

Appeal Nos. 20-35346, 20-35353

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

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

Plaintiff-Appellant,

SAMISH INDIAN NATION,

Intervenor-Appellant,

v.

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

Defendants-Appellees,

*On Appeal from the United States District Court for the Western District of
Washington at Tacoma in Case No. 3:19-cv-06227 RBL (Hon. Ronald B. Leighton)*

**AMICUS CURIAE BRIEF OF TULALIP TRIBES
SUPPORTING DEFENDANTS-APPELLEES AND AFFIRMANCE**

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STATEMENT OF INTEREST

The Tulalip Tribes (“Tulalip”) have a legally protected interest in treaty hunting and gathering rights reserved under the Treaty of Point Elliott. Tulalip is the present-day tribal entity that “is a political successor in interest to certain tribes, bands or groups of Indians which were parties to the Treaty of Point Elliott.” *United States v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1975). Tulalip “is composed largely of people who are descendants of one or more of the groups commonly referred to today as the Snohomish, Snoqualmie, and Skykomish tribes, although many variants of those names have been used in treaty-time and subsequent writings.” *United States v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1986), *aff’d sub nom, United States v. Lummi Indian Tribe*, 841 F.2d 317 (9th Cir. 1988). Tulalip is the political successor to treaty-time Snoqualmie Indians and the treaty rights claimed by the Snoqualmie Tribe in this proceeding lawfully reside in Tulalip.

The modern-day Snoqualmie Tribe (the Plaintiff-Appellant here) is not a treaty tribe and does not retain rights (neither fishing nor hunting) under the Point Elliott Treaty. *United States v. Washington*, 476 F. Supp. 1101, 1109 (W.D. Wash. 1979), *aff’d* 641 F.2d 1368 (9th Cir. 1981) (*Washington II*). In this litigation, the modern-day Snoqualmie Tribe ignores previous rulings of this court and seeks to establish and exercise treaty hunting and gathering rights that would directly

overlap with and infringe upon those of Tulalip who is the successor of the treaty-time Snoqualmie Indians and who have the right to exercise treaty rights in those locations exercised by the Snoqualmie Indians at treaty times. *Washington*, 626 F. Supp. at 1527-30 (affirming Tulalip usual and accustomed fishing areas based on practices of treaty time Snoqualmie Indians). In other words, Snoqualmie claims treaty hunting rights in this proceeding that lawfully reside in Tulalip. In addition, there are limited game resources to satisfy the needs of existing treaty tribes like Tulalip. Granting Snoqualmie's claim would further harm Tulalip by diluting Tulalip's treaty right to hunt available game.

Due to the significant harm to Tulalip presented by Snoqualmie's litigation, Tulalip moved to intervene as of right in the District Court for the limited purpose of filing a motion to dismiss pursuant to FRCP 12(b)(7) and (19). Prior to ruling on Tulalip's motions, the District Court determined that issue preclusion bars Snoqualmie's suit in the order now challenged on appeal. Dkt. #39. Tulalip agrees that issue preclusion bars this suit and urges affirmance of the District Court's dismissal order. However, Tulalip submits this amicus curiae brief to inform the Court of the broader context of Snoqualmie's claims, the impact that Snoqualmie's claims would have on settled rights of treaty-tribes, specifically Tulalip, the failure to join required parties under FRCP 19, and the additional procedural barriers that preclude Snoqualmie's suit.

All parties, through their counsel, have consented to Tulalip's filing of this amicus curiae brief; thus, it is authorized under Federal Rule of Appellate Procedure 29(a)(2). No party's counsel other than Tulalip's counsel authored any portion of this brief. No party, party's counsel, or any other person or entity besides Tulalip contributed money to fund preparation or submission of this brief.

SUMMARY OF ARGUMENT

In its Complaint (District Court ECF Dkt. #1), Plaintiff-Appellant Snoqualmie seeks declaratory relief that it possesses and is entitled to exercise off-reservation treaty hunting and gathering rights pursuant to the Treaty of Point Elliott. Snoqualmie further seeks to enjoin Defendants-Appellees from interfering with Snoqualmie's exercise of its alleged treaty hunting and gathering rights.

