

Ethan Jones, WSBA No. 46911
Shona Voelckers, WSBA No. 50068
Yakama Nation Office of Legal Counsel
P.O. Box 150 / 401 Fort Road
Toppenish, WA 98948
(509) 865-7268
ethan@yakamanation-olc.org
shona@yakamanation-olc.org

Joe Sexton, WSBA No. 38063
Galanda Broadman, PLLC
8606 35th Ave NE, Suite L1
P.O. Box 15146
Seattle, WA 98115
(206) 557-7509 – Office
(206) 229-7690 – Fax
joe@galandabroadman.com

*Attorneys for the Confederated Tribes and
Bands of the Yakama Nation*

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA
NATION, a sovereign federally
recognized Native Nation,

Plaintiff,

v.

Klickitat County, a political
subdivision of the State of
Washington; Klickitat County
Sheriff's Office, an agency of
Klickitat County; Bob Songer, in
his official capacity; Klickitat
County Department of the
Prosecuting Attorney, an
agency of Klickitat County; David
Quesnel, in his official capacity,

Defendants.

Case No.: 1:17-cv-03192

**YAKAMA NATION'S MOTION FOR
PRELIMINARY INJUNCTION**

Date: February 8, 2019
With Oral Argument: 10:00 am
Hearing Location: Spokane, WA
Judge: Chief Judge Thomas O. Rice

I. INTRODUCTION

In the Treaty with the Yakamas of June 9, 1855, the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) reserved the Yakama Reservation for its exclusive use and benefit. Only Congress can change the Yakama Reservation’s boundaries, which Congress has never done. As a result, the Yakama Nation exercises its inherent sovereign and Treaty-reserved rights and jurisdiction over Indians within the Yakama Reservation, including an area known as “Tract D,” as it has done since time immemorial.

While the Yakama Nation’s criminal jurisdiction remains intact, the United States voluntarily transferred elements of its jurisdiction within the Yakama Reservation to the State of Washington under Pub. L. 83-280 in 1963. The Yakama Nation strongly opposed Pub. L. 83-280, including an unsuccessful challenge before the United States Supreme Court in 1979. At the Yakama Nation’s prompting and the State of Washington’s request, in 2015 the United States reassumed, in relevant part, its criminal jurisdiction within the Yakama Reservation over crimes that involve Indians as a defendant and/or as a victim. Defendant Klickitat County has already unsuccessfully challenged the State’s retrocession of jurisdiction in this Court in 2016, and is now violating the Yakama Nation’s Treaty rights and threatening its sovereignty by exercising criminal jurisdiction over enrolled Yakama Members within Tract D of the Yakama Reservation. Specifically, the Yakama Nation recently learned that on October 13, 2018, Defendants arrested and are now prosecuting another enrolled Yakama Member under State law for alleged crimes arising within the Yakama Reservation.

Pursuant to Fed. R. Civ. P. 65, Yakama Nation respectfully requests that

1 the Court issue a preliminary injunction enjoining Defendants, and all persons
 2 acting on Defendants' behalf, from exercising criminal jurisdiction arising
 3 from actions within the exterior boundaries of the Yakama Reservation,
 4 including Tract D, and involving an Indian as a defendant and/or victim.

6 II. FACTUAL BACKGROUND

7 A. Treaty with the Yakamas of June 9, 1855

8 Since time immemorial, the fourteen Tribes and Bands that were
 9 confederated as the Yakama Nation lived and traveled throughout the Pacific
 10 Northwest for hunting, gathering, fishing, trading, recreational, political, and
 11 kinship purposes. *Yakima Indian Nation v. Flores*, 955 F. Supp. 1229, 1238-1239
 12 (E.D. Wash. 1997). Between May 28, 1855, and June 12, 1855, representatives
 13 from the fourteen Tribes and Bands gathered at the Walla Walla Treaty Council to
 14 negotiate the Treaty of 1855 with Territorial Governor Isaac I. Stevens. *The*
 15 *Yakima Tribe v. The United States*, 158 Ct. Cl. 672, 675 (1962). Criminal
 16 jurisdiction was a topic of discussion at these negotiations. United States General
 17 Palmer told the Yakamas' Treaty signors that the Yakama Nation would be
 18 responsible for crimes committed by Yakamas, and that he and other
 19 representatives of the United States government would be responsible for wrongs
 20 committed by non-Indians. Jones Decl. Ex. B, at 115 (December 11, 2018).

21 On June 9, 1855, the Yakama Nation and the United States executed the
 22 Treaty of 1855; the United States Senate ratified the Treaty of 1855 on March 8,
 23 1859; and President James Buchanan proclaimed it on April 18, 1859. Jones Decl.
 24 Ex. A. The Yakama Nation ceded certain rights to more than 10,000,000 acres of
 25 land, roughly 1/3 of the State of Washington, for the rights reserved in the Treaty.

1 *Id.* In Article II of the Treaty of 1855, the Yakama Nation reserved the Yakama
 2 Reservation for its exclusive use and benefit, which boundaries are described as
 3 follows:

4 Commencing on the Yakama River, at the mouth of the
 5 Attah-nam River; thence westerly along said Attah-nam
 6 River to the forks; thence along the southern tributary to
 7 the Cascade Mountains; thence southerly along the main
 8 ridge of said mountains, passing south and east of Mount
 9 Adams, to the spur whence flows the waters of the
 10 Klickitat and Pisco Rivers; thence down said spur to the
 11 divide between the waters of said rivers; thence along
 12 said divide to the divide separating the waters of the
 13 Satass River from those flowing into the Columbia River;
 thence along said divide to the main Yakama, eight miles
 below the mouth of the Satass River; and thence up the
 Yakama River to the place of beginning.

14 *Id.* at 952. In executing the Treaty of 1855, the Yakama Nation reserved all
 15 inherent rights not expressly ceded to the United States, including but not limited
 16 to criminal and civil jurisdiction over Indians in the Yakama Nation's Indian
 17 Country. *United States v. Winans*, 198 U.S. 371, 381 (1905); *Washington v.*
 18 *Confederated Bands & Tribes of the Yakama Nation*, 439 U.S. 463, 470-71 (1979).

20 **B. Tract D of the Yakama Reservation**

21 **1. History of Tract D in the Treaty of 1855**

22 Yakamas used the area known as 'Cammass Prairie'—today the southwestern
 23 portion of today's Yakama Reservation (known as "Tract D")—to gather camas
 24 roots, which was a principal food source that grows abundantly in Tract D.
 25 Bordeaux Decl. Ex. A, at YN 000395. Tract D was also used as a meeting place
 26

1 and burial ground, for horse races, and as an assembly point for Yakamas to move
2 south to the Columbia River for fishing, and west to the mountains to hunt and
3 gather huckleberries around Pahto (i.e. Mt. Adams). Jones Decl. Ex. AA, at YN
4 001051. In 1939, Mr. Thomas Yallup, an enrolled Yakama Member, testified
5 before the United States Senate Committee on Indian Affairs that Tract D was:

6 that place where they held their general conventions, and
7 the different chiefs and head men had gotten together and
8 held big counsels, and also had big horse races. Different
9 tribes would bring their horses. My grandfather was one
10 of the signers of the treaty of 1855, while he was a young
11 man. He was about 85 years old when he died; and when
12 he appeared before the House committee he told at that
13 time that as far as he could remember he had always
14 remembered that place as the gathering place of the
15 Indians of the Northwest.

16 *Id.*

17 While the Treaty of 1855 was being negotiated, Territorial Governor Stevens
18 described the proposed Yakama Reservation as having “plenty of Salmon . . . there
19 are **roots** and berries.” Jones Decl. Ex. B, at 57 (emphasis added). Territorial
20 Governor Stevens described the southwest boundaries of the Yakama Reservation
21 as proceeding “down the main chain of the Cascade mountains **south of Mount**
22 **Adams**, thence along the Highlands separating the Pisco and Satass river from the
23 rivers flowing into the Columbia” *Id.* at 422 (emphasis added).

24 In Article II of the Treaty of 1855, the specific boundary description for
25 Tract D of the Yakama Reservation is “thence southerly along the main ridge of
26 said mountains, passing south and east of Mount Adams, to the spur whence flows
the waters of the Klickitat and Pisco Rivers; thence down said spur to the divide
between the waters of said rivers; thence along said divide to the divide separating

1 the waters of the Satass River from those flowing into the Columbia River”
2 Jones Decl. Ex. A, at 952. In support of these Reservation boundaries, Territorial
3 Governor Stevens contemporaneously executed a map (hereafter the “Treaty
4 Map”) depicting the Yakama Reservation boundaries extending along the crest of
5 the Cascades in a southerly direction west of Mt. Adams, and then south of Mt.
6 Adams for a distance before turning east along the Yakama Reservation’s southern
7 border. Bordeaux Decl. Ex. B.

8 On June 14, 1855, Territorial Governor Stevens sent a letter to the
9 Commissioner of Indian Affairs that included the Treaty of 1855, the Treaty Map,
10 and a copy of the official Walla Walla Treaty Council proceedings. Jones Decl. Ex.
11 W. In the letter, Territorial Governor Stevens described the Yakama Reservation in
12 relevant part as “back[ing] up against the Cascades, **a fine range for roots**, berries,
13 and game.” *Id.* at 2 (emphasis added); *The Yakima Tribe v. The United States*, 16
14 Ind. Cl. Comm. 536, 539 (Feb. 25, 1966) (see Jones Decl. Ex. R). Shortly
15 thereafter, the United States misplaced the Treaty Map until it was later
16 rediscovered in 1930. *The Yakima Tribe v. The United States*, 16 Ind. Cl. Comm. at
17 540.

18 19 **2. History of Yakama Reservation surveys**

20 For 75 years after the Treaty of 1855, the creation of the Treaty Map, and the
21 United States’ subsequent misplacement of the Treaty Map, the Executive branch
22 attempted to properly identify the exterior boundaries of the Yakama Reservation.
23 *See, e.g.*, Jones Decl. Ex. BB. In 1857, Territorial Governor Stevens executed a
24 second map purporting to depict the boundaries of the Yakama Reservation (the
25 “White Swan Map”). Bordeaux Decl. Ex. C. The United States Supreme Court
26

1 described the White Swan Map as having “many inaccuracies . . .” including the
2 improper placement of ‘Attahnam River’ and Klickitat River, and failure to extend
3 the western Reservation boundary down the crest of the Cascades southeast of
4 Mount Adams. *Northern P. R. Co. v. United States*, 227 U.S. 355, 363 (1913).

5 In 1861, Superintendent of Indian Affairs for the Washington Territory
6 Mr. William Miller contracted with Messrs. Thomas Berry and James Lodge to
7 survey a portion of the southern boundary of the Yakama Reservation.
8 *Northern P. R. Co. v. United States*, 227 U.S. at 364. Messrs. Berry and Lodge
9 were directed to survey west from the Yakima River until they arrived at either
10 the source of the Klickitat or Pisco Rivers, or they reached a point where the
11 divide assumed the character of a perfect natural boundary. *Id.* Given this
12 direction, the Berry and Lodge Survey terminated along the divide at Grayback
13 Mountain—the northeastern most point of Tract D—and therefore did not
14 include a survey of Tract D. *Id.*

15 Controversies between the Yakama Nation and white settlers over the
16 Reservation boundaries persisted. Bordeaux Decl. Ex. D, at YN 000478. So in
17 1890 the United States General Land Office directed Deputy Surveyor George
18 A. Schwartz to survey the Yakama Reservation’s western boundary. *Yakima*
19 *Tribe v. United States*, 16 Ind. Cl. Comm. at 541; *see, e.g.*, Jones Decl. at BB.
20 Deputy Surveyor Schwartz did not have the Treaty Map during his survey and
21 did not follow the calls of the Treaty of 1855. As a result, he failed to properly
22 identify the Yakama Reservation’s western boundary, marking it in his survey
23 many miles east of the crest of the Cascades. *Yakima Tribe v. United States*, 16
24 Ind. Cl. Comm. at 541-42. In his 1891 Report to the Commissioner of Indian
25 Affairs, United States Indian Agent Jay Lynch described the Yakama Nation’s
26

1 reaction to the Schwartz survey by stating “[t]he Indians are unwilling to
2 recognize this new line as the boundary line established by the Treaty”
3 Bordeaux Decl. Ex. D, at YN 000478. Given the Yakama Nation’s dispute over
4 the accuracy of the Schwartz Survey, in 1899 the United States Interior
5 Department directed Topographer E.C. Barnard of the United States Geological
6 Survey to investigate the Yakama Reservation’s boundaries. *Id.* at 542.

7 In 1900, and in possession of the later-criticized White Swan Map rather
8 than the misplaced Treaty Map, Mr. Barnard reviewed the Schwartz Survey and
9 recommended that an additional 357,878 acres be recognized as within the
10 western portion of the Yakama Reservation. *Id.* at 544. Barnard’s
11 recommendation acknowledged the Yakama Reservation’s western boundary as
12 the crest of the Cascade Mountains consistent with the Treaty calls, but this
13 recommendation was partially rejected. *Id.* at 542. Instead, the Interior
14 Department recommended to Congress that 293,837 acres lying east of the crest
15 of the Cascade Mountains be identified as within the western portion of the
16 Yakama Reservation for, and only for, purposes of authorizing land sales within
17 the Reservation. *Id.* at 544-545; Act of December 21, 1904, 33 Stat. 595; *see*,
18 *e.g.*, Jones Decl. at BB.

