, 641 F.2d 1368, 1372-74 (9th Cir. 1981). In that case, the Court affirmed “after close scrutiny” the factual determination that the Snoqualmie had not maintained an organized tribal structure—the “single necessary and sufficient condition for the exercise of treaty rights.” *Id.* at 1372, 1373. The Court revisited and confirmed “the finality of [those] factual determinations” in *United States v. Washington*, 593 F.3d 790, 800 (9th Cir. 2010). The district court closely examined the Court’s precedents, correctly determined that issue preclusion was dispositive to all claims in this case, and dismissed the complaint on res judicata grounds. This Court should affirm the district court’s decision.

## **II. JURISDICTIONAL STATEMENT**

The State agrees with the facts in the Snoqualmie Tribe's and the Samish Nation's jurisdictional statements.

## **III. ISSUES PRESENTED**

1. Did the district court correctly conclude that issue preclusion is dispositive for all claims in this case?

2. Did the district court have Article III constitutional authority to deny the relief requested and dismiss the complaint?

3. Did the district court act within its discretion in resolving the case on issue preclusion before addressing issues of sovereign immunity and standing?

4. Alternatively, should the Court affirm dismissal of the complaint on other grounds supported by the record, such as the State's Eleventh Amendment sovereign immunity, lack of standing, or failure to join other tribes that are necessary parties?

## **IV. STATEMENT OF THE CASE**

In the decision appealed from, the district court concluded that the Snoqualmie previously adjudicated and lost its claim to being successor to one of the tribes with which the United States negotiated the Treaty of Point Elliott,

12 Stat. 927 (1855) (hereinafter “Treaty”), in *United States v. Washington*, 476 F. Supp. 1101, 1108 (W.D. Wash. 1979), *aff’d*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). Accordingly, the district court dismissed the Snoqualmie’s complaint, which alleged that Defendants-Appellees the State of Washington, Governor Jay Inslee, and Washington Department of Fish and Wildlife Director Kelly Susewind (collectively, the “State”) violated federal law by not recognizing the Snoqualmie’s claim to treaty rights under the Treaty. Intervenor-Appellant the Samish Nation (“Samish”) similarly believes itself to be a successor-in-interest to treaty signatories of the Treaty.

## **A. Prior Litigation**

### **1. Tribal Treaty Litigation**

In a 1976 decision known as *Washington I*, Judge Boldt ruled that fourteen tribes were successors to the signatories of the Stevens Treaties (including the Treaty of Point Elliott) and that those tribes held treaty-protected fishing rights that entitled them to take up to fifty percent of the harvestable fish passing through their off-reservation fishing grounds. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (“*Washington I*”), *aff’d*, 520 F.2d 676 (9th Cir. 1975), *cert. denied sub nom Wash. Reef Net Owners*

*Ass’n v. United States*, 423 U.S. 1086 (1976). The Snoqualmie and Samish were not parties in *Washington I*.

Following *Washington I*, the Snoqualmie, Samish, and three other tribes sought to intervene to assert treaty fishing rights. *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979) (“*Washington I*”), *aff’d*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). The district court denied the intervenors’ treaty fishing rights claims, holding in part that “[n]one of the Intervenor entities . . . is at this time a treaty tribe in the political sense” and “[n]one of the intervenor entities . . . presently holds for itself or its members fishing rights secured by any of the Stevens treaties . . .” *Washington II*, 476 F. Supp. at 1111. With respect to the Snoqualmie, the district court based its conclusion, in part, on the finding that “[t]he the citizens comprising the Intervenor Snoqualmie Tribe have not maintained an organized tribal structure in a political sense.” *Id.* at 1109. With respect to the Samish, the district court found “[t]he members of the Intervenor Samish Tribe and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community.” *Id.* at 1106. In denying treaty status, the district court also relied on the fact that, at the time, the Snoqualmie and other tribes had not obtained federal recognition. *Id.* at 1106, 1109, 1111.

On appeal, the Ninth Circuit affirmed the *Washington II* holding, though the Court found that the district court erred in relying on lack of federal recognition as a basis for denying treaty status. 641 F.2d at 1371-72. This 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.* at 1372. The Court applied this standard to the record developed by the district court with respect to the Snoqualmie, Samish and three other intervenor tribes. After its own “close scrutiny” of the facts, it affirmed that the Snoqualmie and Samish had not made a sufficient showing of continuous political and cultural cohesion to establish that they constituted treaty tribes. *Id.* at 1373.

## **2. Federal Recognition and Related Litigation**

This Court has, on several occasions, considered efforts by tribal entities to seek federal recognition under 25 C.F.R. pt. 83, which is an administrative process distinct from judicial recognition of sovereign treaty rights. Through a line of cases in the late 1990s and early 2000s, this Court reinforced a clear distinction between cases adjudicating claims to treaty rights, like *Washington I* and *II*, and cases related to federal recognition of tribal entities.

Occasionally, established treaty tribes have sought to intervene in federal litigation to oppose tribes seeking federal recognition, based on concerns that their treaty rights would be adversely impacted, and the Court repeatedly rejected these arguments based on the distinction between treaty litigation and federal recognition. *E.g.*, *Greene v. Babbitt*, 996 F.2d 973, 975 (1993) (rejecting arguments that the factual inquiries underlying recognition were so similar to the inquiries underlying treaty rights that recognition was bound to affect treaty rights); *Greene v. Babbitt*, 64 F.3d 1266, 1270-71 (9th Cir. 1995) (disagreeing with amicus tribe's position that Samish success in recognition case would undermine the finality of the *Washington II* adjudication of treaty rights).

A fatal inconsistency, however, arose when this Court held in *United States v. Washington*, 394 F.3d 1152 (9th Cir. 2005) (“*Washington III*”) that that the Samish's Rule 60(b) motion for relief from *Washington II* may be warranted based on subsequent federal recognition. *Washington III* expressed the view that “federal recognition is a sufficient condition for the exercise of treaty rights.” 394 F.3d at 1158.

On remand, the district court again concluded that Rule 60(b) relief was not warranted, and this Court convened en banc to address the inconsistency

between *Washington III* and *Washington II*, which the district court's decision highlighted. 593 F.3d 790 (9th Cir. 2010) ("*Washington IV*"). The en banc Court in *Washington IV* confirmed the finality of *Washington II*, as affirmed by this Court, and overruled *Washington III*. *Id.* at 799. The Court was motivated by its concern that treaty tribes would impede federal recognition proceedings based on concerns that an "administrative finding might have an impact on future treaty litigation." *Id.* at 801. Thus, the Court concluded by adopting a firm rule that it would both "deny intervention [in recognition cases] by tribes seeking to protect their treaty rights" and "deny any effect of recognition in any subsequent treaty litigation." *Id.*

## **B. Procedural Background**

The Snoqualmie's complaint alleged that the Snoqualmie is a signatory to the Treaty and that it reserved rights and privileges under that Treaty that were reserved by the other treaty signatories, including the privilege of hunting and gathering "throughout the modern day state of Washington." ER771, ER774-76 (Complaint ¶¶ 1, 11-15, 29). It further alleged that the Washington Department of Fish and Wildlife ("WDFW") violated these rights by not requesting input from the Snoqualmie on WDFW's revised, draft guidelines for considering treaty tribes' assertion of hunting rights outside of a tribe's



treaty-ceded lands. ER775-76 (*Id.* ¶¶ 21-26). The Snoqualmie claimed the State violated the Equal Protection Clauses of the United States Constitution and the Washington Constitution. ER777-78 (*Id.* ¶¶ 35-39). The Snoqualmie sought a declaration that it is a signatory to the Treaty, as well as “an injunction requiring Defendants to comply with Federal law.” ER776-78 (*Id.*, ¶¶ 28-34, Prayer for Relief).

