No. _____

In the
Supreme Court of the United States

KLICKITAT COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF WASHINGTON; KLICKITAT COUNTY SHERIFFS 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,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, A SOVEREIGN FEDERALLY RECOGNIZED NATIVE NATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns a roughly 190-square-mile tract of land in southwestern Washington, which is a mostly non-Indian ranching community adjacent to the Yakama Indian Reservation. In 1904, Congress acted to settle a longstanding dispute between the United States and the Confederated Tribes and Bands of the Yakama Nation over the boundary established by the 1855 treaty setting aside the Reservation. Act of Dec. 21, 1904, ch 22, 33 Stat. 595 (1904) (1904 Act). In doing so, Congress adopted the "findings" of a federal surveyor, E.C. Barnard, concerning the disputed boundary. *Id.* § 1, 33 Stat. at 596. It is undisputed that the area at issue lies outside Barnard's boundary. In 1913, this Court itself confirmed the boundary line drawn by Barnard—and adopted by Congress—in *Northern Pacific Railway Co. v. United States*, 227 U.S. 355, 365-66 (1913).

In the decision below, the Ninth Circuit refused to give effect to the boundary line adopted by 1904 Act and recognized by this Court's 1913 decision. Instead, based on its interpretation of the 1855 treaty establishing the Reservation—some 60 years before Congress acted to settle the disputed boundary—the Ninth Circuit held that the Reservation includes the tract of land at issue. In so holding, the Ninth Circuit also disregarded a physical call in the treaty stating that the boundary of the Reservation runs along the divide of the "Klickatat and Pisco Rivers," which indisputably is located some fifteen miles *north* of the area at issue. The questions presented are:

1. Whether, or in what circumstances, a court may override an Act of Congress adopting a boundary for an Indian reservation, and set its own boundary.

2. Whether the Ninth Circuit erred by holding—in conflict with the decisions of this Court, including a decision involving the very boundary at issue—that the Reservation encompasses the area at issue.

LIST OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), petitioner states that there are no proceedings directly related to this case in this Court.

Confederated Tribes and Bands of the Yakama Nation v. Klickitat County et al., Nos. 19-35807, 19-35821, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 11, 2021; rehearing denied August 18, 2021, 2021.

Confederated Tribes and Bands of the Yakama Nation v. Klickitat County et al., No. 1:17-cv-3192-TOR, U.S. District Court for the Eastern District of Washington, judgment entered August 28, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully ask this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The panel decision of the Ninth Circuit (App. 1a-24a) is reported at 1 F.4th 673, and the order denying rehearing en banc (App. 65a-66a) is unpublished. The district court's findings of fact, conclusions of law, and order granting declaratory judgment (App. 25a-26a) is unpublished.

JURISDICTION

On June 11, 2021, the Ninth Circuit filed its opinion affirming the judgment of the district court (App. 1a). On August 18, 2021, the Ninth Circuit denied petitioner's timely motion for rehearing en banc (App. 65a). Supreme Court Rules 13.1 and 13.3 provide that a petition for a writ of certiorari is timely if filed within 90 days from, *inter alia*, the date of the denial of rehearing. On November 8, 2021, Justice Kagan extended the time to file until and including December 16, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in the appendix to this petition. App. 67a-86a.

INTRODUCTION

This case tests the limits of a federal court's authority to revise—and expand—the boundaries of a federally established Indian reservation. In the decision below, the Ninth Circuit overrode the boundary line adopted by an Act of Congress, a decision of this Court recognizing that boundary, and the physical calls of a treaty, to expand the boundary of the Yakama Indian Reservation in Washington. In doing so, the court swept into the Reservation a roughly 190-square mile tract of land encompassing Glenwood Valley, a mostly non-Indian ranching community in Klickitat County, Washington. Among other things, that ruling strips the County of its authority to prosecute Indians for serious offenses committed in Glenwood Valley, including the rape of a minor in Glenwood that sparked this litigation.

The Ninth Circuit's decision warrants review for three principal reasons. *First*, the Ninth Circuit's decision effectively nullifies an Act of Congress adopting the very boundary at issue here. *See* Act of Dec. 21, 1904, ch. 22, 33 Stat. 595 (1904 Act). The 1904 Act settled a longstanding boundary dispute concerning the Reservation by adopting the "findings" of a federal surveyor, E.C. Barnard. Barnard's boundary line excludes Glenwood Valley. As this Court has long recognized, judicial invalidation of a federal statute presents an issue of paramount importance, and generally is alone enough to warrant this Court's review. *See Shelby County v. Holder*, 570 U.S. 529, 556 (2013) ("Striking down an Act of Congress 'is the gravest and most delicate duty that this Court is called on to perform.'" (quoting *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J.,

concurring)); *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) (granting certiorari on that basis).

Second, the Ninth Circuit's decision conflicts with this Court's own decisions, including a decision of this Court recognizing that the boundary of the Yakama Reservation excludes Glenwood Valley. *See Northern Pac. Ry. Co. v. United States*, 227 U.S. 355, 365-66 (1913). The Ninth Circuit's decision also conflicts with this Court's precedents on treaty interpretation. *See, e.g.*, *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). In particular, the decision contravenes this Court's precedent going back to Chief Justice Marshall stressing that the natural objects identified in land grants have "absolute control," *Brown v. Huger,* 62 U.S. (21 How.) 305, 318 (1858); *see Newsom v. Pryor's Lessee*, 20 U.S. (7 Wheat.) 7, 10 (1822) (Marshall, C.J.), and transforms the Indian canon from a narrow interpretive tool for breaking ties in close cases into a raw power to rewrite and erase treaty terms.

Third, the questions presented are exceptionally important. As noted, the decision below effectively nullifies a federal statute, and rewrites the plain terms of a treaty. That ruling is particularly problematic in the circuit home to more Indian reservations than any other. The court's decision also has profound implications for local governance of non-Indian communities bordering Indian reservations. Novel interpretations of centuries-old treaties like the one here disrupt settled expectations and suddenly transform non-Indian communities into Indian country. Such unexpected boundary modifications intrude on state and local government (including criminal jurisdiction), confer tribal powers of taxation over non-Indian citizens and businesses, and trigger

federal preemption of even non-Indian activity that may conflict with federal Indian policy and tribal sovereignty. This intrusion on state and local sovereignty explains why this Court often grants certiorari to resolve questions concerning the territorial boundaries of Indian Reservations.

The petition should be granted.

STATEMENT OF THE CASE

Klickitat County lies on the southern border of the State of Washington, and is home to a population of about 20,000 people, more than 94 percent of whom are non-Indian. CA9 Klickitat Opening Br. 65. Glenwood Valley—a roughly 190-square mile area in Klickitat County known as "Tract D"—has an even smaller share of Indian population than the broader County. The following map shows Tract D as well as the historic development of the boundary.[1] As discussed below, the Ninth Circuit's decision draws the Reservation boundary as encompassing Tract D, marked in black. The boundary adopted by Congress in 1904—based on Barnard's findings—follows the orange line from Goat Butte to Grayback, and excludes Tract D. And the remaining lines reflect other federal surveys concerning the Reservation's boundary—which likewise exclude Tract D.

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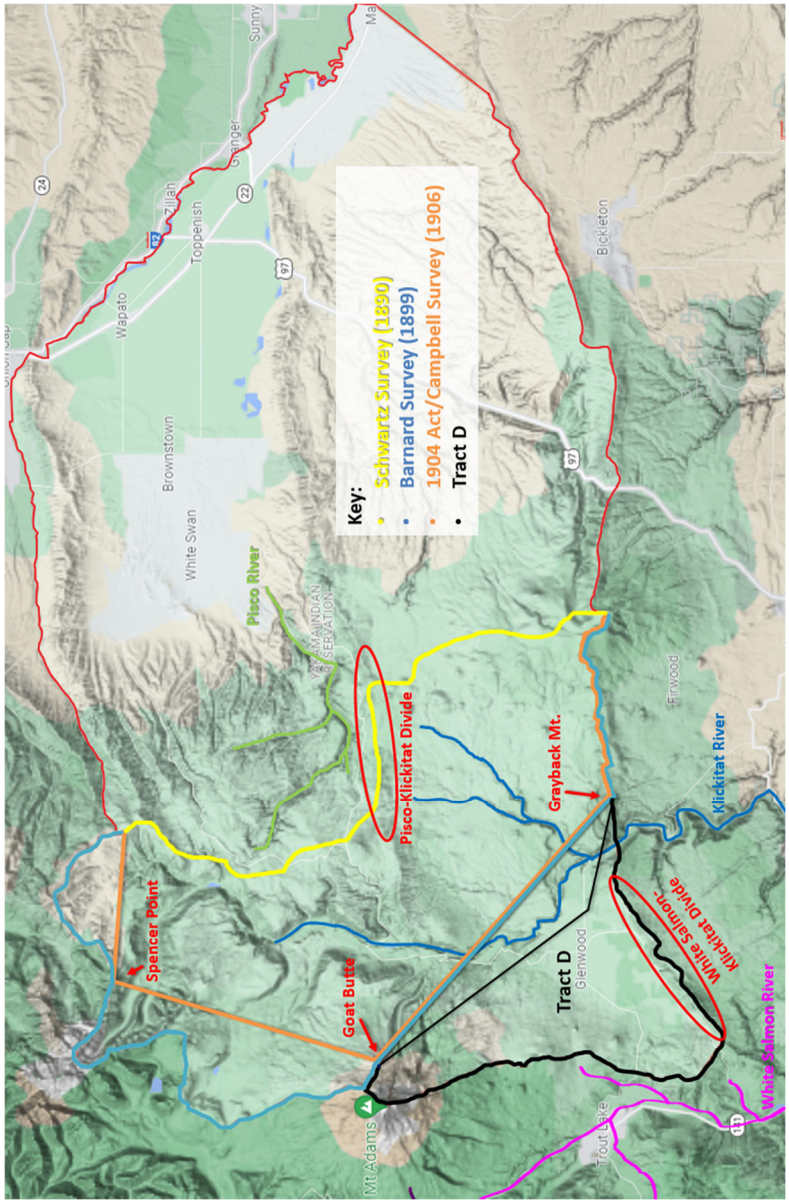
[1] This map is a composite of several maps in the record. *See* 12-ER-2628, -2782; CA9 Klickitat Opening Br. 9.



See App. 87a for larger version of map.

A. The Treaty Of 1855 And Its Aftermath

At a treaty council in 1855, the United States—represented by territorial Governor Isaac Stevens—and representatives of the confederated tribes and bands that became the Yakama Nation executed a treaty reserving certain territory in Washington to the Yakama. App. 2a; *see also* Treaty with the Yakamas, U.S.-Yakama Nation, arts. I & II, June 9, 1855, *ratified* Mar. 8, 1859, 12 Stat. 951.

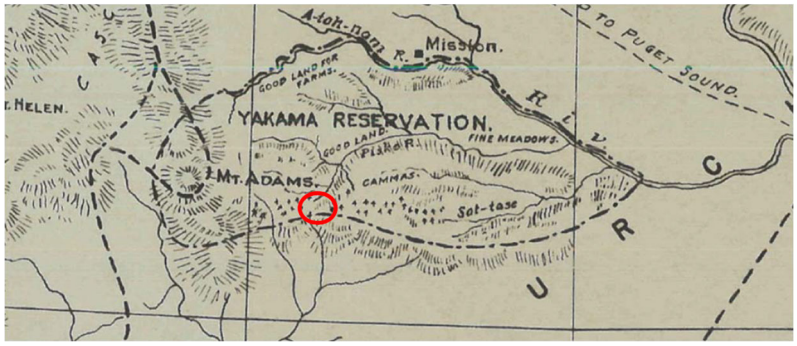
The Treaty described the Reservation's boundary as progressing

> southerly along the main ridge of [the Cascade] mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat 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.

App. 2a-3a (quoting Treaty with the Yakamas, art. II, 12 Stat. at 952).

The treaty thus clearly placed the boundary along the divide created by the "Klickatat and Pisco rivers," which—as the above map shows—is some fifteen miles north of Tract D. And consistent with the treaty calls, there is a "spur"—described by Stevens as a long, discontinuous ridge "thrown out from the main chain of the Cascades," 1-SER-159—that descends south and east of Mount Adams and which connects the Cascade Mountains to the Pisco-Klickitat divide, *see Northern Pac. Ry. Co. v. United States*, 191 F. 947, 958 (9th Cir. 1911), *aff'd*, 227 U.S. 355 (1913).

Stevens used a map during the treaty council to depict the Reservation, as shown below:



See App. 4a, 24a.[2] Among other things, the map depicts the boundary as touching the Pisco-Klickitat divide (circled in red). In addition, the curving line depicting the lower boundary tracks a spur that runs from Mount Adams. *See infra* at 28.

Following the treaty council, Stevens told Chief Spencer—the first Head Chief of the Yakama—that he would send men to "stake[] out" the Reservation. 11-ER-2487. Around 1856, federal agents took Chief Spencer to a junction between Mount Adams and Grayback Mountain, where they explained that the boundary ran between those points. 11-ER-2488-89. And around 1860, federal surveyors showed tribal judge Stick Joe a nearly identical boundary running in a straight line between Goat Butte on Mount Adams and Grayback Mountain. 12-ER-2619. Both times, the line excluded Glenwood Valley.

Tribal headmen who were present at the treaty council endorsed Chief Spencer and Stick Joe as boundary authorities, and Yakama leadership

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[2] After the council, the treaty map was misplaced until it was relocated by the U.S. Office of Indian Affairs in 1930.

repeatedly chose them to identify the correct boundary during later disputes. *See* 1-SER-168-69, 193; 2-SER-346, 363-64. They—along with other tribal leaders—consistently advocated for a boundary that excluded Glenwood Valley.

B. The 1899 Barnard Report And 1904 Act

For seventy-five years following the treaty council, the Yakama consistently advocated for a boundary between Mount Adams and Grayback.

The first federal survey—the 1890 Schwartz survey—omitted much of the western half of the Reservation. *See* App. 87a (map). The Yakama disputed Schwartz's survey. In a petition to the Commissioner of Indian Affairs in 1892, the Yakama insisted that "there is no mistake about the old boundary line" between Goat Butte on Mount Adams and Grayback. 1-SER-168-70. Chief Spencer and Stick Joe signed the petition, along with tribal leaders who had attended the 1855 treaty council.

In 1898, the United States sent a surveyor from the Geological Survey, E.C. Barnard, to investigate the Yakama's boundary claim "with the view of settling the contentions of the Indians." 1-SER-215; *see also* 12-ER-2613-28. Barnard found that the treaty boundary ran out to the Cascades, southward along the mountains' main ridge, swung around the eastern slope of Mount Adams to Goat Butte, and then straight to Grayback. 12-ER-2628; 1-SER-27-30. Although it extended further west and south than the Schwartz survey, Barnard's boundary still excluded Glenwood Valley. *See* App. 87a (map).

In 1904, Congress acted to "settle[]" the "long-standing dispute between the Government and the Indians" over the Reservation boundary. 8-ER-1839;

12-ER-2632. The Secretary of the Interior transmitted Barnard's report to Congress, accompanied by a letter from the Commissioner of Indian Affairs endorsing Barnard's findings as to the boundary, and draft legislation to "negotiate an agreement" with the Yakama "to be *final* and to *cover all claims* of said Indians" as to the disputed boundary. 12-ER-2613-25 (emphasis added).

Congress then enacted legislation that explicitly adopted Barnard's "findings" and acted to "define and mark the boundaries of the western portion of said [Yakama] reservation" according to those "findings." 1904 Act, ch. 22, §§ 1, 8, 33 Stat. 595, 595-96, 598. The 1904 Act "recognized" the "claim of said Indians to the tract of land" surveyed by Barnard and "excluded by [the] erroneous boundary survey" conducted by Schwartz, and provided that "said tract shall be regarded as a part of the Yakima Indian Reservation for purposes of this Act." *Id.* § 1, 33 Stat. at 596. The Act also appropriated money to formally survey and record the boundary that Barnard had identified, "as above set out." *Id.* § 8, 33 Stat. at 598.[3] Resolving the dispute over the boundary was critical to the Act, because the Act also opened up Reservation lands to allotment. *Id.* § 1, 33 Stat. at 596.