19 United States Deputy Surveyors Campbell, Germond, and Long surveyed
20 the Barnard line in 1906-1907. In doing so, they did not reach the main ridge of
21 the Cascades to the west and terminated their survey miles northeast of Mount
22 Adams. *Id.* at 546. The Campbell, Germond, and Long survey did not follow
23 calls for the Reservation boundary in the Treaty of 1855, including the
24 requirement that the western Reservation boundary extend “southerly along the
25 main ridge of said [Cascade] mountains, south and east of Mount Adams, to the
26

1 spur whence flows the waters of the Klickitat and Pisco Rivers” *Id.*

2 Following the Campbell, Germond, and Long Survey, the United States
3 moved to annul railroad patents issued to the Northern Pacific Railroad
4 Company—later the Northern Pacific Railway Company—within the western
5 portion of the Yakama Reservation. *Northern P. R. Co. v. United States*, 227
6 U.S. at 356. The Northern Pacific Railroad Company sued to protect their
7 patents in a case that the United States Supreme Court ultimately decided in
8 1913, holding that the patents were rightfully annulled. *Id.* at 367. The Court
9 reasoned, in relevant part, that the patents were erroneously issued within the
10 Yakama Reservation’s western boundary, which extended not only to the
11 Barnard line surveyed by Campbell, Germond, and Long, but farther to the
12 main ridge of the Cascades pursuant to Article II of the Treaty of 1855. *Id.* at
13 359-361.

14 From 1920 to 1924, United States Associate Cadastral Engineer Charles
15 W. Pecore re-surveyed the Yakama Reservation’s western boundary to follow
16 the main ridge of the Cascades. *Yakima Tribe v. United States*, 16 Ind. Cl.
17 Comm. at 546-47; *see, e.g.*, Jones Decl. at BB. The Pecore Survey’s western
18 boundary departs from the main ridge of the Cascades north of Mount Adams—
19 in conflict with the calls of Article II of the Treaty of 1855—and travels in
20 straight lines to Grayback Mountain. Despite this error, the Pecore Survey
21 recognized an additional 47,593 acres within the Yakama Reservation. *Id.*

22 In 1930, the United States found the Treaty Map within the Interior
23 Department’s files. *Yakima Tribe v. United States*, 16 Ind. Cl. Comm. at 547.
24 With the benefit of the Treaty Map, in 1932 the Interior Department engaged
25 Cadastral Engineer E.D. Calvin of the General Land Office to re-survey
26

1 portions of the western and southern Reservation boundaries around Tract D.
 2 *Yakima Tribe v. United States*, 16 Ind. Cl. Comm. at 548-49; *see, e.g.*, Jones
 3 Decl. at BB. As described by the Indian Claims Commission, the Calvin survey
 4 identified Tract D by the following calls:

5 “a distinct divide between the watersheds of the Klickitat
 6 and White Salmon Rivers extending from the top of Mt.
 7 Adams southerly through Townships 8, 7, and 6 N., R 11
 8 E., and thence easterly and northerly through Townships
 9 5 N., Rs. 11 and 12 E, T. 6N., R 12E., to a point in T. 6N.,
 10 R. 13E., on the right bank of the Klickitat River, across
 and immediately below the mouth of Summit Creek . . .”

11 *Id.*; *see also* Bordeaux Decl. Ex. E. Topographic Engineer F. Marion Wilkes of
 12 the Indian Department closely followed Cadastral Engineer Calvin’s progress
 13 and issued a report on October 15, 1932, supporting the Calvin Survey, and
 14 concluding that the Calvin Survey followed a well-defined spur the entire
 15 distance with the exception of crossing the Klickitat River. *Yakima Tribe v.*
 16 *United States*, 16 Ind. Cl. Comm. at 550.

17 **3. Allotment Era and the Act of December 21, 1904**

18
 19 In 1871, federal Indian policy shifted away from Treaty-making and
 20 towards the allotment of Indian lands (i.e. the Allotment Era). *County of*
 21 *Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S.
 22 251, 253-254 (1992). Congress passed the Indian General Allotment Act in
 23 1887, also known as the Dawes Act. This legislation empowered the President
 24 to allot Indian lands to individual Indians without the consent of the impacted
 25 original nations, and to be held in trust by the United States for 25 years at
 26 which time a fee patent would be issued to the allottee. *County of Yakima*, 502

1 U.S. at 254. Throughout the Allotment Era—which ended in 1934 with the
2 passage of the Indian Reorganization Act—roughly 20% of the Yakama
3 Reservation passed out of trust and into fee ownership, owned by the Yakama
4 Nation, Yakama Members, and non-Indians. *Id.* at 256. Despite this transfer in
5 title, and the compensation Yakama Nation received in exchange for these
6 conveyances of title to land, Yakama Nation’s Reservation was not diminished
7 by virtue of this policy.

8 On March 25, 1904, Congressman Wesley Jones of Washington State
9 introduced a surplus lands act for the Yakama Reservation numbered House
10 Resolution 14468 and titled “To authorize the sale and disposition of surplus or
11 unallotted lands of the Yakima Indian Reservation, in the State of Washington.”
12 Bordeaux Decl. Ex. F. House Resolution 14468 authorized and directed the
13 Secretary of the Interior to act as a sales agent by selling or disposing of
14 unallotted lands within the Yakama Reservation at their appraised value, with
15 all proceeds being deposited in the United States Treasury to the credit of
16 Yakama Members. *Id.*

17 When identifying which lands were subject to the House Resolution,
18 Congress instructed the Secretary of the Interior to regard the 293,837 acres
19 included by Topographer E.C. Barnard and approved by the Interior Department
20 as part of the Yakama Reservation “for purposes of this Act” *Id.* The
21 House Resolution further appropriated \$53,000 to classify and appraise land
22 identified to sell, and a survey to understand the location of the Yakama
23 Reservation’s western boundary as noted by Topographer Barnard. *Id.* The
24 Yakama Nation did not agree to, nor support House Resolution 14468. Jones
25 Decl. Ex. C, at 5783. Both the House of Representatives and the Senate
26

1 approved House Resolution 14468, and on December 21, 1904 the President
2 signed House Resolution 14468 into law as the Act of December 21, 1904, 33
3 Stat. 595.

4 **4. Indian Claims Commission proceedings concerning Tract D**

5
6 On August 3, 1946, Congress established the Indian Claims Commission.
7 Act of August 3, 1946, 60 Stat. 1050. The Yakama Nation filed claims against
8 the United States before the Indian Claims Commission on June 21, 1949.
9 These claims sought compensation for lands guaranteed to the Yakama Nation
10 under the Treaty of 1855, but which improperly passed out of Yakama
11 ownership without compensation to the Yakama Nation, including various lands
12 within Tract D. In a hearing on August 21, 1950 before the Commission, Mr.
13 George W. Olney, an enrolled Yakama Member aged 87 years old, testified
14 during his direct examination concerning the Tract D boundaries as follows:

15 Q: Now, coming down to the southwesterly part at a
16 place called Glenwood, what is the name that the Indians
17 had for that place?

18 A: Puusk – Puusk – Puusk.

19 Q: What did that mean?

20 A: Well, I can't tell you, it was just a name.

21 Q: Was that where Camas Prairie was?

22 A: Yes, that is where Camas Prairie was, that is where
23 they dig them Camas roots and them wild caps are.

24 Q: Did they have horses there?

1 A: I guess so, but I don't know, there wasn't very many
2 horses at that time.

3 Q: Well, did the older Indians understand that Camas
4 Prairie and Glenwood were within the reservation?

5 A: Yes.

6
7 Jones Decl. Ex. Z, at YN 001270.

8 On November 6, 1953, the Indian Claims Commission issued Amended
9 Findings of Fact determining that the Commission was bound by the Supreme
10 Court's decision in *Northern P. R. Co. v. United States*, 227 U.S. 355, to find
11 that Tract D was not included within the exterior boundaries of the Yakama
12 Reservation. *The Yakima Tribe of Indians v. The United States*, 2 Ind. Cl.
13 Comm. 481, 498 (Nov. 6, 1953) (see Jones Decl. Ex. Q). By virtue of the Act
14 of September 8, 1960, Congress amended the Indian Claims Commission Act,
15 60 Stat. 1054, to permit appeals of the Indian Claims Commission's
16 interlocutory determinations. *Yakima Tribe v. United States*, 158 Ct. Cl. at 677.
17 The Yakama Nation appealed, in relevant part, the Indian Claims Commission's
18 determination concerning Tract D to the United States Court of Claims. *Id.* On
19 October 3, 1962, the United States Court of Claims reversed the Indian Claims
20 Commission's decision that it was bound by Supreme Court precedent to find
21 that Tract D was not included within the exterior boundaries of the Yakama
22 Nation, and remanded the issue back to the Indian Claims Commission for
23 further proceedings on the issue of Tract D. *Id.* at 699.

24 On February 25, 1966, the Indian Claims Commission issued Findings of
25 Fact that determined "'Tract D' was intended to be included within the Yakima
26

1 Reservation, and the petitioner's claim to that area should be allowed." *The*
2 *Yakima Tribe v. The United States*, 16 Ind. Cl. Comm. at 552. In confirming
3 that Tract D is within the exterior boundaries of the Yakama Reservation, the
4 Commission reasoned that while the calls of the Treaty did not conform to the
5 topography of the landscape, the Treaty Map "indicates that the southwestern
6 boundary of the reservation was to follow the Cascade Mountains passing to the
7 south of Mt. Adams," and during the Walla Walla Treaty Council, Territorial
8 Governor Stevens stated that the Yakama Reservation was to extend "down the
9 main chain of the Cascade mountains south of Mount Adams." *Id.* at 551-552.
10 The Commission then described the boundaries of Tract D as follows:

11 We find, therefore, that it was the intention of the parties
12 to the Yakima Treaty that the reservation boundary
13 should follow the main ridge of the Cascade Mountains
14 passing over Mount Adams and continuing to the south
15 following a distinct spur which runs southerly and
16 easterly from Mount Adams and then turning in an
 easterly and northeasterly direction to Grayback
 Mountain.

17
18 *Id.* at 552. As a result, the Yakama Nation was able to pursue its monetary
19 claims for title to land that passed out of the Yakama Nation's ownership within
20 Tract D of the Yakama Reservation but without compensation deposited for the
21 benefit of the Yakama Nation (*i.e.*, a "taking"). *Id.*

22 On November 14, 1968, the Indian Claims Commission approved a
23 settlement between the United States and Yakama Nation in which the Yakama
24 Nation settled its takings claims for 97,908.97 acres within the 121,465.69 acres
25 comprising Tract D for a net settlement sum of \$2.1 million. *The Yakima Tribe*
26 *of Indians v. The United States of America*, 20 Ind. Cl. Comm. 76, 90 (Nov. 14,

1 1968) (see Jones Decl. Ex. U). The remaining Tract D land was reserved for
2 consideration in a separate Indian Claims Commission proceeding, and was
3 ultimately resolved with the return of the federal land within Tract D to the
4 Yakama Nation. E.O. 11670, 37 Fed. Reg. 10431 (May 20, 1972).

5 In effectuating the settlement, the Indian Claims Commission (along with
6 the parties) distinguished between patented lands and unpatented lands within
7 Tract D. *Yakima Tribe v. United States*, 18 Ind. Cl. Comm. 426 (June 19, 1967)
8 (see Jones Decl. Ex. T). In a findings of fact on an award of an attorney fee for
9 the Yakama Nation's attorney, the Indian Claims Commission noted the
10 settlement of the party involved compensation for "97,908.977 acres of Tract D
11 lands which had been patented to white settlers," whereas "vacant and unpatented
12 lands of Tract D were returned to the Yakima Tribe in kind." *Yakima Tribe v.*
13 *United States*, 21 Ind. Cl. Comm. 424, 433 (October 29, 1969) (see Jones Decl.
14 Ex. V).

15 A land patent is an official document reflecting a grant by a sovereign that
16 is made public, or "patented." *Marvin M. Brandt Revocable Tr. v. United States*,
17 572 U.S. 93, 99 (2014). Patented lands and any compensation provided in
18 exchange for related conveyances are not determinative in establishing whether
19 those lands are within a tribal reservation's boundaries. *See, e.g.*, Act of
20 December 21, 1904, 33 Stat. 595. In patenting Yakama Reservation lands in
21 1904, for example, Congress decreed that certain proceeds from patented lands
22 sold within the reservation "be deposited in the Treasury of the United States to
23 the credit of the Indians belonging and having tribal rights on the Yakima
24 Reservation." Act of December 21, 1904, 33 Stat. 595. Therefore, money
25 conveyed in exchange for title to the patented lands under the Act of December
26

21, 1904, was conveyed to the Yakama Nation, but such lands remained “fee lands” situated within the Yakama Reservation.