The State filed a Federal Rule of Civil Procedure 12(c) motion on the pleadings on the basis of the State’s Eleventh Amendment immunity, lack of standing, principles of res judicata—specifically, issue preclusion—and due to the Snoqualmie’s failure to join other parties that, absent a waiver of tribal sovereign immunity, are required to be joined under Rule 19. ER248-264. The Snoqualmie’s response requested that it be allowed to amend its complaint if the district court found the pleaded facts insufficient to establish standing or a waiver of sovereign immunity. State-ER91. In reply, the State suggested that it could be most efficient for the district court to address the core issues of res judicata and joinder of parties under Rule 19 because these defects could not be cured by an amended complaint. State-ER117.

Several other Washington State tribes filed motions and briefs in the district court. The Tulalip Tribes moved to intervene as of right for the limited

purpose of filing a motion to dismiss. ER780. The Tulalip Tribes argued that the Snoqualmie's claim to sovereign treaty rights was barred by res judicata, and that the suit must be dismissed for failure to join the Tulalip Tribes as a party required under Federal Rule of Civil Procedure 19. State-ER05-07; State-ER13-15; *see also* State-ER19-43. In the Tulalips' view, they are the successor-in-interest to the sovereign treaty rights that the Snoqualmie seeks to claim. State-ER09-10; State-ER12; State-ER14-15. Seven tribes filed a joint motion for leave to file an amicus brief also arguing res judicata barred the Snoqualmie's claim of sovereign treaty rights and that the suit must be dismissed for failure to join other tribes with recognized treaty rights as parties required under Rule 19. State-ER44-67. The Samish filed a motion for leave to file an amicus brief primarily based on its interest as a tribe similarly situated to the Snoqualmie. ER272-318.

The district court granted the State's motion on the pleadings based on issue preclusion and denied all other pending motions as moot. ER2-13. The district court reviewed the factual findings in *Washington II*, this Court's affirmation of *Washington II*, and five subsequent Ninth Circuit cases, including *Washington IV*. ER4-7. The district court recognized that this case presents a new question regarding whether the *United States v. Washington*

litigation of fishing rights has a preclusive effect for hunting and gathering rights. ER7. The district court concluded that the “type of rights sought is a distinction without a difference” because this Court’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.” ER9 (citing 641 F.3d at 1372). The district court considered and rejected the Snoqualmie’s arguments that *Washington II* was limited to fishing issues, that exceptions to res judicata should be applied, that an administrative ruling required a different outcome, and that *Washington IV* had created an exception for the Snoqualmie to re-litigate the factual findings in *Washington II*. ER9-13.

The Snoqualmie appealed. ER780. The district court granted the Samish’s request to intervene for appeal, and the Samish appealed. *Id.* Pursuant to the Parties’ joint motion, the Court consolidated the two appeals for briefing and argument. Dkt. 9.

## V. SUMMARY OF ARGUMENT

The district court properly dismissed this case because issue preclusion is dispositive on all claims. The Snoqualmie’s and Samish’s claims to treaty rights were adjudicated in *Washington II*, and this Court affirmed

Judge Boldt's ruling after close scrutiny. Contrary to the Snoqualmie's and Samish's reading, this Court's decision in *Washington IV* affirmed the finality of *Washington II*. The district court correctly concluded that *Washington IV* did not create an exception for the Snoqualmie or the Samish to relitigate claims of treaty rights adjudicated in *Washington II*.

By dismissing the case based on res judicata principles, the district court acted within its constitutional authority. Dismissing a case that asks for a declaration of treaty rights is not an "abrogation" of treaty rights. In applying the doctrine of res judicata, the court simply applied the factual and legal determinations previously decided in *Washington II*, as affirmed by this Court, and confirmed again in *Washington IV*, after the Snoqualmie invoked the court's jurisdiction.

The district court appropriately applied its discretion in deciding the case on res judicata grounds before addressing other threshold issues. While a court will typically address jurisdictional issues first, Supreme Court precedent recognizes this is not required when other threshold issues provide a more straight-forward basis for dismissal. That was precisely the case here: the Snoqualmie asked for leave to amend the complaint to address potential failings in its factual allegations raised by the State's jurisdictional arguments.

In contrast, the res judicata issue presents a purely legal issue that goes to the heart of the case. The district court appropriately used its discretion to dismiss the case based on issue preclusion.

Alternatively, this Court may affirm the dismissal on other grounds supported by the record. The Snoqualmie's complaint warrants dismissal for failing to plead facts sufficient to show a waiver of state sovereign immunity and standing. The case may also be dismissed because other tribes are necessary parties and they cannot be joined absent a waiver of tribal sovereign immunity.

## **VI. STANDARD OF REVIEW**

This court reviews a district court's grant of a Rule 12(c) motion de novo. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001); Fed. R. Civ. P. 12(h)(2)(B). A Rule 12(c) motion for judgment on the pleadings is properly granted when, "taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Owens*, 244 F.3d at 713. Although the Court must accept as true a complaint's well-pleaded facts, conclusory allegations of law and unwarranted inferences will not defeat a Rule 12(c) motion. *Vazquez v. L.A. Cty*, 487 F.3d 1246, 1249 (9th Cir. 2007).

A district court decision to address other threshold issues before subject-matter jurisdiction is reviewed for abuse of discretion. *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (“There is no mandatory sequencing of jurisdictional issues . . . [A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits.”); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999). Under the abuse of discretion standard, a reviewing court will not reverse unless it has a “definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors. A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact.” *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1464 (9th Cir. 1995) (quotations and citations omitted), *cert. denied*, *Pacific Lumber Co. v. Kayes*, 516 U.S. 914 (1995).

## VII. ARGUMENT

The central issue in this case is whether the Snoqualmie is a political entity that holds sovereign treaty rights reserved under the Point Elliott Treaty. The State presented the district court with several bases for dismissal, including issue preclusion. In *Washington II*, Judge Boldt determined and this Court

affirmed, following its own close scrutiny of the record, that the modern-day Snoqualmie (and likewise the Samish) had not maintained the requisite organized tribal structure in order to assert treaty rights as the group named in the Treaty. 476 F. Supp. at 1104, 1109, 1111, *aff'd*, 641 F.2d at 1372-74. This case presents the issue of whether those rulings apply with equal force to the Snoqualmie's assertion of hunting and gathering rights under the same Treaty.

It is the State's opinion that they do, and that the Snoqualmie's claims here are barred by res judicata. The district court agreed, dismissed the complaint, and denied all pending motions as moot. In ruling on the issue of res judicata, the district court followed the clearest and most direct path to resolving the litigation.

**A. The District Court Correctly Dismissed on Issue Preclusion.**

The doctrine of res judicata “serves to protect adversaries from the expense and vexation attending multiple lawsuits, to conserve judicial resources, and to foster reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1528–29 (9th Cir. 1985). The doctrine of res judicata encompasses both claim and issue preclusion. *Id.* Issue preclusion is the relevant doctrine here.

Issue preclusion (or collateral estoppel) bars re-litigation of all “issues of fact or law that were actually litigated and necessarily decided” in the prior proceeding. *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979); *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1321 (9th Cir. 1992). 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.

*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)).

This appeal concerns the scope of issues litigated in *Washington II* and the subsequent appeal, and the preclusive effect of those decisions in light of this Court’s en banc decision in *Washington IV*. The State differs from the Appellant Tribes on how res judicata applies in two key aspects. First, the State’s analysis of *Washington II*, as affirmed by this Court, concludes that case adjudicated the central issue to the Tribes’ claims to being successors under the Treaty. Second, the State’s and the Tribes’ reading of *Washington IV* sharply diverge—the Tribes’ argue *Washington IV* overwrote *Washington II*; in



the State's view, *Washington IV* reaffirmed *Washington II*. The State addresses each issue in turn.

