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

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

Plaintiff,

v.

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

Defendants.

Case No.: 1:17-cv-03192

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

Date: February 15, 2019
With Oral Argument: 10:00 am
Hearing Location: Yakima, WA
Judge: Chief Judge Thomas O. Rice

I. INTRODUCTION

Treaty canons of construction dictate that the Treaty of 1855 must be interpreted as the Yakamas understood it. Yakamas understood the Treaty as including Tract D within the Yakama Reservation. Article II of the Treaty and the Treaty minutes show that the Yakama Reservation's western boundary must at the very least extend south and east of Mt. Adams on the crest of the Cascades. The only boundary offered by the parties that satisfies this Treaty language is the boundary that includes Tract D.

Statutory canons of construction require that the Act of December 21, 1904, be construed liberally in the Yakama Nation's favor, with any ambiguities resolved to their benefit. The 1904 Act is a type of surplus lands act that federal courts have consistently found not to diminish reservation boundaries. While the 1904 Act references the Barnard Report, it expressly qualifies that its boundaries only apply "for purposes of this Act . . ." The Act did not diminish or expand the Yakama Reservation boundaries.

In Response, Defendants contrive a legal and factual universe that does not exist. Defendants do not take on the applicable canons of construction or argue within the well-established reservation diminishment case law. They consistently mischaracterize the precedent upon which they rely, and offer a history of the Yakama Reservation where the Yakama Nation's perspective is absent or defined by third party non-Indians. There are also remarkable inconsistencies in their arguments. Defendants assert that the Reservation does not extend south of the 46th parallel, but they rely on surveys that extend the Reservation boundary south of the 46th parallel. They argue the 1904 Act diminished the Reservation to the lesser Barnard boundary lines, but they concede lands outside these lines are

1 Yakama Reservation lands. Defendants insult Yakama Elders, while relying on a
 2 non-Indian's recollection of Yakama Elders' words. The Yakama Nation met its
 3 burden to establish the Treaty includes Tract D within the Yakama Reservation, and
 4 Defendants have failed to prove that Congress changed those boundaries.

5 Defendants no longer have criminal jurisdiction over Indians within the
 6 Yakama Reservation after the United States accepted the State's retrocession of
 7 Pub. L. 83-280 criminal jurisdiction. The scope of this retroceded jurisdiction is a
 8 federal question. It involves a federal Treaty, associated federal laws, and federal
 9 resumption of federal jurisdiction in Indian Country. This Court is not constrained
 10 by the flawed reasoning of the Washington State Court of Appeals in *State v. Zack*,
 11 which even Defendants contradict. Yakama Nation has met the *Winter* elements
 12 required for issuance of preliminary injunctive relief, including the requisite
 13 showing of a likelihood of success on the merits, irreparable harm, and establishing
 14 that injunctive relief is in the public interest and the balance of equities tips in
 15 favor of the Yakama Nation.

16 II. PRELIMINARY INJUNCTION STANDARD

17 The Yakama Nation seeks a preliminary injunction to maintain the status quo
 18 that Tract D is within the Yakama Reservation, and that Defendants have no
 19 jurisdiction over crimes on the Yakama Reservation involving Indians. Defendants
 20 attempt to transform Yakama Nation's request for a prohibitory injunction into a
 21 request for a mandatory injunction, thereby imposing a heightened burden. ECF
 22 No. 49 at 31. Injunctions to address constitutional violations—such as violations of
 23 the Treaty of 1855, the supreme law of the land under the Supremacy Clause of the
 24 United States Constitution—are a “classic form of prohibitory injunction.”
 25 *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017). Even if the Yakama
 26

1 Nation were seeking an injunction that is mandatory rather than prohibitory, the
 2 Yakama Nation meets both the burden for prohibitory injunctions and the
 3 heightened burden for mandatory injunctions here.

4 To obtain a mandatory injunction, the moving party must show that
 5 “‘extreme or very serious damage will result’ . . . that is not ‘capable of
 6 compensation in damages,’ and the merits of the case are not ‘doubtful.’” *Id.* at 999
 7 (internal citations omitted). The Ninth Circuit found the mandatory injunction
 8 standard to be satisfied in cases of unlawful exercises of criminal jurisdiction,
 9 which is inherently not compensable. *Id.* The Tenth Circuit has described
 10 violations of Native sovereignty by the *ultra vires* exercise of criminal jurisdiction
 11 in Indian Country as “harm to tribal sovereignty” that is “perhaps as serious as any
 12 to come our way in a long time.” *Ute Indian Tribe of the Uintah & Ouray*
 13 *Reservation v. Utah*, 790 F.3d 1000, 1005 (10th Cir. 2015).

