

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

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

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

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

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

Plaintiff,

v.

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

Defendants.

Case No.: 1:17-cv-03192

PLAINTIFF'S TRIAL BRIEF

Trial Date: July 29, 2019
Location: Yakima, WA

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I. INTRODUCTION

The question presented is whether the Treaty of 1855 established the Yakama Reservation's boundaries to include an area south and east of Mt. Adams known as Camas Prairie (i.e. Tract D). The federal Indian law canons of treaty construction must be used to answer this question. The cardinal rule when applying canons of treaty construction—as the United States Supreme Court held on six prior occasions—dictates that the Treaty of 1855 must be interpreted as the Yakama Nation would have naturally understood it at the time of the Treaty negotiations, with ambiguities interpreted to the Yakama Nation's benefit, and eschewing the narrow and hyper-technical interpretations of lawyers after the fact.

Applying this framework, the Treaty of 1855's text requires the Yakama Reservation's boundary to pass south of Mt. Adams on the main ridge of the Cascades. During the Walla Walla Treaty Council, Territorial Governor Isaac I. Stevens described to the Yakamas in attendance that the Yakama Reservation's western boundary would pass south of Mt. Adams on the main chain of the Cascades. The Treaty Map present at the Walla Walla Treaty Council depicts the Yakama Reservation as including significant acreage due south of and including all of Mt. Adams, which is a landmark on the main ridge of the Cascades. This evidence shows the Yakama Nation would have naturally understood that their Reservation boundary passes south of Mt. Adams on the main ridge of the Cascade Mountains. The only boundary in the record that satisfies this requirement is the boundary offered by the Yakama Nation, as surveyed by the United States in 1982.

Only Congress can diminish reservation boundaries, and its intent to do so must be clear. The Supreme Court set forth a three-prong framework for

1 considering whether Congress has diminished a reservation, which considers the
 2 text of the statute, the historical context for the statute, and the subsequent history
 3 of the disputed area. In 1904, Congress passed a surplus land act for the Yakama
 4 Reservation that did not change the Reservation's boundaries.

5 The Yakama Nation respectfully requests that this Court issue declaratory
 6 relief affirming that (1) the Yakama Nation Treaty negotiators would have
 7 naturally understood the Yakama Reservation's boundary described in the Treaty
 8 of 1855 to include Tract D, (2) Congress has not acted to change the Yakama
 9 Reservation's boundaries set forth in the Treaty of 1855, (3) the Yakama
 10 Reservation's southwestern boundary between Mt. Adams and Grayback
 11 Mountain follows the lines surveyed and reported by Ronald Scherler in 1982,
 12 which include Tract D within the Yakama Reservation, and (4) Defendants do not
 13 have criminal jurisdiction over Indians within the Yakama Reservation.

14 II. FACTUAL OVERVIEW

15 A. Tract D Of The Yakama Reservation

16 1. *Historical Use Of Camas Prairie*

17 Since time immemorial, the fourteen Tribes and Bands that were
 18 confederated as the Yakama Nation lived and traveled throughout the Pacific
 19 Northwest for hunting, gathering, fishing, trading, recreational, political, and
 20 kinship purposes. They historically used *Tahk* or "Camas Prairie"—today the
 21 southwestern portion of the Yakama Reservation referred to as "Tract D"—as a
 22 source of essential foods, primarily camas roots, as well as a communal gathering
 23 place. Pl's Ex. 39 at 14. Every year, women and children dug up and baked the
 24 camas bulbs while men hunted and fished in the area. Camas Prairie's flat and
 25 grassy meadows were an ideal location for multiple tribes and bands to come
 26

1 together annually to trade, socialize, gamble, and race horses.

2 The cultural and sustenance values of Camas Prairie, as well as the need to
3 protect it from euro-American encroachment, were recognized by federal
4 representatives prior to the Treaty of 1855. When travelling through the area in
5 1853 for a railroad survey, ethnographer George Gibbs noted the Klickitat and
6 Yakama Bands' annual festivities in Camas Prairie. Pl's Ex. 39 at 18.¹ In 1854,
7 federal sub-agents recommended Camas Prairie be reserved "as soon as possible"
8 because of the necessary foods the area provided, and the likelihood that early
9 settlers—if allowed—would destroy the valuable roots that were then plentiful
10 within Camas Prairie. Pl's Ex. 39 at 22.

11 **2. *Treaty With The Yakamas Of June 9, 1855***

12 In the summer of 1855, the Yakama Nation's representatives gathered at the
13 Walla Walla Treaty Council to negotiate the Treaty of 1855 with Gov. Stevens.
14 The three most relevant pieces of evidence in this case were developed at the
15 Treaty Council: the Treaty of 1855, a contemporaneously executed map (the
16 "Treaty Map"), and official minutes from the Treaty Council ("Treaty Minutes").
17 In executing the Treaty of 1855, the Yakama Nation ceded certain rights to more
18 than 10,000,000 acres of land, roughly one third of the State of Washington, for
19 the rights reserved in the Treaty. Pl's Ex. 6.

20 Article II of the Treaty of 1855 describes the boundaries of the Yakama
21 Reservation wholly by referencing natural geographic features, and reserves the
22 Reservation for the exclusive use and benefit of the Yakama Nation. Pl's Ex. 6 at
23

24
25 ¹ For ease of reference, all citations to specific pages in the identified exhibits ref-
26 erence the .pdf page number rather than any other pagination source.

2. The specific boundary description for the Yakama Reservation’s southwestern boundary in the Treaty of 1855 is: “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.” Pl’s Ex. 6 at 2. These boundary descriptions can be traced on the Treaty Map, which depicts the Yakama Reservation boundaries extending along the crest of the Cascades in a southerly direction west of Mt. Adams, and then south of Mt. Adams for a distance before turning east along the Yakama Reservation’s southern border. Pl’s Ex. 11.

While the Treaty of 1855 was being negotiated, Gov. Stevens described the southwest boundaries of the Yakama Reservation as proceeding “down the main chain of the Cascade mountains **south of Mount Adams**, thence along the Highlands separating the Pisco and Satass river from the rivers flowing into the Columbia.” Pl’s Ex. 32 at 66. (emphasis added). After the Treaty was signed, Gov. Stevens sent a letter to the Commissioner of Indian Affairs that included the Treaty of 1855, the Treaty Map, and the Treaty Minutes. In the letter, Gov. Stevens described the Yakama Reservation in relevant part as “back[ing] up against the Cascades, a fine range for roots, berries, and game.” Pl’s Ex. 9 at 2. The United States subsequently misplaced the Treaty Map in their files, where it remained lost until 1930.

3. *Yakama Reservation Surveys*

In the 75-year period following the Treaty of 1855’s execution, during which time the Treaty Map was missing, boundary disputes arose in multiple areas

1 of the Yakama Reservation. These disputes prompted a number of erroneous
2 federal surveys that created a complicated historical record.

3 The 1861 Berry and Lodge Survey considered the southern Reservation
4 boundary from the Yakima River to Grayback Mountain, but did not include a
5 survey of the Reservation's southwestern boundary. Pl's Ex. 80. In 1890, the
6 Schwartz survey failed to properly identify the Yakama Reservation's western
7 boundary by excluding almost half of the Reservation. Pl's Ex. 81. The Yakama
8 Nation rejected the Schwartz survey, prompting the United States to task Mr. E.C.
9 Barnard with investigating the boundary.

10 In possession of the inaccurate and later-repudiated White Swan Map,² Mr.
11 Barnard reviewed the Schwartz Survey in 1900 and recommended that an
12 additional 357,878 acres be recognized as part of the western portion of the
13 Yakama Reservation. Pl's Ex. 20 at 2. In reviewing the southwestern boundary of
14 the Reservation, Mr. Barnard relied on a conversation with Mr. Stick Joe and Mr.
15 Chief Spencer, both enrolled Yakama Members, who recounted an erroneous
16 boundary between Mt. Adams and Grayback Mountain that had been described to
17 them by federal agents years after the Treaty was signed. Pl's Ex. 66 at 12-13. Mr.
18 Abraham Lincoln, also an enrolled Yakama Member, identified this erroneous

19
20 ² Two years after the Treaty of 1855 was executed, Gov. Stevens created a second
21 map purporting to depict the boundaries of the Yakama Reservation (the "White
22 Swan Map"). Pl's Ex. 14. While some of the erroneous surveys relied on the
23 White Swan Map, the United States Supreme Court has deemed the map
24 inaccurate and the United States Court of Claims has held that it is unreliable.
25 *Northern P. R. Co. v. United States*, 227 U.S. 355, 363 (1913); *Yakima Tribe v.*
26 *United States*, 158 Ct. Cl. 672, 692 (1962).

1 boundary in the field. Pl’s Ex. 66 at 8-9. The straight line that Mr. Barnard drew in
 2 his report was inconsistent with the erroneous boundary Messrs. Joe and Spencer
 3 recounted, creating further confusion in the different Yakama Reservation
 4 boundaries advocated by the federal government.³

5 After Congress passed a surplus lands act for the Yakama Reservation in
 6 1904, as discussed further below, the Campbell, Germond, and Long Survey
 7 marked the extent of the impacted land (the “Barnard/Campbell Line”). This
 8 survey identified surplus land boundaries—reflected in three straight boundary
 9 lines—that excluded land in the northwest, west, and southwest areas of the
 10 Reservation. The United States then brought suit to annul railroad patents issued
 11 within the Barnard/Campbell Line in a dispute that ultimately reached the
 12 Supreme Court. *Northern P. R. Co.*, 227 U.S. 355. The Court rejected Northern
 13 Pacific Railroad Company’s contention that the Barnard/Campbell Line marked
 14 the western boundary of the Yakama Reservation, instead affirming that the
 15 Yakama Reservation extends to the main ridge of the Cascades pursuant to Article
 16 II of the Treaty of 1855. *Id.* at 351. The southwestern Reservation boundary was
 17 not at issue in the *Northern P. R. Co.* litigation.

