

The Honorable Thomas O. Rice

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA 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.

No. 1:17-cv-03192-TOR

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

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PRELIMINARY INJUNCTION
Case No. 1:17-cv-03192-TOR

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I. INTRODUCTION AND RELIEF REQUESTED

Defendants respectfully request that this Court deny the Yakama Nation's motion for preliminary injunctive relief. A preliminary injunction is an extraordinary remedy that is never awarded as a matter of right. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). When the moving party seeks a mandatory injunction that alters rather than preserves the *status quo*, such as the one requested by the Yakama Nation, that party must make an even stronger showing to obtain this extraordinary relief. *See, e.g., Heckler v. Lopez*, 463 U.S. 1328, 1333-34 (1983). The Yakama Nation cannot carry its "heightened" burden, and its request for a wholly unworkable mandatory injunction should be denied for at least four key reasons:

No Showing Of Likely And Immediate Irreparable Harm. Yakama Nation waited more than a year after it filed this case to seek preliminary injunctive relief. Such delay effectively eliminates a claim that it will suffer irreparable harm between now and the time this case can be resolved on dispositive motion or in the July 2019 trial if one is needed to resolve factual and legal issues in this case. *See* Section IV.A below. Moreover, no person charged with a crime or traffic infraction alleged to have been committed within the borders of Tract D since 2016 has contested the State's jurisdiction on the basis that s/he is an Indian. *Id.* In fact, the Yakama Nation presents no *evidence* to show it will suffer likely and immediate irreparable harm in the absence of the requested injunction, so the motion should be denied. *Id.*

Not Likely To Prevail On The Merits Of Whether "Tract D" Is Within The Exterior Boundaries Of The Reservation. Injunctions should be denied if the moving party fails to establish facts supporting a key element of its case. As explained in Section IV.B.1 below, treaty-time evidence, the subsequent actions of

1 the treaty parties, and binding Congressional action all confirm that Tract D is not
2 within the Yakama reservation. Yakama Nation's failure to provide evidence to
3 support its contrary position on this key factual issue is a sufficient basis to deny
4 the requested injunction.

5 **Requested Injunction Conflicts With Binding Precedent On The Scope**
6 **Of Washington's Retroceded Jurisdiction.** Even if Tract D were within the
7 reservation (it is not), precedent binding on this Court makes clear that the State of
8 Washington has retained criminal enforcement jurisdiction within the reservation
9 when *either* the defendant *or* the victim are non-Indians. *See* Section IV.B.2 below.
10 The requested injunction would require this Court to commit error by ignoring that
11 binding precedent. This too is sufficient to deny the motion.

12 **Requested Injunction Is Not In The Public Interest.** The requested
13 injunction would effectively prevent the Klickitat County Sheriff and his deputies
14 and the Klickitat County Prosecuting Attorney and his deputies from detaining,
15 arresting, or prosecuting Yakama Nation members at a time when the Yakama
16 Nation itself has recognized it is facing a significant public safety crisis. *See*
17 Section IV.C below. Moreover, the Yakama Nation's motion provides no evidence
18 of what resources it could provide to ensure public safety within Tract D or how it
19 would go about coordinating its enforcement efforts with other law enforcement,
20 and it plainly ignores the effect of its requested injunction on federal authorities.
21 Such transitions cannot take place overnight, and the absence of a plan for
22 accomplishing them is strong evidence that the requested injunction is not in the
23 public interest and is unquestionably premature in light of the contested issues.

24 Defendants respectfully request that the Court deny this motion.
25
26

II. BACKGROUND

A. Procedural Background

Plaintiff filed this suit November 3, 2017. ECF No. 1. On March 6, 2018, the Court entered its initial scheduling order setting trial for January 14, 2019. ECF No. 15. Recognizing the need to complete additional discovery, on October 12, 2018, the parties jointly moved to stay deadlines pending entry of a revised case schedule. ECF No. 30. The Court granted the request. ECF No. 31.

After weeks of negotiation, the parties proposed a revised case schedule on November 2, 2018. ECF No. 33. On November 5, 2018, the Court entered an amended case-scheduling order, largely adopting the parties' proposal. ECF No. 34. At no point during the parties' negotiations did Plaintiff indicate a need for, or any intent to seek, preliminary injunctive relief. Weythman Decl. at ¶2.

The factual predicate for this action was the arrest, detention, prosecution, and punishment of seventeen-year-old PTS for sex offenses committed at a location near Glenwood, Washington, in Klickitat County. The Yakama Nation claims this area is within the exterior boundary of the Yakama Nation reservation. ECF No. 1. Klickitat County denies this assertion. ECF No. 8. The area in dispute is known as "Tract D." *Id.* The Yakama Nation has not, nor could it, request relief for PTS in its Complaint.¹

¹ A federal court may not provide relief to the juvenile offender due to his failure to file a petition for habeas corpus within one-year from the expiration of the time for filing a direct review from the order of disposition. *See* 28 U.S.C. § 2244(d)(1). PTS was sentenced upon his guilty plea to two counts of second degree rape of a child in *State of Washington v. [PTS]*, Klickitat County Superior Court Cause No. 17-8-00019-20, on October 26, 2017. Quesnel Decl. at ¶5. Washington grants a 30-day period within which to file a notice of appeal. *See* RAP 5.2(a).

PTS never asserted that the State lacked jurisdiction over him on the grounds that he is an Indian or that the location of the offense was within the exterior

1 Instead, the Yakama Nation requests that this Court declare that:

2 (1) Defendants do not have criminal jurisdiction over enrolled
3 Yakama Members for actions arising within the Yakama Reservation,
4 including but not limited to the jurisdiction to arrest, detain, prosecute,
5 adjudicate, convict, and sentence such enrolled Yakama Members
6 within the exterior boundaries of the Yakama Reservation, including
7 Tract D.

8 (2) Defendants violated the Yakama Nation's inherent sovereign and
9 Treaty-reserved rights by unlawfully exercising criminal jurisdiction
10 over PTS, an enrolled Yakama Member whose alleged crimes
11 occurred in Indian Country.

12 ECF No. 1 at 9-10.

13 The Nation further requests

14 Both a preliminary and permanent injunction pursuant to 28 U.S.C.
15 2202 enjoining Defendants from exercising criminal jurisdiction over
16 enrolled Yakama Members for actions arising within the Yakama
17 Reservation, including but not limited to the jurisdiction to arrest,
18 detain, prosecute, adjudicate, convict, sentence or incarcerate such
19 enrolled Yakama Members, within the exterior boundaries of the
20 Yakama Reservation.

21 *Id.*

22 Most of the Yakama reservation is located outside of Klickitat County.
23 Because the relief requested was not limited to Tract D, Defendants filed a motion

24 boundaries of the Yakama Nation reservation. Quesnel Decl. at ¶5. PTS's failure to
25 assert a jurisdiction defense predicated upon his Indian status in state court,
26 presents an additional barrier to federal court relief. *See, e.g., Baldwin v. Reese*,
541 U.S. 27, 29 (2004) (a petition must properly exhaust state remedies before
seeking federal habeas relief).

Despite PTS's guilty plea and the passage of time, he may still assert a lack of state
court jurisdiction claim in state court. *See generally Arquette v. Schneckloth*, 351
P.2d 921, 923 (Wash.1960); *Wesley v. Schneckloth*, 346 P.2d 658, 660 (Wash.
1959); RCW 10.73.100(5).

1 to dismiss the case for failure to join indispensable parties, specifically, the
 2 Yakima County Prosecuting Attorney and the Yakima County Sheriff, prosecutors
 3 and police chiefs from cities located within the Yakama Nation reservation, and
 4 state officials who exercise criminal jurisdiction within the reservation. Defendants
 5 filed this motion in an effort to avoid future, separate lawsuits between the Yakama
 6 Nation and other jurisdictions and to prevent Defendants from being subjected to
 7 competing court orders. *See* ECF No. 16.

8 Defendants' motion was denied, ECF No. 25, after the Yakama Nation
 9 argued that the motion relied on "speculation that disputes with different
 10 jurisdictions may arise at some point in the future involving jurisdictional tensions
 11 between other parties and the Yakama Nation that do not, at present, exist." ECF
 12 No. 23 at 17. Defendants' "speculation" has proven accurate, with the Yakama
 13 Nation recently bringing a similar action for injunctive relief against the City of
 14 Toppenish and Yakima County. *See Confederated Tribes and Bands of The*
 15 *Yakama Nation vs. City of Toppenish and Yakima County*, United States District
 16 Court for the Eastern District of Washington No. 1:18-CV-03190-TOR.

17 **B. Preliminary Injunction Request**

18 Thirteen months after filing this action, Yakama Nation sought a
 19 "preliminary injunction enjoining Defendants, and all persons acting on
 20 Defendants' behalf, from exercising criminal jurisdiction arising from actions
 21 within the exterior boundaries of the Yakama Reservation, including Tract D, and
 22 involving an Indian as a defendant and/or victim." ECF No. 36 at 60.²

23 The impetus of the motion was a traffic stop and ultimate arrest of Robert
 24 Libby within the City of Glenwood. This 19-year-old man, who did not inform

25 ² The Nation is seeking a similar order against Yakima County and the City of
 26 Toppenish. Both that motion and this one are set for hearing February 8, 2019.

officers at the time of contact that he was an enrolled member of the Yakama Nation and who only identified himself with a Washington State Identification card, was stopped for a traffic infraction committed on a public street. *See* Quesnel Decl. at ¶2. He was arrested upon a misdemeanor warrant from Yakima, Washington, and for new offenses discovered during the traffic stop, including possession of loaded firearms. ECF No. 38 at 222-240. The new charges are currently pending in Klickitat County District Court. While Mr. Libby has not asserted a lack-of-jurisdiction defense in state court,³ the Yakama Nation now seeks to halt Mr. Libby's criminal case via preliminary injunction in this unrelated federal action.⁴

Since April 19, 2016,⁵ no individual charged with a crime or traffic infraction alleged to have been committed within the borders of Tract D has contested the State's jurisdiction on the basis that s/he is an Indian. Quesnel Decl.

³ Washington courts routinely address jurisdictional claims predicated upon Indian status and location of the offense. *See, e.g., State v. Shale*, 345 P.3d 776 (Wash. 2015); *State v. Jim*, 273 P.3d 434 (Wash. 2012); *State v. L.J.M.*, 918 P.2d 898 (Wash. 1996); *State v. Pink*, 185 P.3d 634 (Wash. App. 2008) *State v. Daniels*, 16 P.3d 650 (Wash. App. 2001).

⁴ Concerns of equity caution federal court restraint against interference with on-going state criminal investigations or prosecutions. *Younger v. Harris*, 401 U.S. 37, 45 (1971). And federal courts are generally prohibited from enjoining state-court proceedings. 28 U.S.C. § 2283; *see also Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1007 (10th Cir. 2015) ("out of respect for comity and federalism the AIA usually precludes federal courts from enjoining ongoing state court proceedings").

⁵ Washington's partial retrocession of criminal jurisdiction over on-reservation matters took effect April 19, 2016. *See* Section II.D.3, *infra*.

at ¶4. During that time, nine individuals who have been identified as “Indians”⁶ at some point in their interactions with the State of Washington and/or Klickitat County were charged with traffic infractions or crimes based on conduct committed within Tract D. Quesnel Decl. at ¶4. Only PTS was eligible for adjudication in juvenile court.⁷ *Id.* at ¶5.

C. Historical Background On Tract D

1. The United States And Yakama Nation Enter Treaty Of 1855.

The Yakama Nation “is a confederation of several Indian tribes and bands which lived in what is now the State of Washington.” *Yakima Tribe v. United States*, 158 Ct. Cl. 672, 675 (U.S. 1962). Beginning the third week of May, 1855, these and other Indian groups gathered at Walla Walla for a treaty council with the United States to negotiate the cession of tribal lands and the creation of tribal reservations. *Id.* On June 9, 1855, the parties executed a treaty, which Congress ratified on March 8, 1859 and which the President proclaimed on April 18, 1859. *Id.* (citing 12 Stat. 951).

Isaac Stevens, then Governor of Washington Territory, negotiated the Treaty on behalf of the United States. *Id.* On June 4, 1855, Governor Stevens *initially* proposed that the Yakama reservation, “extend from the Attannum river – to include the valley of the Pisco river – and from the Yakama river to the Cascade

⁶ Defendants possess no information apart from the Yakama Nation’s representations as to whether any of the nine individuals is an “Indian” as defined by 25 U.S.C. § 2201(2) or as to whether any of the nine individuals is an “Indian” under Washington law. *See generally State v. Daniels*, 16 P.3d 650 (Wash. App. 2001); *see also* Quesnel Decl. at ¶4.

⁷ Juvenile court jurisdiction in Washington is a function of age, criminal history, and severity of crime. Persons as young as sixteen may be “adults” under state law. *See* RCW 13.04.030(1)(e)(v).

Mountains.” *See* ECF 38 at 21; *see also id.* at 333.⁸ On June 5, Stevens described the proposed boundaries as, “commencing with the mouth of the Attanum river, along the Attanum river to the cascade mountains, thence down the main chain of the Cascade mountains south of Mount Adams, thence along the Highlands separating the Pisco and the Sattass river from the rivers flowing into the Columbia, thence to the crossing of the Yakama below the main fisheries, then up the main Yakama to the Attanum where we began.” *See* ECF No. 38 at 30.