As the United States later observed, "[t]he Barnard report prompted Congress to pass the Act of December 21, 1904, adopting said survey as correctly fixing the Southern and Western boundaries of the Yakima Indian Reservation." Br. for Appellee 5,

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[3] That survey—the Campbell survey—was undertaken in 1906. 12-ER-2782; *see* App. 87a (map).

Northern Pac. Ry. Co. v. United States, 191 F. 947 (1911) (No. 1916) (citation omitted).

Following passage of the 1904 Act, a Yakama tribal council in April 1905 (presided over by the son of a treaty signer) formally "express[ed] to the Government our thanks and appreciation of the Act conceding . . . our right and title" to "the disputed tract" "lying on the Western Border of our Reservation." 2-SER-358-59 (emphasis in original). Subsequent letters in 1906 from Yakama tribal councils, signed by leading chiefs and headmen (including some who either attended the 1855 treaty council themselves or descended from a treaty signer), continued to endorse Barnard's survey and to advocate for a boundary that excluded Glenwood Valley. 13-ER-2851-56, 12-ER-2864.

C. This Court's 1913 *Northern Pacific* Ruling

In 1908, the United States sued to nullify certain land patents granted to the Northern Pacific Railway Company in the western portion of the Yakama Reservation—between the boundary identified by the 1890 Schwartz survey and the boundary identified by the 1899 Barnard reconnaissance. *See* App. 18a; *Northern Pacific*, 227 U.S. at 364-66. The dispute thus centered on which of the two surveys properly identified the boundary of the Reservation.

The district court held, based on the testimony of the Yakama's own witnesses, that it was "clearly established" that the Yakama claimed "boundaries substantially as defined by the Barnard survey." 2-SER-277. And the Ninth Circuit—reviewing both the treaty and the 1904 Act—likewise concluded that "the Barnard survey [was] recognized by Congress in the

Act of December 21, 1904, as locating the boundaries of the reservation." *Northern Pacific*, 191 F. at 956.

This Court affirmed. To decide the case, the Court necessarily had to answer the question, "what are the boundaries of the reservation?" *Northern Pacific*, 227 U.S. at 356. And this Court specifically addressed the portion of the boundary at issue here: Just after describing the southwestern boundary line from Goat Butte to Grayback identified by Chief Spencer and Stick Joe and endorsed by Barnard, *id.* at 365, this Court concluded that the evidence "establishes the correctness of the Barnard survey," *id.* at 366. Thus, in the *Northern Pacific* decisions, the Ninth Circuit and Supreme Court endorsed a boundary line—the line identified in Barnard's findings between Goat Butte and Grayback—that is identical to the one adopted by Congress in the 1904 Act. That boundary line indisputably excludes Glenwood Valley.[4]

D. Mid-Twentieth Century Litigation

In 1930, the U.S. Office of Indian Affairs commissioned a survey of Tract D after locating the original 1855 treaty map. App. 5a-6a; *see supra* at note 2. In 1949, the Yakama sued in the Indian

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[4] Barnard had reported that *north* of Mount Adams, the Yakama claimed only a straight-line northwestern boundary, whereas in Barnard's view, the treaty called for a line following the main ridge of the Cascades. 12-ER-2616. As to this northwestern boundary (not at issue here), the 1904 Act followed the line the Yakama claimed, whereas this Court in *Northern Pacific* followed the line Barnard identified as called for by the treaty. *See* 227 U.S. at 360-61. But both the 1904 Act and *Northern Pacific* adopted an identical southwestern boundary based on Barnard's findings (which is the only boundary relevant here), and that line excluded the Glenwood Valley.

Claims Commission seeking compensation for the taking of various tracts adjacent to the Reservation, including Tract D. App. 6a. This was the first time, after nearly 100 years, that the Yakama had formally claimed Tract D as part of the Reservation.

The United States argued that this Court's *Northern Pacific* decision was dispositive, and argued that the inclusion of Tract D would contradict the treaty calls and treaty map. *See* Def.'s Objs. to Findings of Fact, Request for Findings of Fact, and Br. 68, 98, *Yakima Tribe of Indians v. United States*, No. 47 (Ind. Cl. Comm'n. Apr. 18, 1952) ("ICC U.S. Br."). As the government explained, "it is clear that the judgment in the *Northern Pacific* case, affirmed by the decision of the Supreme Court, established the southwestern boundary along a straight line—the Barnard Line—from the Hump [*i.e.*, Goat Butte] to Grayback Peak" and thus "determined a question affecting the title to the lands in Tract D, i.e., it determined that those lands lay *outside* the Yakima Indian Reservation." *Id.* at 77 (emphasis added).

The Commission agreed with the United States. But the Court of Claims reversed. *Yakima Tribe v. United States*, 158 Ct. Cl. 672 (1962). The court acknowledged that "Congress accepted the Barnard survey by Act of December 21, 1904." *Id.* at 679. But it declined to follow the Act and *Northern Pacific*, reasoning that it was not bound by this Court's decision because it was "closer to a determination of fact than a legal ruling." *Id.* at 681. After that decision, the United States ultimately acceded and settled the Yakama claim to Tract D in 1968. App. 22a. Nevertheless, neither the County nor the State of Washington has treated Glenwood Valley as

Reservation land during the half-century since the Court of Claims decision. 2-ER-253-54; 1-SER-2-5.

E. This Litigation

In 2017, Klickitat County arrested and charged a seventeen-year-old tribal member with two counts of rape of a child in the second degree, committed near Glenwood, Washington. App. 7a; 2-ER-259. The perpetrator was convicted on both counts, but the Yakama Nation sued in federal court to bar the County's exercise of criminal jurisdiction over tribal members for offenses arising within the Yakama Reservation—which they argued includes Tract D. App. 8a. The County argued that the 1855 treaty establishing the Reservation and the 1904 Act settling its boundary both exclude Tract D. *Id.*

Following a bench trial, the district court issued declaratory relief in favor of the Yakama, holding that Tract D is within the Reservation. *Id.* at 63a-64a. The court found that the 1855 Treaty was "ambiguous in its call for a southwestern boundary that follows a spur and divide separating the Klickitat River from the Pisco River (i.e. Toppenish Creek)," stating that "these features do not exist between said rivers south of Mount Adams." *Id.* at 35a. Invoking the Indian canon, the court then held that the Reservation included Glenwood Valley. *Id.* The court further held that the 1904 Act could not change that boundary because it did not clearly evince an intent to "change the Treaty boundaries of the Yakama Reservation" and thus "did not effectuate a diminishment of the Reservation" to exclude Tract D. *Id.* at 39a.

F. Decision Below

The Ninth Circuit affirmed. The court acknowledged the existence of the 1904 Act settling the boundary, as well as this Court's decision endorsing the same boundary and excluding Glenwood. App. 19a-21a. But the court nonetheless held that the boundary differed from that established by the 1904 Act and this Court's precedent, based on the panel's own interpretation of the treaty.

The court began by noting the district court's factual finding that there was no "spur" "south of Mount Adams," *id.* at 10a-12a. The court reasoned that because the treaty contains several references to a "spur," "[i]f the spur does not exist, . . . then the Treaty is ambiguous *in its description of the Reservation's southwestern boundary*." *Id.* at 11a (emphasis added). In other words, the court determined that the *entirety* of the treaty's boundary description (and not just the references to the spur) was ambiguous—including portions of the treaty that unambiguously referred to certain landmarks, such as the divide between the Pisco and Klickitat rivers.

To resolve this purported ambiguity, the court invoked the Indian canon and held that "the Treaty's ambiguity must be resolved according to the Yakamas' understanding that Tract D was included within the Yakama Reservation." *Id.* at 16a. Thus, the court interpreted the treaty as setting a boundary along the divide between the *White Salmon* and Klickitat Rivers—an entirely different divide from the divide specified in the treaty (the divide between the "Klickitat and Pisco Rivers"). *Id.* at 15a-17a.

Only then did the court turn to the 1904 Act. The court acknowledged that "Congress may change

reservation boundaries by statute" and that Congress "chose" the Barnard line to settle the boundary dispute in 1904, *id.* at 19a, 21a, but it asserted that "'[i]f Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so,'"' *id.* at 19a (alteration in original) (quoting *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019)). And the court found a "lack[]" of "'clear evidence that Congress *actually considered* the conflict between its intended action on the one hand' and the Yakamas' right to Tract D on the other, and that it 'chose to resolve that conflict by abrogating the treaty' to take Tract D away from the Yakamas." *Id.* at 21a (citation omitted). Thus, although the court acknowledged that Congress "recognized" a Reservation boundary excluding Tract D, the court concluded "the 1904 Act [did not] abrogate[e] the Yakamas' right to it." *Id.* at 20a-21a.

The court made only passing reference to this Court's decision in *Northern Pacific*, noting that this Court "analyzed the Treaty text to determine whether the Schwartz survey or the Barnard report better adhered to the Treaty negotiators' intentions." *Id.* at 21a. Based on this, the court reasoned "that the 1904 Act did not supersede the Treaty's establishment of the southwestern boundary." *Id.* The court did not address, however, that the southwestern boundary adopted in the 1904 Act and *Northern Pacific*—Barnard's line between Goat Butte and Grayback—was the *same* in the relevant respect. Nor did it acknowledge that this boundary excluded Tract D.

The Ninth Circuit denied rehearing. App. 65a-66a.

REASONS FOR GRANTING THE WRIT

This case concerns the proper role of, and limits on, the federal courts in resolving boundary disputes involving federal Indian reservations—a critical matter not only to the Nation's Indian tribes but to all affected communities and individuals, as well as to the separation of powers more generally. The Ninth Circuit's resolution of the boundary dispute in this case nullifies an Act of Congress adopting a boundary that excludes the area at issue; directly conflicts with a decision of this Court confirming the boundary set by that Act; rewrites the plain text of the treaty at issue, including its geographic calls; and flouts this Court's decisions on treaty interpretation more generally. This Court's intervention is needed.

I. The Ninth Circuit's Decision Nullifies An Act Of Congress Settling The Boundary At Issue

The Ninth Circuit negated an Act of Congress adopting a reservation boundary according to a line that indisputably excludes Tract D. *See* 1904 Act, ch. 22, §§ 1, 8, 33 Stat. 595, 595-96, 598.

1. Congress possesses plenary authority to set, enlarge, or diminish reservation boundaries. *See United States v. Lara*, 541 U.S. 193, 200 (2004); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 191, 196 (1876).

That authority is rooted in the Property Clause, which grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the

United States." U.S. Const. art. IV, § 3, cl. 2; *see United States v. Celestine*, 215 U.S. 278, 284 (1909). The Constitution confers that power on Congress alone, and "[i]t is not within the power of the courts to overrule the judgment of Congress." *Celestine*, 215 U.S. at 290.[5] Indeed, as this Court has explained, "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

Congress has frequently exercised its authority to set boundaries for Indian reservations and settle boundary disputes governing such lands. *See, e.g.*, Act of June 6, 1894, ch. 93, 28 Stat. 86, 86 (1894) ("Defining and permanently fixing the northern boundary line of the Warm Springs Indian Reservation" based on a contested survey.).[6]

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[5] The Property Clause is also the source of authority for Congress's binding determinations of boundary disputes involving other federal lands, such as national reserves, forests, and parks. *See, e.g.*, *United States v. Alaska*, 521 U.S. 1, 33 (1997); *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

[6] *See also* Crow Boundary Settlement Act of 1994, Pub. L. No. 103-444, 108 Stat. 4632; An Act to Confirm the Boundaries of the Southern Ute Indian Reservation, Pub. L. No. 98-290, §§ 1, 3, 98 Stat. 201, 201-02 (1984); Act of Dec. 22, 1974, Pub. L. No. 93-531, 88 Stat. 1712; Act of Sept. 2, 1957, Pub. L. No. 85-271, § 2, 71 Stat. 596; An Act to Define the Exterior Boundary of the Uintah and Ouray Indian Reservation in the State of Utah, ch. 108, 62 Stat. 72 (1948); An Act to Authorize the Secretary of the Interior to Enter Into an Agreement Fixing Boundary Lines on Wind River Indian Lands, ch. 138, 55 Stat. 207 (1941); An Act to Quiet the Title to Lands Within the Pueblo Indian Land Grants, ch. 331, 43 Stat. 636 (1924); An Act to Establish the Boundary-

2. Congress exercised its plenary authority and unilaterally settled the Yakama Reservation boundary dispute when it adopted the Barnard Line—between Goat Butte on Mount Adams and Grayback Mountain—by statute in 1904. That line indisputably excludes the Glenwood Valley.

The plain language of the 1904 Act reflects Congress's intent to approve Barnard's "findings" on the boundary at issue and to "define and mark" the boundary of the Reservation along the Barnard line. 1904 Act, §§ 1, 8, 33 Stat. at 596, 598. The Act "recognized" the "claim of said Indians to the tract of land" surveyed by Barnard and "excluded by [the] erroneous boundary survey" conducted by Schwartz, and provided that "said tract shall be regarded as a part of the Yakima Indian Reservation for purposes of this Act." *Id.* § 1, 33 Stat. at 596. Having "define[d]" the boundaries of the Reservation, the Act then allotted surplus lands *within* the Reservation for homesteading, *see id.* §§ 1-2, 33 Stat. at 596. The Act hinged on adopting Barnard's survey, which, as Congress found, the Secretary of the Interior had previously approved. *Id.* § 1, 33 Stat. at 596.

The statutory history confirms this plain reading of the Act. The Interior Secretary's letter transmitting Barnard's report to Congress urged legislation that would "cover all claims of said Indians" related to the boundary dispute. 12-ER-2625. And both legislative reports for the 1904 Act began with a discussion of the Yakama's boundary

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Line Between the State of Arkansas and the Indian Country, 43 Cong., ch. 140, 18 Stat. 476 (1875) ("declar[ing]" the boundary "as originally surveyed and marked" to be "the permanent boundary-line," and providing for a new survey to retrace it).

claim and the Barnard report. 8-ER-1835-36, 12-ER-2629. Both reports then expressed Congress' belief that, through passage of the 1904 Act, the "long-standing dispute between the Government and the Indians is settled." 8-ER-1839; 12-ER-2632. And in the trial court below, the Yakama's expert conceded that Congress believed that the 1904 Act had unilaterally settled the boundary of the Reservation by adopting the Barnard Line. 4-ER-804-05.

In short, as the United States later observed, the 1904 Act "correctly fix[ed] the Southern and Western boundaries of the Yakima Indian Reservation" by adopting the Barnard Line as the boundary. Br. for Appellee 4-5, *Northern Pac. Ry. Co. v. United States*, 191 F. 947 (1911) (No. 1916).

3. In the decision below, the Ninth Circuit acknowledged that the boundary expressly adopted by the 1904 Act excluded Glenwood Valley. App. 21a. But, remarkably, the court refused to give effect to that boundary and, instead, set a new boundary that sweeps in some 190-square miles of land—Tract D.

As discussed above, the 1904 Act explicitly adopted Barnard's "findings" on the Reservation's boundary, and allocated funds to "define and mark" the boundary according to those findings. 1904 Act, §§ 1, 8, 33 Stat. at 596, 598. That boundary indisputably excludes Glenwood Valley. The Ninth Circuit erred in refusing to give effect to the boundary adopted by Congress. Courts, of course, must always give effect to Acts of Congress (barring a constitutional defect not alleged here). Moreover, "[i]t is long settled that 'the provisions of an act of Congress, passed in the exercise of its constitutional authority, . . . if clear and explicit, must be upheld by the courts, even in contravention of express

stipulations in an earlier treaty' with [an Indian tribe]." *United States v. Dion*, 476 U.S. 734, 738 (1986) (omission in original) (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893)).