**1. Issue Preclusion Applies Because the Snoqualmie's Claim to Treaty Rights Was Litigated in *Washington II*.**

The Snoqualmie asserts it is a successor to signatories of the Treaty and therefore holds hunting and gathering rights under it. ER776-78. This Court previously considered whether the Snoqualmie was a successor to signatories of the Treaty when it affirmed *Washington II*. 641 F.2d at 1372. Regardless of whether a tribal entity asserts treaty hunting rights or treaty fishing rights, both issues are nested within the same single, overarching inquiry that has been clearly articulated by this Court for assessing entitlement to treaty rights. *Id.* But the Snoqualmie argues that *Washington II* is not controlling with respect to its assertion of treaty hunting rights because hunting rights were not at issue in the *United States v. Washington* cases. Snoqualmie Br. at 19-24, 30.

While it is true that those cases arose in the context of treaty fishing rather than hunting, the district court recognized this Circuit's standard for recognizing treaty rights turns on the "single necessary and sufficient condition" of the maintenance of an organized tribal structure. 641 F.2d at 1372. The district court squarely addressed the Snoqualmie's attempt to blur the distinction between claim and issue preclusion in this case: "The

Snoqualmie do not explain how the factual issue necessary to determine signatory status with respect to fishing rights could differ from those required to determine hunting and gathering rights.... This is because they do not differ.” ER9. Indeed, the same Treaty article addresses both hunting and fishing rights in a singular paragraph, leaving no room for a tribe to qualify for treaty protection of off-reservation hunting while not qualifying for treaty protection of off-reservation fishing. Treaty, art. V. Thus, the district court correctly concluded that the central issue that the Snoqualmie seeks to litigate in this case is identical to the treaty right recognition issue litigated in *Washington II*.

In a similar vein, the Snoqualmie argues that *Washington II* is explicitly limited to fishing rights (Snoqualmie Br. at 30-32), and that *Washington II* litigated fishing rights, federal recognition, and reservation lands, but not the issue of broader treaty rights (*id.* at 33-36). These arguments, however, fail to acknowledge both the scope of the district court’s findings in *Washington II* and this Court’s decision affirming the ruling.

Judge Boldt in *Washington II* made specific findings of fact relative to Snoqualmie’s assertion of treaty rights. For example:

(12). None of the five Intervenor entities whose status is considered in these Findings is at this 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 treaties of Medicine Creek and Point Elliott

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(47). The members of the Intervenor Snoqualmie Tribe and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community. The present 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 Intervenor entity.

(48). The Intervenor Snoqualmie Tribe is not an entity that descended from any of the tribal entities that were signatory to the Treaty of Point Elliott.

(49). The citizens comprising the Intervenor Snoqualmie Tribe have not maintained an Organized tribal structure in the political sense.

476 F. Supp. at 1104, 1109.<sup>1</sup> Based on these findings, the district court held that neither the Snoqualmie nor the other intervenors “is at this time a treaty tribe in the political sense,” and they therefore do not have treaty fishing rights.<sup>2</sup> *Id.* at 1111.

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<sup>1</sup> In a proposed amicus brief, seven tribes argue that briefing from 1974 shows that the Snoqualmie sought to establish before Judge Boldt that it was a successor in interest to the Treaty signatories. State-ER56; State-ER65.

<sup>2</sup> The Snoqualmie asserts that Judge Boldt’s finding that the Snoqualmie was not “at this time a treaty tribe” and did not “presently hold” fishing rights recognized that Plaintiff might acquire treaty status in the future. Snoqualmie Br. at 22. This is a gross misreading of *Washington II*. In context the quoted words reflect the court’s findings that, whatever treaty rights the signatories to the Treaty enjoyed at the time of the signing, the modern-day Snoqualmie no longer enjoys them.

This Court affirmed the district court in *Washington II*. After close scrutiny of the factual findings, the Court held that the findings supported the conclusion that the Snoqualmie had not maintained an organized tribal structure establishing that it was the group named in the Treaty. This fact is the “single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory.” 641 F.2d at 1371-72. It is readily evident in numerous *United States v. Washington* cases that the long-running litigation encompasses both determinations of whether tribes are successors to the signatories of the Stevens Treaties, and for tribes with treaty rights, the scope of the fishing rights secured under the Treaties. *Id.*; *cf. United States v. Washington*, 520 F.2d at 692-93 (affirming *Washington I* and addressing whether certain tribes held treaty rights generally); *Washington IV*, 593 F.3d at 792 (describing *Washington II* as rejecting the Samish's claim to treaty rights).

In this new case, the Snoqualmie seeks to relitigate the identical issue decided against it in *Washington II*. The district court correctly concluded that Judge Boldt’s decision in *Washington II*, as affirmed by this Court, “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.” ER13.

**2. The District Court Properly Concluded that *Washington IV* Does Not Create an Exception to Issue Preclusion.**

The Samish does not dispute that issue preclusion would follow from *Washington II*, but instead argues that *Washington IV*, 593 F.3d 790, created an exception to issue preclusion that applies narrowly to the Snoqualmie and the Samish. Samish Br. at 23-37. The Snoqualmie presents a similar argument regarding *Washington IV*. Snoqualmie Br. at 19-24.

The Appellant Tribes’ arguments turn on two particular sentences from *Washington IV* that follow the decision’s central holding that the Samish could not use Rule 60(b) to reopen *Washington II*:

Nothing we have said precludes a newly recognized tribe from attempting to intervene in *United States v. Washington* or other treaty rights litigation to present a claim of treaty rights not yet adjudicated. Such a tribe will have to proceed, however, by introducing its factual evidence anew; it cannot rely on a preclusive effect arising from the mere fact of recognition.

*Id.* at 800.

As an initial matter, it bears noting that the sentences highlighted by the Tribes are not a holding of *Washington IV*, and thus should best be regarded as dicta. See *Best Life Assurance Co. v. Comm’r*, 281 F.3d 828, 834 (9th Cir.

2002) (defining dictum as “a statement made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential ...”) (internal quotations and citation omitted). The quoted text does not establish a new rule, as the Snoqualmie argues. Snoqualmie Br. at 20. The Snoqualmie quotes the phrase “the course we adopt,” but that phrase appears at the end of the opinion when the Court states:

The best way of avoiding such difficulties, we conclude, is to deny intervention by tribes seeking to protect their treaty rights, and to deny any effect of recognition in any subsequent treaty litigation. *That is the course we adopt.*

593 F.3d at 801 (emphasis added). As explained in greater detail below, in *Washington IV*, this Court overruled *Washington III*, confirmed the finality of the factual determinations in *Washington II*, and firmly separated adjudication of federal recognition from adjudication of tribal treaty rights. *Id.* at 799-801. The phrase “this is the course we adopt” references the Court’s final holding in *Washington IV* that administrative findings in federal recognition have no effect in treaty litigation. If it had been the intent of the en banc Court to create an exception from issue preclusion for the Appellant Tribes, the Court could have clearly conveyed that intent. It did not.

Nonetheless, the Samish argues that through these two sentences this Court ruled that the Samish “could litigate any other treaty claim that has not

yet been adjudicated in a future case by proving its treaty factual evidence ‘anew’.” Samish Br. at 5. The Snoqualmie argues similarly that the decision allows a newly recognized tribe, such as itself, to present evidence anew on a new claim of treaty rights. Snoqualmie Br. at 20.

The two sentences highlighted by the Tribes, if read without the context of the surrounding text in the *Washington IV* decision, become ambiguous and could be susceptible to the reading proposed by the Tribes. But, when read in the context of the full decision, the opposite becomes clear.