Negotiations continued, and the parties ultimately reached agreement on different final boundaries. *Departing* from Stevens’ earlier descriptions during the council, the executed Treaty describes the Yakama reservation as,

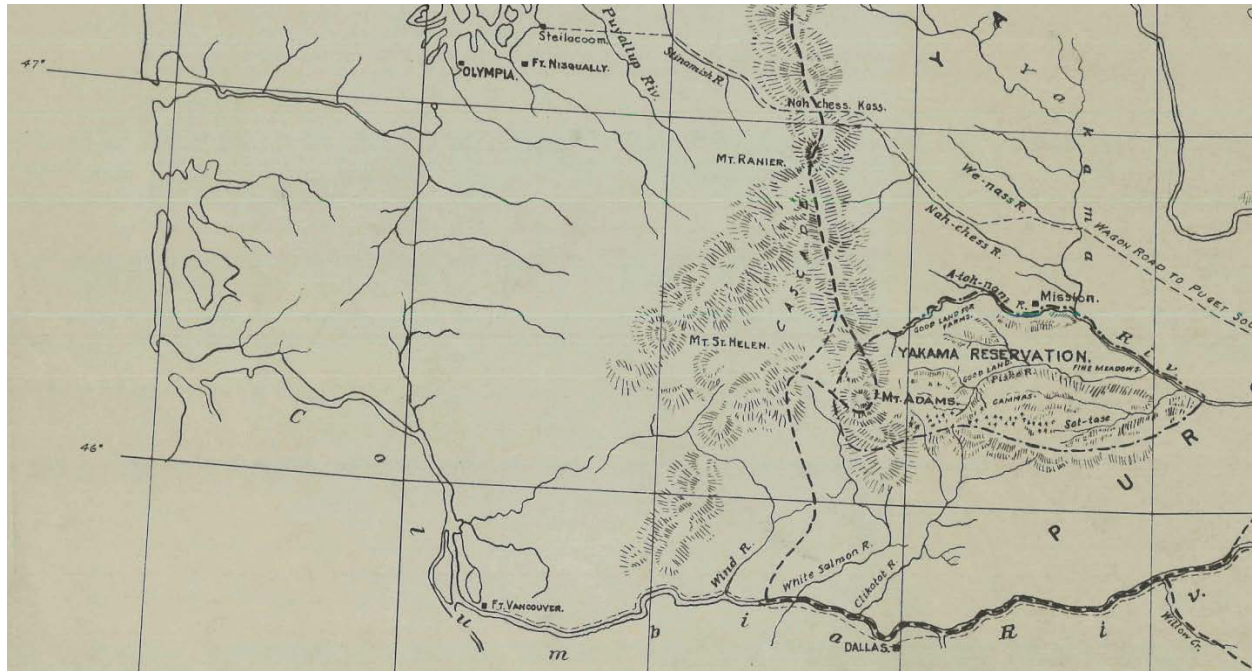
Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence 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 the waters of the 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.

ECF No. 38 at 9 (Treaty Art. II). The Treaty anticipated that the boundaries would require specification via a formal survey, and specifically stated that such lands “shall be set apart and, so far as necessary, surveyed and marked out for the exclusive use and benefit” of the Yakama Nation. *Id.*

Importantly, throughout the council, Governor Stevens referred to a map, which he appears to have used to visually aid the Indians in understanding the

⁸ ECF No. 38 is a declaration from Yakama counsel Ethan Jones with roughly 450 pages of exhibits. In referring to those exhibits, this brief will cite ECF pagination.

1 proposed reservation boundaries. Reis Decl. at ¶7. The map—an excerpt of which
 2 is shown below⁹—was formalized on June 12, 1855, and accompanied the
 3 executed Treaty to the Commissioner of Indian Affairs on June 14, 1855. *See* ECF
 4 No. 38 at 402; *see also id.* at 314. Under the Treaty, the Yakama Nation
 5 reservation comprised of 1,233 square miles (789,120 acres).¹⁰ ECF No. 38 at 403.



(June 12, 1855 Treaty Map. *See* Ex. A to Reis Decl. at 9.)¹¹

2. Defining Reservation Boundaries Requires Several Surveys.

In 1861, surveyors Berry and Lodge attempted to survey the southern boundary of the Yakama reservation pursuant to instructions of the Superintendent of Indian Affairs who “directed them to proceed from the Yakima River westerly

⁹ For an archival version of the Treaty Map, *see* ECF No. 39 at 19.

¹⁰ This calculus included a second reservation of “6 square miles” (3,840 acres) known as the “Wenatshapam fishery,” which is not at issue in this case. *See* ECF 38 at 11 (Treaty Art. X); *id.* at 402 (referencing the “two reservations provided for in the Treaty”).

¹¹ Details of all maps herein are visible using the zoom function for PDF files.

1 along the divide between the Satass and Columbia rivers and along the divide
2 between the Klickitat and Pisco rivers until they arrived at the source of either the
3 latter or the former.” *N. P. R. Co. v. United States*, 227 U.S. 355, 364 (1913).
4 Following a ridge from the Yakima River west until it intersected the Klickitat
5 River, and determining that the “other boundaries are defined naturally,” Berry and
6 Lodge terminated their survey at Grayback Mountain. *Id.*; *see also* ECF No. 36
7 at 7.

8 To alleviate controversy between the tribe and white settlers over the
9 western boundary subsequent to the Berry and Lodge survey, in 1890, the United
10 State General Land Office directed surveyor George A. Schwartz to survey the
11 reservation’s western boundary. *See generally* ECF No. 38 at 337. Importantly,
12 there is no evidence that any party involved in the boundary controversy claimed
13 that Tract D should be included. Relying on the earlier work by Berry and Lodge,
14 Schwartz followed the same ridge west towards Grayback Mountain. *Id.*; *see also*
15 Ex. C to Weythman Decl. (House Doc. No. 621), at 12. Schwartz, however,
16 interpreted the calls of the Treaty as prohibiting the crossing of the Klickitat River,
17 so his survey turned sharply north well in advance of Grayback Mountain. *Id.*

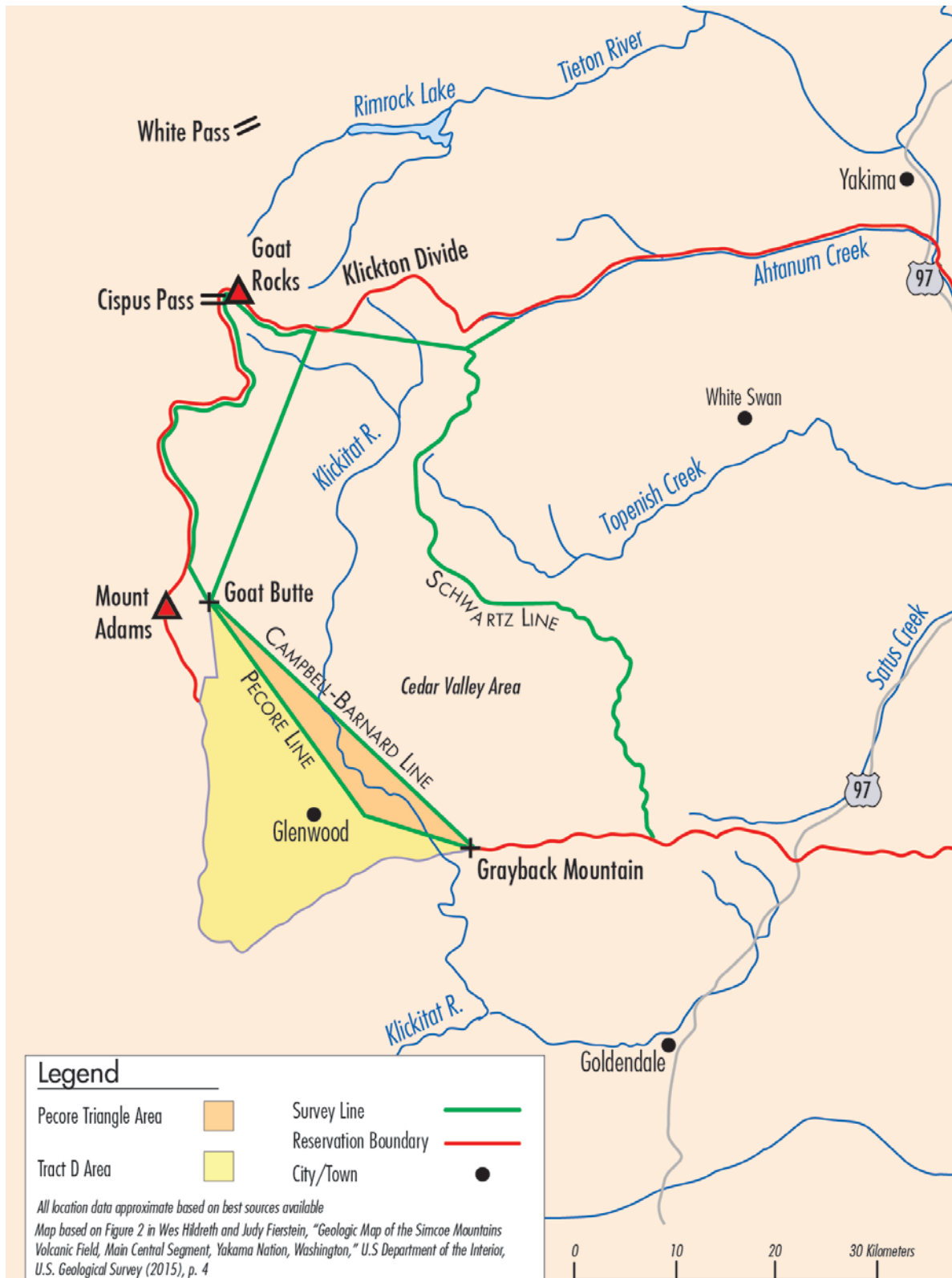
18 Schwartz’s survey, which was approved by the Government Land Office in
19 1891, set the western reservation boundary some twenty miles east of the main
20 ridge of the Cascade Mountains. *See* ECF No. 38 at 337 (ICC Finding of Fact No.
21 60). The Yakama Nation objected. *See, e.g.*, Ex. C to Weythman Decl., at 13. In
22 response, in 1899, the U.S. Department of Interior instructed topographer E.C.
23 Barnard to determine the reservation boundaries.¹² *See id.* at 6.

24
25 ¹² Barnard’s initial instructions occurred in 1898, but his efforts were postponed on
26 account of “adverse weather conditions.” *See* Ex. C to Weythman Decl., at 6.

1 Upon investigation, Barnard determined that the western boundary should
2 extend from Grayback Mountain to a “conical hump on the southeast slope of
3 Mount Adams, which hump is well defined and was also plainly visible.” *Id.* at 7.
4 From there, the boundary was to follow the main ridge of the Cascade Mountains
5 north to Goat Rocks. *Id.* at 9. In making these determinations, Barnard relied on
6 discussions with Yakama Nation tribal leaders who had participated in
7 reconnaissance surveys between 1858 and 1860. *Id.* at 7-8.

8 Barnard principally relied on the recollections of Chief Spencer and a tribal
9 elder named Stick Joe. *Id.* Notably, Chief Spencer was Chief of the Klickitat Band
10 and, at the time of the Berry and Lodge survey, had been appointed Chief of the
11 confederated Yakama Nation. *See* Ex. J to Weythman Decl.; *see also* Reis Decl. at
12 ¶8. Both Chief Spencer and Stick Joe informed Barnard that their understanding of
13 the western boundary was a straight line from Grayback Mountain to the conical
14 hump at the base of Mount Adams. Ex. C to Weythman Decl., at 7-8. These
15 recollections are consistent with what the Indians had told Schwartz nearly ten
16 years earlier. *Id.* at 12 (from “Gray Back Mountain...it is claimed by the Indians the
17 line bears in a northwesterly direction, crossing the Klickitat River, to the base of
18 Mount Adams”).

19 Barnard ultimately concluded that 357,878 acres should be added to the
20 Yakama Nation reservation, comprising an area between the Schwartz survey and
21 the main ridge of the Cascade Mountains. *Id.* at 9. Importantly, as can be seen on
22 the following map, Barnard’s line plainly excludes Tract D.
23
24
25
26



(See Ex. A to Reis Decl. at 7.)

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3. Congress Adopts Barnard Line To Settle The Boundary Dispute.

Well aware of the Yakama Nation's claims regarding the reservation's western boundary—and with the Barnard investigation in hand—Congress wanted to settle the boundary dispute once and for all. So in 1904, as part of its effort to sell and dispose of the unallotted lands of the Yakama Nation, Congress adopted the Barnard line as the official boundary of the Yakama Nation reservation, officially adding 293,837 acres. *See* 33 Stat. 595, Act of December 21, 1904 (“1904 Act”) (attached as Ex. B to Weythman Decl.).

In relevant part, the 1904 Act reads,

Provided, that the claim of said Indians to the tract of land adjoining their present reservation on the west, excluded by erroneous boundary survey and containing approximately two hundred and ninety-three thousand eight hundred and thirty-seven acres, according to the findings, after examination, of Mr. E.C. Barnard, topographer of the Geological Survey, approved by the Secretary of the Interior April seventh, nineteen hundred, is hereby recognized, and the said tract shall be regarded as a part of the Yakama Indian Reservation for the purposes of this Act.

Id.; *see also* ECF No. 38 at 341 (ICC Finding of Fact No. 62) (“the recommended 293,837 acres were added to the Yakima Reservation by Section 1 of the Act of December 21, 1904”).

While this area represented less than what Barnard had recommended, Congress believed the 293,837 acres sufficiently corrected the erroneous Schwartz survey, giving the Yakama Nation all that it had asked for. Indeed, both the corresponding House and Senate reports make clear that the Yakama Nation claimed only those 293,837 acres which Congress ultimately added to its reservation. *See* Ex. D (House Rep. No. 2346, April 9, 1904) and Ex. E (Senate Rep. No. 2738, Dec. 12, 1904) to Weythman Decl.

1 The Barnard line, which Congress adopted and ratified in the 1904 Act, was
 2 officially surveyed in 1906-07 by Campbell, Germond, and Long. *See* ECF No. 38
 3 at 341 (ICC Finding of Fact No. 63). The newly established reservation boundary
 4 unequivocally excluded Tract D.