18 Following the Supreme Court’s holding in *Northern P. R. Co.*, Mr. Charles

19
 20 ³ The erroneous southwestern boundary at this time reflected some federal agents’
 21 post-Treaty statements to Messrs. Lincoln, Spencer, and Joe. These statements of
 22 three Yakamas who were recounting what federal agents had told them are de-
 23 scribed inconsistently within the historical record. At times they are recorded as
 24 describing a straight-line boundary from Mt. Adams to Grayback Mountain. Pl’s
 25 Ex. 66 at 12. At other times they are recorded as describing a triangular boundary
 26 that passes an old trail junction marked with a “blazed tree.” Pl’s Ex. 65 at 6-7.

1 Pecore re-surveyed the Yakama Reservation's western boundary. While the Pecore
2 Survey's western boundary begins on the main ridge of the Cascades, it departs
3 from the main ridge north of Mt. Adams and travels in straight lines to Grayback
4 Mountain. Pl's Ex. 113. Although the Pecore Survey recognized an additional
5 47,593 of the Yakama Reservation's acreage, its southwestern boundary failed to
6 follow natural features and the language of Article II of the Treaty of 1855. Pl's
7 Ex. 113.

8 In 1930, after at least 70 years lost in the records of the Department of the
9 Interior's ("Interior") files, the United States found the Treaty Map. With the
10 benefit of the Treaty Map, Mr. E.D. Calvin re-surveyed portions of the western
11 and southern Reservation boundaries. The Calvin Survey affirmed Yakama
12 Nation's understanding that the Yakama Reservation includes the entirety of
13 Camas Prairie and that the Reservation's boundary follows a natural spur divide
14 south of Mt. Adams along the main ridge of the Cascade Mountains that
15 encompasses Tract D. Pl's Ex. 1. Topographic Engineer F. Marion Wilkes of the
16 Indian Department closely followed Mr. Calvin's progress and issued a report on
17 October 15, 1932, in support of the Calvin Survey. Mr. Wilkes concluded that the
18 Calvin Survey followed a well-defined spur divide the entire distance of the
19 boundary with the exception of crossing the Klickitat River. Pl's Ex. 60.

20 **4. Allotment Era And The Act Of December 21, 1904**

21 Congress passed the Indian General Allotment Act in 1887, which
22 empowered the President to allot land to individual Indians without the consent of
23 the impacted Native Nations. Such lands were to be held in trust by the United
24 States for 25 years at which time a fee patent would be issued to the allottee. After
25 the 1887 Allotment Act was passed, a federal commission, known as the "Crow-
26

1 Flathead Commission,” attempted to convince the Yakama Nation to approve the
 2 sale of unallotted lands within the Reservation. The Yakama Nation refused, citing
 3 outstanding Reservation boundary errors. Pl’s Ex. 17.

4 On December 21, 1904, Congress passed a surplus lands act for the Yakama
 5 Reservation (“1904 Act”), titled “To authorize the sale and disposition of surplus
 6 or unallotted lands of the Yakima Indian Reservation, in the State of Washington.”
 7 Pl’s Ex. 18 at 2. In the 1904 Act, Congress instructed the Secretary of the Interior
 8 to treat the 293,837 acres included by Mr. Barnard and approved by Interior as
 9 part of the Yakama Reservation “for purposes of the Act...” (i.e. the allotment and
 10 sale of surplus lands). Pl’s Ex. 18 at 2. The 1904 Act’s express purpose was
 11 “merely to have the United States act as trustee for said Indians in the disposition
 12 and sales of said lands and to expend or pay over to them the proceeds derived
 13 from the sales as herein provided.” Pl’s Ex. 18 at 4.

14 During the Senate hearing on the 1904 Act, Senator Wesley Jones of
 15 Washington confirmed the intent of the bill was “to help provide for the better
 16 disposition of the Indian” and “to be fully protecting the Indians in all their rights .
 17 . . .” Pl’s Ex. 19 at 3. Senator Jones then reaffirmed the intent of the bill, twice,
 18 stating “I can not conceive of a bill that would be fairer or more just to the Indians
 19 . . . I believe it is one of the fairest bills for the Indians that has ever been
 20 presented in this House.” Pl’s Ex. 19 at 3. The supporting House Report says the
 21 1904 Act “guards well the rights and interests of the Indians . . .” Pl’s Ex. 20 at
 22 5. The Yakama Nation did not agree to, nor support, the 1904 Act.

23 **5. Indian Claims Commission Proceedings Concerning Tract D**

24 The Indian Claims Commission (“ICC”) confirmed the Yakama Nation’s
 25 understanding that both parties to the Treaty of 1855 intended that Tract D be
 26

1 included within the Yakama Reservation. In 1949, the Yakama Nation filed claims
2 with the ICC against the United States seeking compensation for fee simple title to
3 Yakama Reservation lands that the federal government improperly patented to
4 non-Indians without compensation to the Yakama Nation, including lands within
5 Tract D. The ICC heard from Yakama Members, including the elder Mr. George
6 Olney, regarding Yakama peoples' historic use of Camas Prairie and the Yakama
7 Nation's understanding that Camas Prairie, or Tract D, was within the
8 Reservation. Pl's Ex. 61 at 48. The ICC also heard testimony from Mr. Calvin
9 regarding his approach to surveying the southwestern boundary given the
10 ambiguous terms within Article II of the Treaty of 1855 and Article II's complete
11 reliance on natural geographic features to describe the Reservation's boundary.
12 Pl's Ex. 61 at 120-121, 166-167.

13 The ICC initially determined that the United States Supreme Court's
14 decision in *Northern P. R. Co.* controlled the question of whether the Yakama
15 Reservation includes Tract D. *Yakima Tribe*, 158 Ct. Cl. 672. The ICC reasoned
16 that *res judicata* foreclosed the Yakama Nation's ICC claims because the Supreme
17 Court did not conclude that Tract D within the Yakama Reservation in 1913, but
18 the issues before the Supreme Court in *Northern P. R. Co.* did not concern any
19 land within Tract D. *Id.* at 680. On appeal, the United States Court of Claims
20 reversed the ICC's initial holding finding that *res judicata* did not apply and that
21 new evidence (i.e., the discovery of the Treaty Map) counseled in favor of a new
22 consideration of the Yakama Reservation's southwestern boundary. *Id.* at 680-682.

23 On remand, the ICC determined that Tract D, as surveyed by Mr. Calvin,
24 was intended to be included within the Yakama Reservation and therefore the
25 Yakama Nation's claim to that area should be allowed. Pl's Ex. 46 at 17; Pl's Ex.
26

1 47 at 12. In confirming that Tract D is within the Yakama Reservation, the ICC
2 reasoned that while the calls of the Treaty of 1855 did not conform to the
3 topography of the landscape, the Treaty Map indicated that the southwestern
4 boundary of the reservation was to follow the main ridge of the Cascade
5 Mountains passing to the south of Mt. Adams, and Gov. Stevens had stated at the
6 Walla Walla Treaty Council that the Yakama Reservation was to extend down the
7 main chain of the Cascade mountains south of Mt. Adams. Pl's Ex. 46 at 16-17;
8 Pl's Ex. 47 at 11.

9 In 1968, the ICC approved a settlement between the United States and
10 Yakama Nation. Pl's Ex. 23 at 14-17. In this settlement, the parties distinguished
11 parcels within Tract D that the United States had sold to non-Indians without
12 providing the Yakama Nation compensation, from Tract D lands that remained un-
13 patented, and therefore required no compensation as those lands were and always
14 had been part of the Yakama Reservation. Pl's Ex. 23 at 14-17. For the patented
15 lands, the Yakama Nation accepted \$2.1 million to settle its takings claims for
16 97,908.97 patented acres within the 121,465.69 acres that comprise Tract D.
17 Separately, and discussed further below, President Nixon acknowledged in
18 Executive Order 11670 that 21,008.66 acres that the federal government had
19 erroneously made part of a national forest situated in the northwest corner of Tract
20 D was and always had been part of the Yakama Reservation as negotiated in 1855.

21 **6. Federal Treatment Of Tract D After The Indian Claims**
22 **Commission Proceedings**

23 Since the ICC proceedings, the federal government has uniformly taken the
24 position that Tract D is within the exterior boundaries of the Yakama Reservation.
25 In 1968, United States Assistant Regional Solicitor C. Richard Neely sent a
26

1 memorandum to the Bureau of Indian Affairs' ("BIA") Branch of Law and Order
2 addressing jurisdiction within Tract D. Pl's Ex. 27. Mr. Neely confirmed that until
3 Congress acted to change the boundaries of the Yakama Reservation, both Tracts
4 C and D remained part of the Reservation and the Yakama Nation had authority to
5 exercise its jurisdiction within those areas. Pl's Ex. 27 at 10-11.

6 In 1978, United States Bureau of Land Management Cadastral Surveyor
7 Ronald Scherler surveyed the southwestern boundary of Tract D. Pl's Ex. 74. The
8 field notes for his survey describe in great detail each survey point along Tract D's
9 boundary, all of which were marked at the time with iron posts affixed with
10 marked brass caps. Pl's Ex. 74. The United States Chief Cadastral Surveyor of
11 Washington approved Mr. Scherler's survey in 1982. Pl's Ex. 74 at 105.

12 Interior has repeatedly confirmed the Reservation boundaries include Tract
13 D in response to questions from elected representatives. In 1978, Interior Solicitor
14 Krulitz wrote to Klickitat County's Congressional Representative Mike
15 McCormack to affirm the Interior's position that Glenwood is within the
16 Reservation and that Yakama Nation's jurisdiction in Tract D remained intact
17 despite the variety of land owners within the area. Pl's Ex. 28. In 1980, the BIA
18 Superintendent for the Yakama Agency referenced signs that were installed around
19 Tract D identifying it as the Yakama Reservation's boundary. Pl's Ex. 29. Later
20 that year, the Office of the Regional Solicitor issued a memorandum confirming
21 the boundary. Pl's Ex. 30.