Most significantly, the phrase “claim of treaty rights not yet adjudicated” must be read with the prior paragraphs of the decision which overruled *Washington III*. 593 F.3d at 800. On the preceding page of the opinion, the en banc Court discussed at length how *Washington III* was inconsistent with its decision affirming *Washington II*. *Id.* at 799. The Court observed that in *Washington II*, “the crucial finding of fact justifying the *denial of treaty rights*” had been litigated before a special master, in a de novo evidentiary hearing before the district court judge, and affirmed by the Ninth Circuit “after close scrutiny.” *Id.* (emphasis added). The Court affirmed “the finality of the *Washington II* factual determinations.” *Id.* at 800. Thus, in overruling *Washington III*, *Washington IV* reaffirmed *Washington II* as it applied to the

tribes that had litigated their claims to treaty rights in that case (including the Appellant Tribes).

The Snoqualmie's and Samish's textual arguments also assert that through footnote 12 of *Washington IV*, which describes the Samish Tribe as a "newly recognized tribe," 593 F.3d at 800, the Court included the Samish among the tribes contemplated in the two highlighted sentences. Snoqualmie Br. at 20; Samish Br. at 27. The Snoqualmie similarly points to the use of the phrase "newly recognized tribe" later in *Washington IV*, where the Court stated: "There are good reasons for adhering to the rule that treaty tribes are not entitled to intervene in recognition decisions to protect against possible future assertions of treaty rights by the newly recognized tribe, whether or not that tribe has previously been the subject of a treaty rights decision," 593 F.3d at 800. *See* Snoqualmie Br. at 20-21. Under the Tribes' reasoning, the use of that phrase in several locations signals that the Court intended that the Appellant Tribes could bring new claims.

Nothing in the text of the footnote nor text in the body of the decision supports the Tribes' attempt to remake the meaning of the Court's statement that: "[n]othing 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*.” 593 F.3d at 800 (emphasis added). The meaning of the sentence for this issue does not turn on the phrase “newly recognized tribe,” which *Washington IV* uses to generally describe a tribe that recently obtained federal recognition.<sup>3</sup> The fatal problem with the Tribes’ argument is that the Samish and the Snoqualmie had previously adjudicated their claims to being successors under the Treaty, and thus, they are not included among the *subset* of newly recognized tribes addressed in the highlighted sentence that could potentially present a claim of treaty rights not yet adjudicated. Indeed, a comparison of the three instances when the Court used the phrase “newly recognized tribe” in the opinion confirms that the en banc Court in *Washington IV* drew a distinction in that sentence between the Samish as a newly recognized tribe that *had previously adjudicated* its claim to treaty rights — and other newly recognized tribes that *had not previously adjudicated* their treaty rights. The district court correctly concluded that this Court’s statement in *Washington IV* does not apply to tribes

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<sup>3</sup> See *Washington IV*, 593 F.3d at 801 (“There are good reasons for adhering to the rule that treaty tribes are not entitled to intervene in recognition decisions to protect against possible future assertions of treaty rights by the *newly recognized tribe, whether or not that tribe has previously been the subject of a treaty rights decision*.”) (emphasis added); see also *id.* at 800 n. 12 (discussing a subsequently withdrawn Samish assertion that it would agree to certain conditions to minimize disruption, and stating: “In any event, it would potentially disturb treaty fishing of the tribes now exercising Samish treaty rights to have the newly recognized Samish Tribe join them.”).

like the Snoqualmie and the Samish whose treaty right claims were already adjudicated and denied.

The Appellant Tribes also urge this Court to reject the district court's reading of *Washington IV* based on the word "anew," which they argue becomes surplusage under the district court's reading. Snoqualmie Br. at 21-22; Samish Br. at 28. Not so. *Washington IV* addressed, at its core, the distinction between federal recognition and claims of entitlement to treaty rights. The Court held that a newly recognized tribe "cannot rely on a preclusive effect arising from the mere fact of [administrative] recognition." 593 F.3d. at 801. The most logical interpretation of the term "anew" in this context is that a tribe that has been "newly recognized" through the administrative process, but that had not yet had its treaty right claims adjudicated and denied, would have to present the same factual evidence used in the administrative process to a court in asserting treaty rights, hence the presentation of evidence "anew". This interpretation aligns with the rule established in *Washington IV* that the Court would "deny any effect of recognition in any subsequent treaty litigation." *Id.* at 801.

In sum, the Appellant Tribes misread *Washington IV*. This Court in *Washington IV* held that litigation of treaty rights is not affected by federal

recognition. The Court also recognized that claims by the Snoqualmie and Samish of entitlement to treaty rights were previously adjudicated and denied in *Washington II*, as affirmed by the Court, and the Court further reaffirmed the finality of those factual findings. *Washington IV*, 593 F.3d at 799. The district court's analysis that *Washington IV* did not create an exception to res judicata for the Appellant Tribes was well-reasoned and should be upheld.

**3. The District Court Correctly Ruled that Exceptions to Res Judicata Did Not Apply.**

The Snoqualmie argues that the district court erred in not applying two exceptions to res judicata from the Restatement (Second) of Judgments § 28 (1982). Snoqualmie Br. at 36-42. The Samish does not join this argument, noting that *Washington IV* forecloses the Snoqualmie's attempt to rely on these exceptions to res judicata. Samish Br. at 25, 36. The district court correctly concluded that the res judicata exceptions do not apply here because the governing legal standard for denial of a claim to treaty rights has not changed since this Court upheld *Washington II* and arguments similar to the Snoqualmie's attempt to challenge the adequacy of *Washington II* have been rejected by this Court. ER11-12.

**a. Governing Law Was Reaffirmed, Not Changed, in *Washington IV*.**

The Snoqualmie argues first that this Court should apply an exception to res judicata for circumstances where the governing law has changed, pointing to *Washington IV*, a Department of Interior (“DOI”) 1997 decision recognizing the Snoqualmie as a tribal entity under 25 C.F.R. pt. 83, and a land-to-trust decision by a DOI Solicitor made in March 2020 pursuant to 25 C.F.R. pt.151.<sup>4</sup> Snoqualmie Br. at 37-41. None of these decisions constitute a change in governing law to which the res judicata exception would apply.

Regarding *Washington IV*, the Snoqualmie circles back to its argument that *Washington IV* created an exception for the Samish and the Snoqualmie to bring new claims. Snoqualmie Br. at 37-38; *see also id.* at 19-24. As discussed

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<sup>4</sup> The Court should deny the Appellant Tribes’ requests that this Court take judicial notice of the DOI March 2020 land-to-trust decision (Snoqualmie Br. at 39, n. 8), the judgment in *Greene v. Babbitt*, No. C89-645Z, W.D. Wash., Nov. 1, 1996, Dkt. #330 (Samish Br. at 14, n.8), and an administrative decision currently under appeal (Samish Br. at 14, n.22). Judicial notice of these documents would not be appropriate because the Tribes have failed to show how the proffered documents are relevant to the issues under appeal in this case. The Snoqualmie’s proffered DOI 2020 land-to-trust decision was decided after the district court decision under appeal, and this Court has been exceedingly clear that facts determined in administrative proceedings do not have preclusive effect in this Court’s adjudication of cases claiming sovereign treaty rights. *Washington IV*, 593 F.3d at 800-801. The Samish fail to present any argument as to how the proffered documents contain adjudicative facts that would be appropriate for judicial notice in this case. Similarly, the Snoqualmie fails to make any showing for correction or modification of the record pursuant to Rule of Appellate Procedure 10(e)(3). *Contra* Snoqualmie Br. at 39-40, n.8.

at length above, this interpretation of *Washington IV* fails when the sentences at issue are read in context because the Snoqualmie, though a newly recognized tribe, has previously adjudicated its claim to treaty rights. *Supra* at Argument VII.A.2. As the district court correctly noted in rejecting the Snoqualmie's attempt to apply this res judicata exception, "[t]here 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." ER11 (citations omitted).