5. Treatment after the Indian Claims Commission adjudication

Following settlement, the federal government took actions confirming Tract D’s location within the exterior boundaries of the Yakama Reservation. On September 19, 1968, United States Assistant Regional Solicitor C. Richard Nealy, sent a memorandum to the Bureau of Indian Affairs’ Branch of Law and Order addressing jurisdiction within Tract D. Jones Decl. Ex. D. In the memorandum, Assistant Regional Solicitor Nealy discusses Tract D as follows:

Until there is Congressional action to the contrary, we must hold, as the Interior Department did in 1904, that the findings in the present [Indian Claims Commission] suit serve to correct errors heretofore made in the survey and establish the boundaries of reservation as described in the Treaty of 1855, and that the additional area must be regarded as a part of the Yakima Reservation.

Therefore, the Superintendent of the Yakima Reservation should be informed that until the boundaries of the reservation are changed by congressional action, the land within Tracts C and D remains a part of the Yakima Reservation. The land taken by action of the United States in appropriating it to other uses constitutes fee-patented land within the reservation. The Tribe has the authority to exercise jurisdiction over the activities of its members within these areas and to assert the rights granted to them by the Treaty.

Id. at 9-10. As a result, the United States’ position in 1968 following the Indian Claims Commission’s decision concerning Tract D was that Tract D was within

1 the exterior boundaries of the Yakama Reservation.

2 On May 20, 1972, President Richard Nixon issued Executive Order
3 11670 transferring ownership of roughly 21,000 acres of federal land within the
4 Yakama Reservation and Tract D back into Yakama ownership. 37 Fed. Reg.
5 10431. This land was at issue as part of the Yakama Nation's claim for Tract D
6 before the Indian Claims Commission, but was carved out of the settlement
7 agreement that ultimately terminated the claim. *The Yakima Tribe of Indians v.*
8 *The United States of America*, 20 Ind. Cl. Comm. at 90. President Nixon
9 acknowledged that the "tract had originally been intended for inclusion in the
10 Yakima Reservation." 37 Fed. Reg. 10431. He rejected the Pecore survey and
11 instead used the 1932 Calvin Reconnaissance Survey Map, which depicts Tract
12 D of the Yakama Reservation, to describe the land that was being returned to
13 the Yakama Nation, and directed the Secretary of the Interior to "administer it
14 for the use and benefit of the Yakama Tribe of Indians as a portion of the
15 reservation created by the Treaty of 1855, 12 Stat. 951." *Id.*

16 On June 28, 1978, United States Bureau of Land Management Cadastral
17 Surveyor Ronald W. Scherler surveyed the "southwesterly boundary of Tract D
18 of the Yakima Indian Reservation" Jones Decl. Ex. E, at 1. In the field
19 notes for his survey, which repeatedly identifies Tract D as within the exterior
20 boundaries of the Yakama Reservation, he gives a history of prior federal
21 surveys in and around Tract D. *Id.* at 1-2. The history identifies Bureau of
22 Land Management surveys of Tract D conducted in 1972 by Mr. Donovan
23 Harris, and 1973 by Cadastral Surveyor Scherler. *Id.* at 2. The Field Notes
24 describe in great detail each survey point along Tract D's boundary, all of which
25 are marked with iron posts affixed with marked brass caps. *Id.* at 3-99. The
26

1 markings inscribed on each brass cap are individually identified, all of which
2 include the designation “YIR,” presumably for Yakama Indian Reservation. *Id.*
3 Cadastral Surveyor Scherler completed his survey on August 11, 1981, certified
4 the survey on January 21, 1982, and it was approved by the United States Chief
5 Cadastral Surveyor of Washington on May 7, 1982. *Id.*

6 On August 4, 1978, Solicitor L.K. with the United States Department of
7 the Interior sent a letter to Congressman Mike McCormack—Klickitat County’s
8 Congressional Representative—responding to Congressman McCormack’s June
9 7, 1978 request for the Department of the Interior’s “position on the question of
10 whether the town of Glenwood, Washington, is within the Yakima Indian
11 Reservation.” Jones Decl. Ex. F, at YN 000519. Solicitor L.K. responded that
12 “[i]t is our view that Glenwood is, indeed, within the Reservation.” *Id.* He then
13 explained that Tract D was included in the Reservation in the Treaty of 1855,
14 acknowledged the subsequent erroneous surveys, and stated the surveys “as a
15 matter of law could not have had the effect of removing the lands from the
16 Reservation.” *Id.* In addressing congressional intent, Solicitor L.K. said
17 “[c]ertainly there was no Congressional intention to remove these [Tract D]
18 lands from the Reservation.” *Id.* He then closes his response by discussing the
19 difference between the ownership of land and the location of that land within a
20 jurisdiction’s boundaries:

21 In short, simply because the tribal proprietary interest has
22 been extinguished in most of the Tract D lands, it does
23 not follow that tribal governmental authority has
24 similarly been terminated unless there has been a clear
25 Congressional intention to diminish the reservation
26 boundaries.

1 *Id.* at YN 000520 (internal citation omitted).

2 The issue was raised again in 1992 by Congressman Sid Morrison—
 3 Klickitat County’s Congressional Representative—who asked Secretary of the
 4 Interior Manuel Lujan, Jr. for “clarification of the status of the southwestern
 5 boundary of the Yakima Indian Reservation.” Jones Decl. Ex. G, at YN
 6 000521. Solicitor Thomas Sansonetti responded that “the Treaty with the
 7 Yakima Tribe included Tract D as part of the Yakima Reservation.” *Id.*
 8 Congressman Morrison had apparently questioned why non-Indian owned land
 9 within Tract D was considered to be within the Yakama Reservation, to which
 10 Solicitor Sansonetti explained:

11 Although patenting land to third parties results in the land
 12 no longer belonging to the Tribe, it need not change the
 13 boundaries of the reservation. Substantial amounts of
 14 land that is clearly within the Yakima Indian Reservation
 15 is owned by non-Indians.

16 *Id.* (internal citations omitted). Solicitor Sansonetti concluded, consistent with
 17 Solicitor Nealy and Solicitor L.K., that Tract D was located within the exterior
 18 boundaries of the Yakama Reservation. *Id.* at YN 000522.

19 **C. Criminal jurisdiction over Indians within the Yakama Reservation**

20 The Yakama Nation exercises its inherent sovereign jurisdiction over
 21 Yakama Members and other Indians within the Yakama Reservation. The
 22 United States asserts concurrent criminal jurisdiction over Indians in Indian
 23 Country under the “Indian Country Crimes Act,” “Major Crimes Act” and
 24 “Assimilative Crimes Act.” 18 U.S.C. §§ 13, 1152, 1153. Indian Country is
 25 defined by federal statute, for the purpose of criminal jurisdiction, as:
 26

1
2 “(a) all land within the limits of any Indian reservation under the
3 jurisdiction of the United States Government, notwithstanding the
4 issuance of any patent, and, including rights-of-way running through
5 the reservation, (b) all dependent Indian communities within the
6 borders of the United States whether within the original or
7 subsequently acquired territory thereof, and whether within or without
8 the limits of a state, and (c) all Indian allotments, the Indian titles to
9 which have not been extinguished, including rights-of-way running
10 through the same

11 18 U.S.C. 1151.

12 In 1953, Congress passed Pub. L. 83-280 to authorize state assumption of
13 limited criminal and civil jurisdiction over Indians in Indian Country. Act of
14 August 15, 1953, 67 Stat. 588; *Washington v. Confederated Tribes and Bands*
15 *of Yakima Indian Nation*, 439 U.S. 463, 471-75 (1979). In 1963, Washington
16 State assumed general civil and criminal jurisdiction over all off-reservation
17 Indian Country; all reservations with the exception of trust or restricted Tribal
18 land within reservations; and Indians on trust or restricted Tribal land within the
19 following eight areas: compulsory school attendance, public assistance,
20 domestic relations, mental illness, juvenile delinquency, adoptions proceedings,
21 dependent children,¹ and operation of motor vehicles upon public roads. Wash.
22 Rev. Code 37.12.010. The Yakama Nation unsuccessfully challenged
23 Washington State’s assumption of Pub. L. 83-280 Jurisdiction to the United
24 States Supreme Court on statutory and constitutional grounds. *Washington v.*
25 *Confederated Tribes and Bands of Yakima Indian Nation*, 439 U.S. 463.

26 ¹ Congress returned jurisdiction over adoption proceedings and dependent children
to Native Nations in 1978 with the passage of the Indian Child Welfare Act. 25
U.S.C. 1901 et seq.

1 In 1968, Congress authorized the United States to accept a retrocession of
2 any state desiring to relinquish Pub. L. 83-280 jurisdiction within Indian
3 Country. 25 U.S.C. 1323(a). On June 7, 2012, the Washington State Legislature
4 codified a process for the state to retrocede Pub. L. 83-280 jurisdiction. Wash.
5 Rev. Code 37.12.160. The Yakama Nation filed a retrocession petition with the
6 State of Washington's Office of the Governor on July 17, 2012, asking the State
7 to partially retrocede its civil and criminal jurisdiction over "all Yakama Nation
8 Indian country". Jones Decl. Ex. H, at 1.

9 On January 17, 2014, by proclamation, Governor Jay Inslee agreed to
10 retrocede certain aspects of state jurisdiction over Indians within the Yakama
11 Reservation, including, in relevant part, criminal jurisdiction over all criminal
12 offenses unless they involve "non-Indian defendants and non-Indian victims."
13 Jones Decl. Ex. X, at 2. Governor Inslee transmitted the Proclamation to the
14 Department of the Interior on January 27, 2014, under a cover letter that
15 attempted to revise the Proclamation's terms concerning the State's retrocession
16 of criminal jurisdiction to reserve state criminal jurisdiction whenever "non-
17 Indian defendants *and/or* non-Indian victims" were involved. Jones Decl. Ex. I,
18 at 2.

19 Executive Order No. 11435 vests the Secretary of Indian of Affairs for
20 the United States Department of the Interior with discretion to accept the
21 retrocession and imposes two requirements before doing so: (1) acceptance of
22 retrocession is effected through publication in the Federal Register with such
23 notice specifying "the jurisdiction retroceded and the effective date of the
24 retrocession," and (2) where criminal jurisdiction is retroceded, acceptance may
25 occur "only after consultation by the Secretary with the Attorney General." *See*
26

1 Executive Order No. 11435, 33 Fed. Reg. 17339 (Nov. 23, 1968).

2 By letter dated October 19, 2015, Assistant Secretary of Indian Affairs for
3 the Department of the Interior, Mr. Kevin K. Washburn, issued a letter rejecting
4 Governor Inslee's clarifying letter and formally accepted the plain terms of the
5 Proclamation "pursuant to 25 U.S.C. § 1323 and authority vested in the
6 Secretary of Interior by Executive Order No. 11435 of November 21, 1968, 33
7 Fed. Reg. 17339, and delegated to the Assistant Secretary-Indian Affairs."
8 Jones Decl. Ex. J, at fn. 2. In his Letter, Assistant Secretary Washburn found
9 that the scope of retroceded jurisdiction outlined in the Proclamation "is plain
10 on its face and unambiguous." *Id.* at 5. He also explained that on June 16,
11 2014, the Department of the Interior requested consultation with the
12 Department of Justice in accordance with Executive Order 11435. *Id.* at 2. In
13 August 2015, following numerous meetings between the Department of the
14 Interior, the Department of Justice, the United States Attorney for the Eastern
15 District of Washington, and the Federal Bureau of Investigations, the
16 Department of Justice "declined to state a position in favor of or against
17 retrocession" and recommended a six-month implementation period. *Id.* at 5.

18 On October 20, 2015, the Department of Interior finalized retrocession
19 through publication of notice in the Federal Register that it was accepting the
20 retrocession "offered by the State of Washington in Proclamation by the
21 governor 14-01," and that "[c]omplete implementation of jurisdiction will be
22 effective April 19, 2016." *See* Acceptance of Retrocession of Jurisdiction for the
23 Yakama Nation, 80 Fed. Reg. 63583 (Oct. 20, 2015).

24 On April 18, 2016, the United States Attorney for the Eastern District of
25 Washington, Mr. Michael Ormsby, issued guidance documents to local law
26

1 enforcement agencies explaining that following retrocession, the State of
2 Washington no longer retained criminal jurisdiction to prosecute Indians for
3 offenses occurring within the Yakama Reservation. Jones Decl. Ex. K, at 1. On
4 November 30, 2016, the Principal Deputy Assistant Secretary of Indian Affairs
5 for the United States Department of the Interior, Mr. Lawrence S. Roberts,
6 issued a guidance memorandum confirming the Department of the Interior's
7 recognition that the State of Washington had retroceded all criminal jurisdiction
8 within the Yakama Reservation over offenses whenever an Indian was involved
9 as either a defendant and/or victim. Jones Decl. Ex. L. Yakama Nation's
10 inherent criminal jurisdiction over Yakama Members and other Indians within
11 the Yakama Reservation remains unchanged by Washington State's
12 Retrocession of jurisdiction back to the United States government. *Id.*

13 Following the successful implementation of retrocession, on March 8,
14 2018, the Washington State Court of Appeals for Division III issued a decision
15 that held the State only retroceded criminal jurisdiction within the Yakama
16 Reservation back to the United States whenever a non-Indian defendant **or** a
17 non-Indian victim is involved. *State v. Zack*, 2 Wn. App. 667 (2018), *review*
18 *denied*, 191 Wn.2d 1011 (2018). On July 27, 2018, the Office of Legal Counsel
19 of the United States Department of Justice—who has no congressionally
20 delegated authority in the federal retrocession process—issued a memorandum
21 opinion adopting the court's reasoning in *State v. Zack* and contradicting
22 Assistant Secretary Washburn's Letter, Deputy Assistant Secretary Roberts'
23 Guidance Memorandum, and years of work to implement retrocession. Jones
24 Decl. Ex. M. The federal Office of Legal Counsel did not consult with the
25 Yakama Nation on a government-to-government basis prior to issuing the
26

1 Opinion and did not give any prior notice to the Yakama Nation that the
2 Opinion had been requested or was being prepared. Jones Decl. at ¶ 15.