22 When Klickitat County's Congressional Representative Sid Morrison raised
23 the issue again in 1992, Solicitor Thomas Sansonetti responded that the Treaty of
24 1855 included Tract D and explained that patenting of land to third parties does
25 not result in a change to reservation boundaries. Pl's Ex. 31. When U.S.
26

1 Representative Jay Inslee, now Governor of Washington State, requested
2 clarification on behalf of the Glenwood Community Council, the Portland Area
3 Director for Interior wrote in 1993 that the Reservation boundaries remained
4 unchanged since 1855 and fully included Tract D. Pl's Ex. 87.

5 Today, federal agencies—including those agencies charged with
6 administering the United States' trust responsibilities to Indian tribes—treat Tract
7 D as part of the Yakama Reservation subject to both Yakama and federal
8 jurisdiction. The BIA operates the Glenwood Ranger Station just west of the town
9 of Glenwood within Tract D, employing local residents and managing timber sales
10 in the western portion of the Yakama Reservation. Pl's Ex. 138. Through this
11 federal office, BIA has managed timber sales on Yakama trust allotments within
12 Tract D. These timber sales included salvage efforts following the 2009 Spring
13 Creek Fire and 2015 Cougar Creek Fire, both of which are fires that impacted
14 Tract D where fire response included both BIA and the Yakama Nation. BIA
15 manages its Reservation roads within Tract D, and the United States Fish and
16 Wildlife Service works with the Yakama Nation on wildlife management at
17 Conboy National Wildlife Refuge. The Environmental Protection Agency also
18 exercises regulatory jurisdiction over Glenwood's wastewater treatment facility.
19 Pl's Exs. 41, 42.

20 **7. *Executive Order 11670***

21 In 1972, the United States confirmed Tract D's Reservation status by
22 returning possession of roughly 21,008.66 acres (the "Executive Order Land") of
23 Tract D land back to the Yakama Nation by executive order. Pl's Ex. 25. President
24 Nixon's executive order acknowledged that this land, which was then being
25 managed by the United States National Forest, had been intended for inclusion in
26

1 the Yakama Reservation. He used the Pecore and Calvin Surveys to describe the
2 land that was being returned to the Yakama Nation, and directed the Secretary of
3 Interior to administer it for the use and benefit of the Yakama Nation as a portion
4 of the Yakama Reservation created by the Treaty of 1855. Pl's Ex. 25.

5 A 1972 Attorney General Opinion, federal agencies, and elected
6 representatives at the state and national level all supported Executive Order
7 11670. The United States Attorney General's Opinion explained that because there
8 was not a "taking" within the meaning of the Fifth Amendment to the
9 Constitution, the Reservation land that was erroneously included in a national
10 forest could be restored to the possession of the Yakama Nation through executive
11 order. Pl's Ex. 24. Washington Governor Dan Evans wrote to President Nixon to
12 urge the transfer of the Executive Order Land to Yakama Nation citing the validity
13 of Yakama Nation's claim. Pl's Ex. 117. Interior, the Department of Agriculture,
14 and congressional representatives also wrote in support of restoring the lands
15 considered under Executive Order 11670. Pl's Exs. 119, 125, 126, 127.

16 **B. Criminal Jurisdiction Over Yakama Members Within Tract D**

17 The Yakama Nation exercises its inherent sovereign and Treaty-reserved
18 rights and jurisdiction over Indians within the Yakama Reservation, including
19 Tract D. The United States transferred elements of its jurisdiction within the
20 Yakama Reservation to the State of Washington under Pub. L. 83-280 in 1963. At
21 the Yakama Nation's prompting and the State of Washington's request, in 2015 the
22 United States reassumed, in relevant part, its criminal jurisdiction within the
23 Yakama Reservation over crimes involving Indians. Pl.'s Ex. 104.

24 Despite this retrocession, Defendants are now asserting criminal jurisdiction
25 over enrolled Yakama Members within the Yakama Reservation. Specifically,
26

Defendants have arrested, confined, and prosecuted Yakama Members for alleged acts of juvenile delinquency, alleged crimes against non-Indian victims and alleged victim-less crimes. Defendants have expressed an intention to continue prosecuting Yakama Members for alleged crimes arising within Tract D of the Yakama Reservation. ECF No. 8 at 10.

III. STANDARD OF PROOF

Defendants have alleged as a defense to this action that Tract D is not within the Yakama Reservation, and therefore Defendants hold the burden to prove their defense. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005). This burden shift is consistent with federal law, which places the burden of proof on Defendants to establish that the Yakama Nation ceded to the United States its aboriginal title to Tract D in the Treaty of 1855. 25 U.S.C. § 194.⁴

⁴ While the Supreme Court has held that this burden-shifting law applies to “artificial entities,” such as corporations as well as individuals, it has held that this law does not apply to sovereign states. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666-68 (1979) (“In common usage, the term ‘person’ does not include the sovereign, and statutes employing the phrase are ordinarily construed to exclude it. . .”); see also *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1416 (9th Cir. 1986) (“Although the Court did find that the term “white person” [in 25 U.S.C. 194] did not include the sovereign, it also squarely rejected the argument that the statute does not apply when an Indian tribe . . . is the litigant.”). The 2nd Circuit has reasoned, in dicta, that this statute does not apply to local municipalities; however the 9th Circuit has not determined that counties and municipalities are immune from Section 194’s application. *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 143 n.1 (2nd Cir. 2012) (Hall, J., dissenting) (arguing that Section

1 Even if the Yakama Nation bears the initial burden to refute Defendants’
 2 defense, the Yakama Nation has established in this brief and will continue to
 3 establish at trial by a preponderance of the evidence that the Yakama Nation
 4 naturally understood the Treaty of 1855 to include Tract D within the Yakama
 5 Reservation. However, the 9th Circuit has cautioned that any such burden on
 6 the Yakama Nation must be understood in the context of the canons of Treaty
 7 construction that the Treaty of 1855 must be interpreted as the Yakama Nation
 8 understood it, and that the Treaty of 1855 must be broadly interpreted to the
 9 Yakama Nation’s benefit. *Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir.
 10 1996).

11 On the issue of reservation diminishment, Defendants have favorably
 12 cited precedent on the applicable burden where the party arguing diminishment
 13 bears the burden to prove that the Yakama Reservation was diminished or
 14 otherwise changed by an act of Congress. ECF 49 at 38 (citing *Oneida Nation*
 15 *v. Village of Hobart*, 2017 U.S. Dist. LEXIS 174662 (E.D. Wis. 2017). As
 16 Defendants necessarily are arguing for diminishment if the Court finds that
 17 Tract D was included in the Yakama Reservation by the Treaty of 1855,

18
 19 194 should apply to local municipalities); *Cf. Monell v. Dep’t of Soc. Servs. of City*
 20 *of New York*, 436 U.S. 658, 687–88 (1978) (holding municipalities are persons un-
 21 der 42 U.S.C. § 1983 because corporations are treated as persons in interpreting
 22 statutory liability, and this principle was extended “automatically and without dis-
 23 cussion” to municipal corporations in 1869); see also *In re Multidistrict Vehicle Air*
 24 *Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir. 1973) (“political subdivisions
 25 such as cities and counties, whose power is derivative and not sovereign, cannot
 26 sue as parens patriae . . .”).

Defendants bear the burden to prove that Congress subsequently diminished the Yakama Reservation's boundaries.

IV. LEGAL ARGUMENT

A. Under The Federal Indian Law Canons Of Treaty Construction, The Evidence Establishes The Yakama Nation Understood The Treaty of 1855 To Include Tract D Within The Yakama Reservation

1. The Canons Of Indian Treaty Construction Must Be Applied To Resolve Yakama Reservation Boundary Disputes

The central dispute between the parties on the question of Tract D can be summed up in one question: what is the southwestern boundary of the Yakama Reservation established by the Treaty of 1855? The Yakama Nation argues that its ancestors would have naturally understood the Treaty of 1855 to include Tract D within the Yakama Reservation. Defendants disagree.

To decide this issue, the Court must use the well-established federal Indian law canons of treaty construction to interpret Article II of the Treaty of 1855. The United States Supreme Court recently reiterated this framework as follows:

Indian treaties must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians . . . and the words of a treaty must be construed in the sense in which they would naturally be understood by the Indians.

Herrera v. Wyoming, No. 17-532, 2019 WL 2166394, at *8 (U.S. May 20, 2019).

While *Herrera* did not specifically address the Yakama Treaty of 1855, the Supreme Court has interpreted the Treaty of 1855 consistent with this rule at least six times in cases spanning from the early 20th century to as recently as March

2019. In each instance where terms of the Treaty of 1855 were in dispute, the Court “stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855.” *Washington State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011 (2019); *see also Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979); *Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *Northern P. R. Co. v. United States*, 227 U.S. 335 (1913); *United States v. Winans*, 198 U.S. 371 (1905).