In 1979 Judge Boldt ruled that this modern-day Snoqualmie Tribe "is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott." *United States v. Washington*, 476 F. Supp. 1101, 1109 (W.D. Wash. 1979), *aff'd* 641 F.2d 1368 (9th Cir. 1981) ("*Washington II*"). Judge Boldt found, and this Court affirmed, that the modern-day Snoqualmie are not a "treaty tribe" and "do not have and may not confer upon their members fishing rights under the Treaties of Point Elliott and Medicine Creek." *Id.* at 1111.

The subsequent federal recognition of the modern-day Snoqualmie Tribe does not change their lack of treaty-tribe status for purposes of reserved fishing,

hunting, and gathering rights. *United States v. Washington*, 593 F.3d 790, 798-801 (9th Cir. 2010) (en banc) (“*Washington IV*”) (holding that subsequent federal recognition of an Indian tribe has no effect on whether that tribe is a treaty tribe and does not support re-opening of prior adverse determinations of treaty status). Nor does the fact that this case addresses hunting and gathering rights rather than fishing rights under the Treaty of Point Elliott change the underlying (and previously adjudicated) determination that Snoqualmie is not a treaty tribe and has no legal basis to assert any rights, whether hunting or fishing, that derive from the Treaty of Point Elliott. *Id.*; *Washington II*, 641 F.2d at 1372-74 (affirming Snoqualmie’s lack of treaty tribe status).

The District Court correctly determined that issue preclusion bars Snoqualmie’s claims because Snoqualmie’s lack of treaty-tribe status under the Treaty of Point Elliott has been previously and finally adjudicated. Dkt. #39, pp. 8-9. “[T]he factual issue that determined the [Snoqualmie] Tribe’s [lack of] fishing rights in *Washington II* is the same gateway question that the Court would face here when determining hunting and gathering rights under the Treaty of Point Elliott.” Dkt. #39, p. 8. “The Snoqualmie do not explain how the factual issues necessary to determine signatory status with respect to fishing rights could differ from those required to determine hunting and gathering rights, all of which are described in the same article of the Treaty.” *Id.* This is because they do not differ.

The prior adverse determination against Snoqualmie regarding its treaty status precludes re-litigation here.

In addition to being barred by issue preclusion, Snoqualmie's suit is also subject to dismissal pursuant to FRCP 12(b)(7) and FRCP 19 for failure to join Tulalip, who is a required party.¹ Unlike Snoqualmie, Tulalip is the present-day tribal entity which "is a political successor in interest to certain tribes, bands or groups of Indians which were parties to the Treaty of Point Elliott." *United States v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1975). The Tulalip Tribes are composed of "... people who are descendants of one or more of the groups commonly referred to today as the Snohomish, Snoqualmie and Skykomish tribes," *United States v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985). Based in part on evidence of fishing engaged in by Snoqualmie fishermen at treaty times, Tulalip has treaty fishing rights and adjudicated usual and accustomed fishing areas in the Snohomish-Snoqualmie-Skykomish river drainages. *Id.* at 1529-30. The present-day Snoqualmie Tribe possesses no treaty-reserved fishing or hunting rights. Any treaty rights associated with the historic Snoqualmie Tribe reside in Tulalip. *Id.*

¹ Due to Tulalip's sovereign immunity, which it expressly does not and has not waived, Tulalip cannot be joined in Snoqualmie's suit.

Tulalip urges this Court to affirm the District Court's order of dismissal, which is plainly correct. However, if the Court does not affirm the District Court's ruling on the basis of issue preclusion, this Court should remand to the District Court for adjudication of the numerous other jurisdictional and procedural deficiencies that bar Snoqualmie's suit including its failure to join required parties such as Tulalip pursuant to FRCP 12(b)(7) and FRCP 19. For similar reasons, the Court should also reject the Intervenor-Appellant Samish arguments, which are largely identical to Snoqualmie.

ARGUMENT

I. Plaintiff-Appellant Snoqualmie Is Not A Treaty Tribe; Treaty Rights Claimed by Snoqualmie In This Proceeding Reside in Tulalip.