5 **4. The Ninth Circuit And Supreme Court Affirm The Barnard Line.**

6 Based on Congress' adoption of the Barnard line, the United States filed suit
 7 against the Northern Pacific Railway Company to annul prior land patents which
 8 were located within the newly established reservation boundaries. *See N. P. R. Co.*
 9 *v. United States*, 227 U.S. 355, 356-58 (1913). Upholding the annulments, the
 10 Ninth Circuit acknowledged that Congress had both "recognized and adopted" the
 11 Barnard survey "as locating the boundaries of the reservation in accordance with
 12 the treaty of June 9, 1855." *Northern P. R. Co. v. United States*, 191 F. 947, 956,
 13 (9th Cir. 1911). The Supreme Court affirmed, stating, "we have referred to enough
 14 to indicate the character and relative strength of that which makes for or against the
 15 contentions of the parties, and, considerately weighing it, we think it establishes
 16 the correctness of the Barnard survey." *N. P. R. Co.*, 227 U.S. at 365-66.

17 **5. Upon Discovery Of The 1855 Treaty Map, The Nation Seeks**
 18 **Payment For Additional Lands, Including Tract D.**

19 In 1930, Stevens' June 12, 1855 Treaty Map—which had gone missing prior
 20 to the Schwartz survey—was rediscovered among papers for the War Department.
 21 *See* Ex. G to Weythman Decl. (House Maj. Rep. No. 749, June 5, 1939), at 4.
 22 Claiming the map showed a larger reservation than what was adopted in 1904,
 23 Yakama Nation petitioned Congress for permission to file a monetary claim in the
 24 U.S. Court of Claims for lands which it alleged had been "erroneously excluded"
 25 from the reservation—including Tract D. *See id.* Congress declined to adopt
 26 legislation authorizing such a claim. *See* Ex. A to Reis. Decl. at 23. A proposed

1 amendment to the failed legislation would have permitted Congress, in the event of
 2 a judicial determination in favor of the tribe, to “include such lands within the
 3 Yakima Indian Reservation” in lieu of payment to the Yakama Nation. *See* Ex. G
 4 to Weythman Decl., at 1.

5 **6. Indian Claims Commission Agrees With Yakama Nation That**
 6 **Tracts Outside The Reservation Boundaries Were Taken.**

7 Congress subsequently created the Indian Claims Commission (ICC) in
 8 1946, to “hear and determine...claims against the United States on behalf of any
 9 Indian tribe....” 60 Stat. 1049, Act of August 3, 1946. The ICC’s authority was
 10 limited to ruling on claims for monetary compensation. In 1949, the Yakama
 11 Nation petitioned the ICC “for compensation for four separate areas contiguous to
 12 the reservation boundaries designated as Tracts A, B, C and D...and for
 13 compensation for lands patented to settlers and purchasers within the boundaries of
 14 the Yakima Reservation.” *See* Ex. F to Weythman Decl., at 2; *see also* Ex. I to
 15 Weythman Decl. (Yakima Tribe ICC Petition); ECF No. 38 at 350. Notably, in its
 16 petition, the Yakama Nation distinguished between lands “erroneously excluded
 17 from the Yakima Indian Reservation” and those “formerly excluded...and later
 18 added by defendant to said Reservation.” Ex. I to Weythman Decl., at YN000119.

19 The ICC expressly found that “the boundary of the Yakima Reservation, at
 20 the time of filing this claim” included a section traveling “west to Grayback Peak;
 21 thence in a direct line to Goat Butte on the east slope of Mt. Adams, thence
 22 northwesterly to the summit of the Cascade Mountains....” ECF No. 38 at 316
 23 (ICC Finding of Fact No. 8); *see also* Ex. F to Weythman Decl., at 2. The ICC
 24 further found that “[t]he Barnard line extending between Grayback Peak and Goat
 25 Butte (the Hump) was approved...by the Act of December 21, 1904” and that “the
 26 entire line questioned by the Indians and which forms the northerly boundary of

1 Tract D has been approved by the administrative officials of the Government and
2 by Congress.” ECF No. 38 at 327-28 (ICC Finding of Fact No. 23), 341-42 (ICC
3 Finding of Fact No. 63).

4 While expressly recognizing that “[t]he present reservation boundary in this
5 area leaves the main ridge of the Cascade Mountains north of Mount Adams and
6 runs to Goat Butte...and then runs in a straight line southwest to Grayback
7 Mountain,” the ICC concluded “that ‘Tract D’ *was intended* to be included within
8 the Yakima Reservation” and thus allowed the Yakama Nation’s claim for
9 compensation. *See* ECF No. 38 at 347 (ICC Finding of Fact No. 68).

10 **7. Yakama Nation Settles Its Tract D Claim For \$2.1 Million.**

11 In July 1968, the Yakama Nation and the United States settled the Nation’s
12 Tract D claim for \$2.1 million. *See* ECF No. 38 at 369 and 379. Congress approved
13 the settlement on July 22, 1969, *see* 83 Stat. 49, and it appropriated the funds on
14 September 25, 1970. *See* 84 Stat. 865. As part of the settlement, approximately
15 21,000 acres were segregated from the claim “to enable the Yakima tribe to seek
16 restoration of these lands to the Yakima Reservation,” which it did, but none of
17 those acres are at issue here. *See* Ex. F to Weythman Decl., at 1-2; *see also* ECF
18 No. 38 at 380.

19 Pursuant to its terms, the settlement constituted “a final determination of all
20 claims asserted or which could have been asserted by the Yakima Tribe....” ECF
21 No. 38 at 381.

D. Washington's Assumption Of On-Reservation Criminal Enforcement Jurisdiction Under Public Law 280 And Scope of Partial Retrocession Of Jurisdiction In 2014.

1. Washington State Assumes Criminal Enforcement Jurisdiction Under Public Law 280 in 1963.

In 1953, Congress passed what is commonly known as Public Law 280 to (1) reduce the economic burden of exercising federal jurisdiction over reservations and (2) respond to a perceived hiatus in law enforcement on reservations. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 498 (1979); *Bryan v. Itasca Cty., Minn.*, 426 U.S. 373, 379 (1976). Public Law 280 authorized individual states to assume jurisdiction over criminal offenses committed by or against Indians in Indian country. Pub. L. No. 83-280, 67 Stat. 588 (1953). Public Law 280 did not impact an Indian tribe's criminal jurisdiction over crimes committed by Indians. *See Confederated Tribes & Bands of Yakima Indian Nation v. Washington*, 608 F.2d 750, 752 (9th Cir. 1979). Public Law 280 also did not impact the federal government's criminal jurisdiction. *See* 18 U.S.C. § 1152. And Public Law 280 did not alter any criminal jurisdiction a state possessed prior to its adoption of Public Law 280.

In 1963, the State of Washington assumed partial Public Law 280 jurisdiction over the Yakama Nation reservation and other Indian country in the state. Laws of 1963, ch. 36 (codified in ch. 37.12 RCW). Specifically, the State assumed jurisdiction over all offenses committed by non-Indians within Indian country and over offenses committed by Indians on fee lands. *See* RCW 37.12.030; RCW 37.12.010. For offenses committed by Indians on trust land within a reservation, the State assumed jurisdiction only as to eight subject matter areas. *Yakima Indian Nation*, 439 U.S. at 475-76.

1 **2. The U.S. Supreme Court Flatly Rejected The Yakama Nation's**
 2 **Challenge To Washington's Jurisdiction Under Public Law 280.**

3 The Yakama Nation immediately challenged the State's partial assumption
 4 of criminal jurisdiction on the reservation, raising statutory, constitutional, and
 5 treaty arguments. The U.S. Supreme Court rejected all three theories, dispensing
 6 with the treaty argument in a footnote:

7 The Tribe also contends that under its 1855 Treaty with the United
 8 States, 12 Stat. 951, it was guaranteed a right of self-government that
 9 was not expressly abrogated by Pub. L. 280. The argument assumes
 10 that under our cases, *see, e. g., Menominee Tribe v. United States*, 391
 11 U.S. 404, treaty rights are preserved unless Congress has shown a
 12 specific intent to abrogate them. Although we have stated that the
 13 intention to abrogate or modify a treaty is not to be lightly imputed,
 14 *id.*, at 413; *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160, this rule
 15 of construction must be applied sensibly. In this context, the argument
 16 made by the Tribe is tendentious. The treaty right asserted by the
 17 Tribe is jurisdictional. So also is the entire subject matter of Pub. L.
 18 280. To accept the Tribe's position would be to hold that Congress
 19 could not pass a jurisdictional law of general applicability to Indian
 20 country unless in so doing it itemized all potentially conflicting treaty
 21 rights that it wished to affect. This we decline to do. The intent to
 22 abrogate inconsistent treaty rights is clear enough from the express
 23 terms of Pub. L. 280.

24 *Yakima Indian Nation*, 439 U.S. at 478 n.22.

25 **3. Washington Gives Back A Portion Of Its Public Law 280**
 26 **Criminal Enforcement Jurisdiction In 2014.**

1 In 1968, Congress modified Public Law 280 to permit states to choose
 2 whether they wanted to undo, or "retrocede," all or "some measure" of the
 3 jurisdiction previously assumed under Public Law 280. 25 U.S.C. § 1323. The
 4 President delegated to the Secretary of the Interior the authority to accept
 5 retrocession. 33 Fed. Reg. 17339 (Nov. 23, 1968).

1 In 2012, the Washington Legislature enacted a process under which an
 2 Indian tribe can request that the State retrocede jurisdiction it previously acquired
 3 under Public Law 280. RCW 37.12.160. Thereafter, the Yakama Nation requested
 4 *full* retrocession of civil and criminal jurisdiction, with the exception of two areas
 5 of law not relevant to this case. ECF No. 38 at 183-85. Governor Jay Inslee
 6 *partially* granted the Yakama Nation's request through Proclamation 14-01
 7 (January 7, 2014). ECF No. 38 at 406-408. As required by RCW 37.12.160(4),
 8 Governor Inslee submitted the Proclamation to the Department of Interior, along
 9 with a letter describing exactly what jurisdiction was being retroceded. ECF No. 38
 10 at 187-88.

11 **4. Partial Retrocession Accepted; Other Jurisdiction Retained**

12 The Secretary of the Interior accepted the retrocession effective April 19,
 13 2016. 80 Fed. Reg. 63583 (Oct. 20, 2015). The acceptance explicitly acknowledges
 14 that Washington retroceded *only part* of what the Yakama Nation requested,
 15 stating that "it is the content of the Proclamation that we hereby accept in
 16 approving retrocession." ECF No. 38 at 194. The Department of the Interior
 17 advised the Yakama Nation that, "[i]f a disagreement develops as to the scope of
 18 the retrocession, we are confident that courts will provide a definitive
 19 interpretation of the plain language of the Proclamation." *Id.*

20 Within the Yakama reservation, Paragraph 1 of Proclamation 14-01
 21 retroceded all of the State's Public Law 280 civil and criminal jurisdiction over
 22 four subject matter areas, including juvenile delinquency. Paragraphs 2 and 3
 23 retroceded the State's jurisdiction over criminal offenses where only Indians are
 24 involved as both perpetrator and victim. But for other offenses, the Proclamation
 25 retroceded criminal jurisdiction only "in part," retaining some portion of the
 26 jurisdiction upheld as lawful by the Supreme Court in *Yakima Indian Nation*.

1 In particular, Paragraph 3 of the Proclamation provides that the “State
2 retains jurisdiction over criminal offenses involving non-Indian defendants and
3 non-Indian victims.” ECF No. 38 at 407. Paragraph 5 of the Proclamation retains
4 jurisdiction over the Yakima Nation’s Indian Country located outside of the
5 exterior boundaries of the Yakama reservation. ECF No. 38 at 408. Finally,
6 Paragraph 7 of the Proclamation says, “Pursuant to RCW 37.12.010, the State shall
7 retain all jurisdiction not specifically retroceded herein.” ECF No. 38 at 408.¹³

8 **5. State And Federal Governments And Binding State-Court**
9 **Precedent All Agree That Washington Retains On-Reservation**
10 **Criminal Enforcement Jurisdiction When Either A Criminal**
11 **Defendant Or The Victim Is A Non-Indian.**

12 Washington State courts addressed precisely what jurisdiction the State
13 intended to retrocede through Governor’s Proclamation 14-01 in *State v. Zack*, 413
14 P.3d 65, 66 (Wash. App. 2018), *review denied*, 425 P.3d 517 (Wash. 2018), a
15 criminal prosecution involving an individual who claimed to be an Indian charged
16 with assaulting a non-Indian law-enforcement officer on land within the Yakama
17 reservation. The courts rejected the defendant’s assertion—identical to the
18 assertion the Yakama Nation has made—that the State only retained jurisdiction
19 over cases involving *both* non-Indian defendants *and* non-Indian victims. *Id.* at 69.

20 The Court of Appeals found that “[s]tandard rules of construction simply
21 preclude [this] interpretation.” *Id.* at 70. The court went on to hold that the State
22
23
24

25 ¹³ A table outlining the specific areas in which the State of Washington has
26 retained its criminal enforcement jurisdiction within the boundaries of the Yakama
reservation is at Weythman Decl. Ex. N.