14 The Yakama Nation is seeking an injunction to prevent further harm to its
 15 sovereignty by Defendants’ *ultra vires* exercise of criminal jurisdiction over crimes
 16 involving Indians within the Yakama Reservation, which is harm federal courts
 17 have found to be very serious, and such harm is not compensable. Because of this,
 18 and the showing that the Yakama Nation is likely to succeed on the merits of both
 19 its Reservation boundary claim and retrocession claim, the public interest
 20 promoting Yakama self-government, and the balance of equities tipping in the
 21 Yakama Nation’s favor, the Yakama Nation has met its burden for injunctive relief.

22 III. ARGUMENT

23 **A. The Yakama Nation is likely to succeed on the merits of its claim that**
 24 **the Treaty of 1855 included Tract D in the Yakama Reservation, and**
 25 **Congress has not acted to diminish the Yakama Reservation.**
 26

1 When considering the Yakama Reservation boundaries, the Court should (1)
 2 analyze the Treaty's inclusion of Tract D in the Reservation, and upon making
 3 such a finding, (2) determine whether Congress acted with clear intent to diminish
 4 the Yakama Reservation using the well-established *Solem* factors. Defendants ad-
 5 mit that they carry the burden to prove that the Yakama Reservation was dimin-
 6 ished by Act of Congress. ECF 49 at 38 (citing *Oneida Nation v. Village of Ho-*
 7 *bart*, 2017 U.S. Dist. LEXIS 174662 (E.D. Wis. 2017). Diminishment should not
 8 be lightly inferred. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Congressional in-
 9 tent to diminish a reservation must be explicit, with any ambiguities resolved in the
 10 Yakama Nation's favor. *Hagen v. Utah*, 510 U.S. 399, 437 (1994). Under *Solem*,
 11 courts analyze Congressional intent by reviewing (1) the text of the statute, (2) the
 12 historical context for the statute, and (3) unequivocal evidence of subsequent
 13 treatment of the disputed lands. *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016).
 14 Evidence under the third *Solem* factor is the least compelling evidence of Congres-
 15 sional intent. *Id.* at 1082.

16 Applying this framework here, and in consideration of applicable federal In-
 17 dian law canons of Treaty construction and statutory construction, the Yakama
 18 Reservation has included Tract D since its establishment and the Act of 1904 did
 19 not diminish Reservation boundaries. Defendants' significant focus on evidence
 20 going to the third *Solem* factor—which strongly supports the Yakama Nation's
 21 claims in any event—is inapposite.

22 **1. Well-established federal Indian law canons of Treaty construction**
 23 **support Yakama Nation's understanding that it reserved Tract D**
 24 **as part of the Yakama Reservation within the Treaty of 1855.**

25 When interpreting Indian treaties, courts construe the terms “in the sense in
 26 which they would naturally be understood by the Indians.” *Jones v. Meehan*, 175

1 U.S. 1, 11 (1899). Any ambiguities should be “resolved from the standpoint of the
 2 Indians.” *Winters v. United States*, 207 U.S. 564, 576 (1908). These federal Indian
 3 law canons of Treaty interpretation “are rooted in the unique trust relationship be-
 4 tween the United States and the Indians.” *County of Oneida v. Oneida Indian Na-*
 5 *tion*, 470 U.S. 226, 247 (1985). They ensure that Native Nations receive the benefit
 6 of their bargain in these inherently coercive transactions. *See, e.g., United States v.*
 7 *Winans*, 198 U.S. 371, 380-81 (1905).

8 The Treaty canons also account for the significant linguistic and cultural bar-
 9 riers to tribal understanding of the Treaty language drafted by federal officials.
 10 *Jones*, 175 U.S. at 10-11. Treaties “must therefore be construed, not according to
 11 the technical meaning of its words to learned lawyers, but in the sense in which
 12 they would naturally be understood by the Indians.” *Washington v. Washington*
 13 *State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676 (1979).
 14 Thus, courts must look “beyond the written words to the larger context that frames
 15 the Treaty, including ‘the history of the treaty, the negotiations, and the practical
 16 construction adopted by the parties.’” *Minnesota v. Mille Lacs Band of Chippewa*
 17 *Indians*, 526 U.S. 172, 196 (1999) (internal citations omitted).

18 Applying these Treaty canons to Article II of the Treaty of 1855, Tract D has
 19 been within the exterior boundaries of the Yakama Reservation since the Treaty
 20 was signed. Yakamas had no written language in 1855, so Yakama leaders natural-
 21 ly focused on what Governor Stevens said during the Treaty Council rather than
 22 what was written. Fisher Aff. Ex. A, at 22. With the aid of the Treaty Map, Gover-
 23 nor Stevens verbally described the relevant boundary as “down the main chain of
 24 the Cascade Mountains south of Mt. Adams . . .” Fisher Aff. Ex. A, at 21. The
 25 Treaty Map depicts the western Reservation boundary extending south of Mt. Ad-
 26

ams. ECF No. 39 at 19. Yakamas lacked familiarity with European cartographic techniques, but they possessed a deep, practical knowledge of the geography within and surrounding Tract D. Fisher Aff. Ex. A, at 19. Yakamas understood that Tract D was within the Yakama Reservation.¹ Fisher Aff. Ex. A, at 29-30.