3 **D. Klickitat County's recent arrest and prosecution of a Yakama**
4 **Member for alleged crimes arising within the Yakama Reservation**

5 On October 13, 2018, Klickitat County Sheriff's Deputy Chris
6 Wyzkowski, Badge No. 2031, filed Officer Report No. 18-004064 concerning
7 his arrest of an enrolled Yakama Member, Mr. Robert Libby, for actions arising
8 within the exterior boundaries of the Yakama Reservation, and specifically
9 within the City of Glenwood in Tract D. Jones Decl. Ex. N. Deputy
10 Wyzkowski alleged a non-functioning right tail light and expired vehicle
11 registration as the basis for the traffic stop that led to the arrest. *Id.* at 3.

12 According to Deputy Wyzkowski's report, during the traffic stop he
13 identified a rifle case and pistol case within the vehicle. *Id.* Deputy
14 Wyzkowski inspected the rifle case and his fellow Klickitat County Sheriff's
15 Deputy Wykes inspected the revolver case. *Id.* The rifle was loaded with two
16 rounds of ammunition, and the pistol was loaded with three rounds of
17 ammunition. *Id.* Mr. Libby identified the pistol as having been passed down by
18 his grandfather, and the rifle as his hunting rifle. *Id.* Deputy Wyzkowski also
19 contacted dispatch who identified a 2016 misdemeanor warrant for Mr. Libby's
20 arrest from Yakima County for failure to appear in court following a citation for
21 driving without a valid license. *Id.*

22 Deputy Wyzkowski arrested Mr. Libby and booked him in Klickitat
23 County Jail based on his outstanding warrant, use of firearms by a minor,
24 possession of a loaded rifle in a vehicle, and possession of a loaded pistol in a
25 vehicle. *Id.* at 3-4. Defendants charged Mr. Libby under state law for alleged
26

violations of RCW 9.41.050(2)(a)—carrying a loaded pistol in a vehicle, RCW 9.41.240—possession of a pistol 18-21 years old, and RCW 77.15.460(1)—use/possession of loaded firearm in vehicle. *Id.* at 8. Defendants also issued citation #8Z1013579 to Mr. Libby for driving without a valid driver’s license, without insurance, and with expired registration. *Id.* at 4. At no time during the traffic stop, arrest, or booking did Defendants contact Yakama Nation Police to handle the traffic stop, outstanding warrant, or alleged criminal violations of the Revised Yakama Law & Order Code by a Yakama Member within the Yakama Reservation. Shike Decl. at ¶ 3 (December 11, 2018).

III. PRELIMINARY INJUNCTION STANDARD

Preliminary injunctions are designed to preserve the status quo pending the ultimate outcome of litigation and prevent irreparable loss of rights prior to judgment. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).

In the Ninth Circuit, a party seeking preliminary injunctive relief must meet one of two tests. Under the first test, a plaintiff seeking a preliminary injunction must show that it is likely to succeed on the merits, that it is likely to suffer irreparable harm without an injunction, that the balance of equities tips in its favor, and that an injunction is in the public interest. *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The irreparable harm requirement is satisfied where state law enforcement action infringes on a tribe’s sovereignty. *See, e.g., Confederated Tribes and Bands of the Yakama Nation v. Klickitat County et al.*, No. 1:18-cv-03110 at 10 (E.D. Wash. June 28, 2018) (attached at Jones Decl. Ex. Y).

Under the second test, the movant must show “either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits.” *Miller v. California Pacific Medical Center*, 19 F.3d 449, 456 (9th Cir. 1994) (*en banc*). This alternative test is on a sliding scale: the greater the likelihood of success, the less risk of harm must be shown, and vice versa. *Id.*

IV. ARGUMENT

A. Yakama Nation is likely to succeed on the merits of its claim that the Yakama Reservation includes Tract D.

Tract D is within the exterior boundaries of the Yakama Reservation. Treaty of 1855, 12 Stat. 951; *Yakima Tribe v. United States*, 16 Ind. Cl. Comm. at 551. Only Congress can change a reservation’s boundaries, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), and no act of Congress has diminished the Yakama Reservation’s boundaries since they were first established in Article II of the Treaty of 1855. Jones Decl. Ex. A, at 952. Simply put, the Yakama Nation is likely to prevail on its claim that Tract D is now and always has been part of the Yakama Reservation.

1. The Yakama Reservation was established in and through the Treaty of 1855 and has not been legally diminished.

Article II of the Treaty of 1855 established the Yakama Reservation’s boundaries. *Id.*; *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. at 256. Only Congress may diminish the boundaries of an Indian reservation, and its intent to do so must be clear. *Solem v. Bartlett*, 465 U.S.

1 463, 470 (1984). Congress has never diminished the Yakama Reservation. Tract
 2 D, therefore, remains part of the Yakama Reservation.

3 Any analysis determining Tract D's status as part of the Yakama Reserva-
 4 tion must commence with the establishment of the Yakama Reservation through
 5 the Treaty of 1855; and the analysis must, with "the broadest possible scope," em-
 6 ploy the canon of Treaty construction providing that "legal ambiguities" are to be
 7 "resolved to the benefit of the Indians." *See DeCoteau v. District County Court for*
 8 *Tenth Judicial District*, 420 U.S. 425, 447 (1975).

9 Article II of the Treaty of 1855 described the Yakama Reservation's bounda-
 10 ries as follows:

11 Commencing on the Yakama River, at the mouth of the
 12 Attah-nam River; thence westerly along said Attah-nam
 13 River to the forks; thence along the southern tributary to
 14 the Cascade Mountains; thence southerly along the main
 15 ridge of said mountains, **passing south and east of**
 16 **Mount Adams, to the spur whence flows the waters of**
 17 **the Klickitat and Pisco Rivers; thence down said spur**
 18 **to the divide between the waters of said rivers; thence**
 19 **along said divide to the divide separating the waters**
 20 **of the Satass River from those flowing into the Co-**
 21 **lumbia River;** thence along said divide to the main
 22 Yakama, eight miles below the mouth of the Satass Riv-
 23 er; and thence up the Yakama River to the place of be-
 24 ginning.

25 Jones Decl. Ex. A, at 952. The plain language of the Treaty extends the Yakama
 26 Reservation's western boundary south of Mount Adams to include Tract D.

27 The Yakama Treaty signers understood this language to include Tract D
 28 within the Yakama Reservation. Bordeaux Decl. Ex. B, at YN 001051. Their un-
 29 derstanding is consistent with Territorial Governor Stevens' statements at the Wal-
 30 la Walla Treaty Council, where he described the southwest boundaries of the

1 Yakama Reservation as proceeding “down the main chain of the Cascade moun-
 2 tains **south of Mount Adams**, thence along the Highlands separating the Pisco and
 3 Satass river from the rivers flowing into the Columbia” Jones Decl. Ex. B, at
 4 65 (emphasis added). Tract D is then depicted as within the Yakama Reservation
 5 in Territorial Governor Stevens’ Treaty Map sent back to Washington D.C. along-
 6 side the Treaty in June of 1855. Bordeaux Decl. Ex. C. Taken together, the Trea-
 7 ty, the Yakama Signers’ understanding of the Treaty, the Treaty Minutes, and the
 8 Treaty Map provide strong evidence that the Treaty included Tract D within the
 9 exterior boundaries of the Yakama Reservation.

10 In their 1966 Findings of Fact that ultimately determined Tract D was in-
 11 cluded within the Yakama Reservation, the Indian Claims Commission walked
 12 through the relevant Treaty, Treaty Map, and Treaty Minutes analysis. *Yakima*
 13 *Tribe v. United States*, 16 Ind. Cl. Comm. at 536-40. After a detailed analysis of
 14 the history, ascertained through nearly two decades of litigation before it, the Indi-
 15 an Claims Commission concluded that it was the intention of the parties to the
 16 Treaty of 1855 to include Tract D within the Yakama Reservation. *Id.* at 552.
 17 This was reiterated in an accompanying Opinion of the Commission:

18 Giving due consideration to the treaty map and to Gover-
 19 nor Stevens’ explanation to the Indians at the treaty
 20 council that the reservation extended “down the main
 21 chain of the Cascade mountains south of Mount Adams,”
 22 we interpret the treaty call to require a boundary that ex-
 23 tends south of Mount Adams before turning in an east-
 24 wardly direction. . . for the reasons we have outlined, we
 25 have concluded that [Yakama Nation’s] claim for the
 26 Tract D area must be allowed.

24 *Yakima Tribe v. United States*, 16 Ind. Cl. Comm. 553, 563-64 (Feb. 25, 1966) (see
 25 Jones Decl. Ex. S).

2. Surveys conducted while the Treaty Map was misplaced do not legally diminish the Yakama Reservation.

At some point after its creation, the United States misplaced the Treaty Map until it was found in 1930. *Id.* at 540. During this period, a series of erroneous surveys were completed in the absence of the Treaty Map. *Id.* at 540-47. Surveys cannot serve as a basis for the diminishment of the Yakama Reservation; only an act of Congress showing a clear intent to diminish a reservation with ambiguities resolved in favor of the Indian tribe may shrink an Indian reservation. *Solem*, 465 U.S. at 470. Therefore, the Schwartz, Barnard, Campbell, Germond, Long, Pecore, and any other surveys conducted without the benefit of the Treaty Map are without legal effect when determining the Yakama Reservation's boundaries.

3. Klickitat County's argument regarding Tract D requires diminishment and there has been no diminishment.

Klickitat County conceded in discovery that the "Indian Claims Commission found that Tract D was intended to be included within the Yakama Reservation boundaries as described in Article II of the Yakama Treaty." Jones Decl. Ex. O, at 15-16. In describing its position on the current status of Tract D, however, the County takes the position that Congress deleted Tract D from the Yakama Reservation in 1904, by omission apparently:

The exterior boundaries of the Yakama Reservation were established by Congress, based upon a survey in 33 Stat. 595 [Act of December 21, 1904]. Tract D lies outside the exterior boundaries established in 33 Stat. 595 and did not include the area of Tract D within the reservation.

Id. at 17-18.

Contrary to the County's claims, 33 Stat. 595—or the Act of December 21, 1904—did not establish the boundaries of the Yakama Reservation. The

1 Yakama Reservation’s boundaries existed prior to 1904, and any assertion to the
2 contrary is simply not true legally or factually. Because it is settled beyond any
3 reasonable dispute that the Yakama Reservation, including its boundaries, was es-
4 tablished in 1855 (*see County of Yakima*, 502 U.S. at 256 (“The Yakima Indian
5 Reservation . . . was established by treaty in 1855”)), the real argument Klickitat
6 County advances is one of diminishment through the 1904 legislation even if it re-
7 fuses to concede this point or squarely address the legal standards required to es-
8 tablish diminishment of an Indian reservation. Strained as it may be, there is simp-
9 ly no other way the contention the County advanced in discovery could be legally
10 viable. Accordingly, unless the Yakama Reservation was diminished by the 1904
11 legislation—or some other legislation by Congress—Tract D is part of the Yakama
12 Reservation as a matter of law.

13 “The first and governing principle [of diminishment] is that only Congress
14 can divest a reservation of its land and diminish its boundaries’ and its intent to do
15 so must be clear.” *Solem v. Bartlett*, 465 U.S. at 470. After land is included in a
16 reservation “no matter what happens to the title to individual plots within the area,
17 the entire block retains its reservation status until Congress explicitly indicates oth-
18 erwise.” *Id.* (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)). Dimin-
19 ishment “will not be lightly inferred,” and “requires that Congress clearly evince
20 an intent to change boundaries.” *Id.* (quoting *Rosebud v. Kneip*, 430 U.S. 584, 615
21 (1977)).

22 The United States Supreme Court has established a three-factor test for de-
23 termining whether Congress has explicitly diminished a reservation. *Hagen v.*
24 *Utah*, 510 U.S. 399, 410–11 (1994). First, “the most probative evidence of dimin-
25 ishment is . . . the statutory language used” in the law in which diminishment is
26

1 claimed. *Nebraska v. Parker*, 136 S. Ct. at 1079 (quoting *Hagen v. Utah*, 510 U.S.
2 at 410–11). Second, courts consider “the historical context” regarding the congres-
3 sional act. *Hagen v. Utah*, 510 U.S. at 411. Finally, courts can look to any “une-
4 quivocal evidence” of the contemporaneous understanding of the status of the res-
5 ervation by the Indians, non-Indians, the United States, and the State. *Id.*

6 Common textual indications of Congress’ intent to diminish reservation
7 boundaries include “[e]xplicit reference to cession or other language evidencing
8 the present and total surrender of all tribal interests” or “an unconditional commit-
9 ment from Congress to compensate the Indian tribe for its opened land.” *Nebraska*
10 *v. Parker*, 136 S. Ct. at 1079 (quoting *Solem*, 465 U.S. at 470). Such language
11 “providing for the total surrender of tribal claims in exchange for a fixed payment”
12 evinces Congress’ intent to diminish a reservation. *Id.* (quoting *South Dakota v.*
13 *Yankton Sioux Tribe*, 522 U.S. 329, 345 (1998)). Similarly, a statutory provision
14 restoring portions of a reservation to “the public domain” signifies diminish-
15 ment. *Id.* (quoting *Hagen*, 510 U. S. at 414).