It is also black letter law that more narrow and technical interpretations of Treaty language should “never be construed to [a Native Nation’s] prejudice,” because, “[h]ow the words of the treaty were understood by this unlettered [Native] people, rather than their critical meaning, should form the rule of construction.” *Worcester v. State of Ga.*, 31 U.S. 515, 582, (1832), *abrogated on other grounds by White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

This rejection of narrow, hyper-technical interpretations to limit or erase promises made in Indian treaties was further explained in *Jones v. Meehan*, 175 U.S. 1, 10–12 (1899). There, the Court fixed this rule against the backdrop of the disparate negotiation positions and technical knowledge of the parties to Indian treaties, describing the United States as “an enlightened and powerful nation” having “representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves” and that the U.S. has the benefit of drafting the treaty “in their own language.” *Jones v. Meehan*, 175 U.S. 1, 10–12 (1899). Quoting the *Worcester* opinion, the Court described Native treaty negotiators as disadvantaged given they “were not critical judges of our lan-

1 guage” and had the treaty “interpreted to them” by the United States and agents
 2 thereof. *Id.* Assigning more narrow hyper-technical meanings to terms and promis-
 3 es would “do injustice to the understanding of the parties.” *Id.*

4 Accordingly, the question here concerning the Yakama Nation’s natural un-
 5 derstanding of the Yakama Reservation’s boundaries described in the Treaty of
 6 1855 must be analyzed as follows: (1) the Treaty of 1855 must be interpreted in a
 7 way that resolves any ambiguities regarding Reservation boundaries in favor of the
 8 Yakama Nation; (2) the Reservation boundaries identified in the Treaty of 1855
 9 must be interpreted as the Yakamas who negotiated the Treaty would naturally
 10 have understood it in 1855; and (3) technical meanings of Treaty terms and princi-
 11 ples must not be construed to prejudice the Yakama Nation, especially in the ab-
 12 sence of any evidence Yakamas at the Treaty council understood such terms or
 13 technical principles.

14 The Supreme Court recently applied this framework to the Treaty of 1855 in
 15 *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019). In re-
 16 solving the question of whether a state fuel tax violated the Yakama Nation’s pro-
 17 tected interests memorialized in the Treaty of 1855, the Court did not rest its analy-
 18 sis on how Washington State or even the United States interpreted the Treaty of
 19 1855. What mattered was what the Yakama Nation naturally understood the Treaty
 20 of 1855’s promises to mean, as Justice Breyer’s plurality opinion makes clear:

21 In a word, the treaty negotiations and the United States’
 22 representatives’ statements to the Yakamas would have
 23 led the Yakamas to understand that the treaty’s protection
 24 of the right to travel on the public highways included the
 25 right to travel with goods for purposes of trade. We con-
 26 sequently so construe the relevant treaty provision.

Cougar Den, Inc., 139 S. Ct. at 1013.

1 The concurring opinion reiterates this point, noting that “[t]o some modern
 2 ears, the right to travel in common with others might seem merely a right to use the
 3 roads subject to the same taxes and regulations as everyone else. But that is not
 4 how the Yakamas understood the treaty’s terms.” *Id.* at 1016-17 (Gorsuch, J., con-
 5 ccurring). Not only are historic non-Indian understandings of what was negotiated
 6 subordinate to the understanding of the Indians at that time of the Treaty, but the
 7 State’s newly fashioned theories were likewise subordinate to the original under-
 8 standing of the Yakamas at the Walla Walla Treaty Council:

9 Our job in this case is to interpret the treaty as the Yaka-
 10 mas originally understood it in 1855—not in light of new
 11 lawyerly glosses conjured up for litigation a continent
 away and more than 150 years after the fact.

12 *Id.* at 1019.

13 Ultimately, federal jurisprudence requires that paramount consideration be
 14 afforded to the Yakamas’ understanding in Treaty interpretation. This has been re-
 15 iterated in each Supreme Court decision interpreting the Treaty of 1855’s terms
 16 and promises in light of a given dispute. *See Washington State Commercial Pas-
 17 senger Fishing Vessel Ass’n*, 443 U.S. at 678, *modified sub nom. Washington v.
 18 United States*, 444 U.S. 816 (1979) (“we think greater importance should be given
 19 to the Indians’ likely understanding of the other words in the treaties”); *Tulee*, 315
 20 U.S. at 684-85 (“It is our responsibility to see that the terms of the treaty are car-
 21 ried out, so far as possible, in accordance with the meaning they were understood
 22 to have by the tribal representatives at the council”); *Seufert Bros. Co.*, 249 U.S. at
 23 198 (“We will construe a treaty with the Indians as ‘that unlettered people’ under-
 24 stood it” (quoting *Winans*, 198 U.S. 371)); *Northern P. R. Co.*, 227 U.S. at
 25 362 (“ . . . our effort must be to ascertain and execute the intention of the treaty
 26

1 makers; and as an element in the effort we have declared that concession must be
 2 made to the understanding of the Indians. . . .”); *Winans*, 198 U.S. at 380–81.

3 The Court’s task here is no different than the Supreme Court’s undertaking
 4 in each of the cases cited above. That is, this Court must construe the Treaty of
 5 1855 as the Yakamas who negotiated that Treaty would naturally have understood
 6 it, resolving any ambiguities in the Yakama Nation’s favor, and discounting any
 7 narrow reading afforded by technical meanings or principles.

8 **2. The Yakama Nation Understood The Treaty Of 1855 Included** 9 **Tract D Within The Yakama Reservation**

10 The boundaries of the Yakama Reservation were established in Article II of
 11 the Treaty of 1855, 12 Stat. 951 (1859). *See also County of Yakima v. Confederat-*
 12 *ed Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 256 (1992). Article
 13 II defines the Yakama Reservation’s boundaries by natural features as follows:

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

Art. II, 12 Stat. 951; Pl’s Ex. 6 at 2.

Breaking this description down to its relevant parts, most elements of the de-
 scription are clear. It is clear is that the Reservation’s western boundary is the main

1 ridge of the Cascade Mountains. It is also clear that the western boundary extends
2 down the main ridge of the Cascades passing south and east of Mt. Adams to a
3 spur. In other words, the western boundary does not leave the main ridge of the
4 Cascades until it meets a spur south of Mt. Adams. The boundary follows this spur
5 to a first divide, and then along the first divide to a heretofore undisputed second
6 divide (i.e. the Reservation's southern boundary east of Grayback Mountain) locat-
7 ed between the Satus River and Columbia River watersheds. The only Reservation
8 boundary offered by the parties that follows natural features from Mt. Adams to a
9 spur, to a first divide, and then to a second divide are the 1932 Calvin Survey and
10 the 1982 Scherler Survey boundary, both of which are generally consistent with
11 each other. This 1982 Scherler Survey is the Reservation boundary the Yakama
12 Nation offers in this case.

13 Article II's ambiguity arises in Gov. Stevens' description of "the spur
14 whence flows the waters of the Klickitat and Pisco Rivers . . . ," because there is no
15 hydrographic spur divide between the Klickitat River and Pisco River (i.e. Top-
16 penish Creek). Pl's Ex. 61 at 166-67. Gov. Stevens' failure to properly account for
17 and identify the rivers defining the Yakama Reservation at its southwestern bound-
18 ary led to "difficulties . . . because the description of the [Yakama] Reservation
19 boundaries as defined in the [Yakama] Treaty by natural objects did not fit the nat-
20 ural objects on the ground." 21 Ind. Cl. Comm. 424, 427 (1969).⁵

21
22 ⁵ Gov. Stevens' lack of geographical knowledge relevant to the Yakama Reserva-
23 tion's boundary is further demonstrated by the Reservation's northwestern bounda-
24 ry. In Article II, Gov. Stevens assumed the south fork of the Ahtanum Creek
25 reached the Cascade Mountains when in fact it terminates miles to the east. This
26 ambiguity resulted in the Yakama Nation's successful ICC claim for just compen-

1 Applying the required canons of treaty construction, Article II's terms—
 2 drafted solely by the United States in a language foreign to the Yakama Nation's
 3 representatives both in form (i.e. writing) and substance—must be construed as the
 4 Yakama Nation would have understood them with ambiguities resolved to their
 5 benefit. It is a reasonable inference that based on the Yakama Nation's superior
 6 geographic knowledge of the territory, Pl's Ex. 39 at 14, they would have naturally
 7 understood the Treaty's reference to natural features (i.e. a spur and series of di-
 8 vides) south and east of Mt. Adams as following the plainly visible spur divide that
 9 encircles Camas Prairie and defines Tract D.⁶

10 When the ICC considered the problem of Gov. Stevens' geographic errors, it
 11 ultimately held that both parties to the Treaty of 1855 intended Tract D to be in-
 12 cluded within the Yakama Reservation. It found that the boundary of Tract D fol-
 13 lows the natural topography of the boundaries described in the Treaty of 1855, if
 14 not the specific watershed divides, which are impossible to follow and reflected
 15 Gov. Stevens' flawed understanding of the geography of this area:

16 There is a distinct spur which runs southerly and easterly
 17 from the southern slope of Mount Adams. True this is not
 18 a spur 'whence flows the waters of the Klickitat and
 19 Pisco [Toppenish] Rivers' – but there is no such spur.

20 sation for the taking of land within 'Tract C' of the Yakama Reservation. Pl's Ex.
 21 48.

22 ⁶ When viewed from Camas Prairie or the vicinity of Glenwood on a clear day, the
 23 spur divide from Mt. Adams south and east around Camas Prairie to Grayback
 24 Mountain is plainly visible, as is the lack of any intervening geographic features.
 25 The Yakama Nation respectfully invites the Court to visit Camas Prairie and view
 26 these natural features.

1 The treaty calls for a boundary which leaves the main
 2 ridge of the Cascade Mountains by means of a “spur” and
 3 to follow that “spur” to a divide. We believe that the
 4 boundary urged by [Yakama Nation] satisfies such a call.
 5 The boundary which [Yakama Nation] claims should be
 6 followed follows the main ridge of the Cascade Moun-
 7 tains passing over Mount Adams and continues to the
 8 south following a distinct spur which runs southerly and
 9 easterly from Mount Adams and then turns in an easterly
 10 and northeasterly direction to Grayback Mountain. This
 11 we conclude was the intention of the treaty makers in de-
 12 scribing the [Yakama] Reservation boundary at its
 13 southwest corner . . . for the reasons we have outlined,
 14 we have concluded that petitioner’s claim for the Tract D
 15 area must be allowed.