The plain language of the Treaty should be construed consistent with this Yakama understanding.² Article II requires that the Reservation boundary extend “southerly along the main ridge of said mountains, passing south and east of Mount Adams . . .” ECF No. 38 at 9. This language establishes a western boundary extending along the crest of the Cascades south and east of Mt. Adams. The only boundary offered by any party to this dispute that meets this Treaty call is the boundary around Tract D. *See* ECF No. 49 at 21 (Defendants’ map³ showing the

¹ This Yakama understanding is supported by the Yakama Nation’s consistent objections concerning Reservation boundaries. Since before the Schwartz survey in 1890, Yakamas consistently objected to erroneous Reservation boundaries until the ICC’s 1966 confirmation that Tract D is within the Yakama Reservation. Fisher Aff. Ex. A, at 23, 29, 30-31, 32, 33, 39, 42, 46, 51, 54, 57, 60, 62, 68.

² Defendants also argue that Article II of the Treaty requires surveys to set the Reservation boundaries, but they do not quote the relevant language in full which conditions the surveys on necessity. ECF No. 49 at 31. Article II provides the Reservation should be “set apart, and, so far as necessary, surveyed and marked out . . .” Treaty, Art. II. The plain language of the Treaty does not require surveys.

³ Defendants and their Expert cite a U.S. Geological Survey Report as the source for their map, but the U.S. Geological Survey’s map **extends the red Reservation Boundary line around Tract D** consistent with the Yakama Nation’s arguments here. *Compare* ECF 49 at 21, *with* Jones Decl., Ex. A (February 1, 2019). Defend-

1 erroneous Schwartz, Barnard, and Pecore survey lines, none of which extend south
2 and east of Mt. Adams on the crest of the Cascades).⁴

3 Defendants' argument that the Treaty Map's gap between the 46th parallel
4 and the southern Reservation boundary signals an intent by the United States not to
5 include Tract D in the Reservation is unpersuasive and inconsistent. ECF No. 49 at
6 45. Defendants offer no evidence that Yakamas understood latitude, longitude, or
7 the 46th parallel, and do not explain why the Treaty canons and the Yakama under-
8 standing should be ignored on this account. *See* ECF No. 49. Their argument also
9 assumes cartographic perfection in the Treaty Map, but they offer no explanation
10 for the many other inaccuracies in the Treaty Map. *See id.*; ECF 39 at 19 (for ex-
11 ample, Gov. Stevens erroneously placed Mt. St. Helens significantly north of Mt.
12 Adams, when in fact it is south of Mt. Adams). Defendants contradict themselves
13 by conceding that Grayback Mountain, which is located south of the 46th parallel,
14 has been within the Yakama Reservation since before the Act of December 21,
15 1904. ECF No. 49 at 19, 20, 21, 24, 25, 40, 41; Jones Decl. Ex. B (U.S. Geological
16 Survey map depicting Grayback Mountain south of the 46th parallel). They also

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18 ants and their Expert significantly altered the map for their own purposes. *Id.* De-
19 fendants' map is **not** a U.S. Geological Survey map.

20 ⁴ Defendants do not clearly identify which southwestern Reservation boundary they
21 are advocating for. They cannot argue for the lesser Barnard line without also re-
22 futing that the Reservation Boundaries include Tract C to the north, significant
23 acreage between the western Barnard line and the crest of the Cascades, and the
24 portion of Tract D addressed in Executive Order 11670. Confusingly, Defendants'
25 own map recognizes all of these areas as within the Reservation, which is in direct
26 conflict with any claim for the lesser Barnard line. ECF 49 at 21.

1 cite the Berry & Lodge Survey and Barnard Report without dispute, but both place
2 most of the Reservation's southern boundary south of the 46th parallel. ECF 49 at
3 10-12.

4 Defendants also offer no compelling evidence to support their argument that
5 Governor Stevens had a well-developed understanding of the topography of the
6 Yakama Reservation boundaries prior to negotiating the Treaty of 1855, or that the
7 railroad maps that Defendants' attribute to Governor Stevens without any evidence
8 were at the Walla Walla Treaty Council or played any role in the negotiations. ECF
9 No. 49 at 43. Both the United States Supreme Court and United States Court of
10 Claims have highlighted Governor Stevens' imperfect knowledge of the area, as
11 demonstrated by the geographical errors in Article II of the Treaty and his 1857
12 White Swan map. *N. P. R. Co. v. United States*, 227 U.S. 355, 362-63 (1913); *Ya-*
13 *kima Tribe v. United States*, 158 Ct. Cl. 672, 692 (1962).