Article 5 of the 1855 Treaty of Point Elliott guarantees: "[t]he 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." 12 Stat. 927, Article 5. In 1974, Judge Boldt ruled that fourteen Indian tribes, not including the present-day Snoqualmie Tribe, were entitled to off-reservation treaty fishing rights as political successors to tribes that signed treaties including the Treaty of Point Elliott. *United States v. Washington*, 384 F. Supp. 312, 406 (W.D. Wash. 1974) ("*Washington I*").

Shortly thereafter, the Snoqualmie Tribe and four other tribes (Samish, Snohomish, Duwamish, and Steilacoom) (collectively, the “Five Tribes”) intervened in the *Washington* litigation and sought to establish their entitlement to treaty fishing rights. At that time, the Snoqualmie Tribe was not federally recognized. On September 13, 1974, Judge Boldt referred the issue of the treaty status of the Five Tribes (including Snoqualmie) to Magistrate Judge Robert E. Cooper. *United States v. Washington*, 98 F.3d 1159, 1161 (9th Cir. 1996). Magistrate Judge Cooper held hearings and received evidence on whether any of the Five Tribes had treaty fishing rights. *Id.* Magistrate Judge Cooper, on March 5, 1975, recommended a finding that none of the Five Tribes (including Snoqualmie) had maintained their political cohesion since treaty time, and thus recommended a conclusion of law that none had rights under the Stevens Treaties, including the Point Elliott Treaty. *Id.*

Following appeal of the Magistrate’s Report, the District Court held a three-day de novo evidentiary hearing, directed the parties to submit additional evidence, and heard oral argument. *Id.* On March 23, 1979, District Judge Boldt accepted Magistrate Cooper’s finding and ruled that the Five Tribes (including the modern-day Snoqualmie Tribe, the Plaintiff-Appellant here) are not treaty tribes and have no rights under the Point Elliott Treaty and the Ninth Circuit affirmed. *Washington II*, 476 F. Supp. at 1109, *aff’d*, 641 F.2d 1368 (9th Cir. 1981).

Snoqualmie’s lack of treaty status has already been adjudicated. *Id.* The District Court correctly ruled that Snoqualmie cannot relitigate that issue here.

In *Washington II*, Judge Boldt found the modern-day Snoqualmie Tribe is composed primarily of persons that descend from Indians who in 1855 were known as Snoqualmoo. *Id.* at 1108. Judge Boldt found that a Snoqualmoo chief, named Patkanim, was signatory to the Point Elliott Treaty. *Id.* Some Snoqualmoo or Snoqualmie Indians settled on the Tulalip Reservation and many of their descendants are members of the Tulalip Tribes. *Id.* Judge Boldt acknowledged that the modern-day Snoqualmie Tribe prosecuted claims before the Indian Claims Commission. *Id.* But he also determined that the members of the modern-day Snoqualmie Tribe “do not and have not lived as a continuous, separate, distinct and cohesive Indian cultural or political community.” *Id.* at 1109. Judge Boldt found that the “Snoqualmie Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott.” *Id.* And “the citizens comprising the Intervenor Snoqualmie Tribe have not maintained an organized tribal structure in a political sense.” *Id.* Based on these findings, Judge Boldt concluded that the Snoqualmie Tribe is not “a treaty tribe in the political sense within the meaning of Final Decision No. 1 and the related Orders of the Court in this case.” *Id.* at 1111. Thus, the Snoqualmie Tribe does “not have and may not confer upon their members fishing rights under the Treaties of Point Elliott”

Id. The Ninth Circuit gave “close scrutiny” to Judge Boldt’s ruling in *Washington II* and affirmed that the modern-day Snoqualmie Tribe is not a treaty tribe. 641 F.2d at 1371-1374. As the District Court properly found, that prior adverse decision on the issue of Snoqualmie’s treaty status bars Snoqualmie’s claims of treaty-tribe status in this case. Dkt. #39, pp. 8-9.