The Snoqualmie also seeks to rely on factual conclusions in the DOI 1997 decision recognizing the Snoqualmie as a tribal entity under 25 U.S.C. pt. 83, suggesting those represent a change in law. This argument must fail because the Court's en banc decision in *Washington IV* "den[ies] any effect of recognition in any subsequent treaty litigation." 593 F.3d at 801. As the district court correctly noted, existing law establishes that "nothing about federal recognition 'constitutes a 'change or development in controlling legal principles' for determining treaty status." ER11 (citing *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948)).

The Snoqualmie argues that the district court should have deferred to the DOI 1997 federal recognition determination. Snoqualmie Br. at 38-41 (citing

*Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001)). Deference to an administrative decision in this context would be inappropriate in light of this Court’s emphatic holding that facts determined in administrative proceedings do not have preclusive effect in treaty rights litigation, but rather factual evidence must be introduced “anew.” *Washington IV*, 593 F.3d at 800-801.

Nor does the DOI’s March 2020 land-to-trust decision alter the legal standard for claims to sovereign tribal treaty rights established by this Court in *Washington II*, 641 F.2d at 1371-72. As with the administrative decisions regarding recognition, federal administrative decisions regarding land-to-trust acquisitions made pursuant to 25 C.F.R. pt. 151 are fundamentally different from adjudication of tribal treaty status in the federal courts. *Cf. Greene II*, 64 F.3d at 1270. And like the DOI 1997 recognition determination, the DOI 2020 land-to-trust decision is not a change in governing law that could trigger consideration of whether to apply the asserted exception to res judicata.

**b. The Snoqualmie Had Extensive Opportunities to Argue its Claim of Successorship under the Treaty in *Washington II* before the Special Master, District Court, and on Appeal to this Court.**

Nor does the Restatement exception for “differences in the quality or extensiveness of the procedures followed in the two courts” apply here. The

Snoqualmie argues that it had little time to present its case in *Washington II*, and there was a “dearth of evidence offered” to the special master and in the de novo trial conducted by the district court. Snoqualmie Br. at 42. This Court previously addressed and rejected a similar argument in *Washington IV*.

In the context of the Samish’s Rule 60(b) request, this Court observed in *Washington IV* that the crucial findings of fact in *Washington II* for denial of treaty rights:

. . . had been made by a special master after a five-day trial, and had been made again by the district judge de novo after an evidentiary hearing. On appeal, “[a]fter close scrutiny, we conclude[d] that the evidence supports this finding of fact.”

593 F.3d at 799 (quoting 641 F.2d at 1371). The en banc Court further noted that “[n]or was there any reason why the Samish Tribe lacked incentive to present in *Washington II* all of its evidence supporting its right to successor treaty status.” *Id.* The same applies to the Snoqualmie.

Parties will always want additional opportunities to litigate issues previously lost, and with additional time and hindsight, they may be able to assemble more documentation and develop additional arguments. Agreeing with the Snoqualmie’s argument here would subject every case to relitigation if additional documentary evidence and arguments are developed over time, contrary to the res judicata doctrine. *See Sunnen*, 333 U.S. at 598 (under issue

preclusion, “matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel.”).

The district court correctly concluded that the exceptions did not apply and dismissed the case on the basis of res judicata.

**B. Federal Courts Have Article III Authority to Decide Tribal Treaty Issues.**

The Snoqualmie argues the district court impermissibly “abrogated” treaty rights in dismissing the complaint because only Congress can take away treaty rights. Snoqualmie Br. at 43-46. This contention faces two insurmountable hurdles.

First, a court deciding whether a tribal entity is entitled to exercise tribal treaty rights is not an “abrogation” of treaty rights. The term “abrogation” is defined as “the abolition or repeal of a law, custom, institution, or the like.” Black's Law Dictionary (11th ed. 2019). In this case, as with prior *United States v. Washington* litigation, the district court did not abolish or repeal treaty rights. Instead, the court fulfilled its constitutional role when called upon to evaluate disputed facts and legal arguments to determine whether a tribal entity asserting a claim to treaty rights is in fact entitled to exercise such rights. *E.g.*, 641 F.2d at 1374 (affirming *Washington II* after



closely scrutinizing findings of facts). This Court rejected a similar argument in *Washington II* when the tribes argued that they were entitled to a presumption of holding the claimed treaty rights and this Court held that the tribes had “the burden of proving that they were entitled to exercise tribal treaty rights.” *Id.* at 1374.

Second, the logic of the Snoqualmie’s argument is flawed. The Snoqualmie initiated this case, invoking the district court’s jurisdiction. ER772 (Complaint ¶ 4). Having invoked the court’s jurisdiction but displeased with the result, the Snoqualmie posits a constitutional argument that the district court in fact lacked authority to deny the relief requested. The Snoqualmie’s position would seem to be that a tribe can present a claim of entitlement to treaty rights, and a court may answer “yes” but it cannot answer “no.” This argument must fail. The federal courts’ Article III jurisdiction cannot turn on the substantive outcome of its decision on a tribe’s request for a declaration of treaty rights. Moreover, the district court did not rule on the merits of the Snoqualmie’s claim. In applying the doctrine of res judicata, the court simply applied the factual and legal determinations previously decided in *Washington II*, affirmed by the Court on appeal, and further re-confirmed in *Washington IV*.

**C. The District Court Did Not Abuse Its Discretion When Dismissing this Case on Issue Preclusion Before Addressing Other Threshold Issues.**

The State presented several alternative bases for dismissal in its Rule 12 motion on the pleadings: (1) failure to show a waiver of State sovereign immunity, (2) lack of standing, (3) *res judicata*, and (4) failure to join necessary parties as required by Rule 19. The district court also had pending before it the Tulalip Tribes’ motion to intervene and proposed motion to dismiss for failure to join other tribes under Rule 19 absent a waiver of tribal sovereign immunity. The Snoqualmie argues that the district court erred in not addressing the State’s arguments on standing and state sovereign immunity before addressing issue preclusion. Snoqualmie Br. at 47.<sup>5</sup> Rather, the court took the most judicially efficient path to correctly conclude the litigation.

A court may “choose among threshold grounds for denying audience to a case on the merits.” *Ruhrgas*, 526 U.S. at 585. While courts will often first address the threshold jurisdictional issues of standing and sovereign immunity, they are not required to do so, and their decision to exercise their “leeway” is reviewed for abuse of discretion. *Sinochem*, 549 U.S. at 431. For example, a

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<sup>5</sup> While the Samish would have preferred that the district court address the threshold issues of state and tribal sovereign immunity, the Samish does not argue that the district court was required to do so. Samish Br. at 33.

district court “may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.” *Id.* at 432. Because dismissal on res judicata grounds does not reach the merits, a court may dismiss based on res judicata without resolving jurisdictional issues. *See Graboff v. Am. Ass’n of Orthopaedic Surgeons*, 559 F. App’x 191, 193 n. 2 (3d Cir. 2014) (citing *Sunnen*, 333 U.S. at 597, and *Sinochem*, 549 U.S. at 430-31); *cf. SBC Commc’ns Inc. v. F.C.C.*, 407 F.3d 1223, 1230 (D.C. Cir. 2005) (Res judicata has a “somewhat jurisdictional character.”).

The district court perceived that addressing res judicata was the most efficient basis for resolving the dispute presented by the Snoqualmie. The issue of res judicata is central to this case. The Snoqualmie’s complaint asserts that “[a]s a tribe that signed the Treaty of Point Elliott and has maintained a continuous organized structure since, the Tribe is entitled to exercise rights thereunder.” ER776 (Complaint ¶ 30). To the State and the district court’s reading, this statement is in direct conflict with the factual finding in *Washington II*, which the Ninth Circuit affirmed. 641 F.2d at 1374. Issue preclusion in this instance was straightforward and dispositive to all claims in the case.