16 Applying the diminishment test to the Act of December 21, 1904, none of the
17 three factors supports Defendants’ position that this legislation removed Tract D
18 from the Yakama Reservation. First, the language of the legislation does not
19 “clearly evince an intent” to diminish the Yakama Reservation as to Tract D. The
20 1904 legislation merely provided that the Secretary of the Interior is authorized to
21 “sell or dispose of unallotted lands embraced in the Yakima Indian Reservation
22 proper . . . set aside and established by the treaty with the Yakima Nation of Indi-
23 ans, dated June eighth, eighteen hundred and fifty-five.” Act of December 21,
24 1904, 33 Stat. 595. The legislation recognized that a 293,837 acre tract of land
25 previously “excluded by erroneous boundary survey” is in fact part of the Yakama
26

1 Reservation “for purposes of this Act” *Id.* Tract D is not mentioned in this
2 legislation.

3 Further, none of the common textual indications of Congressional intent to
4 diminish a Reservation are present in the Act of December 21, 1904. There are no
5 discussions of cession or the surrender of Yakama interests in Tract D. Tract D
6 land is not disposed of for a sum certain, and it is not congressionally restored to
7 the public domain. In fact, the Act of December 21, 1904, contains no language
8 regarding Tract D as a whole, much less any language that could be deemed to
9 evince a clear intent to remove Tract D from the Yakama Reservation. Rather, the
10 Secretary of the Interior is designated as a sales agent for unallotted lands “em-
11 braced in the Yakima Indian Reservation proper” with proceeds from such sales
12 being “deposited in the Treasury of the United States to the credit of the Indians . .
13 ..” *Id.* Such language does not express clear congressional intent to diminish an
14 Indian reservation.

15 Second, the historical context of the Act of December 21, 1904, does not
16 support a finding of diminishment. During the Senate hearing on House Resolu-
17 tion 14468, Senator Jones of Washington confirmed the intent of the bill was “to
18 help provide for the better disposition of the Indian” and “to be fully protecting the
19 Indians in all their rights” Jones Decl. Ex. C, at 5782-83. Senator Jones then
20 reaffirms his intent, twice, stating “I can not conceive of a bill that would be fairer
21 or more just to the Indians . . . I believe it is one of the fairest bills for the Indians
22 that has ever been presented in this House.” *Id.* at 5783. Surely the fairest bill ev-
23 er presented to Congress concerning Indians would not have unilaterally dimin-
24 ished the Yakama Reservation without the Yakama Nation’s prior consent, as was
25 obtained from other tribes prior to a finding of diminishment for their reservation
26

lands. *Id.* (describing the Yakama Nation's refusal to negotiate concerning the Yakama Reservation, and active lobbying efforts to uphold the Treaty's reservation boundaries). Hence, the historical context of this legislation also does not support a claim that the 1904 Act served to diminish the Yakama Reservation and remove Tract D.

Third, Tract D remains sparsely populated to this day.⁴ There are no incorporated cities—Glenwood is unincorporated—and very few non-Indians have settled on Tract D since the Act of December 21, 1904. *Id.* Accordingly, this final factor likewise does not support diminishment.

4. The Yakama Nation did not agree to diminishment through the Indian Claims Commission litigation.

The Yakama Nation settled claims brought against the United States seeking compensation for the improper taking of land title within Tract D through litigation

⁴ Glenwood is the largest community in Tract D. In a 2007 document, Washington State Department of Natural Resources cited to the US Census conducted in 2000 in fixing the total population of Glenwood at "522 residents and 244 housing units." See Glenwood Community Wildlife Protection Plan, p. 8, citing to Appendix E. This document is available online as of the date of this brief at: https://www.dnr.wa.gov/publications/rp_burn_cwpp_glenwood.pdf. In a 2014 document, DSHS cites to the US Census conducted in 2010 and fixes the total population of Glenwood at 524. See Risk and Protection Profile for Substance Abuse in Washington Communities: Glenwood, Klickitat County, p. iii. This document is available online as of the date of this brief at: <https://www.dshs.wa.gov/sites/default/files/SESA/rda/updates/research-4.53-SD-Glenwood.pdf>.

1 before the Indian Claims Commission. The County argues that Yakama Nation
 2 “acknowledged that Tract D was not part of the reservation created by Congress
 3 when it filed a claim for compensation for the omitted land with the Indian Claims
 4 Commission.” Jones Decl. Ex. O, at 17-18. There was never any such acknowl-
 5 edgment. In fact, if the County’s argument regarding the Act of December 21,
 6 1904, had merit and Congress established a reservation excluding Tract D as of
 7 1904, the Indian Claims Commission’s decision compensating the Yakama Nation
 8 for taking of individual tracts within Tract D would be baseless because the Yaka-
 9 ma Nation would have had no valid claim as to Tract D.⁷

10 The documents memorializing the settlement agreement after the Indian
 11 Claims Commission found that Tract D is within the Yakama Reservation reveal
 12 that compensation under the Indian Claims Commission settlement would be lim-
 13 ited to those lands “patented” and sold to non-Indians:

15
 16 ⁷ Similarly, any reliance by the county upon *Northern Pac Ry Co v. United States*,
 17 227 U.S. 355, to suggest this Supreme Court decision foreclosed Yakama Nation’s
 18 claims to Tract D is misplaced. The United States Court of Claims, on appeal of
 19 the Indian Claims Commission’s denial of Yakama Nation’s claim to compensa-
 20 tion for lands sold within Tract D based on this
 21 Supreme Court decision, held that *Northern Pacific R. Co. v. United States* does
 22 not control the question of Tract D’s inclusion in the reservation. The United
 23 States Court of Claims noted that *res judicata* did not apply and that principles of
 24 *stare decisis* should not preclude consideration of new evidence; namely the dis-
 25 covery in 1930 of the Treaty map showing the errors of the various surveys under-
 26 taken to that point. *Yakima Tribe v. United States*, 158 Ct. Cl. at 678-82.

1 IT IS FURTHER ORDERED that as agreed by the parties,
 2 the total acreage of the unpatented lands within said
 3 Tract D with respect to which there has been no ‘taking’
 is eliminated from the claim and will be deducted from
 the total area of Tract D to be valued.

4 IT IS FURTHER ORDERED that the patented lands in-
 5 cluded within said Tract D shall be valued by the parties
 6 on the dates of the patents issued to said patented lands;
 7 or, in the alternative, a fair approximation of average of
 8 values, over the period during which said patents were is-
 sued, may be adopted to avoid burdensome detailed
 computation of value as of the date of disposal of each
 separate tract.

9
 10 *Yakima Tribe v. United States*, 18 Ind. Cl. Comm. 426. This shows the Indian
 11 Claims Commission compensated the Yakama Nation for “each separate tract”
 12 which had been sold at a time when Tract D was mistakenly not considered part of
 13 the Yakama Reservation, but that compensation was for transfer of title and not for
 14 extraction from the Yakama Reservation. The balance of lands not sold to non-
 15 Indians did not result in compensation to the Yakama Nation, because no title had
 16 passed. The Yakama Nation still owned such lands.

17 This is supported by the authority vested in the Indian Claims Commission
 18 in general,⁸ the terms of the settlement achieved by the parties to the Indian Claims
 19 Commission litigation, and also by the specific orders of the Indian Claims Com-
 20 mission regarding the Tract D adjudication:

21
 22
 23 ⁸ See 25 U.S.C. 70(a), the Indian Claims Commission was not vested with jurisdic-
 24 tion to alter reservation boundaries, but instead it was empowered to hear and de-
 25 cide, among other things, claims related to the taking of lands by the United States
 26 “without the payment for such lands of compensation agreed to by the claimant.”

1 The stipulation of settlement was unique in that 2,548.06
 2 acres of **vacant and unpatented lands** of Tract D were
 3 returned to the Yakima Tribe in kind . . . **in addition to**
 4 **the payment of \$2,100,000.00 for 97,908.97 acres of**
 Tract D lands which had been patented to white set-
 tlers

5 *The Yakima Tribe v. The United States of America*, 21 Ind. Cl. Comm. at 433 (em-
 6 phasis added). The Indian Claims Commission settlement distinguished between
 7 “vacant and unpatented lands,” which were simply returned to rightful Yakama
 8 Nation control, and “lands which had been patented to white settlers.” This is ef-
 9 fectively compensation for a taking, not for reservation diminishment.

10 While diminishment can certainly involve a taking, a taking does not neces-
 11 sarily establish diminishment. Simply put, the Yakama Nation did not exchange
 12 Tract D as a whole for \$2.1 million at the end of its successful Indian Claims
 13 Commission litigation. Instead, the Yakama Nation accepted \$2.1 million as com-
 14 pensation for the sale of individual lands within its Reservation (i.e., Tract D),
 15 which lands remained within its Reservation after payment of this compensation
 16 regardless of the fee title ownership of such lands. *See Solem*, 465 U.S. at 470
 17 (“no matter what happens to the title to individual plots within the area, the entire
 18 block retains its reservation status until Congress explicitly indicates otherwise.”).

19 The fact that Tract D remained within the Yakama Reservation following the
 20 Indian Claims Commission proceedings is evident from President Richard Nixon’s
 21 return of Mt. Adams to the Yakama People. Keeping in mind that only Congress
 22 can change a reservation’s boundary, in 1972 President Nixon issued Executive
 23 Order 11670 to transfer 21,000 acres of federal land within Tract D back to the
 24 Yakama Nation, and which directed the Secretary of the Interior to administer the
 25 land “for the use and benefit of the Yakima Tribe of Indians as a portion of the res-
 26

1 ervation created by the Treaty of 1855, 12 Stat. 951.” 37 Fed. Reg. 10431. The
2 only way President Nixon could have legally directed such treatment would be if
3 the land was already within the exterior boundaries of the Yakama Reservation.

4 A United States Assistant Regional Solicitor to the Bureau of Indian Affairs
5 wrote a memorandum in 1968 in which he confirmed Yakama Nation’s position on
6 Tract D, further illuminating the true nature of the status of Tract D before and af-
7 ter the Indian Claims Commission adjudication. After noting that the Indian
8 Claims Commission litigation restored the Yakama Reservation as it was originally
9 constituted and always should have been recognized, the Solicitor describes the
10 lands that had been sold within Tract D, and for which the Yakama Nation was to
11 be compensated, as part of the Yakama Reservation:

12 The land taken by action of the United States in appro-
13 priating it to other uses constitutes fee-patented land
14 within the reservation. The Tribe has the authority to ex-
15 ercise jurisdiction over the activities of its members with-
in these areas and to assert the rights granted to them by
the Treaty.

16 Jones Decl. Ex. D, at YN 000498. On August 4, 1978, Solicitor L.K. affirmed
17 Assistant Regional Solicitor Nealy’s opinion in a letter to Congressman Mike
18 McCormack—Klickitat County’s Congressional Representative—confirming
19 that Tract D is located within the Yakama Reservation. Jones Decl. Ex. F, at
20 YN 000519. Solicitor Thomas Sansonetti reiterated this position in 1992 in a
21 letter to Congressman Sid Morrison—Klickitat County’s Congressional
22 Representative—stating “the Treaty with the Yakima Tribe included Tract D as
23 part of the Yakima Reservation.” Jones Decl. Ex. G, at YN 000521. These
24 opinions represent a significant history of Department of the Interior Solicitors
25 over a period of two decades re-affirming the Indian Claims Commission’s
26

1 determination that Tract D is within the Yakama Reservation.

2 There has been no diminishment of the Yakama Reservation to sever Tract
3 D. The Yakama Nation never entered into any agreement or settlement with the
4 United States to exclude Tract D from its Reservation, and determinatively, Con-
5 gress has never acted to diminish the Yakama reservation to remove Tract D. Con-
6 sequently, Tract D, including Glenwood, is and always has been part of the Yaka-
7 ma Reservation.

8 **B. The Yakama Nation is likely to succeed on its claim that the United**
9 **States reassumed the State of Washington's Pub. L. 83-280 concurrent**
10 **criminal jurisdiction within the Yakama Reservation over crimes**
11 **involving Indians as defendants and/or victims.**

12 **1. The scope of retrocession is determined by the United States'**
13 **understanding of how much of its own jurisdiction it reassumed,**
14 **without regard for the State action triggering retrocession.**

15 The Yakama Nation formally petitioned the State to retrocede its
16 jurisdiction within the Yakama Reservation to the United States. The State
17 drafted and executed a Governor's Proclamation approving in relevant part the
18 Yakama Nation's petition, and subsequently sent a letter attempting to clarify the
19 plain language of its Proclamation. The Secretary of the Interior accepted the
20 State's Proclamation—not the clarifying letter—by publishing notice in the
21 federal register and sending an acceptance letter discussing the scope of
22 jurisdiction that the United States reassumed. The Assistant Secretary of Indian
23 Affairs later issued another memorandum providing further clarification on the
24 impact of retrocession on jurisdiction within the Yakama Reservation. Years after
25 retrocession was implemented, the Department of Justice issued a memorandum
26 opinion that contradicts the Department of the Interior's stated intentions when

1 accepting retrocession. With three governments taking various and at times
 2 contradictory legal positions on this matter, it is imperative to understand that the
 3 Department of the Interior's actions are controlling, regardless of any other
 4 governments' and agencies' contrary interpretation of the scope of jurisdiction
 5 reassumed by the United States within the Yakama Reservation.