1 retained jurisdiction over criminal offenses occurring within the boundaries of the
2 Yakama reservation when either the victim *or* defendant is a non-Indian.¹⁴ *Id.*

3 While a petition for review from the *Zack* decision was pending before the
4 Washington Supreme Court, the United States Department of Justice, Office of
5 Legal Counsel, issued a Memorandum Opinion regarding the scope of state
6 criminal jurisdiction over offenses occurring on the Yakama Nation reservation.
7 The Memorandum Opinion reached precisely the same conclusion as the
8 Washington Court of Appeals, stating that “under the proclamation making a
9 partial retrocession, Washington has retained criminal jurisdiction over an offense
10 on the Yakama Reservation *when the defendant or the victim is a non-Indian, as*
11 *well as when both are non-Indians.*” ECF 38 at 220 (emphasis added).¹⁵ Shortly
12 after this Memorandum Opinion was released, the Washington Supreme Court
13 denied the defendant’s petition for review. *See State v. Zack*, 425 P.3d 517 (Wash.
14 Sept. 6, 2018). No petition for certiorari has been filed, so *Zack* is final.

15 III. PRELIMINARY INJUNCTION STANDARDS

16 “[A] preliminary injunction is an extraordinary and drastic remedy, one that
17 should not be granted unless the movant, *by a clear showing*, carries the burden of
18 persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in
19 original). “A plaintiff seeking a preliminary injunction must establish that he is
20

21 ¹⁴ The *Zack* court’s statement is an oversimplification of the State’s criminal
22 jurisdiction within the exterior boundaries of the Yakama reservation. The State
23 did not increase its jurisdiction through the retrocession process. The State’s
24 jurisdiction over crimes committed by Indians is still impacted by the land status –
trust or fee – where the crime was committed. Weythman Decl. Ex. N accurately
reflects the scope of state jurisdiction.

25 ¹⁵ The Opinion is also available online at
26 <https://www.justice.gov/olc/file/1085636/download> (last visited Jan. 7, 2019).

likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20; *see also Herb Reed Enters., LLC v. Florida Ent’t Mgmt., Inc.*, 736 F.3d 1239 (9th Cir. 2013). A court may properly withhold injunctive relief when presented with difficult questions of law or disputed questions of fact. *See, e.g., Dymo Indus. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964).

As Yakama Nation concedes, “preliminary injunctions are designed to *preserve the status quo* pending the ultimate outcome of litigation.” ECF No. 36 at 25 (citing *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984)) (emphasis added); *see also U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010). But the Yakama Nation admits that this motion does not seek to preserve the *status quo*; rather, it seeks to upend the *status quo* by forcing Klickitat County to abdicate its current and long-standing jurisdictional responsibilities—particularly its law-enforcement responsibilities. ECF No. 36 at 2-3.

This motion therefore seeks a mandatory injunction. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009). Such “mandatory injunctions” are “particularly disfavored,” *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979), and will not be granted “unless extreme or very serious damage will result.” *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879; *see also Kittitas Co. Fire Dist. #8 v. United States Forest Serv.*, No. CV-11-3103-LRS, 2011 U.S. Dist. LEXIS 146335, at *12 (E.D. Wash. Dec. 8, 2011). As compared with traditional injunctions which merely preserve the *status quo*, mandatory injunctions impose upon plaintiff a heightened standard of persuasion and “are not issued in doubtful cases.” *Id.*

Moreover, the “sliding scale” analysis cited in the motion¹⁶ is inapplicable to such mandatory injunctions as “a movant seeking a preliminary injunction that alters the *status quo* should always have to demonstrate a substantial likelihood of success on the merits.” *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 980 (10th Cir. 2004). Yakama Nation’s burden on this first and “most important” factor “is doubly demanding.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). To prevail, it “must establish that the law and facts *clearly favor* [its] position, not simply that [it] is likely to succeed.” *Id.* (emphasis in original); *see also Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 97 (2d Cir. 2005) (where the movant requests a mandatory injunction, “the likelihood-of-success standard is elevated: the movant must show a clear or substantial likelihood of success”).

IV. ARGUMENT

A. Yakama Nation Has Not Made Any Showing Of Likely And Immediate Irreparable Harm That Will Occur Absent Immediate Injunctive Relief.

To prevail on its motion for *preliminary* injunction, Yakama Nation must show, based on specific facts, that it is likely to suffer immediate, irreparable injury and that “extreme or very serious damage will result” if its request is denied. *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879. The Nation has failed to provide any support for its assertion that continued concurrent criminal jurisdiction within the Yakama Nation reservation and Tract D will irreparably harm the Nation, much less that such harm will result in extreme damage to the tribe. Relief sought

¹⁶ The “sliding scale” test cited by Yakama Nation is not an “alternative” to the *Winter* test, but rather an approach that may be “applied as part of the four-element *Winter* test.” *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

thirteen months after a case is filed is hardly “preliminary” and the Nation’s lengthy delay in seeking an injunction undercuts the claim of any such harm. On this basis alone, its request for preliminary relief should be denied.

1. The Nation Failed To Provide Specific Facts Demonstrating It Is Likely To Suffer Immediate, Irreparable Harm.

Yakama Nation claims an October 13, 2018 arrest of an alleged tribal member¹⁷ prompted its “need” for preliminary injunctive relief. ECF No. 36 at 2. That arrest occurred two months before the Nation filed this motion, and the individual has neither identified himself as a tribal member nor asserted a jurisdictional defense based on tribal status. Quesnel Decl. at ¶¶2, 4. The Nation points to no other present circumstance to support its claim of immediate, irreparable harm, and it provides no support that any such event is likely to occur.

Instead, the Nation cites this Court’s opinion in the Fireworks Litigation (E.D. WA Case No. 1:18-CV-3110) for the proposition that the “irreparable harm requirement is satisfied where state law enforcement action infringes on a tribe’s sovereignty.” ECF No. 36 at 25. The order, however, states no such rule, and neither the order nor any other authority cited by the Yakama Nation stands for such a broad-sweeping presumption.¹⁸

¹⁷ The County first became aware of Mr. Libby’s alleged status as a member of the Yakama Nation immediately before the Nation filed its motion for preliminary injunction. Quesnel Decl. at ¶2. His criminal prosecution is ongoing and is not properly subject to injunction. *See id.*; *see also* 28 U.S.C. § 2283.

¹⁸ This certainly is not a situation where state agencies seek to compel the tribe’s participation in litigation or where the seizure of tribal assets causes a lack of resources that threatens the tribe’s ability to engage in self-government. *See Eeoc v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) (subjecting tribe to subpoena despite sovereign immunity constituted irreparable harm); *Kiowa Indian Tribe of Okla.v Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998) (seizure of

1 Rather, the Court’s analysis in the Fireworks Litigation supports the well-
 2 established rule that irreparable harm must be analyzed on a case-by-case basis.
 3 *See, e.g., Park Vill. Apartment Tenants Ass’n v. Mortimer Howard Tr.*, 636 F.3d
 4 1150, 1162 (9th Cir. 2011); *see also Groupe SEB United States, Inc. v. Euro-Pro*
 5 *Operating LLC*, 774 F.3d 192, 205 (3d Cir. 2014) (“courts considering whether to
 6 grant injunctive relief must exercise their equitable discretion in a case-by-case,
 7 fact-specific manner”); *Gould v. Lambert Excavating, Inc.*, 870 F.2d 1214, 1221
 8 (7th Cir. 1989). Indeed, irreparable harm may not be presumed. *Flexible Lifeline*
 9 *Sys. v. Precision Lift, Inc.*, 654 F.3d 989, 997 (9th Cir. 2011); *Park Vill. Apartment*
 10 *Tenants*, 636 F.3d at 1162. It must be clearly shown, through specific facts, with a
 11 high degree of certainty. *See Winter*, 129 S. Ct. at 375; *see also Fed. R. Civ. P.*
 12 65(b). The Nation provides no such facts.

13 **2. The Order From The Fireworks Litigation Does Not Support** 14 **Preliminary Relief In This Case.**

15 The circumstances in the Fireworks Litigation differ from the case at bar in
 16 almost every respect. In the Fireworks Litigation, the Court ruled that the County’s
 17 jurisdiction over tribal firework sales was regulatory rather than prohibitory. ECF
 18 No. 38 at 417. In contrast, the parties do not dispute that the criminal jurisdiction at
 19 issue in this case is prohibitory.

20 Similarly, in the Fireworks Litigation, the Court found that a temporary
 21 restraining order would serve its traditional purpose by preserving the *status quo*—
 22 tribal jurisdiction over tribal firework sales during the limited sales period. *Id.* at
 23 421-22. Here, Yakama Nation concedes the *status quo* is County jurisdiction. ECF
 24 No. 36 at 59.

25 tribal assets which threatened a shutdown of tribal government constituted
 26 irreparable harm).

1 In the Fireworks Litigation, Yakama Nation sought injunctive relief
 2 immediately. Here it waited thirteen months before making such a request. And,
 3 unlike the temporary relief in the Fireworks Litigation, which lasted only eight
 4 days and affected only five businesses, ECF No. 38 at 421, a preliminary
 5 injunction in this case could last months with the potential to affect every person
 6 on the reservation as well as in Tract D.

7 Finally, the Court found in the Fireworks Litigation that precluding the
 8 County from asserting regulatory control over five tribal firework stands would not
 9 impose a significant harm on the County and that the County's interest in such
 10 regulation was limited. *Id.* But, as explained in Sections IV.C and D below, an
 11 injunction in this matter will have substantial negative impacts on local law
 12 enforcement and public safety.

13 **3. The Nation's Delay In Seeking Preliminary Relief Weighs Heavily** 14 **Against Its Unsupported Claim Of Immediate, Irreparable Harm.**

15 The Nation filed this suit in November of 2017, yet it waited more than
 16 thirteen months to seek preliminary relief. Outside its Complaint, it never once
 17 raised the issue with the County or the Court. Nor did it raise this issue during the
 18 negotiations regarding the agreed-upon revised scheduling order, despite Mr.
 19 Libby's arrest having occurred well *before* those discussions took place. The
 20 Nation's extraordinary delay in seeking an injunction—including after weeks of
 21 negotiating what is now the current, agreed case schedule—belies the Nation's
 22 claim of immediate, irreparable harm and weighs heavily against issuing an
 23 injunction. *See, e.g., Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015)
 24 (waiting months before seeking an injunction undercuts claim of irreparable harm).
 25 Indeed, a “[p]laintiff’s long delay before seeking a preliminary injunction implies a
 26 lack of urgency and irreparable harm.” *Oakland Tribune, Inc. v. Chronicle Pub.*

1 Co., 762 F.2d 1374, 1377 (9th Cir. 1985); *Lydo Enterprises, Inc. v. City of Las*
 2 *Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (“By sleeping on its rights a plaintiff
 3 demonstrates the lack of need for speedy action”). Such a delay indicates “that the
 4 harm would not be serious enough to justify a preliminary injunction.” *Kittitas Co.*
 5 *Fire Dist. #8*, 2011 U.S. Dist. LEXIS 146335, at *11-12.

6 **B. Yakama Nation Will Not Prevail On The Merits Of Key Issues.**

7 For this Court to grant Yakama Nation’s request for preliminary injunction,
 8 the Nation must make a “clear showing” that (1) Tract D is currently part of the
 9 Yakama Nation reservation and (2) Washington State retroceded criminal
 10 jurisdiction over crimes involving non-Indians on reservation grounds. It has failed
 11 to make either showing, and both failures are independently dispositive as to its
 12 request for preliminary injunctive relief.

13 **1. Tract D Is Not Part Of The Yakama Nation Reservation.**

14 Yakima Nation repeatedly states, without a factual showing, that Tract D is
 15 within reservation boundaries. But the pertinent historical records demonstrate that
 16 the parties to the 1855 Treaty did *not* intend for the area encompassing Tract D to
 17 be part of the original Yakama Nation reservation. *See* Reis Decl. at ¶4. Rather, the
 18 overwhelming weight of evidence, including maps created before, at, and after
 19 treaty times and contemporaneous tribal-member statements, conclusively
 20 establish a reservation that *excludes* Tract D. *See generally* Reis Decl. Maps
 21 prepared by Governor Stevens *before* the treaty negotiations and even the
 22 previously-lost 1855 Treaty Map—on which the Yakama Nation heavily relies—
 23
 24
 25
 26

1 unambiguously place the southern boundary of the reservation far north of the 46th
 2 parallel, and therefore north of Tract D.¹⁹ *Id.* at ¶¶5-6.

3 Any doubt on this point was put to bed in 1904 when Congress passed
 4 legislation recognizing and adopting the Barnard survey as the official reservation
 5 boundary. *See* Ex. B to Weythman Decl. No act of Congress, presidential
 6 proclamation, or binding precedent has ever recognized the disputed portion of
 7 Tract D as being part of the Yakama reservation.²⁰ Because Yakama Nation is not
 8 likely to prevail on this issue, its motion should be denied.

9 **a. Historical records demonstrate Yakama Nation's treaty**
 10 **time understanding that Tract D was not part of the**
 11 **reservation.**

12 Yakama Nation has the burden to prove that Tract D was *originally intended*
 13 as part of the reservation. *See United States v. Lummi Indian Tribe*, 841 F.2d 317,

14 ¹⁹ Glenwood, Washington, the population epicenter in Tract D, is located almost
 15 precisely on the 46th parallel. *See* Reis Decl. at ¶6.

16 ²⁰ In 1972, President Nixon purported to place approximately 21,000 acres of
 17 *federal* land encompassing the east slope of Mount Adams into the reservation. *See*
 18 Executive Order No. 11670. These lands were initially part of the Tract D area that
 19 was in dispute in the ICC proceedings, but they were carved out from those
 20 proceedings “to permit the Yakima Tribe and counsel to seek restitution to the
 21 *Yakima Reservation* of these lands.” ECF No. 38 at 396 (emphasis added). Yakama
 22 Nation now claims that President Nixon’s executive order merely restored title to
 23 the Nation and that the land was always within the reservation, but the Nation
 24 properly questions whether President Nixon had actual authority to make such
 25 restitution. *See* ECF No. 36 at 37. The Nation’s concern is well founded. *See*
 26 *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947)
 (“the President had no authority to convey to the petitioners a compensable interest
 in the lands described in the order lying north of the true 1868 [treaty] boundary”).
 However, the lands at issue in Nixon’s executive order were always lands under
federal ownership, control, and jurisdiction and are therefore beyond the scope of
 this case.