16 Pl’s Ex. 47 at 11-12. The canons of treaty construction require a determination of
 17 what the Yakama Nation would have understood the Treaty of 1855 to mean, but
 18 the ICC went one step further to state that both the Yakama Nation and United
 19 States *intended* the Treaty of 1855 to include Tract D within the Yakama Reserva-
 20 tion’s boundaries.

21 This holding is consistent with both the Treaty Minutes⁷ and the contempo-
 22 raneous Treaty Map, which provide crucial supporting evidence that the Yakama
 23 Nation’s Treaty representatives understood the Yakama Reservation to include
 24

25 ⁷ The United States Supreme Court has consistently relied on the Official Proceed-
 26 ings of the Walla Walla Treaty Council (i.e. Treaty Minutes) in applying the treaty
 canons of construction to the Treaty of 1855. *See, e.g., Cougar Den, Inc.*, 139 S.
 Ct. at 1013; *Washington State Commercial Passenger Fishing Vessel Ass’n*, 443
 U.S. at 668 n.12; *Tulee*, 315 U.S. at 684-85.

1 Tract D. The Treaty Minutes reflect that at the Walla Walla Treaty Council, Gov.
2 Stevens described the Yakama Reservation as follows:

3 Here is the Yakama Reservation, commencing with the
4 mouth of the Attanum River, along the Attanum River to
5 the Cascade Mountains, **thence down the main chain of**
6 **the Cascades Mountains south of Mt. Adams**, thence
7 along the highlands separating the Pisco and Saltoss
8 [Satus] River from the rivers flowing into the Columbia
9 thence to the crossing of the Yakama below the main
10 fisheries, then up the main Yakama to the Attanum where
11 we began.

12 Pl's Ex. 32 at 66 (emphasis added). Gov. Stevens expressly stated that the Reserva-
13 tion's western boundary would extend south of Mt. Adams on the main chain of
14 the Cascades, which is language that would have been interpreted and proclaimed
15 to the Yakama Nation's representatives gathered at the Treaty Council. Pl's Ex. 32
16 at 66. As a standalone piece of evidence, this strongly suggests the Yakama Nation
17 understood at the time the Treaty of 1855 was negotiated that their Reservation in-
18 cluded land south of Mt. Adams. Taken together with the Treaty Map, which Gov.
19 Stevens' phrasing suggests he was referencing at the time, the inference becomes
20 all the more credible.

21 The Treaty Map was created contemporaneously with the Treaty Council
22 negotiations and reflects this fact, as we know from Hazard Stevens' account. Mr.
23 Stevens wrote his father, Gov. Stevens,' biography and relayed therein this quote
24 from his father:

25 It was my invariable custom...whenever I assembled a
26 tribe in council, to procure from them their own rude
sketches of the country, and a map was invariably pre-
pared on a large scale and shown to them, exhibiting not
only the region occupied by them, but the reservations
that were proposed to be secured to them.

1 Pl's Ex. 39 at 29. Mr. Stevens had accompanied his father to the Walla Walla Trea-
2 ty Council, and said that at Walla Walla "[a] large map was brought forth, and the
3 boundaries of the reservations accurately marked out and shown. The Indians took
4 great interest in this map, asking many questions about the mountains and streams
5 they saw represented upon it" Pl's Ex. 39 at 29.

6 The Treaty Map shows the Yakama Reservation's western boundary extend-
7 ing in a southerly direction west of Mt. Adams, and continuing south of Mt. Adams
8 for some distance before turning to the east. The boundary then travels northeast to
9 the divide separating the Satus River watershed from the Columbia River water-
10 shed. This boundary encompasses a significant area of land south of Mt. Adams
11 within the Yakama Reservation, which the Yakama Nation's representatives would
12 have understood. The only boundary of the Yakama Reservation thus far advocat-
13 ed by the parties that honors the Treaty, Treaty Minutes, and Treaty Map, by in-
14 cluding land south of Mt. Adams within the Yakama Reservation, is the boundary
15 the Yakama Nation advances here.

16 In contrast, Defendants and their expert witness have offered the Bar-
17 nard/Campbell line, which cannot reasonably be reconciled with the Treaty, Treaty
18 Minutes, or Treaty Map. Article II defines the Reservation boundaries using natu-
19 ral features, but Defendants' proposed line extends a straight line for more than
20 twenty miles in total disregard for any natural features between Mt. Adams and
21 Grayback Mountain. As a feature of the main ridge of the Cascades, the Treaty in-
22 cludes Mt. Adams within the Reservation, but Defendants' boundary excludes Mt.
23 Adams in its entirety. The Treaty Minutes require the boundary to extend south of
24 Mt. Adams on the main chain of the Cascades, but Defendants' line departs the
25 Cascades north of Mt. Adams. The Treaty Map includes the entirety of Mt. Adams
26

1 in the Reservation along with significant acreage south of Mt. Adams, but Defend-
2 ants have argued that Mt. Adams is entirely excluded from the Yakama Reserva-
3 tion, along with all land to the south and southeast of Mt. Adams, west of Gray-
4 back Mountain. Further the Treaty Map does not use straight lines to depict any of
5 the Reservation's boundaries, while Defendants argue that nearly half the Reserva-
6 tion's western boundary is a straight line. The most important evidence of how the
7 Yakama Nation understood Article II is the Treaty, the Treaty Minutes, and the
8 Treaty Map, and none of this evidence supports Defendants' proposed boundary.

9 **3. Executive Order 11670 Confirms The United States' Understand-**
10 **ing That Tract D Was Included Within The Yakama Reservation**
11 **In 1855.**

12 Executive Order 11670 provides strong evidence of the United States' un-
13 derstanding that Tract D was reserved by the Yakama Nation in Article II of the
14 Treaty of 1855, and remains within the Yakama Reservation today. In Executive
15 Order 11670, President Nixon returned beneficial ownership of roughly 21,008.66
16 acres of land within Tract D back to the Yakama Nation. The 21,008.66 acres
17 comprises the northwestern-most portion of Tract D, including the eastern half of
18 Mt. Adams. In his signing statement, President Nixon explained that President
19 Theodore Roosevelt mistakenly included 21,008.66 acres of the Yakama Reserva-
20 tion within the Mount Rainier Forest Reserve. Pl.'s Ex. 25. Executive Order 11670
21 remedied this error. It directs the Secretary of the Interior to administer the proper-
22 ty within this portion of Tract D "for the use and benefit of the Yakima Tribe of
23 Indians as a portion of the reservation created by the Treaty of 1855, 12 Stat. 951."
24 President Nixon's plain language acknowledges that the Tract D lands are within
25 the Yakama Reservation reserved by Treaty in 1855.
26

1 In support of President Nixon's action, then United States Attorney General
2 John N. Mitchell issued an opinion discussing the authority of the President of the
3 United States to restore the Yakama Nation's beneficial ownership to its Reserva-
4 tion lands. 42 Opp. Att'y Gen. 441 (Jan. 18, 1972), Pl's Ex. 24. Mr. Mitchell ex-
5 plained that those Reservation lands were never taken in the Constitutional sense.
6 Rather, the beneficial ownership interest restored by Executive Order 11670 had
7 always been part of the Yakama Reservation since its establishment. Mr. Mitch-
8 ell's Opinion is founded upon Tract D's status as Yakama Reservation land, un-
9 changed since 1855.

10 Executive Order 11670 received support from a broad coalition of Executive
11 Branch, Legislative Branch, and State actors, demonstrating a widespread under-
12 standing that Tract D remained within the Yakama Reservation. The Office of the
13 Vice President described the Yakama Nation's position as a "valid claim. . . ." Pl's
14 Ex. 128. The Agriculture Secretary wrote a letter acknowledging the mistaken in-
15 clusion of Yakama Reservation lands in what became the Gifford Pinchot National
16 Forest. Pl's Ex. 119. Interior issued a memorandum stating "[t]itle to 21,008.66
17 acres of land referred to above, now and from time immemorial, has resided in the
18 Yakima Indian Nation." Pl's Ex. 127. Interior and Agriculture executed a Memo-
19 randum of Understanding describing Interior's future management of Tract D as
20 Reservation land, including provision for the payment of timber revenues to the
21 Yakama Nation's trust accounts. Pl's Ex. 118. Senator Warren Magnuson, Senator
22 Henry Jackson, and Congressman Mike McCormack lobbied President Nixon on
23 the Yakama Nation's behalf. Pl's Ex.'s 125, 126. Washington State Governor Dan-
24 iel J. Evans wrote President Nixon to support restoration of the Yakama Nation's
25 beneficial ownership of the 21,008.66 acres within Tract D, stating:

I am urging that you facilitate the transfer of the 21 thousand acres from the Department of Agriculture Forest Service to the Department of Interior for transfer again to the tribe. Because the land was erroneously excluded from the reservation by executive action, an administrative remedy rather than an Act of Congress may correct the situation.

Pl’s Ex. 117. The United States had assumed control over land within the Yakama Reservation by error, and this broad coalition of elected and appointed federal and state officials urged President Nixon to return ownership to the Yakama Nation.

In effect, Executive Order 11670 only changed who administered 21,008.66 acres of the Yakama Reservation’s land from Agriculture to Interior. The Yakama Nation resumed its role as beneficial owner. Importantly, none of the relevant evidence treats Executive Order 11670 as causing a change in the Yakama Reservation’s boundaries. Rather, and as described in Interior’s and Agriculture’s Memorandum of Understanding, the Executive Order “restor[ed] certain lands to the Yakima Tribe of Indians by modifying the eastern boundary of the Gifford Pinchot National Forest” The National Forest’s boundaries changed, but the Yakama Reservation’s boundaries remained unchanged from their establishment in 1855.