14 Defendants ignore the Treaty canons in their brief. They attempt to under-
15 mine the Yakama Nation's use of the Treaty canons—without ever meaningfully
16 referencing the canons—by citing *Confederated Bands of Ute Indians v. United*
17 *States*, 330 U.S. 169 (1947), to argue that courts cannot hold that Indians owned
18 lands “merely because [the Indians] thought so.” ECF No. 49 at 40. In *Ute Indians*,
19 the only relevant inquiry before the Court was whether the federal government in-
20 tended through its various actions to provide the Ute Nation with a compensable
21 interest in certain diminished lands, which is not an inquiry subject to the Treaty
22 canons. *Ute Indians*, 330 U.S. at 175-76. In contrast, the Treaty canons are clearly
23 applicable to an interpretation of Article II of the Treaty of 1855.

24 In addition to ignoring the Treaty canons of construction, Defendants insult
25 and challenge the veracity of Yakama Elder testimony. Defendants cite *Lower*
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1 *Elwha Band of S'Klallams v. Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000),
2 *United States v. Lummi Indian Tribe*, 841 F.2d 317 (9th Cir. 1988), and *Cheme-*
3 *huevi Indian Tribe v. McMahon*, 2017 U.S. Dist. LEXIS 143446 (C.D. Cal. 2017)
4 to argue that the Court should treat elder testimony with skepticism and that such
5 testimony is inadmissible. ECF No. 49 at 39-40. The Ninth Circuit made no such
6 determination in *Lower Elwha* and *Lummi*, and *Chemehuevi* deemed testimony of a
7 **non-Indian** federal employee who related information provided by tribal members
8 concerning reservation boundaries to be inadmissible. *Lower Elwha*, 235 F.3d at
9 451 (guessing as to why a prior Court ruled consistent with an expert witness ra-
10 ther than an elder); *Lummi Indian Tribe*, 841 F.2d at 319 (expressly relying on el-
11 der testimony that is consistent with the record); *Chemehuevi*, 2017 U.S. Dist.
12 LEXIS 143446 at *20-21; *see also United States v. Washington*, 384 F. Supp. 312,
13 379 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975) (determining that
14 Yakama Elder testimony concerning the Yakamas' understanding of the Treaty
15 was both reasonable and credible).

16 Defendants' attack on Yakama Elder testimony and use of *Chemehuevi* is
17 inconsistent with their significant reliance on the supposed statements of Chief
18 Spencer and Stick Joe. ECF No. 49 at 20, 40. Defendants only evidence that attrib-
19 utes statements to Chief Spencer and Stick Joe was written by Barnard, a non-
20 Indian federal employee. *Id.* Under *Chemehuevi*, such evidence is likely inadmissi-
21 ble. 2017 U.S. Dist. LEXIS 143446 at *20-21. Even if such evidence survived the
22 scrutiny required by *Chemehuevi*, statements attributed to Chief Spencer and Stick
23 Joe were merely recounting statements that unnamed non-Indian federal employees
24 told them decades earlier. Fisher Aff. Ex. A, at 35, 37. Defendants have offered no
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1 legal argument for why the unnamed non-Indian federal employees they ‘quote’
 2 were authorized to change Reservation boundaries. *See* ECF No. 49.

3 **2. The Act of December 21, 1904, did not diminish the Yakama**
 4 **Reservation.**

5 The federal Indian law canons of statutory construction require that statutes
 6 be construed liberally in favor of the Indians, with ambiguous provisions interpret-
 7 ed to their benefit. *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712,
 8 729 (9th Cir. 2003). This statutory canon is consistent with reservation diminish-
 9 ment case law, which requires that Congressional intent to diminish a reservation
 10 must be clearly expressed, with any ambiguities resolved in the Native Nation’s
 11 favor. *Hagen*, 510 U.S. at 437. Defendants ignore these statutory canons, misrepres-
 12 sent the 1904 Act, and mischaracterize the precedent upon which they rely.