6 25 U.S.C. 1323(a) authorizes the United States to "accept a retrocession by
 7 any State of all or any measure of criminal or civil jurisdiction, or both, acquired
 8 by such State" pursuant to Pub. L. 83-280. Executive Order 11435 empowers the
 9 Secretary of the Interior to exercise sole authority to accept such a retrocession of
 10 jurisdiction on the United States' behalf, provided that notice of the retrocession
 11 be published in the federal register, and that the Secretary consult with the United
 12 States Attorney General. E.O. 11435, 33 Fed. Reg. 17339.

13 There is limited federal precedent on the standard for interpreting the scope
 14 of retroceded jurisdiction under Section 1323. However, the existing precedent
 15 suggests that federal courts determine a retrocession's scope by reviewing the
 16 actions of the Secretary of the Interior under federal law, rather than the state's
 17 actions under state law. *Klickitat County v. U.S. Dept. of the Interior et al.*, No.
 18 1:16-cv-03060 at 8 (E.D. Wash. Sept. 1, 2016). This federal focus is consistent
 19 with the United States' plenary power over Indian affairs, under which Congress
 20 is not limited by the actions of states when legislating in the field of federal
 21 Indian law.⁹ *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd on*
 22

23
 24 ⁹ As a matter of policy, the Yakama Nation disputes the United States' assertion of
 25 plenary power over Indian affairs which is rooted in the Doctrine of Discovery and
 26 the Supreme Court's decision in *Johnson v. M'Intosh*, 21 U.S. 543 (1823). With

1 *other grounds by Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
2 Further, Congress intended Section 1323 to “benefit the Indians,” *United States v.*
3 *Brown*, 334 F. Supp. 536, 542 (D. Neb. 1971), thereby triggering application of
4 the Indian canon of construction that statutes are to be construed liberally in favor
5 of the Indians, with ambiguous provisions interpreted to their benefit. *Artichoke*
6 *Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003). As applied
7 to Section 1323, the Indian canon of construction supports a court’s consideration
8 of the scope of retroceded federal jurisdiction by focusing on the Secretary of the
9 Interior’s actions and laws, not those of the state. *Brown*, 334 F. Supp. at 543.

10 In adopting this federal-focused perspective on interpreting retrocessions,
11 the Ninth Circuit has principally relied on two district court decisions: *United*
12 *States v. Brown*, 334 F. Supp. 536, and *Omaha Tribe of Neb. v. Village of Walthill*,
13 334 F. Supp. 823 (D. Neb. 1971). *United States v. Lawrence*, 595 F.2d 1149 (9th
14 Cir. 1979); *Oliphant v. Schlie*, 544 F.2d 1007. In *Brown*, the district court
15 affirmed the validity of the United States’ acceptance of retrocession for the
16 Omaha Reservation by looking to the Secretary of the Interior’s actions rather
17 than the State. *Brown*, 334 F. Supp. at 541. The Indian defendant had challenged
18 federal jurisdiction over her alleged crimes by identifying procedural flaws in the
19 State’s offer of retrocession to the United States, and by asserting that the
20 Secretary of the Interior erred by not reassuming the entirety of the jurisdiction
21 offered by the State. *Id.* at 538. In rejecting these challenges, the Court
22 explained that Congress holds plenary power over Indian affairs, the State only
23 exercised jurisdiction over Indian Country at the United States’ pleasure, and

24
25 that said, the Yakama Nation acknowledges that Congress's plenary power is the
26 federal law applicable in this case.

1 accordingly the Secretary of the Interior was free to reassume its own jurisdiction
2 on any terms that it desired. *Id.* at 541. What matters when interpreting the
3 validity and scope of retrocession, therefore, is the Secretary's actions and
4 understanding, not that of the State. *Id.*

5 Similarly, in *Omaha Tribe* the district court held that federal law governed
6 interpretations on the validity and scope of retrocession. *Omaha Tribe*, 334 F.
7 Supp. at 831. The Omaha Tribe challenged a local non-Indian village's and
8 county's continued assertions of jurisdiction over enrolled Omaha Members
9 within the Omaha Reservation despite the United States' acceptance of
10 retroceded jurisdiction over the said Reservation under Section 1323(a). *Id.* at
11 828. The district court rejected the State's invitation to invalidate the retrocession
12 under State law, and instead analyzed the scope and validity of the United States'
13 acceptance of retrocession under federal law. *Id.* at 831. Ultimately, the court
14 determined that the Secretary of the Interior reasonably relied on the State's offer
15 of retrocession when it reassumed federal jurisdiction over the Omaha
16 Reservation, and as a result the retrocession was valid. *Id.* On appeal, the Eighth
17 Circuit affirmed. *Omaha Tribe of Nebraska v. Walthill*, 460 F.2d 1327 (8th Cir.
18 1972).

19 The Ninth Circuit first adopted the reasoning from *Brown* and *Omaha Tribe*
20 in *Oliphant v. Schlie*, 544 F.2d 1007. There the Ninth Circuit was faced with a
21 question addressed in *Brown*: whether a state offer to retrocede jurisdiction that is
22 invalid under state law automatically invalidates the Secretary's acceptance of
23 said jurisdiction. *Id.* at 1012. The court held that the validity of the State's
24 actions were irrelevant, which it supported by adopting and extensively quoting
25 from *Brown*. *Id.* While *Oliphant* was reversed on other grounds, the Ninth
26

1 Circuit later confirmed that its analytical framework for retrocessions of
2 jurisdiction using *Brown* was “still persuasive” and accordingly rejected any
3 reliance on state law when interpreting the validity and scope of a state
4 retrocession of jurisdiction. *Lawrence*, 595 F.2d 1149.

5 Given the plain language of Section 1323 authorizing the United States to
6 accept “all or any measure” of a State’s Pub. L. 83-280-derived jurisdiction, the
7 affirmation of this federal authority in E.O. 11435, and the Ninth Circuit’s
8 precedent deploying a federal-focused analytical framework for understanding
9 the scope of retroceded jurisdiction, in this case the Court should limit its analysis
10 to the Secretary of the Interior’s acceptance and understanding of retroceded
11 jurisdiction within the Yakama Reservation when interpreting the scope of
12 retrocession. With this focus, it is clear that the Secretary of the Interior
13 reassumed federal jurisdiction over all crimes within the Yakama Reservation
14 where an Indian is involved as a defendant and/or a victim.

15 On October 19, 2015, Mr. Kevin Washburn, Assistant Secretary of Indian
16 Affairs, “accepted retrocession to the United States of partial civil and criminal
17 jurisdiction over the Yakama Nation by the State of Washington.” 80 Fed. Reg.
18 63583. Notice of the acceptance was published in the Federal Register on
19 October 20, 2015, which identified April 19, 2016 as the effective date for
20 complete implementation of the retrocession. *Id.* The notice recognized
21 Proclamation by the Governor 14-01 as offering a retrocession of Pub. L. 83-280
22 jurisdiction to the United States, but does not otherwise elucidate the scope of
23 reassumed jurisdiction. *Id.*

24 While the Federal Register notice is vague as to the scope of retrocession,
25 Assistant Secretary Washburn’s October 19, 2016 letter notifying the Yakama
26

1 Nation of retrocession is not. Jones Decl. Ex. J. Secretary Washburn describes
2 the primary effect of retrocession as “transfer[ring] back to the Federal
3 Government Federal authority that the State had been delegated under Public
4 Law 280.” *Id.* As a result of this transfer, Secretary Washburn noted “tribal
5 leadership and the U.S. Attorney, rather than the State, county or municipal
6 leadership, will now bear the responsibility . . . for public safety on the Yakama
7 Reservation.” *Id.* The letter does not leave open the possibility of the State
8 continuing to play a role in Indian-involved crimes within the Yakama
9 Reservation. This lack of continued State jurisdiction is confirmed by Secretary
10 Washburn’s identification of the need for the Yakama Nation to develop mutual
11 aid and cross-deputation agreements with local jurisdictions to ensure continued
12 public safety. *Id.* There is little need for such agreements if the State retained
13 most of its criminal jurisdiction within the Yakama Reservation following
14 retrocession’s implementation.

15 Secretary Washburn’s letter also expressly rejected the January 27, 2014,
16 cover letter sent by the State of Washington along with Proclamation by the
17 Governor 14-01. *Id.* The cover letter sought to unilaterally re-write language
18 within the Proclamation to significantly alter its meaning and effect such that the
19 State retained criminal jurisdiction any time a non-Indian was involved in a crime
20 as either a defendant or victim. Jones Decl. Ex. I, at 2. In rejecting the State’s
21 request, Secretary Washburn described Proclamation by the Governor 14-01 as
22 “plain on its face and unambiguous,” and characterized any subsequent
23 interpretation—like the interpretation requested by the State—as “unnecessary.”
24 Jones Decl. Ex. J, at 5. He then confirmed that he was not accepting the State’s
25 proposed re-write by stating “[i]n sum, it is the content of the Proclamation that
26

1 we hereby accept in approving retrocession.” *Id.* Importantly, Secretary
2 Washburn ended his letter by noting the federal Indian policy of self-
3 determination and voicing strong support for the Yakama Nation taking on a
4 greater role in criminal justice within the Yakama Reservation to “advance tribal-
5 self government and tribal sovereignty for the Nation.” *Id.* Such advancement
6 would be significantly undermined if retrocession were interpreted to disallow
7 exclusive Yakama/federal jurisdiction whenever an Indian is involved in the
8 crime.

9 Secretary Washburn’s stated intent in accepting retrocession supports the
10 State no longer retaining concurrent criminal jurisdiction whenever an Indian is
11 involved as a defendant and/or victim, and this intent was reaffirmed in a
12 November 30, 2016, memorandum by Mr. Lawrence Roberts, Principal Deputy
13 Assistant Secretary of Indian Affairs. Jones Decl. Ex. L. The purpose of the
14 memorandum is to provide guidance to “Federal, tribal, state and local law
15 enforcement in their implementation of the [Department of the Interior’s]
16 decision.” *Id.* at 1. It provides that following retrocession’s implementation,
17 “Washington State retains jurisdiction only over civil and criminal causes of
18 action in which no party is an Indian.” *Id.* Principal Deputy Assistant Secretary
19 Roberts then delivered a visual matrix identifying with specificity when the State
20 does and does not have jurisdiction. *Id.* at 2. The only criminal offenses over
21 which the State retained jurisdiction are those involving both a non-Indian
22 defendant and non-Indian victim, as well as non-Indian victimless crimes. *Id.*
23 The State did not retain any jurisdiction whenever an Indian is involved as a
24 defendant and/or victim.

25 In consideration of the Assistant Secretary of Indian Affairs’ federal register
26

notice accepting retrocession, notification letter affirming that the State was no longer responsible for public safety on the Yakama Reservation, and the Deputy Assistant Secretary's guidance memorandum, it is clear that on October 19, 2015, the United States reassumed the full scope of Pub. L. 83-280 criminal jurisdiction from the State of Washington. As a result, Defendants do not have jurisdiction over crimes within the Yakama Reservation whenever the defendant and/or victim are Indian.

2. The Department of the Interior's acceptance of retroceded jurisdiction within the Yakama Reservation should be afforded judicial deference.

a. The Assistant Secretary of Indian Affairs Federal Register Notice and accompanying letter accepting retroceded jurisdiction should be afforded Chevron deference.

The United States Supreme Court has established a well-known test for reviewing agency interpretations of federal law. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The Court in *Chevron* created a two-step inquiry for determining the level of deference owed to administrative statutory interpretations. First, if Congress has manifested a clear intent with the statutory language, the reviewing court must give force to that intent. *Id.* at 843. Second, if a statute is ambiguous or silent on a given question, the court must ask whether the agency's interpretation of the statute is based on a permissible construction of the statute—which it is unless the construction is arbitrary and capricious. *Id.* at 843-44. “[C]onsiderable weight [is] accorded to [a federal] executive department’s construction of a statutory scheme it is entrusted to administer . . .” *Klickitat County*, No. 1:16-cv-03060 at 10 (E.D. Wash. Sept. 1, 2016) (quoting

1 *United States v. Mead Corporation*, 533 U.S. 218, 227-28 (2001)).

2 *Chevron* deference does not apply to all agency actions, however, but only
3 those intended to carry the “force of law,” and promulgated in the exercise of that
4 authority. *Mead*, 533 U.S. at 226-227. In interpreting *Mead*, the Ninth Circuit
5 has held that an interpretation has the force of law only when it has a precedential
6 effect that binds third parties. “[T]he precedential value of an agency action [is]
7 the essential factor in determining whether *Chevron* deference is appropriate.”
8 *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc)
9 (quoting *Alvarado v. Gonzales*, 449 F.3d 915, 922 (9th Cir. 2006)) (emphasis in
10 original).