1 318 (9th Cir. 1988) (“[t]he burden is on the petitioning tribe to produce evidence
 2 that disputed waters were” within the areas intended in the treaty); *Oneida Nation*
 3 *v. Vill. of Hobart*, No. 16-C-1217, 2017 WL 4773299, at *1 (E.D. Wis. Oct. 23,
 4 2017); *Confederated Salish & Kootenai Tribes of Flathead Reservation v. United*
 5 *States*, 173 Ct. Cl. 398, 405 (U.S. 1965) (tribe’s evidence was “not adequate to
 6 prove [its] claim” that a particular tract of land was to be included within its
 7 reservation). The Nation provides no *evidence* contemporaneous with the signing
 8 of the 1855 Treaty that even remotely suggests Tract D’s inclusion. Instead, the
 9 Nation makes four arguments; each of which fails under only minimal scrutiny:

10 First, without analysis, Yakama Nation claims that the “plain language” of
 11 the Treaty includes Tract D. ECF No. 36 at 27. The argument is not supported by
 12 the Treaty language, which is neither plain nor dispositive. The Treaty itself
 13 recognized that the boundaries would need to be “surveyed and marked out.” ECF
 14 No. 38 at 9. At least five different survey teams sought to confirm the boundaries
 15 of the Yakama Nation reservation between 1861 and 1924. *See* Reis Decl. at ¶9.
 16 None of them *even considered* including Tract D. *Id.* Likewise, when Congress
 17 expanded the boundaries of the reservation in 1904 to include 293,837 additional
 18 acres identified in the Barnard survey, no one—not Congress, not the Department
 19 of the Interior, not even the Yakama Nation—sought to include Tract D within the
 20 new boundaries. *Id.* at ¶10. And when the Ninth Circuit and the Supreme Court
 21 independently analyzed the Treaty language in 1911 and 1913, respectively,
 22 neither court determined that such language included Tract D. *See generally N. P.*
 23 *R. Co. v. United States*, 227 U.S. 355 (1913); *Northern P. R. Co. v. United States*,
 24 191 F. 947 (9th Cir. 1911). Rather, both courts affirmed a boundary that *plainly*
 25 *excluded* Tract D. *Id.* (affirming the correctness of the Barnard survey). If
 26 anything, careful analysis of the Treaty language—including five surveys

1 following its metes and bounds—has demonstrated that Tract D was never
2 intended to be part of the reservation.

3 The Nation’s second argument—that “Yakama Treaty signers understood
4 [the Treaty] to include Tract D”—is equally unpersuasive. ECF No. 36 at 27. For
5 this, the Nation cites one page of vague “elder” testimony from a 1939 U.S. Senate
6 hearing before the Committee on Indian Affairs. *Id.*²¹ Federal courts properly treat
7 such “elder” testimony with skepticism. *See, e.g., Lower Elwha Band of S’Klallams*
8 *v. Lummi Indian Tribe*, 235 F.3d 443, 451 (9th Cir. 2000) (recognizing that elder
9 testimony may be “self-serving”); *United States v. Lummi Indian Tribe*, 841 F.2d
10 317, 319 (9th Cir. 1988) (“elder testimony is not the most accurate”). Where—as
11 here—the declarant has no personal knowledge of the treaty boundaries by virtue
12 of not having been alive at the time of the negotiations, and instead bases his
13 testimony on what other tribal members told him, the testimony is inadmissible
14 hearsay. *See Chemehuevi Indian Tribe v. McMahon*, No. ED CV 15-1538-DMG
15 (FFMx), 2017 WL 6883765, at *9 (C.D. Cal. Sep. 5, 2017) (slip copy) (“To the
16 extent [the] assertion regarding the Tribe’s occupation of the land in question is
17 based on what members of the Tribe told him . . . it is inadmissible hearsay”).

18 Furthermore, it is well settled that courts “cannot, under any acceptable rule
19 of interpretation, hold that the Indians owned the lands merely because they
20 thought so.” *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169,
21 180 (1947). Rather, “the extent of our interpretive deference to the perspective of
22 the Native leaders cannot extend past the meeting of the minds between the
23 parties.” *Jones v. United States*, 846 F.3d 1343, 1356 (Fed. Cir. 2017).

24
25 ²¹ The document YN001051 is not included within Exhibit B to the Bordeaux
26 Declaration, as indicated in the Nation’s motion.

1 The testimony Yakama Nation cites is directly contradicted by *far earlier*
2 statements of Yakama Nation leaders, including Chief Spencer, the first post-
3 Treaty Chief of the Yakama Nation. As recorded in Barnard’s January 12, 1900
4 report to the Department of the Interior, Chief Spencer described the southwestern
5 boundary of the reservation as a straight line from “Grayback Peak to the hump
6 described on the southeast slope of Mount Adams.” Ex. C to Weythman Decl., at
7 8; *see also N. P. R. Co.*, 227 U.S. at 365; *Northern P. R. Co.*, 191 F. at 957. A
8 tribal elder by the name of Stick Joe, who had accompanied a boundary
9 reconnaissance team in 1860 (one year after the Treaty was ratified), likewise
10 confirmed this straight-line boundary. *See* Ex. C to Weythman Decl., at 7. Both
11 tribal members reiterated their understandings on multiple occasions. *Id.* at 8.
12 Because they were consistent with his own on-the-ground reconnaissance, Barnard
13 relied on these statements in locating the southwest boundary of the reservation
14 north of Tract D. This is the line Congress adopted in 1904, and it has not
15 subsequently been changed.

16 Approximately ten years earlier, surveyor Schwartz also consulted tribal
17 members for their understanding of the southwest boundary. In his report, he
18 stated, “[t]he Indians claim that the line passes along the top of a low ridge of hills,
19 bearing in a southwesterly direction, and terminates at the Big Klickitat River, and
20 that this should be a continuation of their southern boundary. Upon the western end
21 of said ridge there is a round hill called Gray Back Mountain. Thence it is claimed
22 by the Indians the line bears in a northwesterly direction, crossing the Klickitat
23 River, to the base of Mount Adams.” Ex. C to Weythman Decl., at 12. While
24
25
26

1 Schwartz's survey failed to incorporate these claims,²² his report further
2 demonstrates a contemporary understanding by the Yakama Nation of the
3 boundary line from Grayback Mountain "northwesterly...to the base of Mount
4 Adams." *Id.*

5 Yakama Nation also implies—but never actually argues—that Tract D's
6 status as a traditional gathering ground for camas roots somehow supports its
7 inclusion in the reservation. *See* ECF No. 36 at 4-6. The ICC correctly rejected this
8 argument. *See* ECF No. 38 at 347, 355-56. In denying the Nation's claim for
9 "Tract B"—which contained historical hunting grounds and berry patches—the
10 ICC noted that Article III of the Treaty "specifically granted the 'privilege of
11 hunting, gathering roots and berries, and pasturing...horses and cattle upon open
12 and unclaimed land.'" *Id.* at 356. Indeed, Stevens made it clear that the Indians'
13 rights would include "the same liberties *outside the Reservation* to pasture
14 animals..., to kill game, [and] to get berries...." *Id.* at 334 (emphasis added); *see*
15 *also id.* at 27 ("You will be allowed...to get roots and berries and to kill game on
16 land not occupied by the whites; all this *outside the Reservation*") (emphasis
17 added). The Yakama Nation's usual and accustomed grounds span nearly one-third
18 of the state. The fact that the Indians utilized Tract D for gathering camas roots
19 lends no support to their assertion that Tract D is *inside* the reservation boundaries.
20 *See also Chemehuevi*, 2017 U.S. Dist. LEXIS 143446, at *21 (holding that a
21 similarly vague statement is "not enough to establish that the Tribe occupied or
22 possessed [the disputed tract]" as part of its reservation).

23
24
25 ²² Schwartz ultimately rejected claims that the reservation crossed the Klickitat
26 River. It was this rejection that led Congress to adopt the Barnard findings in 1904.

b. Governor Stevens did not include Tract D in the reservation.

The Nation next cites Governor Stevens' description of a *proposed* western boundary on June 5, 1855, at the Walla Walla council. ECF No. 36 at 28. As part of this proposal to the Yakama Nation, Stevens described a western boundary proceeding "down the main chain of the Cascade mountains south of Mount Adams." ECF No. 38 at 30. Yakama Nation suggests, without explanation, that this proposed boundary somehow indicates an intent to include Tract D within the reservation. ECF No. 36 at 28. But this proposed language was not included in the final Treaty, which instead describes the western boundary as "passing south and east of Mount Adams." ECF No. 38 at 9.

Even if the June 9 Treaty had contained a call similar to that described in the June 5 proposal, simply stating that the boundary extends "south of Mount Adams" provides no indication as to *how far south* the boundary should go. The majority of Tract D is located *substantially* south of Mount Adams, as clearly depicted on the 1855 Treaty Map used during the council. *See* ECF 39 at 19. It does not follow that a boundary which includes Mount Adams must also include Tract D, and Yakama Nation points to no contemporaneous evidence suggesting that it should. In fact, to encompass Tract D requires the boundary to extend more than *23 miles* beyond Mount Adams—13 miles further than what is alleged to be shown on the Treaty Map and further south than the 46th parallel shown clearly on the map to be outside the reservation. *See* ECF 38 at 360 and 344 (ICC Finding of Fact 65).

c. Maps from before, at, and after treaty time plainly show that Tract D is not part of the reservation.

Finally – and again without any analysis – the Nation claims that Tract D is "depicted as within the Yakama Reservation in Territorial Governor Stevens'

Treaty Map sent back to Washington D.C. alongside the Treaty in June of 1855.”
ECF No. 36 at 28.²³ This is wrong. The Treaty Map shows the entire reservation boundary located *north* of Tract D, as evidenced by the unmistakable 46th parallel. *See* Reis Decl. at ¶6. Having mapped these same disputed areas years earlier and on multiple occasions, Governor Stevens was very familiar with the location of the 46th parallel and its relation to Mount Adams. *Id.* at ¶5.

For example, the following Pacific Railroad Survey map, which Governor Stevens took part in creating, is dated 1853-54:



(Ex. A to Reis Decl. at 12.)

Not only does this map accurately place the 46th parallel, but it does so in clear relation to “Tahk Plain” (*i.e.*, Tract D).

A second pre-Treaty railroad survey map by Governor Stevens, dated February 10, 1855, further demonstrates Stevens’ understanding of Tract D and the

²³ Yakama Nation cites Exhibit C to the Bordeaux Declaration; the 1855 Treaty Map is actually Exhibit B.

surrounding area. Like the 1853-54 map, the following map accurately depicts the 46th parallel in relation to both Mount Adams and Tract D:



(Ex. A to Reis Decl. at 13; blue circle over Conboy Lake added by counsel)

Notably, both of Governor Stevens' railroad survey maps *correctly* depict the unmistakable body of water now known as "Conboy Lake" as south of the 46th parallel (circled in blue above). Conboy Lake is located squarely within Tract D.

Post-1855 Government Land Office maps confirm Stevens' understanding of that spatial relationship, *see* Ex. A to Reis Decl. at 16-17, and the Treaty itself incorporates latitudinal and longitudinal lines, further demonstrating Stevens' reliance on those features. ECF No. 38 at 9 (Treaty Art. I); *see also Yakima Tribe v. United States*, 158 Ct. Cl. 672, 692 (U.S. 1962) (relying on latitude and longitude in interpreting 1855 Treaty Map). Based on the clear, accurate, and

1 consistent location of the 46th parallel, the Treaty Map unequivocally excludes
2 Tract D from the reservation.

3 **d. In 1904, Congress recognized and adopted the Barnard line**
4 **as the official southwest boundary of the reservation.**

5 It is well established that Congressional action is dispositive in reservation
6 boundary disputes. *Nebraska v. Parker*, 136 S. Ct. 1072, 1075-76 (2016)
7 (describing the three-step test, conclusively established as of 1984, to determine
8 whether a reservation's boundaries have changed); *Solem v. Bartlett*, 465 U.S. 463,
9 470-72 (1984) (same). Even where Congress has not acted to change boundaries,
10 equitable factors may preclude a tribe from exercising jurisdiction over the
11 disputed tract. *Nebraska*, 136 S. Ct. at 1075-76; *City of Sherrill v. Oneida Indian*
12 *Nation of N. Y.*, 544 U. S. 197, 217-221 (2005). Yet Yakama Nation has conceded
13 in prior proceedings that Congress acted to change Yakama's reservation
14 boundaries by passing the 1904 Act. *See, e.g.*, Ex. K to Weythman Decl., at
15 YN001142. Under *Solem* and its progeny, any dispute over reservation boundaries
16 was settled when Congress acted to set the final boundary and to compensate the
17 Nation for its cessions. *See Nebraska*, 136 S. Ct. at 1075.

18 In passing the 1904 Act, Congress settled "[a] long-standing dispute between
19 the Government and the Indians" by recognizing the erroneous nature of the earlier
20 Schwartz survey and adopting the Barnard line as the new boundary. *See*
21 *Weythman Decl.* at Ex. B, Ex. D, at 5, and Ex. E, at 4. In doing so, Congress
22 *expanded* the prior boundary of the Yakama Nation reservation, adding 293,837
23 acres. Ex. B to Weythman Decl. While Barnard had recommended an additional
24 64,041 acres be added, neither the United States nor the Yakama Nation believed
25 these acres to be part of the reservation. *See Weythman Decl.* at Ex. D, at 2, and
26 Ex. E, at 1. Notably, the additional acres identified by Barnard do not include Tract

1 D and are not at issue in this dispute. *See* Reis Decl. at ¶10. Additional legislative
 2 history provided by the Yakama Nation confirms the 1904 Act “recognizes the
 3 very thing that the Indians claim.” ECF No. 38 at 42. Both the Ninth Circuit and
 4 the U.S. Supreme Court ratified the Barnard line as subsequently surveyed. *See N.*
 5 *P. R. Co.*, 227 U.S. at 365-66.