The Five Tribes have made subsequent attempts to re-open or modify Judge Boldt’s decision that the Five Tribes (including Snoqualmie) are not treaty tribes. In *United States v. Washington*, 98 F.3d 1159 (9th Cir. 1996), the Court rejected an attempt by the Duwamish, Snohomish, and Steilacoom Tribes for relief from Judge Boldt and the Ninth Circuit’s judgment in *Washington II*. The Samish Tribe also attempted to reopen the *Washington II* judgment on grounds of its subsequent federal recognition, but the District Court and ultimately the Ninth Circuit (en banc) rejected re-opening of the *Washington II* judgment. *United States v. Washington*, 593 F.3d 790 (9th Cir. 2010) (en banc) (*Washington IV*). In *Washington IV*, this Court (en banc) held that subsequent federal recognition is not relevant to treaty-tribe status and does not permit re-opening of the judgment in *Washington II* that the Five Tribes (Snoqualmie) lack treaty-tribe status. *Id.* at 798-801. This Court stressed the importance of finality in treaty status determinations. *Id.* Snoqualmie seeks to undermine that finality here.

Certain descendants of Patkanim and the treaty-time Snoqualmoo Tribe have attempted to claim off-reservation treaty hunting rights in past cases. In *State v. Posenjak*, 127 Wn. App. 41, 111 P.3d 1206 (2005), a man convicted of illegal elk hunting alleged he was a Snoqualmoo member and a descendant of Chief Pat-kanam who signed the Point Elliott Treaty. *Id.* at 1209. The Court affirmed the conviction, finding that the defendant failed to establish that he was a member of any treaty tribe (either a signatory tribe or a successor tribe). The fact that he was a descendant of an individual treaty signatory was not relevant. *Id.* at 1211. *See also Posenjak v. Dept. of Fish & Wildlife of Wash.*, 74 Fed. Appx. 744, 747 (9th Cir. 2003) (finding insufficient facts to support treaty status of Snoqualmoo Tribe).

In *State v. Snyder*, Case No. 73893-3-I, 2017 Wash. App. LEXIS 779 (Wash. App. 2017), a Defendant convicted of illegal elk hunting claimed a treaty hunting right as a member of the Snoqualmoo Tribe. The Court found that the modern-day Snoqualmie Tribe descended from Patkanim and the treaty time Snoqualmoo Indians, as Snoqualmie alleges in this proceeding. *Id.* at *9. Yet, the Court found that neither the present-day Snoqualmoo nor the present-day Snoqualmie Tribe have treaty rights – hunting or otherwise. *Id.* at **13-14.

Following *Washington I*, the Tulalip Tribes intervened and the Court found Tulalip to be the “present-day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to certain tribes,

bands or groups of Indians which were parties to the Treaty of Point Elliott.

United States v. Washington, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978).

Following Tulalip's Request for Determination of its Usual and Accustomed Fishing Places, the Court found that the "Tulalip Tribe is composed largely of people who are descendants of one or more of the groups commonly referred to today as the Snohomish, Snoqualmie, and Skykomish tribes, although many variants of those names have been used in treaty-time and subsequent writings."

United States v. Washington, 626 F. Supp. 1405, 1527 (W.D. Wash. 1986), *aff'd sub nom*, *United States v. Lummi Indian Tribe*, 841 F.2d 317 (9th Cir. 1988). In determining Tulalip's usual and accustomed fishing areas, the Court relied on the fishing practices of Tulalip predecessors, specifically Snoqualmie Indians, and found that Tulalip usual and accustomed fishing areas include the Snohomish-Snoqualmie-Skykomish River drainage. *Id.* at 1529-31. Binding case law holds that the present-day Snoqualmie Tribe does not possess rights deriving from the Point Elliott Treaty. Tulalip is the political successor to the treaty-time Snoqualmie Indians and the treaty rights of the Snoqualmie reside in Tulalip.

The District Court and Ninth Circuit decisions in *Washington II* confirm that the modern-day Snoqualmie Tribe is not a treaty tribe and does not have rights arising from the Point Elliott Treaty. That decision, which is based on multiple days of hearing before a magistrate, followed by a de novo evidentiary hearing

before Judge Boldt, was affirmed following “close scrutiny” by the Ninth Circuit. *Washington*, 98 F.3d at 1161; *Washington II*, 641 F.2d at 1373. Snoqualmie is just the most recent of the Five Tribes to attempt to undo Judge Boldt’s *Washington II* opinion but, like the others, it should not succeed.