Accordingly, the Ninth Circuit exceeded its authority in second-guessing Congress's judgment based on its own reading of the treaty's terms. A prior treaty cannot trump a subsequent Act of Congress. Without an express re-determination by *Congress*, a federal statute establishing the boundary of an Indian reservation must be given effect. *See Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1461 (9th Cir. 1992) ("Whether Congress was acting under a misapprehension of fact or law is irrelevant once legislation has been enacted."). That is particularly true, when, as here, the Act settled a boundary dispute. 1904 Act, § 1, 33 Stat. at 596. It is "not the proper role of the courts to rewrite the laws passed by Congress and signed by the President." *Nasrallah v. Barr*, 140 S. Ct. 1683, 1692 (2020).

The Ninth Circuit's contrary assertion that the 1904 Act does not control, because Congress "did not clearly express an intent to abrogate the Treaty" is fundamentally misplaced. App. 19a. The only intent that matters is Congress's intent to adopt the Barnard Line—between Goat Butte and Grayback—as the boundary. And that intent is unquestionable. *See supra* at 18-19. The Ninth Circuit circularly reasoned that the Act abrogated the treaty, then anachronistically searched the statute for Congress's intent to abrogate. But the 1904 Act did *not* abrogate treaty rights; it simply settled a dispute over the Reservation boundary. The relevant congressional intent, therefore, is not an intent to "abrogate" the treaty, but to "define" the boundary—which the 1904

Act unmistakably expresses. No court is free to disregard a boundary set by Congress.[7]

Under the Ninth Circuit's logic, a court could nullify *any* boundary determination by Congress through a simple two-step: (1) read the original treaty to provide *more* territory than the claims presented to Congress, and then (2) fault Congress for failing to "clearly express" an intent to abrogate the court's interpretation of the treaty. But of course, Congress cannot "clearly express" its intent to reject a boundary interpretation that was never presented to it (and that was instead adopted by a court years, or in this case, more than a century, later). The Ninth Circuit's decision thus reflects a remarkable judicial overreach, and upends the ordinary framework for resolving sovereign disputes over tribal land.[8]

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[7] For similar reasons, *Solem v. Bartlett*'s diminishment framework does not apply. 465 U.S. 463 (1984); *see* App. 22a n.11. The 1904 Act did not purport to remove Tract D from the Reservation or open it for non-Indian settlement (in fact, Tract D has been settled by non-Indians since the Reservation was established). Congress simply set a boundary that excluded Tract D, and then pursued allotment *within* the Reservation. This Court has never held that a clear statement to abrogate anything is required when reviewing Acts of Congress that simply set (or, as here, clearly settle) a boundary.

[8] The Ninth Circuit also reasoned that Congress's appropriation of funds in 1939 for a survey of Tract D implied that the 1904 Act was not determinative. App. 22a But an appropriation by subsequent Congress cannot overturn the plain text of a duly enacted law, and nothing in the 1939 Act purported to change the boundary adopted by the 1904 Act. *See Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken

The Ninth Circuit's nullification of an Act of Congress is alone a sufficient ground for this Court's review. This Court routinely grants certiorari when a court of appeals negates a duly enacted Act of Congress. *See Shelby County v. Holder*, 570 U.S. 529, 556 (2013); *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) ("Because the Court of Appeals' holding . . . invalidated a portion of an Act of Congress, we granted certiorari."). The same grave interests apply here. The decision below negates the 1904 Act by overriding Congress's boundary determination.

II. The Ninth Circuit's Decision Directly Conflicts With This Court's Precedent

The Ninth Circuit's decision also directly conflicts with a decision of this Court concerning the *exact* treaty boundary at issue, as well as with this Court's precedent stressing the importance of giving effect to the natural objects identified in land grants.

A. The Ninth Circuit's Holding Conflicts With A Decision Of This Court Concerning The Very Boundary At Issue

The decision below directly conflicts with this Court's decision in *Northern Pacific Railway Co. v. United States*, 227 U.S. 355, 365-66 (1913), in which both this Court and the Ninth Circuit recognized a boundary that indisputably excludes Tract D.

Northern Pacific arose from a suit brought by the United States on behalf of the Yakama to nullify railroad patents lying between the Schwartz line (*see* App. 87a) and the main ridge of the Cascades. App.

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seriously . . . ."). Even after the new survey, Congress never altered the boundary adopted by the 1904 Act.

18a. Abe Lincoln, the Yakama boundary patrolman who accompanied Barnard in 1899, testified to the trial court that "all [the Indians] consented" to a boundary substantially similar to the Barnard Line. 1-SER-35-36. And the trial court ruled that the Barnard report accurately identified the southwestern boundary and matched the Yakama's understanding of the treaty. 2-SER-277.

The Ninth Circuit agreed. Based on the 1855 treaty, evidence of the Yakama's contemporaneous understanding of the treaty, and the 1904 Act, the Ninth Circuit concluded that "the Barnard survey"—which was "recognized by Congress in the Act of December 21, 1904"—properly "locat[ed] the boundaries of the reservation." *Northern Pac. Ry. Co. v. United States*, 191 F. 947, 956 (9th Cir. 1911).

On review to this Court, the United States urged this Court to affirm. It argued that the Barnard report controlled the dispute, noting that the erroneous Schwartz survey had "since been set aside . . . by act of Congress," and that "by the act of December 21, 1904, Congress branded the Schwartz survey as erroneous and accepted and confirmed the survey as made by Barnard." Br. for the United States 2, 24, *Northern Pac. Ry. Co. v. United States*, 227 U.S. 355 (1913) (No. 500) (citation omitted)).

This Court affirmed, holding that the Barnard Line between Goat Butte and Grayback Mountain was the "correct[]" southwestern boundary of the Reservation. *Northern Pacific*, 227 U.S. at 365-66. In doing so, the Court pointed to the testimony of Chief Spencer and Stick Joe, both of whom had advocated for a boundary running between Goat Butte ("the conical hump on the southeast slope of Mount Adams") and Grayback Mountain. *Id.* at 365. After

its review of the evidence, this Court endorsed "the correctness of the Barnard survey." *Id.* at 366. And based on evidence of the Yakama's contemporaneous understanding of the treaty "and also congressional action" setting the boundary (*i.e.*, the 1904 Act), the Court nullified the patents. *Id.*

Describing the import of *Northern Pacific* some years later, the United States explained that "it is clear that" *Northern Pacific* "established the southwestern boundary along a straight line—the Barnard Line—from the Hump [*i.e.*, Goat Butte] to Grayback Peak." ICC U.S. Br. 77. According to the United States, *Northern Pacific* thus "determined a question affecting the title to the lands in Tract D, i.e., it determined that those lands lay outside the Yakima Indian Reservation." *Id.*[9] Indeed, the leading treatise on Indian Law cites this Court's *Northern Pacific* decision as the preeminent example of a judicial decision "determining the extent of tribal lands" in a boundary dispute. 1 *Cohen's Handbook of Federal Indian Law* § 15.05 & n.18 (2017).

Northern Pacific resolved that the Reservation's southwestern boundary followed the Barnard Line—and neither the Ninth Circuit nor anyone else was free to disregard that ruling. *See Arizona v. California*, 460 U.S. 605, 619-20 (1983) (Even when

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[9] In this case, the United States reversed its position from the *Northern Pacific* litigation and the Indian Claims Commission litigation that the Barnard Line controlled, and took the opposite position. *See generally* CA9 United States Amicus Br. That flip is itself reason to discount the United States' views. In any event, the United States' current position is erroneous for the reasons discussed above, and the Court need not call for the views of the Solicitor General given that the United States has already filed a brief stating its position.

"the technical rules of preclusion are not strictly applicable," "questions affecting titles to land, once decided, should no longer be considered open."). As the United States explained, "it is the duty of any subordinate federal tribunal to follow the Supreme Court's decision in a prior case," and "[t]he decision of the Supreme Court in the *Northern Pacific* case is controlling . . . because it determined the southwestern boundary." ICC U.S. Br. 78-79.

The Ninth Circuit acknowledged the existence of the *Northern Pacific* decision, App. 18a, 21a, but simply ignored that the decision explicitly endorsed "the correctness of the Barnard survey" with respect to the boundary at issue, *Northern Pacific*, 227 U.S. at 365-66. Indeed, perversely, the Ninth Circuit's only reliance on *Northern Pacific* was to say it *supported* the court's decision because this Court "analyzed the Treaty text to determine [which view] adhered to the Treaty negotiators' intentions," rather than merely deferring to the 1904 Act. App. 21a. But the boundary determination in *Northern Pacific* and the 1904 Act was the *same* in the relevant respect: they both adopted the Barnard Line between Goat Butte and Grayback, and thus both adopted a boundary excluding Glenwood Valley.

The stark conflict between the decision below and *Northern Pacific* alone warrants this Court's review.

B. The Ninth Circuit's Decision Conflicts With This Court's Decisions On The Proper Interpretation Of Treaties Governing The Disposition Of Land

The Ninth Circuit's decision likewise conflicts with this Court's decisions on treaty interpretation. The only way that the Ninth Circuit could ignore the 1904

Act and *Northern Pacific* decisions was to interpret the treaty as creating a boundary lying *beyond* the Barnard Line (rather than along the Pisco-Klickitat divide northeast of the Barnard Line). But that determination rewrites the treaty's text, and conflicts with this Court's precedents going back to Chief Justice Marshall on the proper treatment of "permanent objects" in land grants.

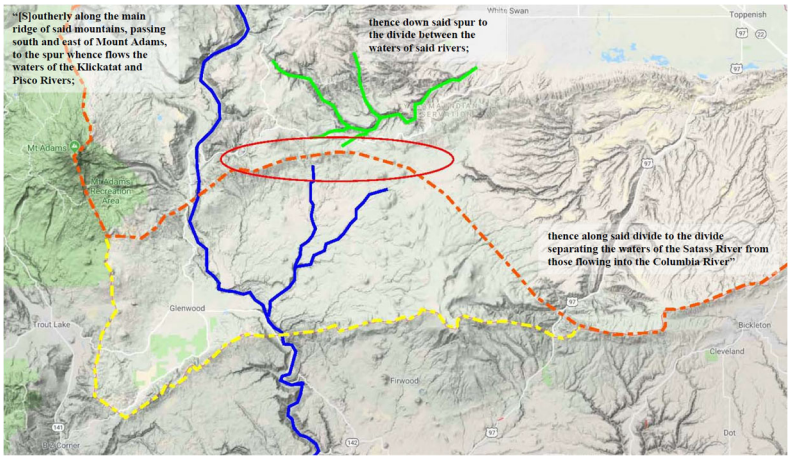
1. The Ninth Circuit's decision flouts the most important rule of treaty interpretation—that a court must give effect to the plain text of the treaty at issue. The treaty states that the boundary must pass "south and east of Mount Adams, to the spur whence *flows the waters of the Klickatat and Pisco rivers*; thence down said spur *to the divide between the waters of said rivers*." App. 2a-3a (emphasis added) (quoting Treaty with the Yakamas, art. II, 12 Stat. at 952). The treaty's plain language thus dictates a boundary that falls along the divide between the Pisco and Klickitat Rivers. Yet the Ninth Circuit set a boundary along the divide between the *White Salmon* and Klickitat Rivers. *Id.* at 18a. As the map shows (*id.* at 87a), this is a major discrepancy.

The Ninth Circuit justified its decision to rewrite this treaty call by asserting that the County's argument is equally impossible to square with the treaty calls, stating: "the Pisco-Klickitat divide lies north of Mount Adams," but the boundary must "run[] south of Mount Adams." *Id.* at 16a-17a. Yet nothing in the treaty text requires the *Pisco-Klickitat divide* to lie south of Mount Adams. The treaty states that the boundary passes "south and east of Mount Adams, to the spur"—meaning that *the spur* is "south" of Mount Adams—and "thence down said spur to the divide between the waters of [the Pisco and Klickitat]

rivers." *Id.* at 2a-3a. But just because the *spur* lies south and east of Mount Adams does not mean that the *divide* must lie south of Mount Adams.

This reading squares with the treaty's use of "*down* said spur," which is most naturally read as *descending along* the spur. And this interpretation maps cleanly onto the geography of the area. As the County's expert testified, a "spur" that meets the treaty calls lies south and east of Mount Adams and turns northeastward to the Pisco-Klickitat divide. 3-ER-533-38. Thus, this interpretation gives effect to *all* of the treaty's plain terms; the Ninth Circuit's eliminates the unambiguous call for the boundary to run along the Pisco-Klickitat divide.

To illustrate, in the map below, the red line follows the spur described by the treaty and crosses the encircled Pisco-Klickitat River divide; the yellow line is the Ninth Circuit's border; and the green and blue lines are the Pisco and Klickitat Rivers, respectively:



5-ER-887.[10]

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[10] The curving red line representing the spur also tracks the boundary drawn by the original treaty map—far before the

In any event, even assuming (as the Ninth Circuit believed) that there is no "spur," it is undisputed that there *is* a divide between the Pisco-Klickitat Rivers, and the treaty is unambiguous that the boundary *must* run along "the divide between the waters of [the Pisco and Klickitat] rivers." Regardless of the location of the spur, a boundary that does not run along the divide of those two rivers—and, instead, runs along a completely different divide—flagrantly disregards the treaty's unequivocal terms.

And that rewriting of the treaty flouts not only the plain-meaning rule, but the "universal rule" of boundary interpretation established by Chief Justice Marshall that "natural or permanent objects" described in an instrument have "absolute control" over "course and distance." *Brown v. Huger*, 62 U.S. (21 How.) 305, 318, 321 (1858) (citing *Newsom v. Pryor's Lessee*, 20 U.S. (7 Wheat.) 7, 10 (1822) (Marshall, C.J.)). This is because a "call for a natural object, as a river, a known stream, or a spring, or even a marked tree" is more "material and certain" than a call setting a directional course. *Id.* at 321.

This "universal rule" has been consistently applied by this Court for 200 years as a "general rule of construction." *Newsom*, 20 U.S. (7 Wheat.) at 10 (Marshall, C.J.); *see also McIver's Lessee v. Walker*, 13 U.S. (9 Cranch) 173, 178 (1815) (Marshall, C.J.); *Preston's Heirs v. Bowmar*, 19 U.S. (6 Wheat.) 580, 582 (1821) (Story, J.); *Higueras v. United States*, 72 U.S. (5 Wall.) 827, 835-36 (1864); *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46, 62 (1874);

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wonders of satellite mapping. For that reason, among others, the relocated treaty map only *buttresses* the County's interpretation. *See* CA9 Klickitat Opening Br. 48-53.

Bartlett Land & Lumber Co. v. Saunders, 103 U.S. 316, 319 (1880); *United States v. State Inv. Co.*, 264 U.S. 206, 211-12 (1924). Indeed, both this Court and the Ninth Circuit itself applied the natural-objects rule when interpreting this very treaty in *Northern Pacific*. *See* 227 U.S. at 361; 191 F. at 955-56 (quoting *Newsom*, 20 U.S. (7 Wheat.) at 9-10).

According to Chief Justice Marshall, "if water-courses be called for in the patent, or mountains or any other natural objects, distances must be lengthened or shortened, and courses varied so as to conform to those objects." *McIver's Lessee*, 13 U.S. (9 Cranch) at 178. The Ninth Circuit did just the opposite, ignoring the water-courses identified in the treaty (the Pisco and Klickitat Rivers) and insisting on a boundary course that "runs south of Mount Adams." App. 17a. The natural-objects rule prohibits precisely this kind of boundary revision. Indeed, Justice Story described the natural-objects rule as "essential to the protection of titles," because "the interpretation" of boundaries "should depend upon known, fixed, uniform principles, and not upon the conjectures of judges." *Cleaveland v. Smith*, 5 F. Cas. 1003, 1007 (C.C.D. Me. 1842) (Story, J.).