In contrast, because the State made a facial motion to dismiss on standing and state sovereign immunity, a ruling by the district court on those issues would likely have resulted in the filing of an amended complaint and prolonged motion practice. In the Snoqualmie's response to the motion to dismiss, it included a request to amend its complaint. State-ER91. The State's reply stated:

Plaintiff's request to amend its complaint should be denied because amendment would be futile, would result in undue delay in resolving this case, and would waste limited judicial and party resources. Plaintiff might attempt to artfully plead around some deficiencies highlighted in the State's motion to dismiss, but key flaws in the case cannot be avoided through the filing of an amended complaint. The Court should dismiss the complaint both in light of the threshold failings of Eleventh Amendment immunity and lack of standing, and on the alterative bases that the claims are barred by res judicata and Plaintiff has not (and cannot) join indispensable parties.

State-ER117. Put another way, while the Snoqualmie could have potentially filed an amended complaint in an attempt to cure the flaws identified in its standing and state sovereign immunity allegations, the issue of res judicata is central and conclusive and could not have been addressed by an amended complaint.

Additionally, res judicata arising out of *United States v. Washington* litigation presents unique circumstances here. As this district court noted,

*United States v. Washington* has “cast a long shadow.” ER6. The district court is especially familiar with the *United States v. Washington* litigation because the Western District of Washington is frequently called upon to address on-going disputes in *United States v. Washington* subproceedings. *E.g.*, *United States v. Washington*, 129 F. Supp. 3d 1069 (W.D. Wash. 2015) (Subproceeding 09-01), *aff’d in part, rev’d in part, sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 106 (2018); *United States v. Washington*, 193 F. Supp. 3d 1190 (W.D. Wash. 2016) (Subproceeding 14-02). The district court is also occasionally called upon to consider the impact of *United States v. Washington* litigation in other disputes. *E.g.*, *Midwater Trawlers Co-Op. v. U.S. Dep’t of Commerce*, No. C96-1808R, 2003 WL 24011242, at \*2 (W.D. Wash. Apr. 11, 2003), *aff’d sub nom.*, *Midwater Trawlers Coop. v. Dep’t of Commerce*, 393 F.3d 994 (9th Cir. 2004); *Skokomish Indian Tribe v. Forsman*, No. C16-5639 RBL, 2017 WL 1093294, at \*6 (W.D. Wash. Mar. 23, 2017), *aff’d*, *Skokomish Indian Tribe v. Forsman* 738 F. App’x 406 (9th Cir. 2018) (considering a dispute over the scope of hunting rights under the Point-No Point Treaty between tribes with treaty rights recognized in *United States v. Washington* litigation). In short, the district court has extensive familiarity with

the *United States v. Washington* litigation, and judicial economy especially warranted bypassing questions of subject-matter jurisdiction to address the conclusive issue of res judicata.

The district court appropriately applied its discretion to address res judicata before other threshold issues presented in the State's motion on the pleadings.

**D. Alternatively, the Court May Affirm Dismissal Based On Other Threshold Issues.**

While the district court did not reach the other three bases for dismissal set forth in the State's motion on the pleadings, this Court can affirm the dismissal on alternative grounds supported by the record. *See, e.g., Gingery v. City of Glendale*, 831 F.3d 1222 (9th Cir. 2016); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1076–77 (9th Cir. 2003) (“Although the district court did not reach the issue of claim preclusion, we may affirm the district court on any ground supported by the record, even if the ground is not relied on by the district court.” (internal quotations and citations omitted)).<sup>6</sup> As explained below, each threshold issue provides an independent basis for dismissal of the Snoqualmie's complaint.

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<sup>6</sup> The Court cannot proceed to adjudicate the merits of the Snoqualmie's claim, as the Snoqualmie's concluding request for relief would suggest.

**1. The Snoqualmie's Claims Are Barred by the Eleventh Amendment.**

The Snoqualmie's complaint lists three defendants: 1) the State of Washington; (2) Governor Jay Inslee in his official capacity; and 3) WDFW Director Kelly Susewind in his official capacity. Each of these defendants are immune from suit under the Eleventh Amendment to the United States Constitution.

“The Eleventh Amendment bars suits against the State or its agencies for all types of relief, absent unequivocal consent by the state,” *Krainski v. State ex rel. Bd. of Regents*, 616 F.3d 963, 967 (9th Cir. 1999), or unless Congress abrogates a state's immunity by exercising its power under the Fourteenth Amendment, *Jenkins v. Washington*, 46 F.Supp.3d 1110, 1116 (W.D. Wash. 2014). The test for waiver is a “stringent one.” *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999). A

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Snoqualmie Br. at 53 (stating that the Snoqualmie requests reversal with a finding “that Snoqualmie meets the Ninth Circuit standard for treaty status”). The district court terminated the Snoqualmie's motion for summary judgment, and no party has had an opportunity to address the evidentiary assertions in that motion. If this case proceeded to the Rule 56 phase, the State would dispute certain factual allegations in the complaint regarding interactions between the State and the Snoqualmie. While the State takes no position on how a court would evaluate the Snoqualmie's claim to being a successor under the Treaty if presented anew to a court, it is likely that other tribes (e.g., the Tulalip Tribes) would seek to dispute the Snoqualmie's claim. *Cf.* State-ER1-43. The Samish recognizes that other threshold issues must be addressed prior to adjudication of the Snoqualmie's claims. Samish Br. at 31-35, 42.

state waives its sovereign immunity only when it voluntarily invokes the federal courts' jurisdiction or makes a clear declaration that it intends to submit itself to federal jurisdiction. *Id*; *see also Jenkins*, 46 F.Supp.3d at 1116-17 (rejecting the assertion that Washington has waived its sovereign immunity).

The Snoqualmie's complaint makes no allegation that Washington has waived its immunity or that Congress has abrogated it. Therefore, neither exception to the State's sovereign immunity is present here. In fact, the Snoqualmie does not attempt to dispute that the Eleventh Amendment bars its claims against the State of Washington. The State is immune and should be dismissed.

The Eleventh Amendment also shields state officials from official capacity suits. *Krainski*, 616 F.3d at 967. There is a narrow exception where the relief sought is prospective in nature (i.e., declaratory and injunctive) and is based on an ongoing violation of the plaintiff's federal constitutional or statutory rights." *Id.* at 968-69 (italics in original); *Jenkins*, 46 F.Supp.3d. at 1118. This limited exception was originally articulated in *Ex parte Young*, 209 U.S. 123 (1908).

In order to invoke the court's jurisdiction in an official capacity suit against a state officer under *Ex parte Young*, there must be a "fairly direct"



connection between the named officer and enforcement of an allegedly unlawful state law. *Los Angeles Cty. Bar Ass’n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). “A generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit.” *Id.*; *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012); *Skokomish Indian Tribe v. Goldmark*, 994 F.Supp.2d 1168, 1182 (W.D. Wash. 2014). As explained below, the allegations in the Snoqualmie’s complaint fail to allege a direct connection between either WDFW Director Susewind or Governor Inslee and the alleged unlawful enforcement of state law. The allegations are therefore insufficient to invoke *Ex parte Young*.

Paragraph 7(b) of the complaint alleges that Director Kelly Susewind “supervises the operation and administration of WDFW and performs the duties prescribed by law and delegated by the Commission.” ER773. Defendant Susewind is the Director of the WDFW and is empowered to manage fish and wildlife in the state. Revised Code of Washington (Wash. Rev. Code) § 77.04.012. WDFW consists of the Washington Fish and Wildlife Commission and the Director. Wash. Rev. Code § 77.04.020. The Commission may delegate its authority to the Director, *id.*, and the Director

may employ personnel and delegate authority to them. Wash. Rev. Code § 77.04.080. Generally, the Commission adopts policies and rules for the preservation, perpetuation and harvest of fish and wildlife, including the establishment of hunting and fishing seasons, pursuant to Wash. Rev. Code § 77.04.055. The Director carries out these policies and goals. Wash. Rev. Code § 77.04.080.