13 The Act of December 21, 1904, is a surplus lands act that “‘merely opened
 14 reservation land to settlement and provided that the uncertain future proceeds of
 15 settler purchases should be applied to the Indians’ benefit.’” *See, e.g., Nebraska*,
 16 136 S. Ct. at 1079-80 (quoting *DeCoteau v. Dist. Ct. for Tenth Judicial Dist.*,
 17 420 U.S. 425, 448 (1975)). “Such schemes allow ‘non-Indian settlers to own land
 18 on the Reservation’ . . . [b]ut in doing so, they do not diminish reservation bounda-
 19 ries.” *Id.* (internal citations omitted). The 1904 Act’s express purpose is “merely to
 20 have the United States act as trustee for said Indians in the disposition and sales of
 21 said lands and to expend or pay over to them the proceeds derived from the sales as
 22 herein provided.” 33 Stat. 595, 598. The 1904 Act acknowledges the lesser Bar-
 23 nard Report as the boundaries within which the surplus land sales would occur, but
 24 expressly qualifies that the Barnard Report would only apply “for the purposes of
 25 this Act . . .” *Id.* at 596. The 1904 Act did not clearly diminish the Yakama Reser-
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1 vation, and should the Court find the 1904 Act to be ambiguous, the federal Indian
2 law canons of statutory construction and the reservation diminishment legal
3 framework require that such ambiguities be interpreted to the Yakama Nation's
4 benefit. *Norton*, 353 F.3d at 729; *Hagen*, 510 U.S. at 437.

5 Despite the 1904 Act's plain language and the applicable statutory canons,
6 Defendants characterize the Act as ceding land from the Yakama Nation to the
7 United States in return for compensation. ECF 49 at 46. This is not true given the
8 plain language of the Act and the holdings of other reservation diminishment cases.
9 The United States Supreme Court has found certain language in surplus lands acts
10 to be common textual indications of Congressional intent to diminish. *Nebraska*,
11 136 S. Ct. at 1079. Explicit references to cession, language evidencing the present
12 and total surrender of tribal interests, the total surrender of tribal claims in ex-
13 change for a fixed payment, and restoration of reservation lands to the public do-
14 main, have all been found to support Congressional intent to diminish. *Id.* The
15 1904 Act has none of these diminishment hallmarks. 33 Stat. 595. It never uses the
16 words 'cede' or 'cession,' there is no total surrender of the Yakama Nation's inter-
17 ests in the land, there is no discussion of fixed payments or sums certain, and the
18 land was not returned to the 'public domain.' *Id.* Defendants fail to cite a single
19 case with comparable facts where federal courts have found Congressional intent
20 to diminish.

21 Instead, Defendants mischaracterize the precedent upon which they rely to
22 fabricate a false reservation diminishment framework. Defendants cite *Solem*, to
23 argue that Congress need only intend "to *change* boundaries" to diminish a reser-
24 vation. ECF No. 49 at 47 (emphasis added by Defendants). In fact, the full quote
25 reads: "Diminishment, moreover, **will not be lightly inferred**. Our analysis of sur-
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1 plus land Acts requires that Congress **clearly evince** an ‘intent . . . to change . . .
2 boundaries’ before diminishment will be found.” *Solem*, 465 U.S. at 470 (emphasis
3 added) (internal citations omitted). The United States Supreme Court reiterates this
4 proposition two paragraphs later, stating “[w]hen both an Act and its legislative
5 history fail to provide substantial and compelling evidence of a congressional in-
6 tention to diminish Indian lands, we are bound . . . to rule that diminishment did
7 not take place” *Solem*, 465 U.S. at 472. *Solem* requires substantially more
8 than an inkling of intent to find that reservation boundaries were diminished.

9 Defendants cite the syllabus of *Nebraska v. Parker*, to argue that courts can
10 deprive Native Nations of civil and criminal jurisdiction based solely on equitable
11 principles even if the reservation is not diminished. ECF No. 49 at 46. There is no
12 plausible reading of *Nebraska* that leads to this conclusion. In fact, the United
13 States Supreme Court expressly declined to reach the equitable principles issue
14 therein. *Nebraska*, 136 S. Ct. at 1082. Defendants try to support this inaccurate
15 statement of law by citing *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197
16 (2005), but that case dealt with a non-Indian jurisdiction’s ability to tax Oneida-
17 owned fee property within its aboriginal lands in New York. Response Br. at 36.
18 The United States Supreme Court does not apply equitable principles to deny Na-
19 tive jurisdiction within an established reservation in *City of Sherrill*. 544 U.S. 197.

20 Defendants’ reliance upon *United States v. Creek Nation*, 295 U.S. 103
21 (1935), to argue that Congress can diminish reservation boundaries based on erro-
22 neous information is similarly misplaced. ECF No. 49 at 47. *Creek Nation* is not a
23 reservation diminishment case and does not stand for this proposition. 295 U.S.
24 103. In *Creek Nation*, the issue was one of land ownership, not jurisdiction. *Id.* at
25 105. Reservation diminishment was not discussed.