2. To make matters worse, the Ninth Circuit attempted to justify its refusal to follow this canon of plain-meaning interpretation by invoking the Indian canon. But that aspect of its decision conflicts with this Court's decisions on treaty interpretation, too.

Under the Indian canon, a court may resolve any "ambiguities in favor of Indians," *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986), and interpret treaties as they purportedly "would have been understood by the [tribe]," *Herrera*, 139 S. Ct. at 1702-03. But this atextual principle necessarily

has limits. For example, the canon "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *Catawba Tribe*, 476 U.S. at 506. This is true because, "even though 'legal ambiguities are resolved to the benefit of the Indians,' courts cannot ignore plain language." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (citation omitted). For that reason, the Indian canon cannot be invoked to erase a geographic call.

Yet the Ninth Circuit did just that. Here, the plain language dictates a Treaty boundary that falls along the Pisco-Klickitat divide, *not* along the White Salmon-Klickitat divide. The Ninth Circuit's boundary does not follow a spur between the Klickitat and Pisco Rivers; it does not touch the divide between those rivers; and it does not traverse that divide to a second, separate divide between the Satus and the rivers flowing into the Columbia—even though those are all express calls set forth in the treaty.

In other words, the Ninth Circuit's interpretation gives the treaty "a contorted construction that abruptly divorces" one clause from another, giving effect to some calls and rewriting others altogether. *Catawba Tribe*, 476 U.S. at 506. Indeed, as this Court stated in *Northern Pacific* when interpreting this very treaty, courts must not give "too much strength to some of the calls of the treaty and against other calls, without attempting to give them all effect." 227 U.S. at 362. Here, the Ninth Circuit read geographic calls *out* of the treaty and reached a result that is directly at odds with the treaty's plain terms.

That glaring textual disconnect should end the matter. But the Ninth Circuit's invocation of the Indian canon is all the more misguided given the

substantial weight of historical evidence showing that the Yakama contemporaneously understood the treaty to exclude Glenwood Valley. "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). And for three-quarters of a century following the 1855 treaty, Yakama leadership and esteemed tribal members all consistently and repeatedly advocated for a southwestern boundary that *excluded* Glenwood Valley. Interpreting the treaty as it was understood by the Yakama should yield a boundary that substantially conforms to the Barnard Line, not the innovative boundary along the White Salmon-Klickitat River divide adopted by the Ninth Circuit.

The Ninth Circuit's use of the Indian canon to override an explicit physical call in the treaty, the tribe's contemporaneous understanding of the treaty, the 1904 Act, and a decision of this Court, is fundamentally flawed. App. 9a-10, 15a-19a. The panel's decision transforms the Indian canon from one of many interpretive tools essentially designed to break ties in close cases into a vast power to erase treaty terms and override an Act of Congress. Indeed, if there is a rule that should apply here, it is that a court ought to be *reluctant* to interpret a treaty to sweep in non-Indian communities long after the treaty was enacted. The Ninth Circuit's interpretation disrupts profound reliance interests, including those of the predominantly non-Indian community that now finds itself within Indian country—along with all the jurisdictional consequences that entails.

The Ninth Circuit's treaty interpretation thus underscores the need for this Court's review.

III. The Question Presented Is Important And Warrants This Court's Review

1. As is true of virtually all tribal boundary cases the Court hears, the dispute is by definition limited to a particular area, but the resolution of that dispute raises recurring questions of unmistakable importance. As discussed above, the decision below squarely contravenes the boundary determination made by Congress in the 1904 Act and this Court in *Northern Pacific*. Whether the Ninth Circuit was warranted in doing so raises crucial questions implicating the separation of powers and this Court's supervisory authority over the courts of appeals. That alone makes this case exceptionally important, warranting this Court's review.

The decision below is all the more important because it implicates a dispute over land between two sovereigns—an area where this Court has traditionally granted review. *See Catawba Tribe,* 476 U.S. at 505-06; *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460 (2020); *cf. Kansas v. Nebraska*, 574 U.S. 445, 453 (2015) (describing the importance of providing a forum for disputes between sovereigns). The Articles of Confederation "create[d] a special judicial power, for the sole and express purpose of finally settling all disputes concerning boundary, arise how they might," and the Constitution did not "give to the judicial power a less extended jurisdiction." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 728 (1838).

The outcome of this inter-sovereign dispute is particularly important because it controls not only the boundary of a federal Indian reservation affecting

nearly 190-square miles of land but Klickitat County's jurisdiction to prosecute serious crimes committed in Glenwood Valley, such as the rape of a child by a Yakama member that sparked this case. Likewise, the Ninth Circuit's decision will subject the predominantly non-Indian residents of Glenwood Valley to additional and competing jurisdictional consequences and demands. Regardless of any other practical consequences, the Court has acknowledged that these are all factors that make a case inherently important and counsel if favor of review.

2. The Ninth Circuit's ruling has ramifications far beyond the Yakama Reservation. Novel treaty interpretations like this one disrupt settled expectations about reservation boundaries, suddenly subsuming neighboring tracts populated mostly by non-Indians into Indian country. By allowing "the conjectures of judges" to trump the "known, fixed, [and] uniform principles" of boundary interpretation, *Cleaveland*, 5 F. Cas. at 1007, the Ninth Circuit's decision casts doubt on other tribal boundaries established and described by reference to natural landmarks. Isaac Stevens concluded ten such treaties with dozens of tribes in the Nebraska and Washington Territories.[11] The United States

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[11] *See, e.g.*, Treaty with the Nez Percés, U.S.-Nez Percé Nation, June 11, 1855, *ratified* Mar. 8, 1859, 12 Stat. 957; Treaty with the Flatheads, July 16, 1855, *ratified* Mar. 8, 1859, 12 Stat. 975; Treaty with Nisquallys, &c., Dec. 26, 1854, *ratified* Mar. 3, 1855, 10 Stat. 1132; Treaty with the Dwámish &c., Jan. 22, 1855, *ratified* Mar. 8, 1859, 12 Stat. 927; Treaty with S'Klallams, U.S.-S'Klallam Nation, Jan. 26, 1855, *ratified* Mar. 8, 1859, 12 Stat. 933; Treaty with the Makah Tribe, U.S.-Makah Nation, Jan. 31, 1855, *ratified* Mar. 8, 1859, 12 Stat. 939; Treaty with the Quinaielts, &c., July 1, 1855, *ratified* Mar. 8, 1859, 12 Stat. 971;

administers about 326 Indian land areas as federal Indian reservations,[12] and the Ninth Circuit is home to more reservations than any other circuit. And just between 1853 and 1856, the United States concluded fifty-two treaties with Indian tribes[13]—many of which described reservation boundaries with geographic calls. Under the Ninth Circuit's decision, any treaty describing a reservation boundary is at risk of judicial re-drafting, with all the attendant disruption on local communities that such judicial innovation entails.

Unexpected boundary modifications intrude on local non-Indian jurisdiction over lands (including criminal jurisdiction), confer tribal powers of taxation over non-Indian citizens and businesses, and trigger federal preemption of even non-Indian activity that conflicts with federal Indian policy and tribal sovereignty—miring local regulation in substantial uncertainty. *See McGirt*, 140 S. Ct. at 2501-02 (Roberts, C.J., dissenting). Civil and criminal jurisdiction, regulatory authority, and authority over taxation are all deeply affected by a determination of reservation status. States and localities lose much of their preexisting jurisdiction over civil causes of action arising on reservation lands. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 223 (1959) (no

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Treaty with the Walla-Wallas, &c., June 9, 1855, *ratified* Mar. 8, 1859, 12 Stat. 945; Treaty with the Ottoes and Missouries, Dec. 9, 1854, *ratified* Feb. 28, 1855, 10 Stat. 1130.

[12] Bureau of Indian Affairs, U.S. Dep't of the Interior, *Frequently Asked Questions: What is a federal Indian reservation?*, https://www.bia.gov/frequently-asked-questions (last visited Dec. 14, 2021).

[13] *See* George W. Manypenny, Comm'r of the Off. of Indian Affairs, *Report of the Secretary of the Interior*, *in* Cong. Globe, 34th Cong., 3d Sess. app. 40, 44, col. 2 (Nov. 22, 1856).

jurisdiction over claim of non-Indian against Indian for on-reservation transaction). Likewise, reservation status hamstrings state and local taxation efforts. *See McClanahan v. State Tax Comm'n*, 411 U.S. 164, 180-81 (1973). And the Ninth Circuit's roughshod approach in this case—rewriting a treaty's plain terms and ignoring boundaries set by Congress—is particularly problematic because the Ninth Circuit is home to more Indian tribes, reservations, and other federal lands than any other circuit.[14]

3. Finally, this petition presents an ideal vehicle for resolving the questions presented. The issues were cleanly presented and squarely addressed by both the district court and the Ninth Circuit in a published decision. And because the Ninth Circuit is the only circuit that could hear this particular dispute, an inter-circuit conflict of authority cannot develop. This petition therefore represents the final—and only— opportunity for this Court to review these questions of exceptional importance.

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[14] This case is unlike *McGirt* in that, here, a plain reading of *both* the 1855 Treaty and the 1904 Act exclude the area at issue. Moreover, the 1904 Act settled the boundary dispute in *favor* of the Tribe—for which the Tribe expressed its "thanks and appreciation" to the federal government. 2-SER-358-59. It was only decades later that the Yakama, for the first time in more than a century, asserted a claim to the land at issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 16, 2021

APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES AND BANDS OF the YAKAMA NATION, a sovereign federally recognized Native Nation, Plaintiff-Appellant/Cross-Appellee,

v.

KLICKITAT COUNTY, a political subdivision of the State of Washington; Klickitat County Sheriffs 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-Appellees/Cross-Appellants.

Nos. 19-35807, 19-35821

Argued and Submitted November 20, 2020
Seattle, Washington

Filed June 11, 2021

1 F4.th 673

Before: RONALD M. GOULD and MICHELLE T. FRIEDLAND, Circuit Judges, and JILL A. OTAKE,* District Judge.

OPINION

FRIEDLAND, Circuit Judge:

This case concerns a boundary dispute between Klickitat County, Washington and the Confederated Tribes and Bands of the Yakama Nation (the "Yakamas" or the "Tribe"). Following a bench trial,

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* The Honorable Jill A. Otake, United States District Judge for the District of Hawaii, sitting by designation.

the district court held that the Yakama Reservation includes a 121,465.69-acre tract ("Tract D") that partially overlaps with Klickitat County. We affirm.

I.

A.

In 1855, the United States negotiated a treaty with the Yakamas under which the Tribe gave up ten million acres of land in exchange for certain rights, including the right to a reservation for the Tribe's exclusive use and benefit. Treaty with the Yakamas, U.S.-Yakama Nation, arts. I & II, June 9, 1855, 12 Stat. 951; *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, —— U.S. ——, 139 S. Ct. 1000, 1007, 203 L.Ed.2d 301 (2019). At the Treaty negotiations, the Yakamas spoke no English and lacked familiarity with cartographic concepts such as latitude and longitude. It was therefore important for the negotiators to define the Reservation's boundaries according to natural features and to describe them through verbal and visual representations. This approach is reflected in the Treaty text, the Treaty minutes, and the Treaty map.

The Treaty text defines the Reservation's boundaries as follows (with the southwestern boundary's definition—the subject of this case—in bold):

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

> **Klickitat and Pisco rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River**; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

Treaty with the Yakamas, 12 Stat. at 952 (emphasis added).

The Treaty minutes indicate that U.S. negotiators, led by Isaac Stevens, Governor of the Territory of Washington, told the Yakamas that the Reservation would extend "to the [C]ascade mountains, thence down the main chain of the Cascade mountains south of Mount Adams, thence along the Highlands separating the Pisco and the Sattass river from the rivers flowing into the Columbia."[1]

The relevant portion of the Treaty map depicts the Reservation's boundaries with a thin line of alternating dots and dashes.[2]

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[1] The primary sources spell the names of the rivers in different ways, and some of the rivers' names have also evolved over time. For instance, "Satass" is sometimes spelled as "Sattass," and the "Pisco River" is now known as "Toppenish Creek." We refer to the rivers by the names used in the Treaty text except when quoting original sources that used different names.

[2] This image was cropped from a digital image of a 1939 reproduction of the full Treaty map. The full 1939 reproduction of the Treaty map appears in an appendix to this opinion.

The map includes natural landmarks such as the Cascade Mountains, Mount Adams, and the White Salmon, Klickitat, and Pisco rivers. As depicted on the map, the Reservation's northern boundary follows the Attah-nam River, its western boundary intersects with the Cascade Mountains, and its southern boundary runs south of Mount Adams.

Despite the Treaty parties' efforts to reach a mutual understanding of the Reservation's boundaries, conflicts arose almost immediately. The Treaty map disappeared soon after the Treaty was signed, making it harder to resolve those disputes. A century-long effort to determine the southwestern boundary ensued.

The earliest federal surveys, conducted without the benefit of the Treaty map, failed to resolve disagreements about the Reservation's boundaries. The first survey (the "Schwartz survey"), completed in 1890, omitted almost half a million acres that the Yakamas understood to be part of the Reservation, including land where they lived and harvested resources. This sparked outrage within the Tribe, which consequently refused to acquiesce in federal activities in the area. A federal report by E.C. Barnard in 1900 (the "Barnard report") and a survey by Charles Pecore in 1926 followed. The Barnard and Pecore investigations placed hundreds of thousands of acres within the Reservation that the Yakamas thought Schwartz had wrongly omitted, but they nevertheless prolonged the boundary dispute: Each investigator proposed a boundary that followed straight lines instead of the natural features described in the Treaty text, and even those straight lines differed. The surveyors' approach appeared to stem from the fact that, according to Barnard, "there [was] no possible way of making the wording of the [T]reaty agree with the topography of the country." Yakima Indian Reservation, H.R. Doc. No. 56-621, at 8 (1900).

Around 1930—seventy-five years after the Treaty's signing—an employee in the federal Office of Indian Affairs found that the Treaty map had been mistakenly filed under "M" for Montana in the government's records. The United States ordered yet another survey in response to the discovery. Completed in 1932 with the benefit of the map, a survey by cadastral engineer Elmer Calvin (the "Calvin survey") included the land currently in dispute, later called "Tract D," within the Reservation

for the first time. Calvin echoed Barnard's confusion in noting that the "language of the [T]reaty fails to fit the topography on the ground," but he determined that the best reading of the Treaty and the map together would include Tract D within the Reservation.

The Department of the Interior accepted the Calvin survey's conclusions, and in 1939, the Secretary of the Interior informed Congress that the Yakamas' claims to Tract D were meritorious.[3] But some federal agencies did not adopt the Department of the Interior's position; the Attorney General, for instance, rejected the Calvin survey and maintained that the Yakamas had no viable claim to Tract D. In 1949, the Yakamas filed a petition with the newly created Indian Claims Commission ("ICC"), which was responsible for adjudicating claims by tribes against the United States. After seventeen years of litigation, the ICC concluded that the Treaty parties had originally intended to include Tract D within the Reservation. *Yakima Tribe v. United States*, 16 Ind. Cl. Comm. 536, 560–64 (1966).[4] The federal

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[3] *See Yakima Indians Jurisdictional Act: Hearing on H.R. 2390 Before the Spec. Subcomm. of the H. Comm. on Indian Affs.*, 76th Cong. 3 (1939) (statement of Harold L. Ickes, Secretary of the Interior) ("As a result of an exhaustive study, extending over a period of years, this Department has heretofore concluded that the boundary claims of the Yakima Indians are meritorious.").