6 Yakama Nation argues that the 1904 Act could not have established the
 7 reservation boundaries because Congress did not “clearly evince an intent to
 8 diminish the Yakama Reservation as to Tract D” and because Congress “would not
 9 have unilaterally diminished the Yakama Reservation without the Yakama
 10 Nation’s prior consent....” ECF No. 36 at 31-32 (internal quotation marks
 11 omitted). Congress unquestionably has plenary power over reservations and may
 12 unilaterally change their boundaries as it sees fit. *See Nebraska*, 136 S. Ct. at 1081
 13 n.1; *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993). To modify a reservation,
 14 Congress need only intend “to *change* boundaries.” *See Solem*, 465 U.S. at 470
 15 (emphasis added).

16 This is true even if Congress modifies boundaries based on erroneous
 17 information. *See United States v. Creek Nation*, 295 U.S. 103, 111 (1935). If
 18 Congress passes legislation based on an erroneous understanding, “the subsequent
 19 action of Congress makes the propriety of the underlying decision irrelevant, *even*
 20 *if* the underlying decision might have transgressed the intent of Congress.”
 21 *Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1171-72 (9th Cir. 2008) (emphasis in
 22 original). “Whether Congress was acting under a misapprehension of fact or law is
 23 irrelevant once legislation has been enacted.” *Mount Graham Red Squirrel v.*
 24 *Madigan*, 954 F.2d 1441, 1461 (9th Cir. 1992). The law gives effect to good-faith
 25 actions “until they are reversed, avoided, or cancelled by a direct attack. So long as
 26 they stand, they are not null and void.” *Confederated Salish & Kootenai Tribes v.*

1 *United States*, 185 Ct. Cl. 421, 427, 401 F.2d 785, 789 (1968). So while an
 2 erroneous survey may not, by itself, change reservation boundaries; Congressional
 3 adoption of that survey does.²⁴

4 In *Creek Nation*, for example, the Supreme Court held that Congressional
 5 ratification of an erroneous survey which resulted in the unintended diminishment
 6 of reservation land was nevertheless effective. *Creek Nation*, 295 U.S. at 109-12.
 7 The Court recognized that while Congress *could* have taken legislative action to
 8 restore the boundaries, it instead chose to pay compensation for the taking. *Id.* at
 9 110; *see also United States v. Lower Sioux Indian Cmty.*, 207 Ct. Cl. 492, 496, 519
 10 F.2d 1378 (1975); *Confederated Salish*, 185 Ct. Cl. at 424-25.

11 By adopting the Barnard line and adding 293,837 acres, Congress
 12 purposefully and unambiguously changed and relocated the boundaries of the
 13 Yakama Nation reservation. *See* ECF No. 38 at 341 (ICC Finding of Fact No. 62)
 14 (“the recommended 293,837 acres were added to the Yakima Reservation by
 15 Section 1 of the Act of December 21, 1904”); *see also United States v. S. Pac.*
 16 *Transp. Co.*, 543 F.2d 676, 696 (9th Cir. 1976) (language of “addition” or “adding”
 17 suggests that Congress intended to change boundaries and that land being added
 18 was not formerly part of the reservation at the time of addition).

19 Because Congressional intent to modify the boundary is clear on the face of
 20 the statute, the inquiry ends.²⁵ Courts must “presume that Congress said what it

21
 22 ²⁴ Yakama Nation cites *Cty. of Yakima v. Confederated Tribes & Bands of the*
 23 *Yakima Indian Nation*, 502 U.S. 251, 256 (1992), for the proposition that its
 24 reservation boundaries were established “beyond any reasonable dispute” by the
 25 mere execution of the 1855 Treaty. ECF No. 36 at 30. But that case never
 26 addressed boundaries, and the Nation’s argument contradicts the plain language of
 the Treaty, which itself *calls for surveys* to establish specific boundary lines. ECF
 No. 38 at 9.

1 meant in the language it drafted.” *Meruelo Maddux Props.-760 S. Hill St., LLC v.*
 2 *Bank of Am., N.A. (In re Meruelo Maddux Props., Inc.)*, 667 F.3d 1072, 1077 (9th
 3 Cir. 2011). “We do not pause to consider whether a statute differently conceived
 4 and framed would yield results more consonant with fairness and reason. We take
 5 the statute as we find it.” *Anderson v. Wilson*, 289 U.S. 20, 27 (1933). Courts need
 6 not wade into legislative history “to further clarify a matter of interpretation
 7 resolved on the face of the statute.” *Stratman*, 545 F.3d at 1170. “As long as the
 8 legislation is valid, it is not the duty of the courts to revise it.” *Id.*

9 **e. Yakama Nation raised the Tract D issue with Congress**
 10 **after 1904, and Congress chose not to act.**

11 Yakama Nation certainly knew Congress was the proper forum for seeking
 12 to include Tract D in the reservation, just as Congress did with the 293,837 acres
 13 added to the reservation by the 1904 Act. *See* ECF 38 at 341 (ICC Finding of Fact
 14 No. 63) (finding that the 1904 Act “added to the Yakima Reservation”). Similarly,
 15 if the Nation believed the Congressionally-adopted Barnard line was incorrect, the
 16 issue was for Congress to rectify. *See Creek Nation*, 295 U.S. at 110. Indeed, this
 17 was well understood among members of the Yakama Nation.

18
 19
 20 ²⁵ Yakama Nation emphasizes the fact that “Tract D is not mentioned in this
 21 legislation.” *See, e.g.*, ECF No. 36 at 32. This fact only underscores that Congress
 22 *never considered* Tract D as part of the reservation; *every survey* leading up to the
 23 Act had excluded it, and the Yakama had never asserted that it was included.
 24 Congress cannot remove land from a reservation when the land is not part of the
 25 reservation to begin with. Significantly, Congress did not act to change the
 26 boundaries it established in 1904 even after it was presented with the Treaty Map
 in the 1930s, nor did it change the boundaries following the ICC decision in 1966.
 Instead, it compensated the Yakama Nation for the cession of Tract D along with
 Yakama’s other cessions.

1 The Nation cites congressional testimony of tribal member Thomas Yallup
 2 during a 1939 hearing before the Senate Committee on Indian Affairs. ECF No. 38
 3 at 447. Mr. Yallup testified that delegations from the Yakama Nation traveled to
 4 Congress each year from at least 1911 through 1938 objecting to the established
 5 southwest boundary and, at least in some cases, “asking that the southwest
 6 boundary...be reestablished....” *Id.*

7 The Nation cites no corroborating record for these other visits, but, taking
 8 Mr. Yallup’s testimony at face value, not only was Congress well aware of the
 9 disputed southwest boundary, it repeatedly chose not to take any action to rectify
 10 the claimed error. “In view of its prolonged and acute awareness of so important an
 11 issue, Congress’ failure to act...provides added support for concluding
 12 that Congress acquiesced....” *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 601 (1983);
 13 *see also Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 621 (1983).²⁶

14 After purportedly decades of having failed to “reestablish” the southwest
 15 boundary, and long after most of the lands in Tract D had been allotted to non-
 16 Indian settlers, the Nation finally sought permission from Congress to bring a
 17 monetary claim before the Court of Claims *specifically* for Tract D. *See* Ex. A to
 18 Reis Decl. at 23-24; *see also* Ex. G to Weythman Decl. Congress once again
 19 rejected the Nation’s request. *See* Ex. A to Reis Decl. at 23. In other words, having
 20 the Tract D issue squarely before it, Congress left in place the boundaries it
 21 adopted over thirty years earlier and denied the Nation the opportunity to assert
 22 even a monetary claim for such lands.

23 ²⁶ Mr. Yallup’s testimony cuts squarely against the Nation’s position in this case
 24 that Tract D has retained reservation status. As the Tenth Circuit has said, “if it
 25 really believed that the area retained its reservation status it would not have labored
 26 so repeatedly to regain reservation status....” *Pittsburg & Midway Coal Mining*
Co. v. Yazzie, 909 F.2d 1387, 1409 (10th Cir. 1990).

Further showing that Congress understood that Tract D was outside reservation boundaries, Congress expressly contemplated an amendment that would allow it to “include such lands within the Yakima Indian Reservation” “in lieu of paying the present value” if the Court of Claims entered judgment for the Nation. Ex. G to Weythman Decl., at 1. If Tract D were already within the reservation, there would be no need for Congress to take action to include it. That the Yakama Nation eventually brought a claim at the ICC under its limited jurisdiction cannot change the fact that Congress rejected the Nation’s (apparently repeated) attempts to “reestablish” the southwestern boundary to include Tract D. The Yakama Nation took the position throughout the ICC Proceedings that Tract D had never been placed in the reservation.

The Barnard line, which was officially surveyed in 1906-07, existed for decades as the undisputed boundary of the Yakama Nation reservation. Yet, in 1949, Yakama Nation submitted a petition to the ICC asserting “five separate claims for just compensation,” including for the area of land that would come to be known as “Tract D.” *See, e.g.*, ECF No. 38 at 389. With its petition, Yakama Nation included “a map setting forth the Yakima Reservation boundaries and the *claimed additions* to said boundaries.” *Id.* (emphasis added). Throughout the ICC proceedings – which lasted for *twenty years* – Yakama Nation repeatedly confirmed to the ICC (and to the Court of Claims) that “[t]he present southwest boundary of the Yakima Reservation was established on the ground by Campbell, Germond and Long in 1906 and approved in 1907.”²⁷ ECF No. 39 at 7. Its long-standing position was that the lands comprising Tract D “*should have been added*

²⁷ Campbell, Germond, and Long completed the official survey of the Barnard line. *See, e.g.*, Reis Decl. at ¶9.

1 to the Yakima Reservation.” *See, e.g.*, Ex. K to Weythman Decl., (Brief and
2 Appendix of the Yakima Tribe), at YN001139 (emphasis added).²⁸

3 At the Court of Claims, the Nation made clear that its takings claim was
4 based on the fact that some other “natural divide should have constituted a true
5 boundary of the Yakima Reservation, rather than the present arbitrary line....” ECF
6 No. 39, at 8 of 36. It further argued that “[t]he area between this natural divide, and
7 the arbitrary straight line forming the present boundary contains 118,650 acres,
8 which...*should have been added* to the Yakima Reservation.” ECF No. 39, at 10 of
9 36 (emphasis added). The record is replete with Yakama Nation’s own statements
10 confirming *its belief* that Tract D had never been made part of the reservation and
11 was unequivocally outside the “present boundaries” at the time of the ICC
12 proceedings.

13 **f. The ICC found that Tract D was *located outside the***
14 **boundaries of the reservation.**

15 Because it cannot point to any contemporaneous evidence or binding
16 authority establishing Tract D as within its reservation, the Nation relies on a 1966
17 finding of the Indian Claims Commission that Tract D “was *intended to be*
18 *included* within the Yakima Reservation.”²⁹ ECF No. 36 at 13 (emphasis added). It

19
20 ²⁸ As contrasted with the 293,837 acres, which the Yakama Nation plainly
21 conceded to the Court of Claims “*were added* to the Yakima Reservation by the
22 Act of December 21, 1904, 33 Stat. 595.” Ex. K to Weythman Decl., at YN001142
(emphasis added).

23 ²⁹ Throughout its motion, the Nation incorrectly claims the ICC “found that Tract
24 D *is* within the Yakama Reservation.” *See, e.g.*, ECF No. 36 at 34; *id.* at 14, 28, 38.
25 To be clear: the ICC found only that Tract D was “intended to be” part of the
26 reservation. ECF No. 38 at 347. For the reasons explained above, even that finding
is not supported by the evidence. Furthermore, even if Tract D were intended to be
included (it was not), Congress unequivocally changed the boundaries in 1904.

1 further relies on a 1968 memorandum by C. Richard Neely, the Assistant Regional
2 Solicitor to the Bureau of Indian Affairs. ECF No. 38 at 60. Neely’s entire
3 analysis, however, is based on a faulty legal premise: that “Tracts C and D...*were*
4 *restored to the Yakima reservation* by Decision of the Indian Claims Commission.”
5 *Id.* (emphasis added). As acknowledged in the memorandum, Neely’s conclusion
6 depended entirely upon the false premise that the ICC “corrected”—and had the
7 authority to “correct”—the reservation boundaries. *Id.* at 62. It did not.

8 The Yakama Nation concedes, as it must, that the ICC cannot correct
9 reservation boundaries or otherwise restore land to a reservation. 60 Stat. 1049,
10 1050 (1946); ECF No. 36 at 35 n.8. Rather, the ICC’s authority only extends to
11 monetary compensation for alleged takings. *Id.*

12 This jurisdictional limitation was plainly recognized in a 1978 letter to
13 Congressman Mike McCormack from the Chairman of the ICC, Jerome
14 Kuykendall, who confirmed that the “Indian Claims Commission made no
15 adjustment of the boundaries of the Yakima Indian Reservation.” Ex. F to
16 Weythman Decl. (Kuykendall Letter), at 2. In the letter, Chairman Kuykendall
17 explains that the Yakama Nation’s petition to the ICC “did not assert a demand for
18 boundary adjustments” but rather “the claims asserted were for compensation for
19 four separate areas contiguous to the reservation boundaries designated as Tracts
20 A, B, C, and D....” *Id.* He distinguishes these tracts located *outside* the reservation
21 from those “patented to settlers and purchasers *within* the boundaries of the
22 Yakima Reservation.” *Id.* (emphasis added). Specifically, he differentiates between
23 the “97,908.97 acres in Tract D *outside* the southwest boundary of the reservation”
24 from the “27,647.71 acres of Cedar Valley land *within* the reservation.” *Id.* at 3
25 (emphasis added). The letter makes clear that “tracts A, B, C, and D [are] *outside*
26 the boundaries of the Yakima Reservation....” *Id.* at 2 (emphasis added).