The complaint makes no specific allegations of enforcement of state law in contravention of the Snoqualmie's asserted treaty hunting and gathering rights. It merely claims that WDFW did not invite the Snoqualmie to provide input on revision of a WDFW guidance document because WDFW understands the Snoqualmie to not hold treaty-protected rights to hunt or fish off-reservation. ER765-67 (Complaint ¶¶ 19-27). This allegation does not satisfy the requirement of a "fairly direct" connection between any defendants and the enforcement of a challenged state law.

With respect to WDFW Director Susewind, the Snoqualmie invokes *Goldmark*, 994 F. Supp.2d at 1182-83. Snoqualmie Br. at 49. In *Goldmark*, the court found the necessary enforcement connection and denied sovereign immunity as to WDFW's Director because the Director had authored a letter specifically threatening Skokomish Indian Tribal members with prosecution.

*Goldmark*, 994 F. Supp. at 1183. In contrast, the *Goldmark* court *declined* to find the necessary connection to the Commissioner of Public Lands and his staff because the complaint did not connect them “to any threatened enforcement action.” *Id.* at 1184. Here, in contrast to *Goldmark*, the Snoqualmie’s complaint alleged no specific threat of prosecution by Director Susewind, simply that he did not include the tribe in a letter. This is insufficient to overcome Director Susewind’s immunity from suit.

The connection is even more attenuated with respect to Governor Inslee. The complaint alleges no specific conduct by the Governor. Paragraph 7(a) of the complaint simply alleges he is “sued in his official capacity as Washington’s chief executive officer. The Governor has a constitutional obligation to ‘see that the laws are faithfully executed.’” ER773. This is precisely the type of “generalized duty to enforce state law” that the Ninth Circuit, in the *Eu* and *Brown* cases, held to be insufficient to invoke *Ex parte Young*.

The Governor does not set fish and wildlife policy for WDFW or direct or otherwise make enforcement decisions for it. The Governor does not hire or directly supervise the Director. The Governor’s primary role as it relates to fish and wildlife management in Washington is to appoint members of the Fish and

Wildlife Commission, with the advice and consent of the Senate. Wash. Rev. Code § 77.04.030. The Commission appoints and supervises the Director. Wash. Rev. Code § 77.04.055(7). The Washington Legislature directs the Commission to meet with the Governor annually to review and prescribe basic goals and objectives related to preservation, protection and perpetuation of fish, wildlife and habitat. Wash. Rev. Code § 77.04.055(1). But this limited role of the Governor has nothing to do with the Snoqualmie's claims. Because the Governor does not have any direct role in enforcing hunting and gathering laws, he is not subject to suit under an *Ex parte Young* theory, and is therefore immune from suit. *National Audubon Soc'y v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (rejecting *Ex parte Young* theory as against Governor and State Secretary of Resources due to lack of showing of enforcement connection to challenged law).

The Snoqualmie cites *Eu*, 979 F.2d at 699; and *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1189 (9th Cir. 2003) to support its claim against Governor Inslee, but neither case applies. Snoqualmie Br. at 49-50. *Eu* was a challenge to a statute prescribing the number of superior court judges the California Governor was required to appoint. *Eu*, 979 F.2d at 704. The Governor and Secretary of State were allegedly neglecting their constitutional

duties to fill court vacancies. *Id.* at 699. These duties created the “specific connection” to the alleged violations required by *Ex parte Young*. *Id.* at 704. In contrast Governor Inslee has no responsibility for the decisions challenged in this case.

*Miranda B.* considered a claim under the Americans with Disabilities Act (ADA). 328 F.3d at 1183, 1186-87. The court determined that Congress had abrogated Oregon’s Eleventh Amendment immunity in the ADA. *Id.* at 1186. There was no discussion in *Miranda B.* regarding the governor’s connection to the challenged conduct because that legal inquiry was not relevant in that case. *Miranda B.* is inapposite to the claims here.

Under these circumstances, the Eleventh Amendment bars claims against all Defendants.

## **2. The Snoqualmie Failed to Demonstrate Article III Standing.**

The Snoqualmie’s lack of standing provides an additional basis for dismissal because the alleged state actions do not result in any concrete or particularized injury to the Snoqualmie’s sovereignty, self-determination, or alleged hunting and gathering rights.

Article III of the United States Constitution limits federal courts’ jurisdiction to actual “cases” and “controversies.” Standing is a key element of

the case and controversy requirement. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). The standing requirement is linked to separation of powers principles, and prevents the federal judiciary from impermissibly intruding in powers vested in the legislative and executive branches by issuing advisory opinions not based on the facts of an actual controversy between adverse parties. *Id.*; *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 654-55 (9th Cir. 2002).

To establish Article III standing, a plaintiff must show a sufficient personal stake in the outcome to justify invocation of the judicial process. *Eu*, 979 F.2d at 700 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)). There are three elements to the constitutional minimum standing requirements: (1) a concrete and particularized injury that is “actual or imminent, not conjectural or hypothetical”; (2) a causal connection between the injury and the defendant’s challenged conduct; and (3) a likelihood that a favorable decision will redress the injury. *Pyramid Lake Paiute Tribe of Indians v. Nevada, Dep’t of Wildlife*, 724 F.3d 1181, 1187-88 (9th Cir. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The burden to establish standing rests on the plaintiff. *Lujan*, 504 U.S. at 561.

The Snoqualmie fails to meet its burden. Even if the Court were to presume for the purposes of the motion to dismiss that the Snoqualmie holds the treaty rights it alleges, the complaint fails to allege a concrete and particularized injury to those rights or a connection between any such injury and conduct by the named State Defendants. To establish an injury-in-fact for standing, a plaintiff must articulate an injury that is both concrete and particularized. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). “A ‘concrete’ injury must be ‘de facto’; that is, it must actually exist.” *Id.* at 1548 (citing Black's Law Dictionary 479 (9th ed. 2009)). A “‘particularized’ injury ‘must affect the plaintiff in a personal and individual way.’” *Id.* (quoting *Lujan*, 504 U.S. at 560).

The Snoqualmie’s alleged injury to treaty rights is neither concrete nor particularized. Paragraphs 19 through 27 of the complaint purport to describe the “State’s 2019 Adverse Actions” that are the gravamen of the Snoqualmie’s claims. ER775-76. Paragraphs 19 through 22 complain that WDFW did not invite the Snoqualmie’s input on revisions to an agency guidance document regarding how WDFW would consider a tribe’s assertion of a treaty hunting right based on historical hunting activity on lands beyond those ceded by treaty. ER775. Paragraphs 23 and 24 allege that in response to the

Snoqualmie's letter expressing "dismay" at having not received an invitation to participate, WDFW informed the Snoqualmie that it did not invite the Snoqualmie because of its understanding that the Snoqualmie do not have off-reservation treaty rights. ER776. Finally, paragraphs 25 and 26 complain that WDFW sent a subsequent letter to other tribes inviting participation in a meeting about the traditional hunting area guidelines but again did not invite Snoqualmie, and an attachment to the letter listed tribes with treaty rights that did not include Snoqualmie. ER776. In sum, the Snoqualmie complains that WDFW did not solicit the Snoqualmie's input for WDFW's still on-going development of a WDFW guidance document. None of these allegations, even if true, establish an actual or imminent injury to the Snoqualmie's alleged treaty rights.

The complaint then makes the conclusory allegation that the Snoqualmie's treaty reserved off-reservation hunting and gathering rights "have been and continue to be directly and adversely impacted by Defendants' conduct." ER776 (Complaint ¶ 27). It further alleges that Defendants denied the Snoqualmie and its members equal protection by unlawfully treating the Snoqualmie differently than other treaty tribes. ER777 (Complaint ¶ 36-39).



But these bare assertions of harm are not concrete or particularized, and are insufficient to establish an injury-in-fact required for standing.