[4] The United States and the Yakamas then settled the Tribe's claim for compensation for the loss of title to lands within Tract D that the United States had patented to non-Indians. And, in 1972, President Nixon issued an Executive Order that returned more than 21,000 acres of national forest lands within Tract D to the Yakamas. *See* Exec. Order No. 11,670, 3 C.F.R. 708 (1971–75).

government considers itself bound by the effect of the ICC's decision, so federal agencies have treated Tract D as part of the Yakama Reservation ever since.

The United States ultimately approved a survey in 1982 that included Tract D within the Reservation. The federal government continues to treat the 1982 survey as the definitive survey of the Reservation's southwestern boundary.

B.

The present dispute between the Yakamas and Klickitat County arose when the County attempted to prosecute P.T.S., a minor and enrolled Yakama member, for acts that occurred within Tract D. Pursuant to a proclamation issued by Washington Governor Jay Inslee in 2014, the Yakamas and the federal government share exclusive jurisdiction over certain criminal and civil offenses that occur on Reservation lands, including juvenile delinquency offenses.[5] Citing that proclamation, the Yakamas

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[5] Wash. Proclamation 14-01 (Jan. 17, 2014), https://www.governor.wa.gov/sites/default/files/proclamations/proc_14-01.pdf. A federal statute enacted in 1953, known as "Public Law 280," allowed states to assume jurisdiction over some crimes and civil causes of action on Indian reservations, but in 1968, Congress enacted another statute that allowed states to give such jurisdiction back through a process known as "retrocession." *See Confederated Tribes & Bands of the Yakama Nation v. Yakima County*, 963 F.3d 982, 985–86 (9th Cir. 2020), *cert. denied*, —— U.S. ——, 141 S.Ct. 2464, 209 L.Ed.2d 528 (2021) (citing Act of Aug. 15, 1953, Pub. L. 83-280, 67 Stat. 588 (1953) and Act of Apr. 11, 1968, Pub. L. 90-284, 82 Stat. 79 (1968) (codified at 25 U.S.C. § 1323)). Washington initially assumed jurisdiction over some crimes and civil causes of action occurring on the Yakama Reservation, *id.* at 985, but in 2012, through a process established by the state, the Yakamas filed a petition for full "retrocession of both civil and criminal jurisdiction on all

contended that Klickitat County lacked jurisdiction to prosecute P.T.S. for an incident that took place within Tract D. The Yakamas sued Klickitat County and several County officials (collectively "the County"), seeking declaratory and injunctive relief barring the County from exercising criminal jurisdiction over Tribe members for offenses that arise within the Reservation's borders, including within Tract D. The County opposed the suit, arguing that Tract D is not part of the Reservation.[6]

Following a three-day bench trial, the district court issued a declaratory judgment in favor of the Yakamas. The court observed that the Treaty's description of the southwestern boundary is ambiguous because some of the natural features it references do not exist. But the court found that the Yakamas would have understood the Treaty to include Tract D within the Reservation at the time of the Treaty negotiations. In so finding, the district

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Yakama Nation Indian country." *Id.* at 986. Governor Inslee's proclamation granted the Yakamas' request "in part," including by retroceding "full civil and criminal jurisdiction [over] . . . Compulsory School Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency." *Id.* (citation omitted).

6 The parties also disputed the types of criminal matters over which the County has jurisdiction on Reservation lands under the Governor's proclamation. The parties now agree that we are bound by our court's intervening decision in *Confederated Tribes & Bands of the Yakama Nation v. Yakima County*, 963 F.3d 982 (9th Cir. 2020), *cert. denied*, —— U.S. ——, 141 S.Ct. 2464, 209 L.Ed.2d 528 (2021), which resolved the types of criminal matters that fall within the County's jurisdiction on Reservation lands, *id.* at 982. For example, the parties agree that the County would have jurisdiction over juvenile offenses involving Yakama members taking place within Tract D only if Tract D was not Reservation land.

court credited the Yakamas' expert's testimony and rejected the County's, explaining that the County's expert's "analysis [was] flawed and ignore[d] important historical events and critical pieces of evidence." The court accordingly held that the Treaty with the Yakamas included Tract D as part of the Reservation, and that the survey approved by the United States in 1982 "marks the correct southwestern boundary."

The County timely appealed.

II.

We evaluate the district court's conclusions in this case in two steps. First, we review for clear error the district court's "[u]nderlying factual findings," including those related to topography and history. *Cree v. Flores*, 157 F.3d 762, 768 (9th Cir. 1998). We will not overturn those findings unless we reach a " 'definite and firm conviction' that a mistake has been committed." *United States v. Washington*, 157 F.3d 630, 648 (9th Cir. 1998) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 346 n.14, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992)). Second, we "review de novo whether the district court reached the proper conclusion as to the meaning of the [Treaty] given those findings." *Id.* at 642.

In our de novo review, we must give due weight to the Indian canon of construction, which dictates that treaty terms must be "construed 'in the sense in which they would naturally be understood by the Indians.' " *Herrera v. Wyoming*, —— U.S. ——, 139 S. Ct. 1686, 1699, 203 L.Ed.2d 846 (2019) (quoting *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979)). The Supreme Court has applied this canon to the

Treaty at issue here several times, and "each time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855." *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, —— U.S. ——, 139 S. Ct. 1000, 1011, 203 L.Ed.2d 301 (2019). The canon also instructs that "Indian treaties are to be interpreted liberally in favor of the Indians," and "any ambiguities are to be resolved in their favor." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999).

III.

A.

We thus begin by reviewing the district court's factual findings for clear error. At the end of the bench trial, the district court issued seventeen pages of factual findings, two of which are key to our analysis and are not clearly erroneous. First, the district court found that no "spur" between the waters of the Klickitat and Pisco Rivers exists south of Mount Adams.[7] This finding is significant because the

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[7] Confusingly, a "spur" has sometimes been referred to as a "spur divide," including by Elmer Calvin, who completed the 1932 survey of the area with the benefit of the Treaty map. The parties generally agree that a "spur" is higher ground extending laterally from the side of a mountain or a ridge, and a "divide" is a boundary between two watersheds. A "spur divide," according to testimony Calvin gave in the ICC proceedings in 1950, is a "long spur that acts as both a spur and a divide." To prevent confusion, and because the County's briefs raise distinct arguments about the Treaty's references to a "spur" and to a "divide," each of which we address separately, we avoid using the term "spur divide."

The County argues that a spur may be "discontinuous," for example if it is crossed by a river. The Tribe disputes this,

critical passage in the Treaty text describes the Reservation's southwestern boundary as "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 another divide separating the Satass and Columbia Rivers. Treaty with the Yakamas, 12 Stat. at 952 (emphases added). If the spur does not exist as described in the Treaty, then the Treaty is ambiguous in its description of the Reservation's southwestern boundary.

The County argues that this finding was erroneous, insisting that a "spur" that satisfies the Treaty call exists between the Klickitat and Pisco Rivers. The County cites reports written by the United States' negotiator, Governor Isaac Stevens, which describe spurs that were "thrown out from the main chain" of the Cascade Mountains, "extending towards and in some cases reaching the banks of the Columbia [River]," including one "between the Klickitat and Pisko tributary of the Yakima [River]." Relying on that description, in its appellate briefs the County reproduces for the first time a Google map of the area immediately surrounding Mount Adams, draws a line on that map that runs east from the base of the mountain, calls that line a "spur," and posits that it satisfies the Treaty call as the Treaty parties would have understood it.

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arguing that crossing a creek, stream, or river is "contrary to the definition of a spur." We need not resolve this precise dispute because, for the other reasons set forth elsewhere in this opinion, we reject the County's broader theory that the Treaty unambiguously requires that the Reservation's southwestern boundary exclude Tract D.

The district court did not commit clear error in concluding otherwise given the lack of expert testimony supporting the location of any such spur. When the County attempted to have its only expert testify about the purported spur's location, the district court sustained an objection from the Tribe that the witness should not be permitted to "testif[y] as to the physical features . . . that could satisfy the calls in the Treaty" because he had failed to disclose this theory in his report. Indeed, that expert—a historian—confirmed on cross-examination that he had no expertise in geography, topography, or cartography.

Even if there had been expert testimony that supported the County's spur theory, we still would not conclude that the district court clearly erred in finding that no spur between the waters of the Klickitat and Pisco Rivers exists south of Mount Adams. The County's proffered spur conflicts with the findings of the United States' surveyors, whose expertise we owe deference.[8] The County's theory also conflicts with the ICC's conclusion that "[t]here is in fact no spur." *Yakima Tribe v. United States*, 16 Ind. Cl. Comm. 536, 560 (1966).

The second key factual finding that we review for clear error is that the Yakamas would have naturally understood the Treaty to include Tract D within the

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[8] The United States has submitted a brief as *amicus curiae* in support of the Yakamas. Although we are not bound by the government's interpretation of the Treaty, its approval of the 1982 survey is "necessarily a strong consideration." *N. Pac. Ry. Co. v. United States*, 227 U.S. 355, 366, 33 S.Ct. 368, 57 L.Ed. 544 (1913); *see also Cragin v. Powell*, 128 U.S. 691, 698–99, 9 S.Ct. 203, 32 L.Ed. 566 (1888) (discussing the need for courts to refrain from second-guessing public surveys).

Reservation. *United States v. Confederated Tribes of Colville Indian Rsrv.*, 606 F.3d 698, 709 (9th Cir. 2010) ("We ... review for clear error the district court's findings as to the understanding of the Native Americans present at the [treaty] negotiations."). This finding is important because it will inform our application of the canon of Indian construction, which requires that we construe ambiguous treaty terms according to the Yakamas' understanding.

The County contends that the written historical record lacks evidence that the Yakamas expressed a belief before the 1930s that Tract D was included in the Reservation. Although "[e]vidence of post-treaty activities" is relevant to discerning the Tribe's understanding of the Treaty, *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1166 (9th Cir. 2017), it is not very informative here, where the Yakama Reservation was not surveyed until thirty-five years after the Treaty agreement was reached. If the Yakamas understood the Reservation to include Tract D from the very beginning, then it is logical that they would not have known about the United States' disagreement with their understanding until at least 1890, when the Schwartz survey was conducted. By that point, according to the Yakamas' expert, the Yakamas were so outraged by Schwartz's omission of more than half a million acres from what they understood to be the Reservation that they expressed their concerns in general terms instead of highlighting specific tracts.

The district court reasonably found that the materials from the Treaty negotiations demonstrate that the Yakamas understood the Treaty to include Tract D in the Reservation, even if the Tribe did not press that understanding for several decades after the

Treaty's signing.[9] For example, the district court gave significant weight to the Treaty minutes, observing that they "are the best evidence remaining of what occurred and what Governor Stevens told the Yakama Nation's representatives." It made sense for the district court to emphasize the minutes because the Yakamas depended almost entirely on oral communication to understand the Treaty's contents. According to the minutes, the Yakamas were told that the Reservation's boundary would run "down the main chain of the Cascade mountains south of Mount Adams." This suggests that the Yakamas were made to understand the boundary as running south of Mount Adams, thereby including territory directly south of the mountain within the Reservation's boundaries. Tract D meets that description. The minutes are also consistent with the map's representation of the boundary: As Department of the Interior topographic engineer F. Marion Wilkes wrote in 1933, "from [the] map it is apparent that the makers of the treaty intended to take in a large area

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[9] We also note that the Yakamas' historical expert, whose testimony was found credible by the district court, emphasized that the written record from the period after the Treaty was signed is incomplete because it lacks evidence from the Yakamas' oral history. We have long recognized the importance of oral traditions when interpreting this very Treaty. *See Cree v. Flores*, 157 F.3d 762, 773 n.11 (9th Cir. 1998) ("Were it otherwise, the history and culture of a society that relies on an oral history tradition could be brought before the fact finder only with the greatest of difficulty and probably with less reliability."). According to the Yakamas' expert, the Tribe's oral history indicates that the Yakamas consistently understood the area within Tract D to be part of the Reservation and that they challenged encroachments on that territory.

south of [Mount] Adams," including "the area around [Tract D]."

Other evidence in the historical record further supports the district court's finding that the Yakamas understood the Treaty to include Tract D within the Reservation. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (looking to historical evidence to "shed[] light" on how a tribe understood a treaty agreement). The Yakamas' expert testified that the Tribe valued Camas Prairie, an area located within Tract D, as a critical source of food. The expert further explained that the United States' negotiators knew about the Yakamas' interest in the prairie: Federal representatives, in an effort to protect the Yakamas' interest from encroaching settlers, recommended that Camas Prairie be reserved for the Yakamas as soon as possible because of the necessary foods the area provided, and the likelihood that early settlers would otherwise destroy the prairie's resources.

Under the highly deferential clear error standard, we uphold the district court's findings that the spur described in the Treaty does not exist and that the Yakamas understood the Treaty to include Tract D within the Reservation's boundaries.

B.

Proceeding to our de novo review of the Treaty's meaning, and taking the district court's factual findings as true, we further hold that the Treaty included Tract D within the Yakama Reservation. The Treaty is ambiguous in that it calls for the southwestern boundary of the Reservation to follow a natural feature south of Mount Adams that, according

to the district court's findings, does not actually exist as described. Under the Indian canon of construction, the Treaty's ambiguity must be resolved according to the Yakamas' understanding that Tract D was included within the Yakama Reservation. *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, —— U.S. ——, 139 S. Ct. 1000, 1011, 203 L.Ed.2d 301 (2019).

Although the County agrees that ambiguities must be resolved in favor of the Tribe, it argues that the Treaty contains unambiguous text that requires the exclusion of Tract D from the Reservation. Here, the County focuses on the term "divide" in the Treaty text. The Treaty calls for the southwestern boundary to run "south and east of Mount Adams," first to the "spur" between the Pisco and Klickitat Rivers, "thence down said spur" to the "divide" between those rivers. Treaty with the Yakamas, 12 Stat. at 952. According to the County, even if the first call is ambiguous because a spur between the Pisco and Klickitat Rivers may not exist south of Mount Adams, the second call is unambiguous because there is a "divide" between those rivers that lies well north of Tract D. Given that the location of the Pisco-Klickitat divide is clear, the County argues, the Reservation's southwestern boundary must be interpreted to traverse it and thereby exclude Tract D.

The County's argument merely replaces one ambiguity with another. Notably, the Pisco-Klickitat divide lies north of Mount Adams. The County concedes this point, but it nonetheless argues that the Treaty's call for the boundary to traverse that divide must be honored anyway. We disagree. Critically, the Treaty text states that the boundary should run "south and east of Mount Adams, to the spur . . . thence down said spur to the divide." *Id.* The Treaty

thus indicates that the southwestern boundary runs south of Mount Adams. Although accepting the County's interpretation might resolve the Treaty's ambiguity as to the relevant divide, it would create a different ambiguity by conflicting with the Treaty's description of where the boundary lies relative to Mount Adams. Because the Treaty is ambiguous either way, under the Indian canon of construction, we must resolve the ambiguity in favor of the Yakamas.[10]

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[10] The County's spur argument, *see supra* section III.A, suffers from a similar problem under the Indian canon of construction. The County asserts that "spur" unambiguously refers to the line it drew on its Google map, which it says represents a "large, discontinuous ridge" that should be considered a spur. In support of its position, the County relies on writings and maps used by Governor Stevens. At most, the County's evidence supports a determination that the term "spur" is ambiguous because it is not defined in the Treaty text. But Stevens used the materials cited by the County for purposes unrelated to the Treaty, and the Yakamas probably never saw them. Under the Indian canon of construction, Stevens' materials provide limited value for interpreting this potentially ambiguous term because we must construe the Treaty liberally in favor of the Yakamas' understanding at the time.