11 Where an agency action merits *Chevron* deference, courts review the
12 agency action to determine if it was arbitrary, capricious, an abuse of discretion,
13 or otherwise not in accordance with law. *Mead*, 533 U.S. at 229 (citing *Chevron*,
14 467 U.S. at 842-845). Review under this standard is narrow and the reviewing
15 court may not substitute its judgment for that of the agency. *U.S. Postal Service*
16 *v. Gregory*, 534 U.S. 1, 6-7 (2001). Courts may reverse an agency action under
17 the arbitrary and capricious standard only if the agency has relied on factors that
18 Congress has not intended it to consider, entirely failed to consider an important
19 aspect of the problem, offered an explanation for its decision that runs counter to
20 the evidence before the agency, or is so implausible that it could not be ascribed
21 to a difference in view or the product of agency expertise. *Greater Yellowstone*
22 *Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010).

23 Applied here, Assistant Secretary Washburn’s acceptance of retroceded
24 jurisdiction by federal register notice and his accompanying letter warrant
25 *Chevron* deference. The first agency action at issue is the United States’
26

1 resumption of jurisdiction within the Yakama Reservation under Section 1323(a)
2 by publishing a federal register notice and sending a letter explaining the scope of
3 reassumed jurisdiction. 80 Fed. Reg. 63583; Jones Decl. Ex. J. Such a
4 retrocession necessarily eliminates in relevant part the State's Pub. L. 83-280
5 jurisdiction and therefore carries the force of law under Section 1323(a) in
6 satisfaction of the first prong of *Mead's* analysis for when *Chevron* deference
7 should apply. Further, Assistant Secretary Washburn promulgated his federal
8 register notice and letter as an exercise of this Section 1323(a) and E.O. 11435
9 authority in satisfaction of the second requirement under *Mead*. The agency
10 action also meets the Ninth Circuit's requirement that the action be binding on
11 third parties because the State is bound to no longer exercise concurrent criminal
12 jurisdiction within the Yakama Reservation following the United States'
13 acceptance of retroceded jurisdiction. As a result, *Chevron* deference is
14 appropriate.

15 Applying *Chevron*, the Department of the Interior did not act in an arbitrary
16 and capricious manner, abuse its discretion, or otherwise act outside law when it
17 reassumed concurrent jurisdiction within the Yakama Reservation over crimes
18 whenever Indians are involved as a defendant and/or victim, to the exclusion of
19 State jurisdiction under Pub. L. 83-280. Congress only required one prerequisite
20 to the Executive Branch accepting retroceded jurisdiction under Section
21 1323(a)—the State offering to retrocede its Pub. L. 83-280 jurisdiction back to
22 the United States—and Assistant Secretary Washburn followed this requirement
23 by acting after the State of Washington issued Proclamation by the Governor 14-
24 01. 25 U.S.C. 1323(a). Assistant Secretary Washburn's accompanying letter
25 discusses in detail his authority and the process for achieving retrocession, as
26

well as his decision to allow for a six-month implementation period, thereby demonstrating that he carefully considered the important issues associated with retrocession. Jones Decl. Ex. J, at 2-5. His decision is consistent with a plain reading of the Proclamation, which he characterized as “plain on its face and unambiguous,” that the State only retains criminal jurisdiction for crimes involving “non-Indian defendants and non-Indian victims.” *Id.* at 5; Jones Decl. Ex. X, at 2. Further, such a plain reading cannot reasonably be considered implausible. Since the Department of the Interior did not act in an arbitrary and capricious manner when it accepted retroceded jurisdiction over all crimes within the Yakama Reservation involving Indian defendants and/or victims, the Court should defer to the agency’s interpretation in this case.

b. Deputy Assistant Secretary of Indian Affairs’s Guidance Memorandum interpreting the scope of retroceded jurisdiction should be afforded Skidmore deference.

Decisions not entitled to *Chevron* deference are still entitled to respect based on an agency’s specialized expertise under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The decision whether to apply *Chevron* or *Skidmore* is assessed under the factors set forth in *Barnhart v. Walton*, 553 U.S. 212, 221-22 (2002): the “interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.” 535 U.S. at 221-222; *see also Fournier v. Sebelius*, 718 F.3d 1110, 1120-1121 (9th Cir. 2014).

Where an agency action does not warrant *Chevron* deference, including interpretations contained in advisory letters, policy statements, agency manuals,

1 and enforcement guidelines, such actions are still accorded deference in light of
2 their persuasiveness under *Skidmore*. *Christensen v. Harris County*, 529 U.S. 576,
3 587 (2000); *Skidmore*, 323 U.S. at 140. Under a *Skidmore* inquiry, courts evaluate
4 the deference owed to an agency action in light of “the thoroughness evident in
5 its consideration, the validity of its reasoning, its consistency with earlier and
6 later pronouncements, and all those factors which give it power to persuade.” *Id.*
7 at 140; *see also Mead Corp.*, 533 U.S. at 228 (reaffirming *Skidmore* and directing
8 that deference be assessed on “the agency’s care, its consistency, formality, and
9 relative expertness, and to the persuasiveness of the agency’s position.”)

10 Deputy Assistant Secretary Roberts’ guidance memorandum is due judicial
11 deference under the *Skidmore* standard because it is thorough, sound, consistent
12 with prior pronouncements, and otherwise persuasive. The memorandum is
13 thorough insofar as it gives a history of the Assistant Secretary of Indian Affairs’
14 retrocession decision, explains the plain reading of Proclamation of the Governor
15 14-01 called for by the Assistant Secretary and confirmed by Judge Lonnie Suko
16 in *Klickitat County*, No. 1:16-cv-03060 at 10 (E.D. Wash. Sept. 1, 2016),
17 discusses that land status within the Yakama Reservation no longer matters to
18 exercises of criminal jurisdiction following retrocession, and provides a detailed
19 chart clearly explaining which governments have criminal jurisdiction in various
20 situations. Jones Decl. Ex. L, at 1-2.

21 The memorandum is also sound in its reasoning. The United States
22 accepted the full measure of jurisdiction retroceded by the State in Proclamation
23 of the Governor 14-01. Jones Decl. Ex. J, at 1. The plain language of the State’s
24 Proclamation is that the State retroceded full criminal jurisdiction unless the
25 crime involves “non-Indian defendants **and** non-Indian victims.” *Id.* Deputy
26

1 Assistant Secretary Roberts’ analysis simply applies this plain language to
2 determine that the State no longer retains concurrent criminal jurisdiction
3 whenever an Indian is involved as a defendant and/or a victim. Legal gymnastics
4 are required to read the Proclamation otherwise.

5 The position taken by Assistant Secretary Washburn in accepting retroceded
6 jurisdiction, by the U.S. Attorney for the Eastern District of Washington in
7 implementing retrocession, and by DOJ while defending retrocession from a
8 lawsuit brought by Klickitat County are all consistent with the position taken by
9 Deputy Assistant Secretary Roberts’ guidance memorandum. Assistant Secretary
10 Washburn’s letter noted that “tribal leadership and the U.S. Attorney, rather than
11 the State, county or municipal leadership, will now bear the responsibility . . . for
12 public safety on the Yakama Reservation.” Jones Decl. Ex. J, at 3. In an email
13 exchange during the implementation of retrocession, the U.S. Attorney for the
14 Eastern District of Washington explained to the Yakama Nation and local non-
15 Indian law enforcement that “[i]f the suspect is non-Indian and the victim is
16 Indian, misdemeanor jurisdiction lies with the federal government (not the state
17 or the Nation).” Jones Decl. Ex. K, at 1. He then extended this analysis non-
18 aggravated felonies as well. *Id.* DOJ argued to protect the validity of
19 retrocession in a motion to dismiss by pointing out the plain language of the
20 Proclamation, and then dismissing any federal requirement to look beyond the
21 Proclamation when reassuming federal jurisdiction. Defendant’s Motion to
22 Dismiss at 18, *Klickitat County v. U.S. Dep’t of the Interior et al.*, No. 1:16-cv-
23 03060 (E.D. Wash. 2016) (attached at Jones Dec. Ex. P). All of these federal
24 actions support the guidance memorandum’s position that the United States
25 reassumed concurrent criminal jurisdiction over crimes within the Yakama
26

1 Reservation whenever an Indian is involved as either a defendant or a victim.

2 The guidance memorandum is persuasive because it provides valid,
3 logical, and well-reasoned explanations in reaching its interpretation. It
4 addresses the Proclamation by the Governor 14-01, Assistant Secretary
5 Washburn's letter, and the United States District Court for the Eastern District of
6 Washington's decision in *Klickitat County v. U.S. Dep't of the Interior et al.*
7 Relevant portions of the Proclamation were quoted, and a plain language
8 interpretation was provided. Deputy Assistant Secretary Roberts then provides
9 both a narrative and an illustrative depiction of the Department of the Interior's
10 position that "Washington state retains jurisdiction only over civil and criminal
11 causes of action in which no party is an Indian." Jones Decl. Ex. L, at 1. The
12 memorandum is not long or verbose, and it was not intended to be. Its stated
13 intent is to "provide law enforcement officers, prosecutors, and other officials
14 tasked with maintaining public safety on the Yakama Reservation a **simple tool**
15 to promote consistency in their on-going implementation within the Yakama
16 Reservation." *Id.* (emphasis added). The guidance memorandum is thorough,
17 sound, consistent with prior pronouncements, and persuasive, and accordingly,
18 the Deputy Assistant Secretary's interpretation of the scope of retrocession is
19 entitled to deference under *Skidmore*.

20 Affording *Skidmore* deference to Deputy Assistant Secretary Roberts'
21 guidance memorandum, and when considered alongside the *Chevron* deference
22 afforded to the underlying agency action, the Court should leave intact the
23 Department of the Interior's decision to reassume concurrent jurisdiction within
24 the Yakama Reservation over crimes whenever an Indian is involved as a
25 defendant and/or victim, to the exclusion of State jurisdiction under Pub. L. 83-
26

1 280.

2
3 **3. The United States Office of Legal Counsel's recent memorandum**
4 **opinion should be afforded no deference.**

5 The United States Office of Legal Counsel issued a memorandum opinion
6 on July 27, 2018—more than two years after retrocession was implemented—that
7 takes a different position than the Yakama Nation asserts in this case. Jones Decl.
8 Ex. M. This court is not bound by an opinion of the United States Attorney
9 General. *Pueblo of Taos v. Andrus*, 475 F. Supp. 359, 364 (D.C. Dist. of
10 Columbia 1979). Congress did not expressly delegate any authority to the
11 Attorney General in Section 1323(a), and E.O. 11435 only identifies the Attorney
12 General in a consulting role prior to the Secretary of the Interior's decision on a
13 request for retrocession. 25 U.S.C. 1323(a); E.O. 11435. Congress did not
14 authorize any Executive Branch agency or department, including the Office of
15 Legal Counsel, to change the scope of retroceded jurisdiction years after a
16 retrocession is implemented, making *Chevron* deference inappropriate for lack of
17 legal authority. 25 U.S.C. 1323.

18 Further, the Office of Legal Counsel's memorandum opinion is contrary to
19 the legal positions taken by the Department of Justice for years, making *Skidmore*
20 deference inappropriate for lack of consistency with prior agency actions. The
21 Assistant Secretary of Indian Affairs consulted with the Attorney General and
22 Department of Justice under E.O. 11436 prior to accepting retroceded jurisdiction
23 from the State of Washington, during which the Attorney General did not raise
24 any concerns with the United States reassuming concurrent criminal jurisdiction
25 wherever an Indian is involved in a crime as either a defendant or a victim. Jones
26

Decl. Ex. J, at 5. The Department of Justice’s only request was that the Yakama Nation be afforded an implementation period before retrocession took effect, and Assistant Secretary Washburn granted that request. *Id.* The U.S. Attorney for the Eastern District of Washington then participated in the implementation of retrocession, during which he explained to the Yakama Nation and local non-Indian law enforcement that “[i]f the suspect is non-Indian and the victim is Indian, misdemeanor jurisdiction lies with the federal government (not the state or the Nation).” Jones Decl. Ex. K, at 1. He extended this analysis to non-aggravated felonies as well. *Id.* In other words, at the time retrocession was implemented, DOJ understood the scope of retrocession in the same way that the Assistant Secretary of Indian Affairs understood it, and in the same manner that the Yakama Nation is advocating for in this lawsuit.

DOJ’s supportive position was confirmed in 2016, when it defended the Department of the Interior in a lawsuit by Klickitat County that challenged the validity of retrocession. Jones Decl. Ex. P. In DOJ’s Motion to Dismiss, it described the scope of criminal jurisdiction retroceded by the State of Washington as including all offenses except those that involve “non-Indian defendants and non-Indian victims.” *Id.* at 6. DOJ then bolstered Assistant Secretary Washburn’s decision to ignore the State of Washington’s attempt to re-write the Proclamation by arguing:

[T]he Federal Government, in reassuming its own jurisdiction, need not look behind the terms of the State’s retrocession in order for the acceptance of the retrocession to be valid: “In fact, the triggering event [for the federal resumption of jurisdiction] could have been devoid of any mention of state action at all.”