II. The Intervenor-Appellant Samish Is Also Not A Treaty Tribe.

In *Washington II*, Judge Boldt found the modern-day Samish Tribe were not named in the Treaty of Point Elliott but were assigned to the Lummi signer, Chowits-hoot, who signed for Lummi and other northern bands. 476 F.Supp 1101 at 1106 (9th Cir. 1981).² Most Samish moved to the Lummi Reservation and some settled on the Swinomish Reservation and many of their descendants are members of the Swinomish and Lummi tribes. *Id.* Judge Boldt acknowledged that the modern-day Samish Tribe prosecuted one claim before the Indian Claims Commission. *Id.* But he also determined that members of the modern-day Samish Tribe “do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community.” *Id.* Judge Boldt found that the “Samish Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott.” *Id.* And the citizens comprising the

² Samish belatedly moved to intervene in this case following the District Court’s dismissal order. They did not attempt to participate in the District Court. In context, the late intervention appears to be another attempt to re-litigate the District Court’s prior ruling that Samish is not a treaty tribe and possesses no treaty rights.

Intervenor Samish Tribe have not maintained an organized tribal structure in a political sense.” *Id.* Based on these findings, Judge Boldt concluded that the Samish Tribe is not a “treaty tribe in the political sense within the meaning of Final Decision No. 1 and the related Orders of the Court in this case.” *Id.*

The Ninth Circuit found that the district court’s crucial finding of fact justifying the denial of treaty rights was the finding ‘that the [Samish] had not functioned since treaty times as a continuous separate, distinct and cohesive cultural or political communit[ies].’” *Washington IV*, 593 F.3d 790 (2010) quoting *Washington II*, 641 F.2d at 1371 (1981). The Ninth Circuit (en banc), in denying the Samish Tribe’s request to reopen the judgment in *Washington II*, reasoned that “considerations of finality loom especially large in this case” and the claims of the Samish Tribe necessarily compete with those of treaty tribes who are legal successors in interest to the Treaty of Point Elliott. *Id.* The decision that the modern-day Samish Tribe is not a treaty tribe is res judicata and Samish’s request to reverse the District Court’s decision in this matter should be denied. *Id.*

III. The District Court Correctly Ruled That the Prior Adverse Determination of Treaty Status Bars Snoqualmie’s Suit.

The District Court correctly determined that “the factual issue that determined the [Snoqualmie] Tribe’s [lack of] fishing rights in *Washington II* is the same gateway question that the Court would face here when determining hunting and gathering rights under the Treaty of Point Elliott.” Order, Dkt. #39, p. 8.

Snoqualmie does not dispute that it is not a treaty-tribe for purposes of fishing rights. Yet, as the District Court properly found: “The Snoqualmie do not explain how the factual issues necessary to determine signatory status with respect to fishing rights could differ from those required to determine hunting and gathering rights, all of which are described in the same article of the Treaty.” *Id.* (emphasis added). The Court explained that, even though *Washington II* does not determine the scope of hunting and gathering rights, “this says nothing about whether tribes that lack fishing rights because they lack successorship to any treaty signatories could nonetheless have other treaty rights.” *Id.* They cannot and do not.

In *Washington II*, Snoqualmie litigated the question of its status as successor in interest to signatories of the Treaty of Point Elliott and lost. Judge Boldt found that the “Intervenor Snoqualmie Tribe is not an entity that is descended from any of the tribal entities that were signatory to the Treaty of Point Elliott.” 476 F. Supp. at 1109. “The citizens comprising the Intervenor Snoqualmie Tribe have not maintained an organized tribal structure in a political sense.” *Id.* On appeal, and upon close scrutiny, the Ninth Circuit affirmed the determination that Snoqualmie is not a treaty tribe because, among other reasons, Snoqualmie lacked the “single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory” which is that “the group must have maintained an organized tribal structure.” *Washington II*, 641 F.2d at 1372.