B. Congress Has Not Acted With Clear Intent to Diminish Tract D From The Yakama Reservation

1. The Supreme Court’s Reservation Diminishment Framework Must Be Applied To Any Claim That The Yakama Reservation Was Diminished After 1855

After determining that the Treaty of 1855 included Tract D within the Yakama Reservation, the issue becomes whether Congress subsequently diminished those Reservation boundaries. The Supreme Court has set a three-part

1 framework that must be used when analyzing whether Congress diminished a con-
 2 gressionally-established Indian reservation. Underlying this well-established
 3 framework are tenets of federal Indian law oft-repeated by the Supreme Court in its
 4 diminishment opinions. Only Congress can diminish a reservation's boundaries,⁸
 5 and Congress's intent to do so must be clear. *Nebraska v. Parker*, 136 S. Ct. 1072,
 6 1078-79 (2016). Absent any such clear intent, the land retains its reservation status
 7 "no matter what happens to the title of individual plots within the area" *Solem*
 8 *v. Bartlett*, 465 U.S. 463, 470 (1984). The Court has also cautioned that
 9 "[d]iminishment, moreover, will not be lightly inferred." *Id.*

10 Turning to the diminishment framework, the first consideration—and the
 11 most probative evidence of congressional intent—is the statutory language used to
 12 open reservation lands. Common hallmarks of congressional intent to diminish in-

13
 14 ⁸ As a matter of policy, the Yakama Nation rejects the United States' assertion of
 15 plenary power to unilaterally change the Yakama Reservation's boundaries re-
 16 served in the Treaty of 1855 without the Yakama Nation's free, prior, and in-
 17 formed consent. Congress's claim of such plenary authority is extra-Constitutional
 18 and founded in the morally and legally objectionable religious doctrine of Christian
 19 discovery, which should be repudiated by modern courts. *See Johnson v. M'Intosh*,
 20 21 U.S. 543 (1823) (adopting the religious doctrine of discovery into federal law to
 21 deprive Native rights); *United States v. Kagama*, 188 U.S. 375 (1886) (finding no
 22 constitutional basis for plenary authority over Native Nations, the Court justified
 23 the plenary power doctrine using the doctrine of discovery); United Nations Decla-
 24 ration on the Rights of Indigenous Peoples, Resolution 61/295 (Sept. 13, 2007)
 25 (requiring States to obtain Native Nations' free, prior, and informed consent before
 26 taking legislative actions that affect Native Nations).

1 clude explicit references to cession, the total surrender of all tribal interests in ex-
2 change for a fixed payment, or the restoration of land to the public domain. *Parker*,
3 136 S. Ct. at 1079. For example, in *Nebraska v. Parker* the Supreme Court re-
4 viewed an 1882 surplus lands act and upon finding that the statutory language
5 “bore none of these hallmarks of diminishment . . .” it unanimously held that the
6 relevant reservation had not been diminished. *Id.* In contrast, in *Hagen v. Utah*,
7 510 U.S. 399 (1994), the Supreme Court found that Congress intended to diminish
8 the Uintah Reservation where it said “all the unallotted lands within said reserva-
9 tion shall be *restored to the public domain*.” *Hagen*, 510 U.S. at 412 (emphasis in
10 original); *see also Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S.
11 351 (1962) (finding congressional intent to diminish based on the same “restored
12 to the public domain” language).

13 The second consideration is the history surrounding the passage of the sur-
14 plus lands act. Where the statutory language does not evidence clear congressional
15 intent to diminish, to overcome this lack of clear intent such historical evidence
16 must “unequivocally reveal a widely held, contemporaneous understanding that the
17 affected reservation would shrink as a result of the proposed legislation.” *Parker*,
18 136 S. Ct. at 1080 (quoting *Solem*, 465 U.S. at 471). Again, *Parker* provides a
19 good example, wherein the Court did not find clear congressional intent to dimin-
20 ish in the relevant statutory language, and then considered whether the surrounding
21 history could overcome the lack of clear intent. Despite evidence that various Con-
22 gressmen said the Tribe would be left with an ample reservation, the reservation
23 would be broken up, and the Tribe wanted to sell the land, the Court said the evi-
24 dence “falls short.” *Id.* at 1080-81. In contrast, the *Parker* Court referenced *South*
25 *Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), as an example where such
26

1 historic evidence provides “unequivocal” and “contemporaneous” and “clear” evi-
 2 dence of diminishment. *Id.* In that case, the Court had evidence of “recorded nego-
 3 tiations between the Commissioner of Indian Affairs and leaders of the Yankton
 4 Sioux Tribe” that “unambiguously ‘signaled [the Tribe’s] understanding that ces-
 5 sion of the surplus lands dissolved tribal governance of the 1858 reservation.” *Id.*
 6 (quoting *Yankton Sioux*, 522 U.S. at 355).

7 Third, post-enactment treatment of the area in dispute by the United States,
 8 as well as demographics in the area, have some evidentiary value. *Id.* However,
 9 this third consideration has never been enough, by itself, to support a finding of
 10 diminishment and demographic evidence is the “least compelling evidence in our
 11 diminishment analysis” *Id.* at 1082 (internal quotations omitted). In *Parker*,
 12 the Tribe had been almost entirely absent from the disputed area for more than 120
 13 years. *Id.* at 1081. The Tribe did not actively exercise jurisdiction within the dis-
 14 puted area, and did not maintain an office, provide services, or host ceremonies
 15 within the area. *Id.* Further, the United States often treated the land as state land in
 16 Office of Indian Affairs opinion letters and reports. *Id.* at 1082. In fact, Interior on-
 17 ly changed its position and began supporting the Tribe after the litigation was filed.
 18 *Id.* Still, the Supreme Court found the subsequent history could not “overcome the
 19 statutory text, which is devoid of any language indicative of Congress’ intent to
 20 diminish.” *Id.*

21 In this case, the only legislation that Defendants have identified that discuss-
 22 es the Yakama Reservation in any detail is the 1904 Act. Pl’s Ex. 18. The 1904 Act
 23 does not diminish the Yakama Reservation. It is appropriately titled “An Act to au-
 24 thorize the sale and disposition of surplus or unallotted lands of the Yakima Indian
 25 Reservation, in the State of Washington.” 33 Stat. 595. In essence, the 1904 Act
 26

designates boundaries within which surplus lands will be allotted, and authorizes the allotment of such lands to Indians, and the sale of any remaining lands to non-Indians with all proceeds deposited to the Yakama Nation's benefit. The text does not clearly evince a congressional intent to diminish or exhibit any of the hallmarks of such an intent. The legislative history counsels against diminishment, and the subsequent history strongly supports Tract D's continued reservation status.

2. The 1904 Act's Plain Text Does Not Evince A Clear Congressional Intent to Diminish the Yakama Reservation

The language of the 1904 Act does not "clearly evince an intent" by Congress to diminish the Yakama Reservation as to Tract D or any other Yakama lands.⁹ The 1904 legislation simply authorized the Secretary of the Interior to "sell or dispose of unallotted lands embraced in the Yakima Indian Reservation proper . . . set aside and established by the treaty with the Yakima Nation of Indians, dated June eighth, eighteen hundred and fifty-five." Pl's Ex. 18 at 2. It regarded a 293,837 acre tract of land previously "excluded by erroneous boundary survey" as part of the Yakama Reservation "for purposes of this Act" Pl's Ex. 18 at 2.

The 1904 Act's express purpose is "merely to have the United States act as trustee for said Indians in the disposition and sales of said lands and to expend or pay over to them the proceeds derived from the sales as herein provided." Pl's Ex. 18 at 4. The Act's effect was to authorize allotment of the Yakama Reservation, providing allotments to Yakama Members and establishing a process to sell title to

⁹ Allotment acts did not diminish the Yakama Reservation. See *United States v. Sutton*, 215 U.S. 291 (1909) ("[t]he limits of the Yakima Reservation were not changed by virtue of the allotments that are referred to in the stipulation of facts.")

1 the remaining surplus lands to non-Indians with proceeds deposited to the Yakama
 2 Nation's benefit. Congress, by necessity, had to identify boundaries within which
 3 lands could be allotted and sold and, therefore, recognized an additional 293,837
 4 acres for that purpose. Tract D is not mentioned in this legislation. Congress could
 5 not have, therefore, clearly intended to diminish Tract D from the Yakama Reser-
 6 vation by virtue of this legislation where Tract D was not even discussed.

7 Further, none of the common textual indications of Congressional intent to
 8 diminish a Reservation appear in the 1904 Act. It does not mention "cession" or
 9 "surrender" of Yakama interests in Tract D. Tract D land is not disposed of for a
 10 sum certain, and it is not congressionally restored to the public domain. Rather, the
 11 Secretary of the Interior is designated as a sales agent for unallotted lands "em-
 12 braced in the Yakima Indian Reservation proper" with proceeds from such sales
 13 being "deposited in the Treasury of the United States to the credit of the Indians . .
 14 . ." Pl's Ex. 18 at 3. The 1904 Act's text does not support a finding of clear con-
 15 gressional intent to diminish any part of the Yakama Reservation.

16 **3. The 1904 Act's Historical Context Does Not Support A Finding Of** 17 **Congressional Intent To Diminish The Yakama Reservation**

18 The historical context of the 1904 Act likewise does not support a finding of
 19 clear congressional intent to diminish the Yakama Reservation. During the hearing
 20 on House Resolution 14468, Congressman Wesley Jones of Washington confirmed
 21 the intent of the bill was "to help provide for the better disposition of the Indian"
 22 and "to be fully protecting the Indians in all their rights" Pl's Ex. 19 at 3.
 23 Congressman Jones then reaffirms his intent, twice, stating "I can not conceive of a
 24 bill that would be fairer or more just to the Indians . . . I believe it is one of the
 25 fairest bills for the Indians that has ever been presented in this House." Pl's Ex. 19
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1 at 3. The supporting House Report says the 1904 Act “guards well the rights and
 2 interests of the Indians . . .” Pl’s Ex. 20 at 5. Surely the “fairest bill ever presented
 3 to Congress concerning Indians” that “guards well” the Yakama Nation’s rights
 4 and interests would not have unilaterally diminished the Yakama Reservation
 5 without the Yakama Nation’s prior consent or even evidence of an understanding
 6 by the Yakamas that diminishment would occur. Pl’s Ex. 20 at 5. (describing the
 7 Yakama Nation’s refusal to negotiate concerning the Yakama Reservation, and ac-
 8 tive lobbying efforts to uphold the Treaty’s reservation boundaries).