And even if we were to compare Stevens' writings and maps to present day maps in an effort to locate the spur, we would need to do so with skepticism. In its thorough consideration of the Yakama Reservation's southwestern boundary, the ICC concluded that a map prepared at Stevens' direction just two years after the Treaty negotiations—and which he vouched for as accurate—had "many inaccuracies." *Yakima Tribe v. United States*, 16 Ind. Cl. Comm. 536, 562 (1966). Apparently, Stevens' map was so inaccurate that the ICC felt compelled to "confess" that "[the map] is disturbing to us in our consideration of this case." *Id.* at 561. The Treaty map was also prepared at Stevens' direction. Although the Treaty map does not accurately depict the topography of the area either, it is relevant because it

Furthermore, the Supreme Court has already rejected an argument similar to the County's argument about the Pisco-Klickitat divide. In *Northern Pacific Railway Co. v. United States*, 227 U.S. 355, 33 S.Ct. 368, 57 L.Ed. 544 (1913), the Court considered another question about the Reservation's boundaries, which arose in the context of a dispute about whether the United States had appropriately granted land patents to a railroad company. In addressing the parties' arguments there, the Court rejected the Schwartz survey for placing too much emphasis on the Pisco-Klickitat divide. *See id.* at 362, 33 S.Ct. 368. The Court suggested that the proper approach would be to try to give effect to all of the Treaty calls based on a "consideration of the topography of the country and the testimony" available. *Id.* In light of this instruction, we must reject the County's contention that the Pisco-Klickitat divide alone determines the location of the Reservation's southwestern boundary.

Fundamentally, the County's argument is that there can only be one way to understand this Treaty, and that the one correct understanding of the Treaty is different from the ICC's determination and from the conclusions of all federal surveys since the rediscovery of the map. Any such argument is at the very least an uphill climb.

For all of these reasons, we conclude that the Treaty language is inherently ambiguous. Consequently, in light of the Indian canon of construction, we agree with the district court's

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represents what the Yakamas saw and were made to understand, whereas Stevens' other maps offer no such value.

interpretation that the Treaty included Tract D within the Reservation.

IV.

Next, we must consider the County's argument that even if the Treaty originally included Tract D within the Yakama Reservation, Congress altered the Reservation's southwestern boundary by statute in 1904 and excluded Tract D. Although Congress may change reservation boundaries by statute, "[i]f Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so.' " *Herrera v. Wyoming*, —— U.S. ——, 139 S. Ct. 1686, 1698, 203 L.Ed.2d 846 (2019) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999)). We hold that Congress did not clearly express an intent to abrogate the Treaty, so we reject the County's contention.

At the turn of the twentieth century, Congress faced growing pressure to open established reservation lands to "waves of homesteaders moving West." *Solem v. Bartlett*, 465 U.S. 463, 466, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). In response, "Congress passed a series of surplus land acts . . . to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." *Id.* at 466–67, 104 S.Ct. 1161. Congress began enacting surplus land acts around the same time that the Yakamas learned that the first official survey of the Reservation's boundary—the Schwartz survey—had found the Reservation to be much smaller than the Yakamas understood. Upon learning of Schwartz's findings, the Yakamas refused to acquiesce in any sales of surplus Reservation lands and demanded that the United States commission another survey.

In 1904, Congress enacted legislation that authorized selling Yakama Reservation lands without the need to obtain the Yakamas' consent. *See* Act of Dec. 21, 1904, ch. 22, 33 Stat. 595 (1904) ("the 1904 Act"). To mollify the Yakamas, Congress included language in the 1904 Act instructing the Secretary of the Interior to recognize a second investigation—the Barnard report—that included nearly 300,000 more acres within the Reservation's boundaries than the Schwartz survey had. *Id.* § 1, 33 Stat. at 596. Neither Schwartz nor Barnard included Tract D within the Reservation's boundaries.

The 1904 Act recognized the Barnard report "for the purposes of this act." *Id.* In another section, the 1904 Act stated that "the purpose of this Act [is] merely to have the United States to act as trustee for said Indians in the disposition and sales of said lands and to expend . . . to them the proceeds." *Id.* § 7, 33 Stat. at 598.

The County argues that the 1904 Act reflects Congress's clear intent to rely on the Barnard report to determine the Yakama Reservation's southwestern boundary. In addition to the statute's text, the County points to congressional committee reports, which explain that "[f]or many years the Indians have claimed that the boundary lines of said reservation as laid out are incorrect and that their reservation includes more lands than have been embraced within the recognized limits of their reservation" and that "[t]his bill proposes to recognize the validity of the claim to the tract of land adjoining the reservation to the extent of" nearly 300,000 additional acres. H.R. Rep. No. 58-2346, at 2 (1904); S. Rep. No. 58-2738, at 1–2 (1904). Although neither the statute nor these legislative materials mention Tract D, the County

asks us to interpret the 1904 Act as abrogating the Yakamas' right to it.

Applying the Indian canon of construction, we decline to infer from the 1904 Act a congressional intent to exclude Tract D from the Yakama Reservation. Nothing in the Act itself or the legislative history suggests that Congress even contemplated Tract D. And, between the surveys Congress did consider, it chose the one that gave the Yakamas more land, not less. The Act therefore lacks "clear evidence that Congress *actually considered* the conflict between its intended action on the one hand" and the Yakamas' right to Tract D on the other, and that it "chose to resolve that conflict by abrogating the treaty" to take Tract D away from the Yakamas. Herrera, 139 S. Ct. at 1698 (emphasis added) (quoting *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202–03, 119 S.Ct. 1187).

The Supreme Court's reasoning in *Northern Pacific Railway Co. v. United States*, 227 U.S. 355, 33 S.Ct. 368, 57 L.Ed. 544 (1913), comports with this conclusion. There, the Court recognized the existence of the 1904 Act, but it did not hold that the Act conclusively settled the Reservation's boundaries. *N. Pac. Ry. Co.*, 227 U.S. at 358, 367, 33 S.Ct. 368. Instead, the Court analyzed the Treaty text to determine whether the Schwartz survey or the Barnard report better adhered to the Treaty negotiators' intentions. *Id.* at 357–58, 33 S.Ct. 368. This suggests that the 1904 Act did not supersede the Treaty's establishment of the southwestern boundary.

The United States' and Congress's subsequent conduct is also consistent with our understanding of the 1904 Act. *See Alaska Pac. Fisheries Co. v. United*

States, 248 U.S. 78, 89–90, 39 S.Ct. 40, 63 L.Ed. 138 (1918) (supporting the conclusion that Congress intended to include submerged lands within an Indian reservation with evidence of the Department of the Interior's subsequent conduct); *United States v. Idaho*, 210 F.3d 1067, 1078–79 & n.17 (9th Cir. 2000) (citing Congress's actions after Idaho's statehood as evidence supporting Congress's "pre-statehood intent" to recognize submerged lands as within a reservation). Two years after the Treaty map was rediscovered, the Calvin survey concluded that the Reservation's boundaries included Tract D. The Secretary of the Interior accepted Calvin's conclusions—even though they were made decades after Congress enacted the 1904 Act—and then informed Congress that the Yakamas' claims to Tract D were meritorious. In 1939, Congress appropriated funds "[f]or completion of a survey of the disputed boundary of the Yakima Reservation, Washington." Act of May 10, 1939, ch. 119, 53 Stat. 685, 696. These actions would not have been necessary if Congress had redefined the Reservation's boundary by statute in 1904.

We accordingly hold that Congress did not conclusively exclude Tract D from the Reservation through the 1904 Act.[11]

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[11] The Yakamas argue that we should apply the "diminishment" framework to determine the effect of the 1904 Act on the Reservation's boundaries. Courts use that framework to resolve disputes over whether Congress "diminished" reservations by opening unallotted reservation lands to non-Indian settlement. *Solem*, 465 U.S. at 467, 104 S.Ct. 1161. We do not apply that framework here because the 1904 Act did not open Tract D for settlement. Even if the diminishment framework did apply, it would require the County to

V.

For the foregoing reasons, we **AFFIRM** the district court's holding that Tract D is within the Yakama Reservation.

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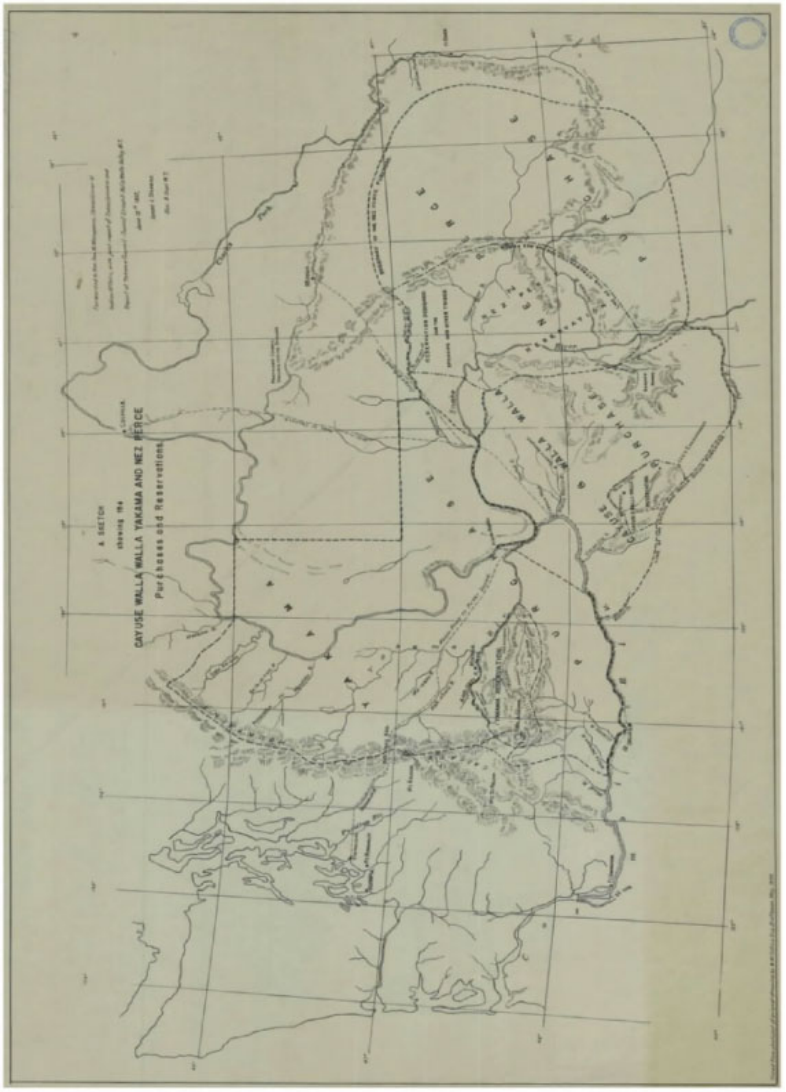
demonstrate a clear congressional intent to remove Tract D from the Yakama Reservation through the 1904 Act. *See id.* at 470, 104 S.Ct. 1161; *cf. McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 2463, 207 L.Ed.2d 985 (2020) (holding that the disestablishment of a reservation, like diminishment, "require[s] that Congress clearly express its intent to do so," typically with "reference[s] to cession or other language evidencing the present and total surrender of all tribal interests" (quoting *Nebraska v. Parker*, 577 U.S. 481, 488, 136 S.Ct. 1072, 194 L.Ed.2d 152 (2016))). As we have explained, the County has failed to make such a demonstration.

APPENDIX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UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF WASHINGTON.

The 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; and DAVID QUESNEL, in his official capacity, Defendants.	NO. 1:17-CV-3192-TOR FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY JUDGMENT

2019 WL 12378995

A bench trial was held from July 29 to 31, 2019. Plaintiff Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") was represented by Mr. Ethan A. Jones and Ms. Shona Voelckers from the Yakama Nation Office of Legal Counsel, and Mr.

R. Joseph Sexton from the firm Galanda Broadman, PLLC. Defendants Klickitat County, Klickitat County Sheriff's Office, Klickitat County Sheriff Bob Songer, Klickitat County Department of the Prosecuting Attorney, and Prosecuting Attorney David Quesnel, were represented by Mr. Timothy J. Filer and Mr. Rylan L. S. Weythman from the firm Foster Pepper PLLC, Mr. David R. Quesnel and Ms. Rebecca N. Sells from the Klickitat County Department of the Prosecuting Attorney, and Ms. Pamela B. Loginsky from the Washington Association of Prosecuting Attorneys. The United States and the State of Washington participated as *amici curiae*, filing briefs with the Court at ECF Nos. 76 and 100.

DISPUTE

In 1930, seventy-five years after the Treaty signing, Moses Sampson succinctly summarized the primary problem now before the Court: "its too bad that all the old people who knew are dead." Ex. 550 at 1.

The Yakama Nation contends that Klickitat County Defendants violated and continue to violate the Treaty with the Yakamas of 1855 (12 Stat. 951) and the Yakama Nation's inherent sovereign rights by exercising criminal jurisdiction over Yakama members for alleged crimes occurring within the Yakama Reservation, and in particular in an area known as Tract D. The Yakama Nation seeks declaratory relief affirming that (1) the Yakama Nation Treaty negotiators would have naturally understood the Yakama Reservation's boundary described in the Treaty of 1855 to include Tract D, (2) Congress has not acted to change the Yakama Reservation's boundaries set forth in the Treaty of 1855, (3) the Yakama Reservation's southwestern

boundary between Mount Adams and Grayback Mountain follows the lines surveyed and reported by Ronald Scherler in 1982, which includes Tract D within the Yakama Reservation, and (4) Defendants do not have criminal jurisdiction over Indians within the Yakama Reservation.

The Klickitat Defendants assert that Tract D is not, and never has been, part of the Yakama Reservation. First, they contend the Yakama Nation cannot carry its burden of proving that the parties to the Treaty of 1855 intended Tract D to be included in the reservation. Second, they contend Congress expressly settled the disputed western boundary in 1904, adopting a boundary that does not include Tract D within the reservation, which boundary is still in effect. Accordingly, Defendants assert that Klickitat County maintains full jurisdiction within the Klickitat County portion of Tract D, and has jurisdiction within the exterior boundaries of the reservation consistent with this Court's Order Denying Plaintiff's Motion for Preliminary Injunction (ECF No. 58) and *State v. Zack*, 2 Wash. App. 2d 667, *review denied*, 191 Wash. 2d 1011 (2018).

JURISDICTION AND STANDING

The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1362, and under federal common law because the Yakama Nation asserts claims arising under the Treaty of 1855. The Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. § 2201, and other relief—including injunctive relief—pursuant to 28 U.S.C. § 2202.

Plaintiff alleges that Defendants' assertion of criminal jurisdiction over crimes within the Yakama

Nation involving Indians, following the United States' acceptance of Washington's retrocession, constitutes a violation of the Yakama Nation's sovereignty. Thus, "[t]he injury that the Yakama Nation has sustained, and will continue to sustain without injunction, is a violation of its sovereign legally protected rights." Defendants do not dispute that they asserted criminal jurisdiction over Yakama members within Tract D following retrocession, nor do they deny that they will continue to exercise such jurisdiction in the future. To the contrary, Defendants maintain that they should not be prevented, by Plaintiff or this Court, from enforcing state criminal laws within the county as Tract D is not within the Yakama Reservation.

The Court finds that actual infringement of the tribe's sovereignty, as alleged by Plaintiff in this case, establishes "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. A tribe has a legal interest in protecting tribal self-government from a state's allegedly unjustified assertion of criminal jurisdiction over Indians and Indian Country. Congress, too, has a substantive interest in protecting tribal self-government. *See Moe v. Confederate Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 469 n.7 (1976). Accordingly, the Defendants' exercise of criminal jurisdiction over Yakama members within Tract D, if within the Reservation, would constitute an affront to sovereignty sufficient to confer standing. Plaintiff has alleged facts from which the Court could reasonably infer concrete, particularized, and actual or imminent injury. *See Lujan*, 504 U.S. at 560.