Defendants cite *United States v. S. Pac. Transp. Co.*, 543 F.2d 676 (9th Cir. 1976) to argue that when Congress uses language of “addition” or “adding” to change reservation boundaries, it suggests that the land was not formerly part of a given reservation. ECF No. 49 at 48. Defendants ignore the fact that Walker River Paiute Tribe’s Reservation was previously diminished by Congressional Act before a second Congressional Act used “addition” language to restore reservation boundaries. *S. Pac. Transp. Co.*, 543 F.2d at 696. As the Ninth Circuit explained, if Congress diminishes a reservation and then restores the previously diminished reservation boundaries, that is evidence that the first Congressional Act diminished the reservation. *Id.* *S. Pac. Transp. Co.* does not stand for the proposition for which Defendants offered it, and it has no immediate relevancy to the present case.

Defendants then offer three statutory construction cases in an apparent attempt to ignore the well-established statutory construction framework applicable in reservation boundary disputes. ECF No. 49 at 49 (*citing Meruelo Maddux Props.-760 S. Hill St., LLC v. Bank of Am., N.A.*, 667 F.3d 1072 (9th Cir. 2012); *Anderson v. Wilson*, 289 U.S. 20 (1933); *Stratman v. Lesnoi, Inc.*, 545 F.3d 1161 (2008)). None of the cited cases address reservation boundary disputes or apply the applicable federal Indian canons of statutory construction. *See, e.g., id.*

Applying the reservation diminishment framework to the 1904 Act, the 1904 Act did not diminish the Yakama Reservation. Defendants have not identified any other Congressional actions that diminish the Yakama Reservation.⁵ As a result,

⁵ Defendants’ argument that Congressional intent to diminish in the 1904 Act can be discerned from Congress’s subsequent failure to pass legislation allowing Yakama claims for the federal taking of ownership of Reservation lands is wholly unsupported by the precedent they cite. Defendants rely on *Bob Jones Univ. v.*

1 the Yakama Nation's boundaries are the same today as they were when negotiated
2 in 1855, and those boundaries include Tract D.

3 **B. The Yakama Nation is likely to succeed on the merits of its claim that**
4 **Klickitat County is violating Yakama Nation's sovereignty by**
5 **exercising criminal jurisdiction over Indians within the Yakama**
6 **Reservation.**

7 The federal Indian law canons of statutory and Treaty construction apply to
8 the retrocession analysis as well. "[T]raditional notions of Indian self-government
9 are so deeply engrained in our jurisprudence that they have provided an important
10 'backdrop,' against which vague or ambiguous federal enactments must always be
11 measured Ambiguities in federal law have been construed generously in order
12 to comport with these traditional notions of sovereignty and with the federal policy
13 of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*,
14 448 U.S. 136, 143–44 (1980). In this case, to the extent 25 U.S.C. 1323 and any
15 federal action taken thereunder is deemed ambiguous, such ambiguities should be
16 construed to return jurisdiction back to the federal government to promote tribal

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18 *United States*, 461 U.S. 574 (1983) and *Guardians Ass'n v. Civil Serv. Comm'n*,
19 463 U.S. 582 (1983), ECF No. 49 at 50, but these cases actually state that Congress-
20 sional inaction is not a useful tool for understanding Congressional intent, unless
21 the nonaction is significant (i.e. in *Bob Jones* there were 13 bills introduced over a
22 12 year period that never left Congressional Committee) or where an agency inter-
23 prets high profile legislation (i.e. the Civil Rights Act in *Guardians Ass'n*) and
24 Congress knows about the interpretation and does nothing for years to change it.
25 461 U.S. at 600; 463 U.S. at 620-21. Defendants fail to prove that either of these
26 exceptions apply to the present case.

1 sovereignty and the federal policy of encouraging tribal independence.⁶

2 Defendants avoid discussing the numerous federal issues implicated in this
3 lawsuit: (1) the Treaty, ratified by the United States before Washington State or
4 Klickitat County existed; (2) the enactment of Public Law 280 (Pub. L. 83-280);
5 (3) the amendment of Pub. L. 83-280 permitting retrocession of jurisdiction from
6 federal to state government (25 U.S.C. 1323); (4) the United States' acceptance of
7 retroceded jurisdiction from the State, which was effectuated by a federal officer
8 working under authority delegated by the President of the United States; and (5)
9 the source of this dispute being federal Indian Country. The Defendants argue that
10 the legal dispute springing from these federal laws and federal actions must be
11 governed by state law. Defendants' argument should be rejected for lack of
12 authoritative support. The federal common law Defendants cite is inapposite and
13 unrelated to the central issue before this Court on retrocession.

14 Defendants rely on *Tyndall* to argue that the scope of retroceded jurisdiction
15 is exclusively a matter of state law. ECF. No. 49 at 59. The full quote from the
16 *Tyndall* case tells a different story:

17 “The validity of the retrocession is a question of federal
18 law and has already been confirmed by federal courts.
19 However, the substance of what Nebraska retroceded, **or**
20 **more specifically, what Nebraska did with the**

21 ⁶ Defendants' public interest argument, ECF No. 49 at 64-65, discounts the Yaka-
22 ma Nation Police Department's presence within the Yakama Reservation. Yakama
23 Nation has successfully worked with federal and local law enforcement to address
24 Reservation public safety and stands ready to continue working with Defendants.
25 Jones Decl. Ex. C. Defendants' disagreement with retrocession is not a legally-
26 valid reason to upend applicable federal law and the jurisdictional status quo.