9 Unlike in *Yankton Sioux*, there is no record of any negotiations with the
 10 Yakamas that evidences the Yakama Nation’s agreement that the Reservation
 11 would be diminished by virtue of the 1904 legislation. In fact, evidence of the
 12 Crow-Flathead Commission’s negotiations with the Yakama Nation in the 1890s
 13 shows no resolution or agreement for sale or disposition of any Yakama lands,
 14 much less a diminishment of the Yakama Reservation. Pl’s Ex. 17. Congressman
 15 Jones acknowledged in the legislative record that the legislation had been present-
 16 ed to the Yakamas but the Yakama Nation rejected it; or as Congressman Jones put
 17 it “for some reason, they have failed to accept any of the offers of the Govern-
 18 ment.” Pl’s Ex. 19 at 3. Thus, because there is no unequivocal, clear, and plain evi-
 19 dence of diminishment, the reservation diminishment factor examining the historic
 20 context of the 1904 Act, cuts against such a finding.

21 **4. The Yakama Reservation’s Subsequent History Following The** 22 **1904 Act Does Not Support Congressional Diminishment**

23 The Yakama Reservation’s history following the 1904 Act does not support
 24 a finding of diminishment. First and foremost, where a statute’s text and its legisla-
 25 tive history “fail to provide substantial and compelling evidence of congressional
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1 intention to diminish Indian lands,” the Court is “bound . . . to rule that diminish-
2 ment did not take place and that the old reservation boundaries survived the open-
3 ing.” *Solem*, 465 U.S. at 472. As there is no substantial and compelling evidence of
4 congressional intent to diminish the Yakama Reservation in the 1904 Act and its
5 legislative history, the Court is bound to find that diminishment did not occur re-
6 gardless of the Yakama Reservation’s history following the 1904 Act. With that
7 said, such history strongly supports Tract D’s continued status as Reservation land.

8 The Supreme Court’s 1913 decision in *Northern P. R. Co. v. United States*
9 confirms that it did not consider the Yakama Reservation’s boundaries to have been
10 changed by the 1904 Act. The issue concerned the patenting of lands between the
11 Schwartz line and the Barnard/Campbell line referenced in the 1904 Act. *Northern*
12 *P. R. Co.*, 227 U.S. at 358. However, the Court acknowledged that the Yakama
13 Reservation’s western boundary extends beyond the Barnard/Campbell line to the
14 main ridge of the Cascades. *Id.* at 360. In other words, the 1904 Act could not have
15 diminished the Yakama Reservation’s boundary where less than 10 years later the
16 Supreme Court acknowledged that the Treaty boundary—which includes lands be-
17 yond the Barnard/Campbell Line—remained in force. *Id.* The Ninth Circuit af-
18 firmed this reading of *Northern P. R. Co.* in *Skokomish Indian Tribe v. France*, de-
19 scribing the Court’s decision as “affirm[ing] a construction of a treaty between the
20 United States and the Yakima Indians, establishing the western boundary of the
21 Yakima Reservation at the main ridge of the Cascade Mountains” *Skokomish*
22 *Indian Tribe v. France*, 320 F.2d 205, 212 n.6x (9th Cir. 1963). The Supreme Court
23 cannot change the Yakama Reservation’s boundaries, and therefore could not have
24 recognized the main ridge of the Cascades as the Reservation’s western boundary
25 if the 1904 Act had previously changed it.

1 In 1939, Congress appropriated \$4,000 for “completion of a survey of the
2 disputed boundary of the Yakima Reservation, Washington” 53 Stat. 685, 696
3 (May 10, 1939). If Congress had definitively diminished the Yakama Reservation
4 in 1904, it would not have appropriated funds to survey what it deemed a “disputed
5 boundary” in 1939. At the same time a jurisdictional bill passed the Senate which
6 would have allowed the Yakama Nation to pursue damages against the United
7 States for the taking of land within the Yakama Reservation. The bill never passed
8 the House, but the Yakama Nation was able to file its claims 10 years later with the
9 Indian Claims Commission.

10 Congress passed the Indian Claims Commission Act in 1946 creating a
11 Commission to hear five defined categories of claims against the United States. 60
12 Stat. 1049 (Aug. 13, 1946). One such category of claims is for “the taking by the
13 United States, whether as the result of a treaty of cession or otherwise, of lands
14 owned or occupied by the claimant without the payment for such lands of compen-
15 sation agreed to by the claimant.” *Id.* at 1050. Where the Commission rules on
16 such takings claims, the Supreme Court has treated the ICC’s findings of fact as
17 persuasive, stating “[a] reviewing court generally will not discard such [ICC] find-
18 ings because they raise the specter of creeping revisionism, as the dissent would
19 have it, but will do so only when they are clearly erroneous and unsupported by the
20 record.” *United States v. Sioux Nation of Indians*, 448 U.S. 371, 421 n.32 (1980).

21 Pursuant to the Indian Claims Commission Act, the Yakama Nation sued the
22 United States for the illegal taking of ownership of land within the Yakama Reser-
23 vation’s boundaries. After two decades of litigation, the ICC concluded that
24 “‘Tract D’ was intended to be included within the Yakama Reservation, and the
25 [Yakama Nation’s] claim to that area should be allowed.” Pl’s Ex. 46 at 16. After
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1 recounting the long history of various Reservation boundary surveys, the ICC
2 based its decision principally on a review of Article II of the Treaty, the Treaty
3 Map, and Gov. Stevens' statements at the Walla Walla Treaty Council. Pl's Ex. 46
4 at 16-17.

5 The ICC case was ultimately resolved in a settlement agreement between the
6 Yakama Nation and United States, which the ICC approved in 1968. Pl's Ex. 23.
7 In the settlement agreement, the United States agreed that the Yakama Nation
8 maintained its beneficial ownership in all unpatented lands within Tract D. Pl's Ex.
9 23 at 14-17. This land was included within the Yakama Reservation in 1855 and
10 never alienated to non-Indians. As a result, the only way the United States could
11 concede the Yakama Nation's continued beneficial ownership in these lands within
12 Tract D is if they remained within the Yakama Reservation's boundaries.

13 In the more than 50 years since the ICC's decision, the United States has
14 uniformly treated Tract D as within the Yakama Reservation. In particular, Interior
15 and its various agencies have repeatedly upheld Tract D's Reservation status. Con-
16 gress has entrusted Interior with responsibility for Indian Affairs. *See* 25 U.S.C. § 2
17 ("The Commission of Indian Affairs shall, under the direction of the Secretary of
18 the Interior, and agreeably to such regulations as the President may prescribe, have
19 the management of all Indian affairs and of all matters arising out of Indian rela-
20 tions"); *see also United States v. Wheeler*, 435 U.S. 313, 328 n.27 (1978).

21 Consistent with Interior's congressionally delegated responsibility over Indi-
22 an affairs, in 1968, a United States Assistant Regional Solicitor to the BIA wrote a
23 memorandum confirming the Yakama Nation's position on Tract D. Pl's Ex. 27.
24 Solicitor Neely described the lands that had been sold within Tract D, and the re-
25 sidual jurisdiction the Yakama Nation retained over Tract D in general:
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1 The land taken by action of the United States in appro-
2 priating it to other uses constitutes fee-patented land
3 within the reservation. The Tribe has the authority to ex-
4 ercise jurisdiction over the activities of its members with-
in these areas and to assert the rights granted to them by
the Treaty.

5 Pl's Ex. 27 at 11.

6 On August 4, 1978, Solicitor L. Krulitz affirmed Assistant Regional Solici-
7 tor Neely's opinion in a letter to Congressman Mike McCormack—Klickitat Coun-
8 ty's Congressional Representative—confirming that Tract D is located within the
9 Yakama Reservation. Pl's Ex. 28. In 1980, the BIA Superintendent for the Yakama
10 Agency acknowledged that signs were installed around Tract D identifying it as the
11 Yakama Reservation's boundary. Pl's Ex. 29. Later that year, the Office of the Re-
12 gional Solicitor issued a memorandum confirming such boundary. Pl's Ex. 30. In
13 1982, the United States certified a survey completed by Cadastral Surveyor Ronald
14 Scherler of the Yakama Reservation's boundary around Tract D, which included
15 the permanent installation of brass caps marking the Reservation Boundary. Pl's
16 Ex. 74. The BIA Superintendent for the Yakama Agency confirmed the BIA's posi-
17 tion that Tract D remained within the Yakama Reservation in a 1986 letter. And this
18 Court expressly treated Tract D as within the Yakama Reservation in its decision in
19 *Holly v. Confederated Tribes & Bands of Yakima Indian Nation*, 655 F. Supp. 557,
20 559 n.2 (E.D. Wash. 1986).

21 Solicitor Thomas Sansonetti reiterated Tract D's reservation status in 1992 in
22 a letter to Congressman Sid Morrison—Klickitat County's Congressional Repre-
23 sentative—stating “the Treaty with the Yakima Tribe included Tract D as part of
24 the Yakima Reservation.” Pl's Ex. 31. In 1993, the BIA Portland Area Director sent
25 then-Congressman Jay Inslee a letter affirming that Tract D is within the Yakama
26 Reservation in 1993. Pl's Ex. 87. In 2003 and 2005, the United States Environmen-

1 tal Protection Agency sent Defendants' legal counsel letters confirming that Glen-
2 wood was within the Yakama Reservation, and therefore subject to EPA regulatory
3 oversight. Pl's Ex.'s. 41, 42.