1 To resolve any doubt, Chairman Kuykendall refers back to ICC Finding of
 2 Fact No. 8, which provides a description of the reservation boundaries “as found
 3 by the Commission...” *Id.* (emphasis added). Those boundaries include “a direct
 4 line” from Grayback Mountain to Goat Butte—which unequivocally excludes
 5 Tract D. *Id.* He assures Congressman McCormack that the “only change” in these
 6 reservation boundaries of which the ICC is aware “is that ordered by President
 7 Nixon in E.O. 11670...” *Id.* at 3.

8 In fact, throughout the ICC proceedings, both the Commission and the Court
 9 of Claims understood that Tract D was located “outside the present boundary” of
 10 the reservation. *See, e.g.*, ECF No. 38 at 316 (ICC Finding of Fact No. 8) (stating
 11 “the boundary...was and now is” the Barnard line); *id.* at 327-28 (ICC Finding of
 12 Fact No. 23) (recognizing that “the entire line questioned by the Indians and which
 13 forms the northerly boundary of Tract D has been approved by the administrative
 14 officials of the Government and by the Congress”); *Yakima Tribe v. United States*,
 15 158 Ct. Cl. 672, 682 (U.S. 1962) (the “areas beyond the Barnard line” are “outside
 16 of the present boundaries”).

17 Thus, everyone involved in the ICC proceedings—including the Yakama
 18 Nation—recognized that Tract D was not included within the reservation
 19 boundaries established by Congress, even if it was originally intended to be.

20 **g. Yakama Nation is estopped from now claiming that Tract D**
 21 **has always been part of its reservation.**

22 After having taken a contrary position for decades, on which both the ICC
 23 and the Court of Claims relied, Yakama Nation must not be allowed to suddenly
 24 change course and now assert that Tract D has always been within reservation
 25 boundaries. *See* ECF No. 36 at 36.

Judicial estoppel acts to “protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal quotation marks and citations omitted). “Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.” *Id.* at 749. It “applies to a party’s stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion.” *Helfand v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997); *see also Menominee Indian Tribe v. Thompson*, 943 F. Supp. 999, 1020-22 (W.D. Wis. 1996).

In deciding whether to apply judicial estoppel, federal courts generally analyze three factors:

First, a party’s later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose unfair detriment on the opposing party if not estopped.

Arizona v. Tohono O’odham Nation, 818 F.3d 549, 558 (9th Cir. 2016).

Here, all three of these factors are met. For nearly two decades, Yakama Nation represented to the ICC and to the Court of Claims that Tract D had been erroneously excluded from its reservation such that those lands were located “outside the present boundaries.” *See, e.g.,* Weythman Decl. at Ex. K; Ex. M (Plaintiff’s Request for Findings of Fact), at 25, 44, 109; Ex. L (Brief of Petitioner on Remand), at YN000187-188.

1 As Chairman Kuykendall's letter makes clear, the ICC relied upon and
 2 adopted this position when it ultimately found that Tract D had been taken from
 3 the tribe. The ICC's determination resulted in a \$2.1 million payment based on the
 4 understanding that these lands were intended to be, *but were in fact not*, included
 5 in the reservation. Having received complete payment for lands in Tract D,
 6 Yakama Nation cannot simply change its mind and make arguments that directly
 7 contradict the positions it took for nearly twenty years in front of two separate
 8 judicial bodies. Judicial estoppel precludes such tactical maneuvers.

9 Furthermore,

10 Section 70u(a) of the Indian Claims Commission Act is a statutory bar
 11 which provides that "The payment of any claim, after its
 12 determination in accordance with this chapter, shall be a full discharge
 13 of the United States of all claims and demands touching any of the
 matters involved in the controversy."

14 *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1481 (D. Ariz. 1990).

15 In similar cases to the one at bar where plaintiff tribes accepted
 16 compensation from the ICC for tracts of land the tribes asserted to have been
 17 erroneously excluded from their reservations, courts have held the tribes' claims to
 18 be barred by res judicata or estoppel. In *White Mountain Apache Tribe v. Clark*,
 19 604 F. Supp. 185, 189 & 189 n.1 (D. Ariz. 1984), the court held that White
 20 Mountain Apache was barred by res judicata from bringing a claim to restore a
 21 tract of land to its reservation that was allegedly excluded in an erroneous survey
 22 because the tribe accepted monetary damages for the cession in the ICC "based
 23 upon almost identical allegations." The Ninth Circuit affirmed, 784 F.2d 921, 925-
 24 26 (1986), and the Supreme Court denied certiorari, 479 U.S. 1006 (1986). In
 25 *Havasupai*, the Havasupai Tribe sought access to a sacred site it claimed was
 26 wrongfully excluded from its reservation, but the court, citing *White Mountain*,

1 held that the Havasupai's acceptance of compensation for the cession from the ICC
 2 barred its subsequent claim that it had a right of permanent access to the site. 752
 3 F. Supp. at 1481-82, *aff'd*, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, 503 U.S. 959
 4 (1992).

5 In 1969, the Indian Claims Commission ordered Congress to pay, and
 6 Congress did pay, compensation to the Havasupai for this land, based
 7 on the Commission's finding that Congress had taken the land in
 8 1880. This finding, in turn, was made after a hearing in which the
 9 Havasupai presented evidence that such a taking had occurred at that
 time. Once Congress compensated the Tribe, aboriginal title was
 extinguished.

10 *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991).

11 Like the White Mountain Apache's and Havasupai's ICC settlements,
 12 Yakama's ICC settlement states that it "finally dispose[s] of all rights, claims or
 13 demands which the petitioner has asserted or could have asserted with respect to
 14 subject matter of [the docket], and petitioner shall be barred thereby from asserting
 15 any such right, claim or demand against defendant in any future action." *See id.* at
 16 1482; *White Mountain Apache*, 604 F. Supp. at 189; ECF No. 38 at 381; Ex. A to
 17 Reis Decl. at 26-28. Like *White Mountain Apache* and Havasupai, Yakama's claim
 18 is barred.

19 **2. The County Has Not Retroceded General Criminal Jurisdiction**
 20 **Over Any On-Reservation Criminal Matters Involving A Non-**
 21 **Indian.**

22 On January 16, 1979, the United States Supreme Court rejected the Yakama
 23 Nation's statutory, constitutional, and treaty challenges to the State of
 24 Washington's assumption of criminal jurisdiction over Indians and Indian territory
 25 under Public Law 280. *See Washington v. Confederated Bands & Tribes of Yakima*
 26 *Indian Nation*, 439 U.S. 463 (1979). In 2014, Washington voluntarily relinquished

1 some, but not all, of its assumed jurisdiction to the federal government. ECF No.
 2 38 at 406-08. The Yakama Nation now seeks to use its present motion, ECF No.
 3 36, to eliminate the State's remaining criminal jurisdiction over any on-reservation
 4 matters involving Indians.

5 Specifically, Yakama Nation seeks to enjoin the County from exercising
 6 criminal jurisdiction in any matter involving an Indian within reservation
 7 boundaries, which the Nation asserts includes Tract D. ECF No. 36 at 3. The
 8 requested injunction goes far beyond the boundary dispute at issue in this case and
 9 improperly seeks to litigate the scope of retrocession pertaining to the State's
 10 jurisdiction over on-reservation criminal matters. Because that jurisdictional
 11 question has been conclusively decided by the Washington Court of Appeals—and
 12 that decision is binding on this Court—the requested injunction is foreclosed by
 13 Washington law.

14 **a. The scope of retroceded criminal jurisdiction on the**
 15 **Yakama Nation reservation is a matter of state law.**

16 While “[t]he validity of the retrocession is a question of federal law..., the
 17 substance of what [is] retroceded...is a question of state law.” *Tyndall v. Gunter*,
 18 840 F.2d 617, 618 (8th Cir. 1988). Neither the Yakama Nation nor the County
 19 questions the validity of Washington's retrocession pursuant to the Governor's
 20 proclamation.

21 Rather, the Yakama Nation challenges the *scope* of what has been
 22 retroceded. This is a question of Washington State law. *Gunter*, 840 F.2d at 618;
 23 *see also Goham v. Wolff*, 471 F.2d 52, 54 (8th Cir. 1972) (state courts decide the
 24 effect of valid retrocession on state-court criminal jurisdiction). This comports with
 25 the general rule that a state court's criminal jurisdiction over Indians is a question
 26 of state law to be made by state courts. *Anderson v. Gladden*, 293 F.2d 463, 467

1 (9th Cir. 1961), *cert. denied*, 368 U.S. 949 (1961); *State v. Cooper*, 928 P.2d 406,
 2 410 (Wash. 1996). Likewise, “[w]hether the State waived jurisdiction is a question
 3 of state law.” *Chapman v. California*, 423 F.2d 682, 683 (9th Cir. 1970), *cert.*
 4 *denied*, 400 U.S. 960 (1970).

5 In an attempt to circumvent this well-established principal, Yakama Nation
 6 cites authority on the *validity* of retrocession, but in each of those cases the *scope*
 7 of what the state had retroceded was never at issue. *See United States v. Brown*,
 8 334 F. Supp. 536 (D. Neb. 1971) (analyzing validity of retrocession and whether
 9 Secretary may accept *less* than what is offered); *Omaha Tribe of Neb. v. Walthill*,
 10 334 F. Supp. 823 (D. Neb. 1971) (same); *see also United States v. Lawrence*, 595
 11 F.2d 1149 (9th Cir. 1979) (addressing validity only); *Oliphant v. Schlie*, 544 F.2d
 12 1007 (9th Cir. 1976) (same).

13 While *Brown* and *Omaha Tribe* acknowledge that the Secretary of the
 14 Interior may accept *less* than what the state has offered—a principal which is plain
 15 on the face of the statute providing for acceptance of “all or any measure” of
 16 retroceded jurisdiction—“there is no contention that the United States could, or
 17 did, accept back *more* in the way of jurisdiction . . . than was offered by
 18 Nebraska.” *Tyndall v. Gunter*, 681 F. Supp. 641, 646 n.3 (D. Neb. 1987) (emphasis
 19 in original); *see also Walker v. Rushing*, 898 F.2d 672, 674 (8th Cir. 1990)
 20 (recognizing that the Secretary’s acceptance is limited by what is offered). Indeed,
 21 the scope of retrocession (*i.e.*, the extent of what the State has offered to retrocede)
 22 is fundamentally different than the scope of acceptance (*i.e.*, the portion of the
 23 State’s offer the federal government has decided to accept).

24 Thus, Yakama Nation’s statement that “the Secretary of the Interior was free
 25 to reassume its own jurisdiction on any terms that it desired,” ECF No. 36 at 41, is
 26

1 patently unsupported and contravenes the plain statutory authority provided in
2 25 U.S.C. § 1323.

3 **b. *State v. Zack* conclusively established state criminal**
4 **jurisdiction over on-reservation crimes involving a non-**
5 **Indian.**

6 In *State v. Zack*, the Washington Court of Appeals held that, although the
7 State had partially retroceded jurisdiction to the Yakama Nation, the State had
8 *retained* general criminal jurisdiction over on-reservation crimes involving a non-
9 Indian, whether as a victim or defendant. 413 P.3d 65, 68 (Wash. App. 2018),
10 *review denied*, 425 P.3d 517 (Wash. 2018).

11 In Governor Inslee’s 2014 retrocession proclamation, the State expressly
12 retained jurisdiction “over criminal offenses involving non-Indian defendants and
13 non-Indian victims.” ECF No. 38 at 407. At issue in *Zack* was whether the
14 Governor’s use of the word “and” in this context should be read in the conjunctive
15 (*i.e.*, only matters involving *both* a non-Indian defendant *and* a non-Indian victim)
16 or disjunctive (*i.e.*, any matter involving a non-Indian defendant *and/or* a non-
17 Indian victim). *Zack*, 413 P.3d at 68. Despite that the Governor’s cover letter to
18 Interior made clear that “and” in this context was disjunctive, Yakama Nation
19 claims—as did the defendant in *Zack*—that the provision must be read to
20 encompass only those matters where both the defendant and the victim are non-
21 Indians. ECF No. 36 at 55; *see also* ECF No. 38 at 187 (Governor’s cover letter).

22 Performing a plain-language analysis, the *Zack* court determined the word
23 “and” in the contested provision “should be read in the disjunctive” to mean
24 “and/or” and that the interpretation offered by the Nation “would render the
25 proclamation internally inconsistent and nonsensical.” *Zack*, 413 P.3d at 68. *Zack*’s
26 (and now Yakama’s) proposed construction “would mean that the only type of case

1 the State now could prosecute would require the involvement of *non-Indian*
 2 defendants who victimized *other non-Indians*” on fee lands within the reservation.
 3 *Id.* at 69 (emphasis added). However, because “the State *already had* authority to
 4 prosecute non-Indians for offenses committed on deeded lands prior to the
 5 enactment of Public Law 280,” the State could not “return” jurisdiction to Yakama
 6 that the State *already had* prior to Public Law 280, and that Yakama *never had*. *Id.*
 7 at 69-70 (emphasis added). In other words, Yakama’s proposed construction
 8 “would result in the Governor engaging in an *ultra vires* action.” *Id.* at 70.