1 **criminal cases pending in its courts**, is a question of
2 state law.”

3 *Tyndall*, 840 F.2d at 618 (emphasis added). Tyndall was an Omaha Member
4 convicted on October 15, 1970, for crimes committed on the Omaha Reservation.
5 He was sentenced in state court on October 26, 1970, one day after the state
6 retroceded jurisdiction over the Omaha Indian Tribe’s Reservation. *Id.* The Eighth
7 Circuit determined that Nebraska’s actions with respect to criminal cases over
8 which it had jurisdiction “**pending in its courts**, is a question of state law.” *Id.*
9 (emphasis added). By contrast, the issue here is whether Defendants have any
10 remaining jurisdiction over crimes arising *after* retrocession takes effect. The
11 alleged crimes at issue in this case occurred after the federal government
12 reassumed its jurisdiction in accordance with the plain language of the State’s
13 retrocession proclamation. ECF No. 36 at 21-22. *Tyndall* does not support
14 Defendants’ position.

15 Defendants allege that *United States v. Brown*, 334 F. Supp. 536 (D. Neb.
16 1971), and *Omaha Tribe of Neb. v. Walthill*, 334 F. Supp. 823 (D. Neb. 1971), deal
17 with validity of retrocession as distinct from questions related to the scope of
18 federally reassumed jurisdiction. ECF No. 49 at 59. *Brown* and *Walthill* do involve
19 validity of a state’s retrocession proclamation, but these two cases stand for the
20 proposition that the laws involved here strongly favor federal jurisdiction. *Pueblo*
21 *of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1296 (D.C. N.M. 1996) (citing *Brown*,
22 334 F. Supp. at 540 (“triggering event [for retrocession] could have been devoid of
23 any mention of state action at all”), and *Walthill*, 334 F. Supp. at 834 (policy and
24 intent of retrocession statute “strongly favors federal jurisdiction”)). Defendants
25 cite no authority dictating that disputes regarding federal jurisdiction reassumed by
26

1 the federal government under federal retrocession law are decided exclusively by
2 state courts and state law.

3 The intent of retrocession was “to permit the United States to regain
4 jurisdiction over civil and criminal causes of action involving Indians on their
5 reservations.” *Id.* The decades-old rule that retrocession is valid even if it violates
6 state law or a state’s constitution should apply with equal force to determining
7 what jurisdiction *the federal government has reassumed*—namely that “federal
8 officials must be able to rely on a facially valid act of the state” and can’t be left to
9 “delve into issues of state law,” after retrocession when either the validity of
10 retrocession is questioned or, as in this case, its scope is disputed. See *Pueblo of*
11 *Santa Ana*, 932 F. Supp. at 1295.

12 Defendants also inaccurately describe the *Walthill* decision, claiming that
13 “the *scope* of what the state had retroceded was never at issue” in *Walthill*. ECF
14 No. 49 at 59. This is not correct. While the validity of the retrocession under state
15 law was in dispute in *Walthill*, the scope of what the federal government
16 accepted—which was different than what the state offered—was also in dispute.
17 *Walthil*, 460 F.2d at 1328 (the federal government had “accepted the state’s
18 retrocession as to the Omaha Indian Reservation, but not the Winnebago Indian
19 Reservation”). “This partial acceptance of Indian reservations in Thurston County
20 [i.e, the scope of retrocession the federal government accepted] precipitated this
21 controversy.” *Id.* Contrary to Defendants’ assertions, therefore, *Walthill* went
22 beyond validity and dealt with the scope of retrocession and found that to be a
23 proper federal question.

24 The Washington State Court of Appeals in *State v. Zack* ignored the
25 application of federal law, canons of construction regarding statutes impacting
26

1 tribal rights, federal agency deference, and the federal government's own
2 determinations regarding the scope of Washington State's retrocession.⁷ 2 Wn.
3 App. 2d 667 (2018). A state court's interpretation of what is primarily a federal
4 issue does not control this Court's analysis. *United States v. Kiliz*, 694 F.2d 628,
5 629 (9th Cir. 1982) (federal courts are not bound by state court's interpretation of
6 state laws incorporated under the Assimilative Crimes Act, 18 U.S.C. §§ 7, 13).⁸