The Court finds that Plaintiff also satisfies Article III's remaining requirements—plaintiff's injury-in-fact is "fairly traceable" to the "complained-of-conduct of the defendant," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), and a favorable ruling would likely redress plaintiff's injury. *Lujan*, 504 U.S. at 561. As noted, Defendants confirm that they exercised criminal jurisdiction over Yakama members within Tract D and do not deny their intent to continue exercising criminal jurisdiction within Tract D because they contend it is not within the Yakama Reservation. An declaratory judgment or injunction preventing Defendants from exercising criminal jurisdiction would unquestionably prevent further alleged violations of the Yakama Nation's sovereignty. Accordingly, the Court finds that Plaintiff has satisfied Article III's standing requirements.

UNDISPUTED FACTS

The parties agreed upon the following facts (ECF No. 90 at 3-4), which the Court accepts without further proof:

1. For the purposes of this case, the boundaries of the area of land referred to as 'Tract D' are those surveyed by E.D. Calvin in 1932, and by Ronald Scherler in 1982, within which there are approximately 121,465.69 acres. Not all of Tract D falls within Klickitat County.

2. The Confederated Tribes and Bands of the Yakama Nation and the United States are parties to the Treaty with the Yakamas of June 9, 1855, codified at 12 Stat. 951 ("Treaty of 1855").

3. The Treaty of 1855 established the Yakama Reservation.

4. Article II defines the Yakama Reservation's intended boundaries, in relevant part, as follows:

> "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 . . ."

5. The present southern boundary of the Yakama Reservation, east of Grayback Mountain, is represented by the boundary surveyed by Berry and Lodge in 1861.

6. The map entitled "A Sketch Showing The Cayuse Walla Walla Yakama And Nez Perce Purchases and Reservations" dated June 12, 1855 and signed by Territorial Governor Isaac I. Stevens ("Treaty Map") was present at the Walla Walla Treaty Council.

7. The original Treaty Map was lost in the United States' records until approximately 1930.

8. The State of Washington has retroceded to the United States of America certain portions of jurisdiction within the exterior boundaries of the Yakama Reservation that the State had previously assumed under Pub. L. 83-280. This lawsuit was commenced after Klickitat County arrested and charged a minor for criminal acts arising within Tract D to which the minor subsequently pled guilty.

9. The Indian Claims Commission ("ICC") lacked jurisdiction to change reservation boundaries. The ICC could not and did not alter the boundaries of the Yakama Reservation.

SPECIFIC FINDINGS AND CONCLUSIONS

Having heard the evidence, including expert testimony, and reviewed the exhibits admitted into evidence, the Court "find[s] the [following] facts specially and state[s] its conclusions of law separately" according to Federal Rule of Civil Procedure 52(a)(1). These factual findings are based at a minimum upon a preponderance of the evidence and oftentimes on clear and convincing or uncontroverted evidence.

10. The Court accepts the expert opinions of Dr. Andrew Fisher. Dr. Fisher's reasoning and justification, citation to important pieces of evidence in the record and thoughtful approach are compelling and accepted. Dr. Fisher, unlike expert witness Michael Reis, looked at the entire historical record and came to reasoned and fair opinions; he is credible.

11. For millennia, indigenous groups that later became the fourteen Tribes and Bands which were confederated as the Yakama Nation lived and traveled throughout the Pacific Northwest for hunting, fishing, gathering roots and berries, trading, and other purposes.

12. The Klickitats and Yakamas used the lands in and around Tract D which they called Táak or Tahk [Plain] (now known as Camas Prairie) as a source of essential foods, camas roots, wápp-a-too (a tuber producing plant like potatoes, probably *Sagittaria latifolia*), salmon fishing and as a communal gathering place. Every year, women and children dug up and baked the roots and camas bulbs and gathered berries, while the men hunted and fished in the area. Táak's flat and grassy meadows were an ideal location

where multiple tribes and bands came together annually to trade, socialize, gamble, and race horses.

13. The cultural and sustenance values of Táak, as well as the need to protect it from euro-American encroachment, were recognized by federal representatives prior to the Treaty of 1855. When traveling through the area in 1853 for a railroad survey, ethnographer George Gibbs noted the Klickitat and Yakama Bands' annual festivities there. In 1854, federal sub-agents recommended Camas Prairie be reserved "as soon as possible" because of the necessary foods the area provided, and the likelihood that early settlers—if allowed—would destroy the valuable roots that were then plentiful within Camas Prairie.

14. In May and June of 1855, the Yakama Nation's representatives gathered at the Walla Walla Treaty Council to negotiate the Treaty of 1855 with Isaac I. Stevens, the Governor and Superintendent of Indian Affairs for the Territory of Washington.

15. The federal Indian law canons of Treaty construction provide that "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*, 139 S.Ct. 1686, 1699 (2019) (citations omitted); *Jones v. Meehan*, 175 U.S. 1, 11 (1899) ("the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.").

16. The Supreme Court has repeatedly stressed that the language of the Treaty "should be understood

as bearing the meaning that the Yakamas understood it to have in 1855." *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000, 1011 (2019).

17. Three important pieces of evidence chronicle what happened at the Treaty Council: the Treaty of 1855 (Ex. 6), the contemporaneously executed map (the "Treaty Map") (Ex. 55; Ex 56 (a 1939 reproduction of original Treaty Map)), and the official minutes from the Treaty Council ("Treaty Minutes") (Ex. 32).

18. The Treaty Minutes are the best evidence remaining of what occurred and what Governor Stevens told the Yakama Nation's representatives during Treaty negotiations at the Walla Walla Treaty Council.

19. The Yakama Nation's representatives present at the Walla Walla Treaty Council did not speak English, so several interpreters were present to translate for the parties.

20. The Yakama Nation's representatives did not understand western cartography or the meaning of latitude and longitude nor is there any evidence that these concepts were explained to them.

21. The Yakama Nation's representatives, including the signatories to the Treaty of 1855, could not read the Treaty of 1855.

22. Before the Treaty of 1855 was signed, Governor Stevens told the Yakama Nation's representatives that the Yakama Reservation's western boundary would extend "to the Cascade mountains, thence down the main chain of the Cascade mountains south of Mount Adams, thence along the Highlands separating the Pisco and the Satass river from the rivers flowing into the

Columbia. . ." Ex 32 at 65. Governor Stevens said, ". . . here is the paper for the Yakamas ... your lands are described. We got the descriptions from yourselfs (sic). Then your reservations are pointed out, those you all know." *Id.* at 100. Governor Stevens then stated that the treaties had been read over not once, but two or three times. *Id.* at 101.

23. The Treaty Map was present at the Walla Walla Treaty Council and used by Governor Stevens to communicate the reservation boundaries.

24. The Treaty Map depicts the Yakama Reservation's western boundary as passing along the main ridge of the Cascade Mountains in a southerly direction west of Mount Adams, and then south of Mount Adams for a distance before turning east along the Yakama Reservation's southern border. Ex. 55.

25. In Article I of the Treaty, the Yakama Nation ceded certain rights to more than 10 million acres of land, roughly one fourth of the State of Washington, for the rights reserved in the Treaty.

26. The Treaty of 1855 established the Yakama Reservation. In Article II of the Treaty, the Yakama Nation reserved from the ceded lands a tract of land included within the following boundaries, to wit:

> Commencing on the Yakama river, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide

> to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, 8 miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.
>
> All which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation . . .

Ex. 6; Treaty between the United States and the Yakama Nation of Indians, 12 Stat. 951, Concluded at Camp Stevens, Walla-Walla Valley, June 9, 1855; Ratified by the Senate, March 8, 1859; Proclaimed by the President of the United States, April 18, 1859.

27. The Treaty of 1855's description of the Yakama Reservation is ambiguous in its call for a southwestern boundary that follows a spur and divide separating the Klickitat River from the Pisco River (i.e. Toppenish Creek) because these features do not exist between said rivers south of Mount Adams.

28. Applying the canons of treaty construction, the Yakama Nation would have naturally understood the Treaty of 1855 to include Tract D within the Yakama Reservation.

29. In all the years following execution of the Treaty, boundary disputes arose in multiple areas of the Yakama Reservation. Unfortunately, the Treaty Map was quickly lost in the Government's files until it was finally recovered nearly seventy-five years later, in 1930. These disputes prompted a number of erroneous federal surveys that further complicated the historical record.

30. Congress passed the Indian General Allotment Act in 1887 (also known as the Dawes Act), which empowered the President to allot land to individual Indians without their consent and allowed non-Indians to purchase un-allotted lands. In 1897, a federal commission, known as the Crow-Flathead Commission, attempted to convince the Yakama Nation to approve the sale of unallotted lands within the Reservation. Ex. 17. The Yakama Nation refused, citing outstanding Reservation boundary errors. *Id.*

31. In 1890, George A. Schwartz's survey failed to properly identify the Yakama Reservation's western boundary by excluding almost half of the Reservation. The Yakama Nation rejected the Schwartz survey, prompting the United States to task Geological Survey Topographer E. C. Barnard with investigating the boundary.

32. Barnard used the White Swan Map, an inaccurate reproduction made by Governor Stevens of the lost Treaty Map. In 1900, even with this inaccurate map, Barnard's report concluded that the Schwartz Survey incorrectly excluded some 357,878 acres in the western portion of the Yakama Reservation.

33. In reviewing the southwestern boundary of the Reservation, Barnard relied on a conversation with Stick Joe and Chief Spencer, both enrolled Yakama Nation members, who recounted an erroneous boundary between Mount Adams and Grayback Mountain that had been described to them by federal agents years after the Treaty was signed.

34. Abraham Lincoln, also an enrolled Yakama Nation member and line rider, identified this erroneous boundary to Barnard, as well.

35. Neither Stick Joe, Chief Spencer nor Abraham Lincoln were present at the Walla Walla Treaty Council, saw the Treaty Map, nor were told the boundaries by Tribal headmen present at the Treaty Council. Only federal agents told them where the boundaries were, years after the Treaty was signed, which they later repeated to others.

36. Despite what his name implies, Chief Spencer was not a chief of the Yakama Nation that could individually speak for the entire Tribe. Neither Stick Joe nor Abraham Lincoln represented the entire Tribe.

37. The straight lines that Barnard drew in his report were inconsistent with the erroneous boundaries Stick Joe, Chief Spencer, and Abraham Lincoln recounted, creating further confusion in the different Yakama Reservation boundaries advocated by the federal government at that time.

38. The Department of Interior then reduced Barnard's calculation and at that time, only recognized an additional 293,837 acres beyond what Schwartz had surveyed.

39. Only Congress can diminish an Indian reservation's boundaries, and its intent to do so must be clear. *Nebraska v. Parker*, 136 S.Ct. 1072, 1078-79 (2016).

40. This Court assesses whether an Act of Congress diminished an Indian reservation by first reviewing the statutory text, for the most probative evidence of diminishment is the statutory language

used to open the Indian lands. *See Parker*, 136 S.Ct. at 1079.

41. Where the statutory text does not clearly evince a congressional intent to diminish an Indian reservation, this Court next reviews the history surrounding the passage of the Act of Congress for evidence that unequivocally reveals a widely held, contemporaneous understanding that the Indian reservation would shrink as a result of the legislation. *See Parker*, 136 S.Ct. at 1080.

42. This Court also reviews the subsequent demographic history of the opened lands to reinforce a finding of diminishment or non-diminishment based on the statutory text, although this consideration cannot, alone, support a finding of diminishment. *See Parker*, 136 S.Ct. at 1081.

43. On December 21, 1904, Congress passed a surplus lands act for the Yakama Reservation ("1904 Act"), titled "To authorize the sale and disposition of surplus or unallotted lands of the Yakima Indian Reservation, in the State of Washington." In the 1904 Act, Congress instructed the Secretary of the Interior to treat the 293,837 acres included by Barnard and approved by Interior as part of the Yakama Reservation "for the purposes of this Act . . ." 33 Stat. 595. Congress expressly proclaimed "it being the purpose of this Act merely to have the United States to 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." *Id.*

44. "Such schemes allow 'non-Indian settlers to own land on the reservation.' But in doing so, they do

not diminish the reservation's boundaries." *Parker*, 136 S.Ct. at 1080 (internal citation omitted).

45. The 1904 Act did not change the Treaty boundaries of the Yakama Reservation and did not effectuate a diminishment of the Reservation. The legislative history, plain language of the text, and subsequent history do not support any finding that Congress intended to diminish the Reservation.

46. Indeed, Congress continued to acknowledge the boundary dispute and in 1939 appropriated funds "[f]or completion of a survey of the disputed boundary of the Yakima Reservation, Washington . . ." 53 Stat. 685, 696.

47. Testimony and evidence concerning the present-day effect of recognizing Tract D as within the Reservation boundaries is irrelevant to the determination of what the parties agreed upon in the Treaty of 1855 and does not support a finding of Congressional diminishment.

48. During the Congressional hearing on the 1904 Act, Representative Wesley Jones of Washington confirmed that the Yakama Nation did not agree with the Act and explained the intent of the bill was "to help provide for the better disposition of the Indian" and "to be fully protecting the Indians in all their rights . . . ." Representative Jones then reaffirmed the intent of the bill, stating "I can not conceive of a bill that would be fairer or more just to the Indians . . . I believe it is one of the fairest bills for the Indians that has ever been presented in this House."

49. The House of Representatives Committee on Indian Affairs stated that the Yakama Nation Reservation "is a very great hindrance to the

continued and complete development of that country. With so large a body of land as that held from settlement and cultivation, settlement and growth can not help but be retarded. We believe it to be very important that this reservation should be opened at once." Ex. 20 at 5 (1904, Committee on Indian Affairs Report No. 2346).

50. After Congress passed the surplus lands act for the Yakama Reservation in 1904, the Campbell, Germond, and Long Survey marked the extent of the impacted land (referred to as the Barnard / Campbell Line). This survey reflected three straight boundary lines of the Reservation that excluded land in the northwest, west, and southwest areas of the Reservation.

51. For the benefit of the Yakama Nation, the United States brought suit to annul railroad patents issued outside the Schwartz survey but within the Barnard / Campbell Line, which suit ultimately reached the Supreme Court. *N. Pac. Ry. Co. v. United States*, 227 U.S. 355 (1913). The Supreme Court affirmed the Circuit Court of Appeals and Circuit Court which cancelled the railroad patents between these surveys. *Id.* at 358, 367.

52. The Supreme Court decision in *N. Pac. Ry. Co.* did not establish the reservation boundaries once and for all, but rather only decided whether the railroad patent claims between two competing boundary lines were valid.

53. Following the Supreme Court's decision in the Northern Pacific Railway Company case, the United States engaged Charles Pecore to survey the Yakama Reservation's western boundary. Pecore's survey, accepted by the General Land Office in 1926,

recognized an additional 47,593 acres in a triangular shape on the Reservation's southwestern boundary, but it too failed to follow natural features and the language of Article II of the Treaty.

54. In 1930, the United States found the original Treaty Map, after it was lost in the Department of the Interior's files for nearly seventy-five years.

55. In 1932, with the benefit of the Treaty Map, the United States tasked Elmer D. Calvin of the General Land Office to resurvey the southwestern Reservation boundary. The Calvin Survey confirmed a natural spur divide south of Mount Adams along the main ridge of the Cascade Mountains between the watersheds of the White Salmon River and Klickitat River that best represented the Treaty's boundary description and which encompassed Camas Prairie and all of Tract D.

56. As called for in the Treaty, a spur divide between the Klickitat River watershed and the Pisco River (i.e., Toppenish Creek) watershed does not exist south of Mount Adams, but this spur divide located by the Calvin Survey best fulfills the Treaty's boundary description.

57. In 1933, Topographic Engineer F. Marion Wilkes of the Office of Indian Affairs, Department of Interior, fully supported the Calvin Survey as correctly interpreting the calls of the Treaty when read in conjunction with viewing the Treaty Map. Ex. 59.

58. In 1949, the Yakama Nation filed claims with the Indian Claims Commission ("ICC") seeking compensation for Yakama Reservation land that the United States patented to non-Indians without

compensation to the Yakama Nation, including lands within Tract D.