9 The court further explained that “[e]xcluding Indians from prosecution in all
 10 cases,” as the Nation suggests is the case, “would mean that the Governor intended
 11 to return *all* of the criminal jurisdiction the State assumed [under Pub. Law
 12 280] and the words ‘in part’ would be rendered meaningless because there would
 13 have been total rather than partial retrocession.” *Id.* at 69 (emphasis in original).
 14 While the court did not rely on the Governor’s cover letter, it nevertheless
 15 recognized that the letter “is significant contemporaneous evidence of the purpose
 16 behind the Governor’s choice of language.” *Id.* at 70.

17 **c. State-court determinations of state law, including criminal**
 18 **jurisdiction, are binding on this Court.**

19 The interpretation of the Governor’s proclamation in *Zack* is binding on this
 20 Court. *See, e.g., Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (decisions by state
 21 courts with respect to state law “are binding on federal courts”); *Brown v. Ohio*,
 22 432 U.S. 161, 167 (1977) (state courts have final authority to interpret state
 23 action); *Garner v. Louisiana*, 368 U.S. 157, 169 (1961) (same); *see also Anderson*,
 24 293 F.2d at 467; *Wright v. Angelone*, 151 F.3d 151, 158 (4th Cir. 1998) (state court
 25 ruling “conclusively establishes” jurisdiction); *Chandler v. Armontrout*, 940 F.2d
 26

1 363, 366 (8th Cir. 1991) (federal courts “are bound by a state court’s conclusion
2 respecting jurisdiction”).

3 District Courts in the Ninth Circuit adhere to this universally accepted
4 principal. *See, e.g., Lewis v. Ryan*, No. CV-17-00220-PHX-JAT (BSB), 2017 WL
5 8787001, at *6 (D. Ariz. Sep. 22, 2017); *Smith v. Ryan*, No. CV-12-2031-PHX-
6 JAT (BSB), 2013 U.S. Dist. LEXIS 174079, at *17 n.6 (D. Ariz. Aug. 15, 2013)
7 (“Questions regarding a state court’s jurisdiction are matters of state law”);
8 *Patterson v. Ryan*, No. CV 08-655-PHX-SMM (HCE), 2010 WL 1193490, at *20
9 (D. Ariz. Feb. 22, 2010) (“issue of subject matter jurisdiction is a matter of state
10 law”).

11 Yakama Nation nevertheless asks this Court to ignore binding precedent
12 from the Washington courts and “limit its analysis to the Secretary of the Interior’s
13 acceptance and understanding of retroceded jurisdiction within the Yakama
14 Reservation when interpreting the scope of retrocession.” ECF No. 36 at 42. While
15 a federal agency’s interpretation of a statute with which it is charged with
16 administration may be given deference, no deference is given to an agency’s
17 construction of state law or of a state criminal statute. *See, e.g., Tijani v. Holder*,
18 628 F.3d 1071, 1079 (9th Cir. 2010). Because the scope of Governor Inslee’s
19 proclamation is squarely an issue of state criminal jurisdiction, the Secretary’s
20 understanding is immaterial.³⁰

21 Even if his opinion were relevant, the Secretary carefully and expressly
22 withheld any interpretation regarding the scope of Washington’s retroceded
23

24 ³⁰ The question here is not whether federal authorities are appropriately applying
25 assimilated state law. *See United States v. Kiliz*, 694 F.2d 628, 629 (9th Cir. 1982).
26 Rather, it is a determination as to whether *state* authorities are appropriately
asserting *state* criminal jurisdiction.

1 jurisdiction on the Yakama Nation reservation: “If a disagreement develops as to
 2 the scope of the retrocession, we are confident that courts will provide a definitive
 3 interpretation of the plain language of the Proclamation.” ECF No. 38 at 194. *Zack*
 4 has provided that interpretation.

5 Moreover, the Secretary’s letter is entirely consistent with *Zack*. It confirms
 6 that the Secretary’s decision was “nothing more than an acceptance of the State’s
 7 request for retrocession.” ECF No. 38 at 193. It recognizes that retrocession was
 8 “partial” and that the State gave up only “a portion” of what it had received under
 9 Public Law 280. *Id.* at 190. It also acknowledges that the State retained jurisdiction
 10 over tribal members for certain on-reservation offenses. *Id.* at 192.³¹ Each is utterly
 11 incompatible with the Nation’s argument that the “State did not retain any
 12 jurisdiction whenever an Indian is involved....” ECF No. 36 at 44.

13 The letter is also consistent with a July 27, 2018 legal opinion by the United
 14 States Office of Legal Counsel (OLC) prepared at the request of the Department of
 15 Interior. ECF No. 38 at 204. After seventeen pages of legal analysis, the opinion
 16 reaches the same conclusion as *Zack*: “under the proclamation making a partial
 17 retrocession, Washington has retained criminal jurisdiction over an offense on the
 18 Yakama Reservation when the defendant or the victim is a non-Indian, as well as
 19 when both are non-Indians.” ECF No. 38 at 220. While Yakama Nation asks the
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 21
 22

23 ³¹ The Secretary explained, “[f]ollowing retrocession, the State will no longer have
 24 jurisdiction over tribal members as to the offenses *for which retrocession has been*
 25 *granted.*” ECF No. 38 at 192 (emphasis added). Under the Nation’s interpretation,
 26 the State would no longer have criminal jurisdiction over tribal members *at all*. See
Zack, 413 P.3d at 69.

1 Court to ignore it, the OLC's memorandum opinion is both thorough and
 2 persuasive. *See Gonzales v. Oregon*, 546 U.S. 243, 268-69 (2006).³²

3 **C. A Preliminary Injunction Will Harm The Public Interest.**

4 The transfer of general criminal jurisdiction from the County to federal
 5 authorities would require significant, multi-department changes in a wide variety
 6 of law-enforcement protocols affecting how law-enforcement officers from
 7 Klickitat County interact with civilians as well as with other agencies. Songer
 8 Decl. at ¶8. Such changes would require design and implementation of new
 9 training regimes and intra-department policies and would likely compel
 10 community outreach programs to inform civilians of the jurisdictional shift. *Id.* at
 11 ¶9. Implementation of the new jurisdictional requirements would impose
 12 unworkable burdens on law enforcement, as criminal suspects are not required to
 13 self-identify as tribal at any point during the investigative or prosecutorial
 14 process.³³ *Id.* at ¶¶10-19.

15 In practice, the injunction requested by the Nation would force the County
 16 into an unconscionable "Catch 22": Either abandon its law-enforcement
 17 obligations on the reservation and in Tract D for the duration of this litigation in
 18 clear contradiction of state law, *see Zack*, 413 P.3d at 68, or continue to serve
 19

20
 21 ³² Yakama Nation prefers the Court rely on a two-page guidance memorandum
 22 lacking any substantive analysis. ECF No. 36 at 48. But that memorandum fails to
 23 meet even the most modest *Skidmore* requirements. *See Christensen v. Harris*
 24 *Cty.*, 529 U.S. 576, 587 (2000) (declining to give *Skidmore* deference to
 25 unpersuasive letter opinion).

26 ³³ This is particularly problematic because Yakama Nation refuses to produce a list
 of enrolled tribal members, despite the County's repeated request for such
 information. Quesnel Decl. at ¶6.

1 public safety at the risk of violating an injunction from this Court and incurring
2 civil liability. *See* Songer Decl. at ¶¶16-17; *see also, e.g.*, 42 U.S.C. § 1983.

3 This Court has denied preliminary injunctive relief “where the record
4 reflects that an injunction would alter policies that have long been followed” and
5 where “entry of a preliminary injunction could frustrate law enforcement by
6 inserting rigid, technical permission requirements into a landscape of vague and
7 shifting jurisdiction.” *Confederated Tribes & Bands of the Yakama Nation v.*
8 *Holder*, No. CV-11-3028-RMP, 2012 WL 893913, at *3 (E.D. Wash. Mar. 15,
9 2012). Here, just like in *Holder*, “public policy counsels against entering a
10 preliminary injunction” because it would necessarily hinder “the public’s strong
11 interest in the investigation of crime and apprehension of criminals.” *Id.*

12 In *Holder*, the Yakama Nation sought to enjoin county officers from
13 entering onto trust land to search or arrest enrolled tribal members. *See id.* at *1. In
14 analyzing the probable effect on the public, this Court found that “County officers
15 navigate a complicated terrain when investigating crimes because their authority
16 shifts depending on the status of land involved” and that “[t]he Nation’s proposed
17 solution that the County contact the auditor’s office to determine the tax status of a
18 parcel before entering the land appears to impose an impediment to effective law
19 enforcement.” *Id.* at *3.

20 Here, Klickitat County officers also navigate a complicated jurisdictional
21 landscape—attributed, in part, to the potential tribal status of defendants and
22 victims. The Nation’s “proposed solution” to “contact Yakama Nation law
23 enforcement or the federal government” each time “an Indian suspect needs to be
24 arrested, detained, or prosecuted” would undoubtedly “frustrate law enforcement
25 by inserting rigid, technical permission requirements into a landscape of vague and
26 shifting jurisdiction.” *Id.*; *see also* ECF No. 36 at 59. Just like the Court found in

1 *Holder*, an injunction here would only exacerbate the already complicated
2 workings of state law enforcement.

3 Indeed, the resulting changes to enforcement protocols necessitated by the
4 Nation's requested injunction would almost certainly put civilians at risk. For
5 example, after stopping an intoxicated driver, County law enforcement would be
6 forced to wait for tribal or federal authorities or allow the inebriated suspect to
7 return to the road. The same would be true when County officers engage suspects
8 who pose a physical danger to bystanders. The potential scenarios are limitless.

9 The County simply does not have the resources to sit idly by while waiting
10 for tribal and/or federal enforcement authorities to arrive, especially since the
11 resources of those agencies within Tract D are even more limited or non-existent.
12 If tribal and/or federal officers are not available, the County would be forced to
13 release suspects – including potentially dangerous suspects – back into the public.
14 Prohibiting the County from detaining these and other suspects, even over the short
15 term, may have significant consequences.

16 Further exacerbating these concerns are pre-existing demands on the
17 Yakama Nation's public safety resources in areas that are indisputably within the
18 reservation. Less than one year ago, the Yakama Nation officially declared a
19 "Public Safety Crisis" to address "rampant crime" on the reservation. *See* Ex. H to
20 Weythman Decl. Citing "an epidemic of drug use, plague of criminal activity,
21 disregard for the rule of law and general civil unrest," the Nation passed tribal
22 resolution T-057-18, which implements emergency law-enforcement mechanisms
23 including enhanced criminal penalties, mandatory curfews, and banishment from
24 the tribe, among others. *Id.* The resolution pleads for greater *state* enforcement
25 within reservation boundaries, based on the State "owing a duty to protect and
26 serve all citizens of the State of Washington, Native and non-Native." *Id.*

1 In light of the dire situation currently plaguing the Yakama Nation, the
 2 reservation needs *more* enforcement resources within recognized boundaries, not
 3 additional responsibilities within disputed areas. The injunction sought in this
 4 litigation would only further reduce law-enforcement presence and exacerbate the
 5 public safety crisis facing the Nation. Even assuming the public has an interest in
 6 tribal self-government and self-determination, *see* ECF No. 36 at 59, such interests
 7 cannot overcome the significant, real-world consequences of an injunction on
 8 reservation residents as well as on those who live in Tract D.

9 Furthermore, Tract D has been populated by non-Indians for over a century;
 10 Klickitat County's population is over 94-percent non-Indian.³⁴ As the United States
 11 Supreme Court has recognized, "jurisdictional history" and "the current population
 12 situation . . . demonstrat[e] a practical acknowledgment" of reservation
 13 diminishment such that a jurisdictional shift "would seriously disrupt the justifiable
 14 expectations of the people living in the area." *City of Sherrill*, 544 U.S. at 215
 15 (quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994)). "[T]he longstanding
 16 assumption of jurisdiction by the State over an area that is over 90% non-Indian,
 17 both in population and in land use," may create "justifiable expectations"
 18 precluding the exercise of tribal jurisdiction. *Id.* (quoting *Rosebud Sioux Tribe v.*
 19 *Kneip*, 430 U.S. 584, 604-605 (1977)).

20 **D. The Balance Of Hardships Disfavors A Preliminary Injunction.**

21 As outlined above, the requested injunction will require County law
 22 enforcement to completely revise its enforcement protocols overnight and force the
 23

24 ³⁴ *See* 2010 Census, available at
 25 [https://www.census.gov/quickfacts/fact/table/klickitatcountywashington,wa/PST04](https://www.census.gov/quickfacts/fact/table/klickitatcountywashington,wa/PST045217)
 26 [5217](https://www.census.gov/quickfacts/fact/table/klickitatcountywashington,wa/PST045217).

1 County to decide between following binding state law or an order of this Court. It
2 will also put the public at risk during a time of serious criminal activity.

3 While the Yakama Nation certainly values its sovereignty, it points to no
4 public safety concerns in the absence of injunction; nor does it identify any real,
5 immediate, or demonstrable harm that will result by maintaining the *status quo*
6 during the pendency of this litigation. As such, the balance of the equities strongly
7 weighs against injunction.

8 Moreover, Yakama Nation provides no evidence demonstrating how it
9 intends to implement the drastic jurisdictional shift required under its proposed
10 injunction or whether the federal government is prepared, or even willing, to
11 assume additional jurisdictional responsibilities. Indeed, Yakama Nation
12 completely disregards the impacts to federal law-enforcement operations that will
13 necessarily result from its requested injunction.

14 **V. CONCLUSION**

15 For the reasons explained above, Defendants respectfully request that the
16 Court deny the requested injunction.

17 Respectfully submitted this 18th day of January, 2019.
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OPPOSITION TO PLAINTIFF'S MOTION FOR
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Case No. 1:17-cv-03192-TOR

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2019, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which automatically generated a Notice of Electronic Filing (“NEF”) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice. All parties are registered users of the CM/ECF system.

DATED this 18th day of January, 2019.

s/ Jan Howell

Jan Howell, Legal Assistant