1 *Id.* at 18 (citing *United States v. Brown*, 334 F. Supp. at 540). The Department of
2 Justice's arguments to defend the Assistant Secretary of Indian Affairs'
3 acceptance of retrocession support the Yakama Nation's arguments in this case,
4 and are inconsistent with the position taken by the Office of Legal Counsel in its
5 memorandum opinion. The Office of Legal Counsel's memorandum opinion
6 does not bind the Court, and should not be afforded deference in this case.

7
8 **4. Washington State's attempt to claw back jurisdiction it clearly
retroceded is not supported by applicable law.**

9
10 If this court finds interpretation of the Proclamation is relevant, the facts and
11 law show that Yakama Nation is likely to succeed at summary judgment or trial on
12 the merits of its claims regarding the scope of retrocession and its effect on
13 Klickitat County's criminal jurisdiction within the Yakama Reservation. As a
14 threshold matter, the plain language of the Proclamation should be given effect and
15 no further interpretation is necessary. *See The Pedro*, 175 U.S. 354, 364 (1899)
16 (when the meaning of a proclamation's language is plain, "a proclamation is not
17 open to interpretation since none is needed"). But to the extent inquiry proceeds
18 from there, interpretation still favors Yakama Nation's position. Courts construing
19 executive orders and proclamations typically turn to traditional canons of statutory
20 interpretation for aid in their analysis. *See Bassidji v. Goe*, 413 F.3d 928, 934 (9th
21 Cir. 2005) ("[a]s is true of interpretation of statutes, the interpretation of an Execu-
22 tive Order begins with its text.") (citing *United States v. Hassanzadeh*, 271 F.3d
23 574, 580 (4th Cir. 2001)). Three rules of construction should guide any necessary
24 interpretation of the Proclamation at issue here.
25
26

1 a. *Under relevant canons of construction, the word “and” in*
 2 *paragraph 3 of Governor Inslee’s Retrocession Proclamation*
 3 *should be interpreted according to its plain meaning.*

4 The first relevant rule of statutory and proclamation interpretation is “to de-
 5 termine whether the language at issue has a plain and unambiguous meaning.”
 6 *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). A court’s “inquiry must
 7 cease if the statutory [or proclamation] language is unambiguous and the statutory
 8 scheme is coherent and consistent.” *Id.* (internal quotes and citations omitted).
 9 Second, relevant here is the rule that when the language of an executive order or
 10 proclamation is ambiguous and “awkward,” the “failure to state explicitly what
 11 was meant is the fault of the Government” and “[a]ny ambiguities should therefore
 12 be resolved against the Government.” See *Cole v. Young*, 351 U.S. 536, 556
 13 (1956). And third, the long-standing rule of construction “that treaties with Indians
 14 must be interpreted as they would have understood them . . . and any doubtful ex-
 15 pressions in them should be resolved in the Indians favor” applies with equal force
 16 “to executive orders no less than treaties.” *United States v. State of Wash.*, 969
 17 F.2d 752, 755 (9th Cir. 1992) (internal citations omitted) (quoting *Choctaw Nation*
 18 *v. Oklahoma*, 397 U.S. 620, 631 (1970)).

19 The dispute on the scope of the retrocession agreed upon by Washington
 20 State through Governor Inslee’s Proclamation arises from the language the state
 21 itself drafted and promulgated in paragraph three of the Proclamation :

22 Within the exterior boundaries of the Yakama Reserva-
 23 tion, the State shall retrocede, in part, criminal jurisdic-
 24 tion over all offenses not addressed by Paragraphs 1 and
 25 2. The state retains jurisdiction over criminal offenses
 26 involving non-Indian defendants and non-Indian victims.

27 Jones Decl. Ex. X, at 2. A Washington State court of appeals in a criminal pro-
 28 ceeding that did not involve a Yakama member or the Yakama Nation as parties

1 has recently reinterpreted “and” in this paragraph to mean “or” for purposes of ef-
 2 fectuating a claw back of jurisdiction the federal government accepted upon retro-
 3 cession pursuant to the federal government’s unilateral authority. *State v. Zack*, 2
 4 Wn. App. 2d 667 (2018). The *Zack* court’s reasoning is unsound and should not be
 5 used by the Court on this federal issue. The plain meaning of “and” as used in this
 6 Proclamation is unambiguous and gives effect to the retrocession the federal gov-
 7 ernment accepted. 80 Fed. Reg. 63583. According to the Proclamation’s plain
 8 terms, the state ceded criminal jurisdiction over offenses arising within the Yaka-
 9 ma Reservation except for “criminal offenses involving non-Indian defendants **and**
 10 non-Indian victims.” Jones Decl. Ex. X, at 2 (emphasis added).

11 In light of the dispute regarding whether to give “and” its plain meaning, the
 12 first issue is to discern the plain meaning of the word “and.” Although “and” may
 13 be interpreted in the disjunctive (i.e., interchangeably with “or”), the plain meaning
 14 of the word “and” is conjunctive, “and unless the context dictates otherwise, the
 15 ‘and’ is presumed to be used in its ordinary sense.” *Reese Bros. v. United States*,
 16 447 F.3d 229, 235–36 (3d Cir. 2006) (quoting *Am. Bankers Ins. Group v. United*
 17 *States*, 408 F.3d 1328, 1332 (11th Cir. 2005)). Moreover, when terms are “con-
 18 nected by a conjunctive term . . . such as the term ‘and’ . . . courts normally inter-
 19 pret the statute as requiring satisfaction of both of the conjunctive terms to trigger
 20 application” of the provision. *United States v. Ganadonegro*, 854 F. Supp. 2d
 21 1068, 1081–82 (D.N.M. 2012) (citing *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236
 22 (2011)). And when a legislature chooses different language—here “and” versus
 23 “or”—courts may presume the legislature “understood the effect of this difference
 24 in language.” See *Id.* (citing *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479,
 25 495, (1991)).

1 Thus, when the Proclamation used the word “and” to join terms such as
2 “non-Indian defendants” and “non-Indian victims,” the satisfaction of both of those
3 terms together in any criminal matter should be required before triggering the ap-
4 plication of state criminal jurisdiction on the Yakama Reservation. Jurisdiction
5 otherwise for crimes on the Yakama Reservation now lies with the federal gov-
6 ernment or with the Yakama Nation and subject to these governments’ discretion
7 under applicable laws.

8 To the extent this provision of the Proclamation is found ambiguous in light
9 of the complexity of retrocession or for any other reason, the “failure to state ex-
10 plicitly what was meant” ultimately falls squarely on the State of Washington’s
11 shoulders, and, therefore, such ambiguity should “be resolved against the govern-
12 ment.” *Cole*, 351 U.S. at 556. The question of any ambiguity arising from use of
13 the word “and” would therefore be resolved against Washington State and its coun-
14 ties given the State’s failure to clearly evince any intent for “and” to mean “or.”

15 Finally, given the nature of the issue here—including the fact that jurisdic-
16 tion with respect to the Yakama Nation was transferred from the United States to
17 Washington under Pub. L. 83-280 over the strong objection of the Yakama Na-
18 tion—the long-standing rule of construction in this country regarding treaties with
19 Indians and “executive orders,” or in this case, proclamations affecting tribal rights
20 should be given effect. To the extent the use of the word “and” joining the terms at
21 issue here is a “doubtful expression,” the term should be resolved in the Yakama
22 Nation’s favor. *State of Wash.*, 969 F.2d at 755. Here, this would again lead to the
23 conclusion that the federal jurisdiction the Yakama Nation never consented for the
24 United States to cede over its Treaty-protected Reservation should be restored to
25
26

1 the United States, notwithstanding any *ex post facto* “intent” to the contrary on the
 2 part of the State.

3
 4 *b. Reading “and” plainly and in the conjunctive sense will not
 render the Proclamation internally inconsistent or nonsensical.*

5 The *Zack* court reasoned that giving “and” its plain meaning would be in-
 6 consistent with the first sentence of paragraph three of the Proclamation, wherein
 7 the State retrocedes criminal jurisdiction “in part.” This is not true; and should not
 8 be given precedence over the plain meaning. In *Oliphant*, 435 U.S. 191, the Su-
 9 preme Court deprived Native Nations of their inherent sovereign right to exercise
 10 criminal jurisdiction over non-Indians within their lands. When the State retroced-
 11 ed its criminal jurisdiction within the Yakama Reservation back to the United
 12 States, it expressly reserved its exclusive post-*Oliphant* criminal jurisdiction when-
 13 ever both non-Indian defendants and non-Indian victims are involved in a crime.
 14 Thus, when the State said it was retroceding its criminal jurisdiction “in part,” the
 15 part that it preserved was its jurisdiction over non-Indian versus non-Indian crimes,
 16 as the Proclamation plainly states. Interpreting both “and” and “in part” according
 17 to their usual and plain meaning simply confirms the State’s intent to retain post-
 18 *Oliphant* criminal jurisdiction over non-Indian versus non-Indian crimes while oth-
 19 erwise returning the criminal jurisdiction framework within the Yakama Reserva-
 20 tion back to its pre-Pub. L. 83-280 status.

21 **C. The Yakama Nation is facing irreparable harm, the balance of equities**
 22 **tips in the Yakama Nation’s favor, and a preliminary injunction is in**
 23 **the public’s interest.**

24 In considering a motion for preliminary injunction “a court must balance
 25 the competing claims of injury and must consider the effect on each party of the
 26

1 granting or withholding of the requested relief.” *Arc of Cal. v. Douglas*, 757
2 F.3d at 975, 991 (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531,
3 542 (1987)). A court must also “weigh in its analysis the public interest impli-
4 cated by [an] injunction.” *Id.* (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109,
5 1138 (9th Cir.2009)). In this case, both of these preliminary injunction factors
6 weigh in favor of granting a preliminary injunction for the duration of this pro-
7 ceeding.

8 First, the irreparable harm requirement is satisfied where state law en-
9 forcement action infringes on a tribe’s sovereignty. *Confederated Tribes and*
10 *Bands of the Yakama Nation v. Klickitat County et al.*, No. 1:18-cv-03110 at 10
11 (E.D. Wash. June 28, 2018). Furthermore, Tribal self-government and self-
12 determination is in the public’s interest. *See Sac & Fox Nation of Missouri v.*
13 *LaFaver*, 905 F. Supp. 904, 907–08 (D. Kan. 1995). Yakama Nation’s request is
14 effectively a court-ordered acknowledgment of the boundaries of its Reservation
15 settled over 160 years ago and the jurisdiction it preserved at that time. An in-
16 junction would do nothing more to Defendants than require them to contact
17 Yakama Nation law enforcement or the federal government when an Indian sus-
18 pect needs to be arrested, detained, or prosecuted.

19 On the other hand, maintaining the status quo perpetuates an ongoing exis-
20 tential threat to the Yakama Nation’s sovereignty that has become acute in light
21 of the retrocession of Pub. L. 83-280 jurisdiction the federal government accept-
22 ed and the political agitation of county officials with respect to the Yakama Res-
23 ervation’s true boundaries. The violation of the Treaty of 1855 promised by the
24 county, and reinforced by the latest violation arresting and prosecuting an en-
25 rolled member of the Yakama Nation, is a profound harm to the sovereignty of
26

1 the Yakama Nation. The Yakama Nation must have the ability to protect its
 2 lands and Peoples from the incursions of outside jurisdictions. Moreover, the
 3 protection of the Yakama Reservation's boundaries agreed upon by the United
 4 States and the Yakama Nation in 1855 is in the public interest as it promotes
 5 Tribal self-government and self-determination.

6 The hardships the county would encounter in having to comply with the
 7 requested preliminary injunction are minimal if any. In fact, county law en-
 8 forcement and resources would be preserved by not having to arrest, detain, and
 9 prosecute a tribal defendant, but instead, handing such criminal process over to
 10 the United States or the Yakama Nation as appropriate. There is nothing in the
 11 public interest favoring a denial of an injunction preserving the Yakama Reser-
 12 vation as it has always existed.

13 **V. REQUEST FOR RELIEF**

14 Yakama Nation requests that the Court grant its motion for a preliminary
 15 injunction enjoining Defendants, and all persons acting on Defendants' behalf,
 16 from exercising criminal jurisdiction arising from actions within the exterior
 17 boundaries of the Yakama Reservation, including Tract D, and involving an
 18 Indian as a defendant and/or victim.

19
 20 DATED this 11th day of December, 2018.

21
 22 s/Ethan Jones

23 Ethan Jones, WSBA No. 46911

24 Shona Voelckers, WSBA No. 50068

25 YAKAMA NATION OFFICE OF LEGAL COUNSEL

26 P.O. Box 151, 401 Fort Road

Toppenish, WA 98948

1 Telephone: (509) 865-7268
2 Facsimile: (509) 865-4713
3 ethan@yakamanation-olc.org
4 shona@yakamanation-olc.org

5 s/Joe Sexton
6 Joe Sexton, WSBA #38063
7 Galanda Broadman PLLC
8 8606 35th Ave NE, Suite L1
9 P.O. Box 15146
10 Seattle, WA 98115
11 (206) 557-7509 – Office
12 (206) 229-7690 – Fax
13 joe@galandabroadman.com

14 *Attorneys for the Confederated Tribes and*
15 *Bands of the Yakama Nation*
16
17
18
19
20
21
22
23
24
25
26