While adjudicated in the context of fishing rights, the issue of Snoqualmie's treaty-tribe status extends to all claims, rights, and entitlements under the treaty. Snoqualmie concedes it is not a treaty-tribe for purposes of fishing under the treaty in accordance with the decision in *Washington II* – but argues that it is a treaty-tribe for purposes of hunting rights which are reserved in the same article of the same treaty at issue in *Washington II*. Snoqualmie's argument is strained and nonsensical and it was properly rejected by the District Court. Treaty-tribes (like Tulalip) are entitled to all rights reserved and all benefits granted pursuant to the treaty. Conversely, entities that are not treaty-tribes (like Snoqualmie here) are not entitled to any such benefits or entitlements under the treaty. Applying well-settled principles of issue preclusion, the District Court correctly found that the prior adverse treaty determination bars Snoqualmie's suit here.³

³ Snoqualmie as well as the amicus curiae Sauk-Suiattle Tribe also argue that the District Court's ruling amounts to an unlawful abrogation of treaty rights. This is plainly incorrect. The District Court properly applied a prior binding judicial determination that the modern-day Snoqualmie Tribe is not a political successor to Indian tribes that signed the Treaty of Point Elliott. Judge Boldt's determination that the modern-day Snoqualmie is not a treaty tribe, affirmed by this Court, governs here. The District Court's application and adherence to Judge Boldt's prior adverse determination of treaty rights against Snoqualmie (affirmed by this Court) is proper and does not amount to a unilateral or unlawful abrogation of treaty rights. As discussed herein, Snoqualmie has no such treaty right to abrogate. Regardless, a Court obviously has authority to adjudicate a legal dispute as to whether a treaty right exists. Snoqualmie and Sauk Suiattle's arguments absurdly suggest that a Court, in a judicial proceeding, could only affirm treaty rights but could never reject a treaty rights claim absent Congressional approval.

IV. Snoqualmie’s Suit Would Harm Treaty Tribes, Specifically Tulalip, And Is Subject to Dismissal for Failure to Join Required Parties.

In addition to being barred by issue preclusion and other sound principles of finality and repose, Snoqualmie’s suit is subject to dismissal for failure to join Tulalip, who is the political successor in interest to the treaty rights of the treaty-time Snoqualmie Indians. Snoqualmie’s suit presents a direct attack on Tulalip’s existing treaty rights. In the District Court, Tulalip filed a motion to intervene as of right for the limited purpose of moving to dismiss under FRCP 12(b)(7) and FRCP 19 for failure to join Tulalip as a required party. Because Tulalip has sovereign immunity and cannot be joined, this suit is subject to dismissal under FRCP 12(b)(7) and FRCP 19 because it cannot proceed in Tulalip’s absence.

Snoqualmie’s claims, if successful, would directly impair Tulalip’s treaty-reserved hunting rights. Tulalip has a legally protected interest in treaty hunting and gathering rights reserved under the Treaty of Point Elliott. “[A]ll tribes with hunting and gathering rights in the subject territory have a vital, legally-protected interest in how the Treaty is interpreted and enforced.” *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1187 (W.D. Wash. 2014). *See also Skokomish Indian Tribe v. Forsman*, Case No. 16-5639-RBL, 2017 U.S. Dist. LEXIS 42730 (W.D. Wash. 2017), *aff’d* 738 Fed. Appx. 406 (9th Cir. 2018) (lawsuit regarding treaty-hunting right could not proceed in absence of other treaty tribes); *Makah*

Indian Tribe v. Verity, 910 F.2d 555, 558-59 (9th Cir. 1990) (concluding that tribes who shared treaty fishing rights had an interest in Tribe’s claim seeking higher allocation of treaty salmon harvest); *Keweenaw Bay Indian Cmty. v. State*, 11 F.3d 1341, 1346-47 (6th Cir. 1993) (absent tribes claiming treaty rights to fish are necessary parties in tribe’s suit against state to protect fishery); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1279 (10th Cir. 2012) (tribe’s request for determination of status of land shared with absent tribe impaired absent tribe’s protected interest); *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245, 250-51 (D. Or. 2017) (treaty fishing right is legally protected interest for Rule 19 purposes).