4 These opinions represent decades of federal officials from various agencies
5 affirming, over and over again, that the Treaty of 1855 included Tract D within the
6 Yakama Reservation. Aside from periods wherein Yakamas were literally disen-
7 franchised and unable to meaningfully petition their trustee for relief, the record of
8 history dating back nearly a century shows Yakamas fighting relentlessly for Tract
9 D, and the United States has continuously recognized Tract D is part of the Yakama
10 Reservation for over fifty years. None of the Supreme Court's reservation dimin-
11 ishment cases feature such an extensive and unwavering federal commitment to a
12 reservation's boundaries as the United States has demonstrated here following the
13 ICC proceedings.

14 **C. Defendants' Arguments Thus Far Are Without Merit**

15 Defendants have argued that the Treaty Map's depiction of the Yakama Res-
16 ervation's location north of the 46th parallel of latitude demonstrates Gov. Ste-
17 vens' understanding that Camas Prairie was not within the Yakama Reservation.
18 This argument completely ignores the treaty canons of construction that the Treaty
19 of 1855 must be interpreted as the Yakama Nation's representatives at the Walla
20 Walla Treaty Council would have understood it, and there is no evidence in the
21 record that they understood latitude and longitude, or that the 46th parallel was ev-
22 er discussed in relation to the Reservation boundaries. Defendants also do not
23 grapple with the inconsistency between their 46th parallel argument, their advoca-
24 cy for a boundary that extends south of the 46th parallel to Grayback Mountain,
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1 and their expert witness's proffered southern boundary from 1855 to the present
2 that is located primarily south of the 46th parallel.

3 Related to this argument, Defendants have referenced evidence they argue
4 shows Gov. Stevens had a commanding knowledge of the geography in and around
5 the Yakama Reservation in 1855, and therefore knew he was not including Camas
6 Prairie in the Reservation when he drew the Treaty Map. Defendants rely on a se-
7 ries of reports from Gov. Stevens' agents who travelled through the Camas Prairie
8 area. The significant geographic errors in Gov. Stevens' description of the Yakama
9 Reservation, depiction of that Reservation on the Treaty Map, and subsequent rep-
10 resentation of the Yakama Reservation in the 1857 White Swan Map suggest oth-
11 erwise. In the Treaty, Gov. Stevens erroneously suggested that the south fork of the
12 Ahtanum River reached the Cascade Mountains, when in fact it terminates miles to
13 the east. Of course, he also erroneously identified a non-existent spur south and
14 east of Mt. Adams that separates the Klickitat River from Toppenish Creek. The
15 Treaty Map places Mt. Adams in the wrong location relative to the other moun-
16 tains—depicting Mt. St. Helens north of Mt. Adams—and his White Swan Map
17 erroneously locates the Klickitat River west of Mt. Adams instead of its proper lo-
18 cation east of Mt. Adams. Regardless, the extent of Gov. Stevens' geographic
19 knowledge does not factor into the mandatory application of the treaty canons of
20 construction in this case.

21 In an apparent attempt to avoid application of the reservation diminishment
22 legal framework, Defendants' expert has asserted that the Barnard/Campbell Line
23 was the intended boundary in 1855, and that Congress confirmed that intention in
24 the 1904 Act. In other words, Defendants' expert agrees with the Yakama Nation
25 that the 1904 Act did not change the Yakama Reservation's boundaries, but he be-
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1 lieves the Barnard/Campbell Line represents that boundary. Defendants have failed
2 to address the plain conflict between the Treaty's description of the Reservation
3 boundaries and the location of the Barnard/Campbell Line. Congress cannot con-
4 firm the Reservation's boundaries as described by Treaty, while at the same time
5 adopting a Reservation boundary that directly conflicts with the Treaty.

6 While never mentioning the canons of treaty construction thus far in the liti-
7 gation, Defendants have argued that the Treaty of 1855 should be interpreted con-
8 sistent with statements purportedly made by a few Yakama Members more than 50
9 years after the Treaty was signed. The statements of Messrs. Spencer, Joe, and
10 Lincoln—none of whom were present at the Walla Walla Treaty Council—are
11 consistently attributed to statements made to them by non-Indian federal employ-
12 ees. Put another way, these are third-hand statements from federal officials told to
13 these Yakama Members. A 1906 petition allegedly supported by less than 150
14 Yakama Members calls for the United States to acknowledge additional acreage
15 within the Yakama Reservation, but it does not say which acres are at issue. It is
16 alleged the petition is signed by enrolled Yakama Members White Swan and Cap-
17 tain Eneas, but the petition directly conflicts with boundaries discussed in a letter
18 that both men also purportedly signed shortly thereafter. In addition, Captain Eneas
19 and two other enrolled Yakama Members purportedly signed a document in 1905
20 thanking the United States for the land acknowledged in the 1904 Act. The re-
21 moteness of the statements and inconsistencies therein make such statements un-
22 persuasive.

23 Defendants have relied significantly on precedent concerning title to Reser-
24 vation lands, thereby suggesting that because land within Tract D passed out of
25 Yakama ownership, such land is no longer within the Yakama Reservation. This
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1 conflation of ownership of Reservation land with the reservation status of such
2 land is wholly without merit. The Tenth Circuit explained that:

3 [A]djudicating reservation boundaries is conceptually
4 quite distinct from adjudicating title to the same land.
5 One inquiry does not necessarily have anything in com-
6 mon with the other, as title and reservation are not con-
7 gruent concepts in Indian law. In fact, allotment in sever-
8 alty to individual Indians and subsequent entry by non-
Indians is entirely consistent with reservation status.

9 *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987) (in-
10 ternal quotations and citations omitted). The Supreme Court’s reservation dimin-
11 ishment framework expressly acknowledges that land retains its reservation status
12 “no matter what happens to the title of individual plots within the area” *So-*
13 *lem*, 465 U.S. at 470.

14 As a corollary argument, Defendants have argued that because the Yakama
15 Nation was paid for the taking of land within Tract D, the land is no longer within
16 the Reservation. This argument is absurd on its face and should be disregarded.
17 The ICC settlement, for Tract D as well as other claims settled between the Yaka-
18 ma Nation and the United States involving land indisputably within the Reserva-
19 tion boundaries, tracks the well-established rule that the alienation of land within a
20 reservation does not change the reservation status of that land. Today, in multiple
21 towns located within the Yakama Reservation, title to a significant portion of the
22 land is held in fee by non-Indians.

23 Defendants and their expert also repeatedly assert that the ICC incorrectly
24 determined that in 1855, Tract D was intended to be included within the Yakama
25 Reservation. Defendants have not cited a single instance where either the Yakama
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1 Nation or the United States (i.e. the parties to the Treaty of 1855) have ever agreed
 2 with their contention after the ICC's proceedings terminated. Defendants clearly
 3 wish that the United States had negotiated a different Reservation boundary in
 4 1855. But they have failed to cite any evidence or legal precedent that undermines
 5 application of the Treaty canons of construction to the Treaty of 1855, Treaty Map,
 6 and Treaty Minutes, which dictates that at the time the Treaty of 1855 was negoti-
 7 ated, the Yakama Nation naturally understood their Reservation to include Tract D.

8 **D. Klickitat County Does Not Have Criminal Jurisdiction Over Yakama**
 9 **Members Within the Yakama Reservation.**

10 The Yakama Nation hereby reiterates, incorporates, and reserves all
 11 arguments raised in support of its Motion for Preliminary Injunction regarding
 12 the limits of Defendants' criminal jurisdiction within the Yakama Reservation
 13 after April 19, 2016.

14 **V. REQUEST FOR RELIEF**

15 The Yakama Nation respectfully requests that the Court order the following
 16 relief:

17 A. A declaratory judgment pursuant to 28 U.S.C. § 2201 declaring that:

18 (1) Defendants do not have criminal jurisdiction over enrolled
 19 Yakama Members within the Yakama Reservation;

20 (2) Tract D, as surveyed by Cadastral Engineer Ronald Scherler
 21 and approved by the United States in 1982, is located within the exterior
 22 boundaries of the Yakama Reservation established by the Treaty of 1855; and

23 (3) Defendants violated the Yakama Nation's inherent sovereign
 24 and Treaty-reserved rights by unlawfully exercising criminal jurisdiction over
 25 PTS, an enrolled Yakama Member whose alleged delinquent act occurred in
 26

1 Indian Country.

2 (4) Defendants violated the Yakama Nation's inherent sovereign
3 and Treaty-reserved rights by unlawfully exercising criminal jurisdiction over
4 Robert Joseph Libby, an enrolled Yakama Member whose alleged crimes occurred
5 in Indian Country.

6 B. Award the Yakama Nation such other relief as the Court
7 deems just and appropriate.

8
9 DATED this 13th day of June, 2019.

10 s/Ethan Jones

11 Ethan Jones, WSBA No. 46911
12 Shona Voelckers, WSBA No. 50068
13 YAKAMA NATION OFFICE OF LEGAL COUNSEL
14 P.O. Box 151, 401 Fort Road
15 Toppenish, WA 98948
16 Telephone: (509) 865-7268
17 Facsimile: (509) 865-4713
18 ethan@yakamanation-olc.org
19 shona@yakamanation-olc.org

20 s/Joe Sexton

21 Joe Sexton, WSBA #38063
22 Galanda Broadman PLLC
23 8606 35th Ave NE, Suite L1
24 P.O. Box 15146
25 Seattle, WA 98115
26 (206) 557-7509 – Office
(206) 229-7690 – Fax
joe@galandabroadman.com

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