The Snoqualmie points to *Skokomish v. Goldmark* to argue that the Snoqualmie’s complaint sufficiently pleads injury-in-fact. Snoqualmie Br. at 52.<sup>7</sup> The *Goldmark* court, however, noted that a party seeking injunctive relief must show “a very significant possibility of future harm.” 994 F. Supp. 2d at 1178 (quoting *Montana Shooting Sports Ass’n v. Holder*, 727 F.3d 975, 979 (9th Cir. 2013)). In *Goldmark*, the court found that the Skokomish had concretely alleged “a genuine threat of imminent prosecution” in the lengthy pleading in that case. *Id.* at 1180-82. Here, in contrast, the Snoqualmie’s complaint does not allege or suggest a concrete threat of prosecution.

The complaint also does not establish the necessary causal nexus between an alleged injury-in-fact and the challenged action by the State. *Pyramid Lake Paiute Tribe of Indians*, 724 F.3d at 1187-88. WDFW not listing

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<sup>7</sup> The Snoqualmie’s citations to *Menominee Tribe v. United States*, 391 U.S. 404 (1968), and *Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. United States*, 299 U.S. 476 (1937), are inapposite because those cases considered issues related to tribal-held lands. *See Menominee*, 391 U.S. at 406 (affirming interpretation of treaty language “to be held as Indian lands are held” and hunting and fishing rights on such lands); *Shoshone Tribe*, 299 U.S. at 484 (addressing valuation of a tribe’s interest in certain lands, not hunting or gathering rights).

the Snoqualmie among the tribes invited to provide input on WDFW's draft guidance, and its explanation for the decision did not cause any injury to Snoqualmie's alleged treaty rights. The Snoqualmie do not allege that either WDFW or the Governor have taken any action constraining the exercise of the Snoqualmie's alleged treaty rights.

A plaintiff may not “rely on a bare legal conclusion to assert injury-in-fact, or engage in an ingenious academic exercise in the conceivable to explain how defendants’ actions caused his injury.” *Daniel v. Nat’l Park Serv.*, 891 F.3d 762, 767 (9th Cir. 2018). Taken as a whole, the complaint fails to allege any harm to the Snoqualmie’s claimed treaty right that is concrete, particularized, or fairly attributable to any individual Defendant as necessary to establish standing. Because the Snoqualmie failed to meet its burden to show that a case and controversy against Defendants, the tribe lacks standing.

### **3. Failure to Join Other Tribes Warrants Dismissal.**

Under Rule 19(a), a tribe is necessary for just adjudication of a claim if the tribe has a legally protected interest in the subject of the suit such that “the disposition of the action in the [tribes’] absence may as a practical matter impair or impede the [tribes’] ability to protect that interest.” *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (quoting Rule 19(a)(2)(i))

(brackets in original). The Snoqualmie argued before the district court that no parties other than Defendants are necessary because the Snoqualmie does not dispute that the Tulalip Tribes are entitled to hunting and gathering rights under the Treaty, and the Snoqualmie does not seek to litigate here the “scope or allocation of any hunting right.” State-ER84 (Snoqualmie Opp. to MTD at 17). This argument lacks merit.

The Snoqualmie seeks to establish that the Treaty entitles the Snoqualmie to hunting and gathering rights through its lineage connected to Snoqualmoo treaty signatories. ER773-77 (Complaint ¶¶ 8-16, 28-39). The Tulalip Tribes contend that they are the political successor in interest to the Snoqualmoo who signed the treaty, and “[a]ny treaty rights associated with the historic Snoqualmie Tribe reside in Tulalip.” State-ER6 (Tulalip Tribes’ motion to intervene at 2); *see also* State-ER7-10, State-ER13-15 (discussing Tulalip Tribes’ treaty rights, historical context and *United States v. Washington* litigation). The State takes no position on whether a court considering the question anew would reach to the same conclusion that Judge Boldt and the Ninth Circuit did in *Washington II*. However, because the Tulalip Tribes have a clear interest in the very treaty rights which the Snoqualmie seeks to have declared as its own, the requirement of a “legally protected interest” for

purposes of Rule 19(a) is satisfied. *Goldmark*, 994 F. Supp. 2d at 1190; *see also Shermoen*, 982 F.2d at 1317-18. Such circumstances “present a textbook example of a case where one party may be severely prejudiced by a decision in his absence.” *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986) (citing, *inter alia*, 3A Moore’s Federal Practice ¶ 19.08 at 19-165 (1984) (“Where the purpose of the suit is the disposition of a fund, a trust, or an estate to which there are several claimants, all of the claimants are generally indispensable.”)).

Moreover, the Snoqualmie requests a declaration that it has the right, under the Treaty, to hunt and gather “throughout the modern day State of Washington.” ER771. Numerous other tribes have established hunting and gathering treaty rights in the State. Thus, if the Snoqualmie were successful in this action, its claims would likely impact the treaty rights of numerous other tribes. As evidenced in the various tribal amici filings and the Snoqualmie’s responses, the Snoqualmie and other tribes do not share a uniform view of the treaty rights that the Snoqualmie seeks to litigate. ER265-318 (Samish motion and proposed brief); ER319-329 (Snoqualmie’s opposition to Tulalips’ motion to intervene); State-ER1-43 (Tulalip Tribes’ motion and proposed brief);

State-ER44-63 (Seven tribes' joint motion and proposed brief); State-ER92-103 (Snoqualmie's opposition to seven tribes' motion to file amicus brief).

The Snoqualmie cannot sidestep these difficulties through paragraph 3 of the complaint, which states “[t]his action does not seek to adjudicate the scope of those rights.” ER772. Setting aside the threshold problems that the language of paragraph 3 is ambiguous and that it conflicts with paragraph 1, the approach proposed by the Snoqualmie does not avoid the need to join other tribes. In effect, the Snoqualmie is asking for the broadest possible relief in this case, which would lay the groundwork for multiple conflicts with other tribes. The Snoqualmie's attempt to forestall the difficult issues presented by its claims only furthers the likelihood that the State would face inconsistent obligations in the future.

The Snoqualmie does not dispute that the Tulalip Tribes and other tribes may not be joined absent an unequivocal waiver of sovereign immunity, and that there have been no such waivers in this case. Where necessary parties cannot be joined, the Court examines four Rule 19(b) factors and asks whether in equity and good conscience, the case should be dismissed. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990).

The first three Rule 19(b) factors weigh heavily in favor of dismissal of the Snoqualmie's claims: (1) prejudice to any party or to the non-party; (2) whether relief can be shaped to lessen prejudice; and (3) whether an adequate remedy, even if not complete, can be awarded without the non-party. Each of these factors ask the Court to consider whether a judgment rendered without the absent party would be adequate. The same reasons that make other tribes necessary under Rule 19(a), establish prejudice to those tribes and the State. There is no way to lessen the prejudice to the other tribes or the State from a decision without all proper parties to the proceeding for purposes of Rule 19(b). *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991). The fourth Rule 19(b) factor, whether an alternative forum exists, weighs against dismissal, but this cannot overcome the interest of other tribes in preserving their sovereign immunity from suit. *Makah*, 910 F.2d at 560; *Goldmark*, 994 F. Supp. 2d at 1192.

Because the Snoqualmie's claims prejudice the ability of non-party tribes to protect their established claims to treaty hunting and gathering rights, the tribes are indispensable to this action, as explained above.

### VIII. CONCLUSION

The State respectfully requests that the district court's decision be affirmed.

RESPECTFULLY SUBMITTED this 18th day of September, 2020.

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## STATEMENT OF RELATED CASES

The State is unaware of any related cases pending in this Court.

DATED: September 18, 2020.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) because this brief contains 11,660 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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RESPECTFULLY SUBMITTED this 18th day of September, 2020.

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### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 18, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 18th day of September, 2020.

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