Snoqualmie asks the Court to declare that it has a treaty right under the Treaty of Point Elliott to hunt and gather off-reservation and that the State be enjoined from interfering with Snoqualmie’s exercise of that alleged treaty right. Granting Snoqualmie’s claims would directly injure Tulalip by diluting Tulalip’s existing treaty rights. Nine tribes hold reserved hunting and fishing rights in the Point Elliott Treaty area. There are not enough game animals for treaty tribes as it is. The addition of another tribe to share finite game resources with would necessarily reduce and limit Tulalip’s right and would be substantially harmful to Tulalip. *Washington IV*, 593 F.3d at 800. In *Makah*, the Ninth Circuit found that absent tribes were required parties to the Makah Tribe’s suit seeking a higher allocation of ocean fishing harvest quotas. “The absent tribes had an interest in the

suit because ‘any share that goes to the [plaintiff] Makah must come from other tribes.’” *Makah*, 910 F.2d at 559. The same is true here.

Beyond the harm resulting from this general dilution, Snoqualmie asserts claims to treaty rights that lawfully reside in Tulalip. Tulalip is the political successor in interest to the Snoqualmie Tribe from treaty time and is the holder of any treaty rights (whether fishing or hunting) claimed by Snoqualmie. *Washington*, 626 F. Supp. at 1527-30; *Washington*, 459 F. Supp. at 1039. The modern-day Snoqualmie Tribe is not a treaty tribe and does not retain rights (whether fishing or hunting) under the Point Elliott Treaty. *Washington II*, 476 F. Supp. at 1109, *aff’d* 641 F.2d 1368 (9th Cir. 1981). Snoqualmie seeks a declaration that conflicts with prior judicial determinations and that directly conflicts with Tulalip’s rights. Tulalip is a required party in this action that directly challenges the scope, interpretation, and meaning of Tulalip’s treaty-reserved rights. *Dine Citizens Against Ruining Our Environment v. BIA*, 932 F.3d 843, 852 (9th Cir. 2019) (party has legally protected interest at stake “where the effect of a plaintiff’s successful suit would be to impair a right already granted”).

In its 2010 *en banc* opinion, this Court explained the injury to existing treaty tribes that would result from allowing non-treaty tribes to attempt to re-litigate their non-treaty status. *Washington IV*, 593 F.3d at 799-800. After obtaining federal recognition in 1996, the Samish Tribe sought to re-open Judge Boldt’s prior

determination that it lacked treaty-tribe status. *Id.* at 792-794. This Court affirmed the District Court’s denial of Samish’s Rule 60(b) motion and held that a non-treaty tribe’s subsequent attainment of federal recognition has no effect on or relevance to its treaty status or lack thereof. *Id.* at 799-801. This Court articulated the harm that could result to existing treaty tribes if any of the Five Tribes (e.g., Snoqualmie and Samish) were allowed to re-litigate their non-treaty status:

The potential disruption and possible injury to existing treaty rights that might follow from reopening the denial of the Samish Tribe’s treaty claims in *Washington II* is not confined to mere across-the-board dilution of the shares of total harvest of all treaty tribes. The treaties guarantee the right to take fish at ‘usual and accustomed . . . stations’ of each treaty tribe. The claims of the Samish Tribe necessarily compete with those of treaty tribes held to be successors of the treaty Samish, who now fish at the customary stations of the Samish at treaty times. The impact of new claims asserted as Samish claims will have a particularly severe impact on such treaty tribes.

Id. at 800. In *Washington IV*, this Court clearly understood that “it would potentially disturb treaty fishing of the tribes now exercising Samish treaty rights to have the newly recognized Samish Tribe join them.” *Id.*, fn. 12.