7 Defendants cite to several cases for the proposition that this Court is bound
8 by *State v. Zack*. ECF No. 49 at 62. None of the cited cases concern the topic at
9 hand, and reliance on them misapprehends the central issue here—exercise of state
10 jurisdiction in Indian Country after the federal government accepts a state's
11 retrocession pursuant to federal law. Defendants also cite to a number of non-
12 binding district court decisions and even a "Report and Recommendation" (i.e., not
13 a decision), all of which arise from habeas corpus cases and all of which follow
14 specific black letter law in habeas corpus jurisprudence that state jurisdiction under
15 state laws is a state-law question. ECF No. 49 at 62-63. These cases have no
16 bearing here. See *Ute Indian Tribe*, 790 F.3d 1000 (state jurisdiction over Indians
17 in Indian Country was a federal question).⁹

18
19 ⁷ Defendants concede that the state court's analysis in *Zack* is flawed. ECF No. 49
20 at 30 fn. 14.

21 ⁸ While this case does not involve the Assimilative Crimes Act, that legislation is
22 analogous insofar as it is federal legislation involving jurisdiction in areas general-
23 ly under federal control.

24 ⁹ Defendants' citation to *Confederated Tribes and Bands of the Yakama Nation v.*
25 *Holder*, No. CV-11-3028-RMP is likewise misplaced. *Holder* was a lawsuit princi-
26 pally against federal agencies for failure to consult or seek prior approval before

C. Klickitat County’s promised continued encroachment on Yakama Nation sovereignty and territory has established a likelihood of continued irreparable harm in the absence of an injunction.

Interference with tribal self-government of the sort ongoing here inflicts irreparable harm on the Yakama Nation. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250–51 (10th Cir. 2001) (infringement on tribal sovereignty and right of self-government is irreparable because it cannot be adequately compensated by monetary damages). Defendants’ contention that the Yakama Nation “has failed to provide any support for its assertion” of harm is inaccurate hyperbole, and this sort of zealous-but-disingenuous advocacy serves no party in this litigation or the Court in its task of analyzing the complex issues raised by the parties.¹⁰ Even a cursory survey of federal Indian law reveals the long-standing rule that Defendants either ignore or remain ignorant of: interference with sovereignty by state governments may be considered *per se* irreparable harm,

entering the Yakama Reservation for federal law enforcement purposes. *Holder* also pre-dates retrocession and is inapplicable to the present dispute.

¹⁰ Defendants’ claim that they did not know Mr. Libby was enrolled Yakama is irrelevant, because Defendants knew he was Indian. ECF No. 49 at 33; ECF No. 44 at 2; ECF No. 38 at 227 (identifying Mr. Libby as Indian). For jurisdictional purposes, Indian status—not enrollment status—is all that matters. Defendants also suggest that Yakama Nation’s jurisdictional claims and sovereignty can be waived by the acts or omissions of its Members in the course of their criminal prosecutions, to which Yakama Nation is not a party. This is wrong. The record here shows that when Yakama Nation discovered PTS’s arrest and prosecution by Defendants, Yakama Nation filed suit. ECF No. 1. When Yakama Nation discovered Mr. Libby’s arrest and prosecution, Yakama Nation filed this Motion. ECF No. 36.

1 where, as here, the interference is significant and purposeful.

2 In *Ute Indian Tribe of the Uintah & Ouray Reservation*, 790 F.3d 1000, the
 3 Tenth Circuit found “the harm to tribal sovereignty” arising from the state’s
 4 prosecution of Indians for actions arising in Indian Country, “perhaps as serious as
 5 any to come our way in a long time.” *Id.* at 1005. Citing to “the United States
 6 Constitution and the authority that document provides the federal government to
 7 regulate Indian affairs,” the Tenth Circuit found there was:

8 no room to debate whether the defendants’ conduct
 9 creates the prospect of significant interference with tribal
 10 self-government that this court has found sufficient to
 11 constitute ‘irreparable injury.’ By any fair estimate, that
 12 appears to be the whole point and purpose of their
 13 actions.

14 *Id.* (internal quotations and citations omitted). *See also*, *N. Arapaho Tribe v.*
 15 *LaCounte*, 215 F. Supp. 3d 987, 1000 (D. Mont. 2016) (harm to a tribe’s
 16 sovereignty cannot be remedied by any other relief other than an injunction) (citing
 17 *Tohono O’odham Nation v. Schwartz*, 837 F. Supp. 1024, 1034 (D. Ariz. 1993)).

18 **IV. REQUEST FOR RELIEF**

19 Yakama Nation requests that the Court grant its motion for a preliminary
 20 injunction enjoining Defendants, and all persons acting on Defendants’ behalf,
 21 from exercising criminal jurisdiction arising from actions within the exterior
 22 boundaries of the Yakama Reservation, including Tract D, and involving an Indian
 23 as a defendant and/or victim.

1 DATED this 1st day of February, 2018.

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