The modern-day Snoqualmie was, like the modern-day Samish, one of the five intervenor tribes who were the subject of Judge Boldt’s 1979 opinion in *Washington II* that affirmatively held those tribes were not treaty tribes and did not have treaty-reserved rights under the Treaty of Point Elliott. *Washington II*, 476 F. Supp. at 1109, *aff’d* 641 F.2d 1368 (9th Cir. 1981). Like Samish, the modern-day Snoqualmie Tribe subsequently obtained federal recognition, which is irrelevant to

the question of whether it has treaty tribe status. *Washington IV*, 593 F.3d at 799-800. Like Samish, Snoqualmie is now attempting to re-litigate its status as a treaty tribe. In addition to issue preclusion, there are many other procedural and substantive reasons why Snoqualmie's claims fail. One of those reasons is that its claims directly implicate and threaten Tulalip's existing treaty-reserved rights. Snoqualmie cannot seek adjudication of treaty rights that reside in Tulalip without Tulalip's presence as a party in this suit. Tulalip's sovereign immunity precludes it from being joined without its consent. Thus, the suit is subject to dismissal under FRCP 12(b)(7) and FRCP 19.

Proceeding in Tulalip's absence would also leave State Defendants-Appellees with multiple inconsistent obligations. For example, the State could be subject to an injunction requiring them to recognize Snoqualmie as a treaty hunting tribe and to include Snoqualmie as a participant in treaty hunting in Tulalip hunting territory. At the same time, not being bound by any judgment entered in its absence, Tulalip would seek to assert its full rights and full share to any game within the scope of the treaty hunting right irrespective of Snoqualmie. Because Tulalip is the holder of the very rights claimed by Snoqualmie in this litigation, "[t]he likelihood that they would seek legal recourse in the event that the judgment deprived them of [treaty] rights to which they believe they are entitled can hardly be characterized as speculative." *Keweenaw Bay Indian Cmty.*, 11 F.3d at 1347.

The State would be placed between a rock and a hard place – faced with the choice of complying with an injunction requiring it to recognize Snoqualmie as a treaty tribe with rights to hunt game under the Point Elliott Treaty or complying with its competing legal obligations to Tulalip, which would assert and seek to exercise treaty hunting rights within the same areas and with respect to the same game.

Snoqualmie’s suit, if successful would create chaos and confusion in the management of game resources in the State of Washington. Tulalip co-manages fish and wildlife resources along with the State Defendants to preserve, protect, perpetuate, and manage wildlife and food fish, game fish, and shellfish. *United States v. Washington*, 19 F. Supp. 3d 1252, 1256 (W.D. Wash. 1997). To accomplish this, Tulalip issues licenses that allow hunting and fishing activity, and, in cooperation with the State of Washington, creates management plans for fish and wildlife resources, and promulgates regulations that guide the exercise of hunting and fishing activity. *Runyon*, 320 F.R.D. at 251 (recognizing that treaty fishing rights are “a function of tribal sovereignty and allow tribes to enforce fishing laws against tribal members”). The State in its regulatory capacity is bound to act in conformance with Tulalip’s treaty-reserved rights. Yet, if successful, this lawsuit would result in a situation where both Snoqualmie and Tulalip each claimed directly conflicting treaty rights to hunt the same game in the same areas. Both tribes would also claim the same conflicting allocations of game out of the

overall tribal treaty share. Tulalip and Snoqualmie's respective claims to game would likely exceed, from the State's perspective, the total permissible treaty allocation for those tribes, leaving the State with multiple, inconsistent, and competing allocation obligations.

Snoqualmie's suit poses direct harm to Tulalip and its treaty rights. It threatens the settled expectations of other treaty-tribes and the State. It seeks to undo and undermine finality in treaty matters that this Court has stressed the importance of. This Court should affirm the District Court's dismissal of Snoqualmie's suit on grounds of issue preclusion. But if it does not affirm on that basis, the matter should be remanded for determination of the remaining procedural and substantive deficiencies that should bar Snoqualmie's suit.

CONCLUSION

For the reasons stated herein, this Court should affirm the District Court's dismissal of Snoqualmie's suit with prejudice. Alternatively, if the Court does not affirm dismissal on the basis of issue preclusion, this case should be remanded for adjudication of the remaining jurisdictional and procedural issues that should independently bar Snoqualmie's suit.

Respectfully submitted this 25th day of September, 2020.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
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1. I certify that this brief complies with the length limitation set forth in Federal Rule of Appellate Procedure 29(a)(5), because this brief contains 5,445 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Date: September 25, 2020

/s/ Mason D. Morisset

Signature of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2020, I served a copy of the foregoing brief on counsel of record by: Electronic Means (by CM/ECF).

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