59. Eventually, in 1966, the ICC determined that Tract D, as surveyed by Mr. Calvin, was intended to be included within the Yakama Reservation and therefore the Yakama Nation's claim to compensation was granted.

60. In 1968, the ICC approved a settlement with the United States paying the Yakama Nation $2.1 million for the 97,908.97 acres that were patented to others within the 121,465.69 acres that comprise Tract D.

61. Since the ICC proceedings, the federal government has uniformly taken the position that Tract D lies within the boundaries of the Yakama Reservation. The United States' amicus curiae brief continues to recognize this now longstanding position. ECF No. 76. Of course, the United States is the only other party to the Treaty of 1855 with the Yakama Nation.

62. In 1972, President Nixon returned possession of 21,008.66 acres that the United States had erroneously made part of the Gifford Pinchot National Forest situated in the northwest corner of Tract D surrounding Mount Adams. Ex. 25; Executive Order 11670. President Nixon's executive order acknowledged that this land was part of the Yakama Reservation created by the Treaty of 1855.

63. From 1978 to 1981, United States Bureau of Land Management Cadastral Surveyor Ronald Scherler surveyed the southwestern boundary of Tract D which he marked with iron posts and brass caps. The United States Chief Cadastral Surveyor of Washington approved Scherler's survey in 1982.

64. Tract D, as surveyed by Cadastral Engineer Ronald Scherler and approved by the United States in 1982, is located within the exterior boundaries of the Yakama Reservation established by the Treaty of 1855. Scherler's survey marks the correct southwestern boundary of the Yakama Nation Reservation.

65. The Bureau of Land Management is authorized by Congress to survey Indian reservations. 25 U.S.C. § 176. The Bureau of Land Management has the authority to correct erroneous public land surveys. 43 U.S.C. § 772. The United States' corrected survey performed by Scherler, accepted and approved by the United States in 1982, reflects the correct southwestern boundary of the Yakama Nation Reservation.

66. Mr. Reis' analysis is flawed and ignores important historical events and critical pieces of evidence to come to a skewed conclusion that Tract D is not part of the Yakama Reservation. The Court rejects Mr. Reis' analysis and conclusions.

67. For instance, Mr. Reis relies heavily on the statements of Stick Joe and Chief Spencer, neither of whom attended the Treaty signing, but rather were told thereafter by government agents where the southwest boundary lay. This misinformation communicated to two tribal members neither of whom were binding representatives of the Nation, skewed the analysis and oral history from the beginning, until the Treaty Map was recovered in 1930. By beginning with a faulty foundation, Mr. Reis' conclusion and later historical analysis are wrong.

68. Mr. Reis opined that the correct boundary is the Barnard Line, but Barnard's survey is comprised

of straight lines—in complete derogation of the calls of the Treaty to follow natural and monumental boundaries. Mr. Reis' opinion on this point is rejected.

69. Another instance of misinterpretation is Mr. Reis' emphasis on the placement of the 46th parallel on the Treaty Map with the boundaries of the Reservation shown well north of this line. First, he has improperly ignored that there is no evidence that the Indians understood latitude and longitude or that it was explained to them. Next, Grayback Mountain lies within the Reservation and that mountain sits south of the 46th parallel. Mr. Reis had no explanation for that mistake on the Treaty Map, yet he places great emphasis on the fact that Camas Prairie is south of the 46th parallel and therefore, in his opinion it could not have been intended to be within the Reservation. On the one hand Mr. Reis ignores a blatant mistake and on the other hand he relies on a defective feature of the map to exclude Tract D from the Reservation. These inconsistent positions cannot be explained, justified nor accepted by the Court.

70. Mr. Reis placed particular emphasis on the railroad maps prepared at Governor Stevens' direction, but not shown to the Indians. Mr. Reis claimed these maps showed that Governor Stevens knew the topography and features surrounding Tract D and he did not include Tract D within the reservation's boundaries. There is no evidence that the railroad maps were shown to the Yakama Indians at the Walla Walla Treaty council, thus, the Indians did not agree upon them. The Court finds it significant that the White Swan Map later prepared by or at the direction of Governor Stevens is severely erroneous, despite that Governor Stevens had access

to the railroad maps. The perspective and scale of the Treaty Map and White Swan Map are also severely distorted. *See N. Pac. Ry. Co. v. United States*, 227 U.S. 355 (1913) ("The Stevens map, though vouched for by him to be accurate, has many inaccuracies . . . and adds to the confusion . . .").

71. Defendants argued that Governor Stevens knew where Camas Prairie was located and did not include that in the Treaty Map. The same can be said that he did not know where Camas Prairie was because it is not labeled on the Treaty Map nor the White Swan map. If Governor Stevens knew where Camas Prairie was, why did he not label it and negotiate that monumental feature with the Indians, either inside or outside the reservation? Without a discussion at the Walla Walla council—a meeting of the minds—whether Governor Stevens knew of Camas Prairie from subordinates performing the railroad surveys is immaterial to what the parties agreed in the wording of the Treaty and what was shown on the Treaty Map.

72. It must also be noted that at the Walla Walla Treaty Council Governor Stevens said, ". . . here is the paper for the Yakamas . . . your lands are described. We got the descriptions from yourselfs (sic). Then your reservations are pointed out, those you all know." Ex. 32 at 100. The Treaty Map depicts the Yakama Reservation's western boundary as passing along the main ridge of the Cascade Mountains in a southerly direction west of Mount Adams, and then south of Mount Adams for a distance before turning east along the Yakama Reservation's southern border. Ex. 55. Governor Stevens was not giving the Yakama Nation a reservation, the Yakama Nation was reserving these lands for themselves.

73. Mr. Reis' opinion that the boundary should proceed from Goat Butte to Grayback Mountain, which lie north and east of Mount Adams, is thus categorically wrong.

74. Mr. Reis viewed certain historical facts and statements without understanding or taking into consideration the political climate and motivation of those speakers and actors. For instance, the Dawes Act did not benefit the Indians; rather, it was designed to take property away from them in order to diminish their land and sovereignty, absorbing them into the non-Indian culture. Later, in the 1930s, Congress took the view of supporting the Indian culture and the independent sovereignty of the Indians and the 1934 Indian Reorganization Act (known as the Wheeler-Howard Law) prohibited any further land allotment. By failing to recognize and appreciate the waxing and waning political climate and motivations of various actors, Mr. Reis came to an unsupportable and incorrect opinion.

RETROCESSION OF PUB. L. 83-280 JURISDICTION

The second issue presented in this case is the scope of state law jurisdiction within the Yakama Reservation. Jurisdiction over the Yakama Reservation, as with all Indian Country, rests with federal and Yakama authorities "except where Congress in the exercise of its plenary and exclusive power over Indian affairs has expressly provided that State laws shall apply." *Washington v. Confed. Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979).

In 1953, concerned with "the absence of adequate tribal institutions for law enforcement" on "certain

Indian reservations," Congress enacted Public Law 280, which required some states and authorized others to assume criminal and civil jurisdiction in Indian Country within a state's borders. *See Bryan v. Itasca Cty., Minn.*, 426 U.S. 373, 379 (1976)); Pub. L. 83-280, 67 Stat. 588, 588-89 (1953). In 1957, Washington enacted a law establishing state jurisdiction over any Indian reservation for any tribe that requested the State's assumption of jurisdiction. *Confed. Bands*, 439 U.S. at 474.

In 1963, Washington passed legislation allowing the State to assume civil and criminal jurisdiction pursuant to Public Law 280 over "Indians and Indian territory, reservations, country, and lands within this state," with certain limited exceptions. *See* RCW 37.12.010. Specifically, Washington did not assume jurisdiction over lands held in trust by the United States or held by a tribe in restricted fee status, unless the tribe consented, except in the following eight areas: (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operations of motor vehicles on public roads. *See* RCW 37.12.010. The Yakama Nation did not agree to the law and unsuccessfully challenged it in the United States Supreme Court. *Washington v. Confed. Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979).

In 1968, Congress amended Public Law 280 and repealed the option for states to assume jurisdiction over Indian Country without tribal consent, making tribal consent a prerequisite for any state assuming jurisdiction over Indian Country. 25 U.S.C. § 1322(a). For Washington and other states that had already

assumed jurisdiction, Congress authorized the United States to "accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of [Public Law 280] as it was in effect prior to [the 1968 amendments]." 25 U.S.C. § 1323(a). The President delegated the authority to accept retrocessions to the Secretary of the Interior, in consultation with the Attorney General. *See* Exec. Order No. 11435 (Nov. 21, 1968), 33 Fed. Reg. 17339-01 (Nov. 23, 1968).

In 2012, the Washington State Legislature adopted a law codifying the process by which the State could retrocede its Public Law 280 jurisdiction to the United States. *See* RCW 37.12.160. The Yakama Nation filed a petition with the Office of the Governor on July 17, 2012, asking the State to retrocede its civil and criminal jurisdiction over "all Yakama Nation Indian Country" and in five areas listed in RCW 37.12.010.

On January 17, 2014, Washington State Governor Jay Inslee issued Proclamation by the Governor 14-01 ("Proclamation 14-01") partially retroceding the State of Washington's jurisdiction over the Yakama Reservation back to the United States. Ex. 102. Three provisions of that Proclamation are relevant to the dispute now before the Court. First, the State of Washington retroceded to the United States "full civil and criminal jurisdiction" in four areas of law: Compulsory School Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency. *Id.* at 2, ¶ 1. Second, the State of Washington retroceded "in part, civil and criminal jurisdiction in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases in the following manner: Pursuant

to RCW 37.12.010(8), the State shall retain jurisdiction over civil causes of action involving non-Indian plaintiffs, non-Indian defendants, and non-Indian victims; the State shall retain jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." *Id.* at 2, ¶ 2. Third, the State of Washington specified that the State would "retrocede, in part, criminal jurisdiction over certain criminal offenses," and "retain[] jurisdiction over criminal offenses involving *non-Indian defendants and non-Indian victims*." *Id.* at 2, ¶ 3 (emphasis added). In a letter transmitting the proclamation to the Department of the Interior ("DOI") on January 27, 2014, Governor Inslee explained that the State's retrocession of criminal jurisdiction was intended to retain jurisdiction whenever "non-Indian defendants *and/or* non-Indian victims" were involved. Ex. 103.

On October 19, 2015, DOI notified the Yakama Nation of the United States' acceptance of "partial civil and criminal jurisdiction over the Yakama Nation." Ex. 104. Regarding the "extent of retrocession," DOI stated that Governor Inslee's proclamation was "plain on its face and unambiguous." *Id.* at 4. Noting its concern that "unnecessary interpretation might simply cause confusion," DOI explained that "[i]f a disagreement develops as to the scope of the retrocession, we are confident that courts will provide a definitive interpretation of this plain language of the Proclamation." *Id.* Pursuant to the DOI's instructions, the United States formally implemented retrocession on April 19, 2016, following significant coordination between the Yakama Nation, the United States, the State of Washington, and local jurisdictions. *See* Ex. 106.

Plaintiff asserts that, following the United States' acceptance of partial retrocession of jurisdiction within the Yakama Reservation, "Klickitat County may no longer exercise any criminal jurisdiction over a minor Yakama Member for alleged crimes committed on the Yakama Reservation; that jurisdiction lies with the Yakama Nation and/or the United States." ECF No. 1 at 7, ¶ 5.14. Plaintiff goes further and maintains that "Klickitat County does not have the authority or jurisdiction to arrest, detain, charge, prosecute, convict, or sentence Yakama Members for alleged crimes occurring within Indian Country as defined by 18 U.S.C. 1151, including by definition all land within the exterior boundaries of the Yakama Reservation."

On September 27, 2017, Klickitat County arrested PTS, an enrolled Yakama member and minor, detained PTS at the Northern Oregon Regional Correctional Facility, and charged PTS with two counts of statutory rape. *Id.* at ¶ 5.16. Plaintiff asserts that the alleged crimes occurred within the exterior boundaries of the Yakama Reservation near Glenwood, within Tract D. *Id.* at ¶ 5.17. Plaintiff argues that Defendants have acted unlawfully by arresting, detaining, charging, prosecuting, and convicting PTS. *Id.* at ¶ 5.18; *see* Ex. 574.

More recently, on October 13, 2018, Plaintiff complains of an arrest of Yakama member Robert Libby within the city of Glenwood, in Tract D. Mr. Libby was arrested and charged with various firearms related crimes and traffic offenses by Klickitat County. *See* ECF No. 36 at 24-25.

Defendants confirm that they exercised criminal jurisdiction over Yakama members within Tract D and do not deny their intent to continue exercising

criminal jurisdiction within Tract D because they contend it is not within the Yakama Reservation.

The Court viewed the plain language of Governor Inslee's retrocession proclamation, DOI's acceptance of retrocession, and federal and state law governing the retrocession process as properly establishing the limitations of the States' retrocession. The State of Washington retroceded to the United States "full civil and criminal jurisdiction" in four areas of law: Compulsory School Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency.

Accordingly, since Tract D is within the Yakama Reservation, acts of Juvenile Delinquency committed by Indians, like PTS, are governed by federal and tribal law, not state law. The Court does not vacate PTS's conviction however as this Court does not have jurisdiction, in this proceeding, to grant that form of relief. Furthermore, the Court understands that PTS did not claim or prove his Indian status as a jurisdictional defense to those charges.

The State of Washington retroceded "in part, civil and criminal jurisdiction in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases in the following manner: Pursuant to RCW 37.12.010(8), the State shall retain jurisdiction over civil causes of action involving non-Indian plaintiffs, non-Indian defendants, and non-Indian victims; the State shall retain jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." Ex. 102 at 2, ¶ 2. Traffic offenses committed by Indians, like Robert Libby, are governed by federal and tribal law, not state law. The Court does not vacate Robert Libby's convictions, if any, as this Court does not have jurisdiction, in this proceeding, to grant that form of relief. Furthermore,

the Court understands that Robert Libby has not claimed or proven his Indian status as a jurisdictional defense to those charges.

Finally, the Court concludes that Plaintiff's interpretation of the extent of retrocession for other crimes is too expansive. Reading the plain language of the Governor's use of the sentence "The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims" in context, both historical and in the context of the entire retrocession proclamation, makes clear that the State retained jurisdiction in two areas—over criminal offenses involving non-Indian defendants and over criminal offenses involving non-Indian victims. Accordingly, the State and necessarily the Defendants here have criminal jurisdiction over offenses committed by or against non-Indians within the Yakama Reservation.

Consistent with this Court's prior ruling in *Confed. Tribes v. City of Toppenish*, 1:18-CV-03190-TOR, ECF No. 28 (Feb. 22, 2019), the Court rejects Plaintiff's argument that Defendants no longer have criminal jurisdiction over Indians within the Yakama Reservation following retrocession. In order to explain the Court's reasoning and for completeness, it is necessary to repeat the court's analysis of the various arguments made there and here. *See* ECF No. 36, Yakama Nation's Motion for Preliminary Injunction.

Plaintiff contends that the State retroceded criminal jurisdiction "over all crimes within the Yakama Reservation where an Indian is involved *as a defendant and/or victim*." (emphasis added). Accordingly, Plaintiff insists that Defendants are violating the Yakama Nation's treaty rights and

threatening its sovereignty by exercising criminal jurisdiction over enrolled Yakama members within the Yakama Reservation. Defendants maintain that, while the State retroceded some criminal jurisdiction to the United States, the State retained jurisdiction over criminal offenses involving non-Indian defendants *and/or* non-Indian victims within the Yakama Reservation.

Plaintiff provides four reasons why the United States reassumed "the full scope of Public Law 280 criminal jurisdiction" from the State of Washington: (1) in accepting retrocession, DOI interpreted the Governor's proclamation as retroceding all criminal jurisdiction over offenses whenever a Yakama member is involved as either a defendant and/or victim; (2) DOI's acceptance of retrocession should be afforded judicial deference; (3) the United States Office of Legal Counsel's recent memorandum opinion should be afforded no deference; and (4) Washington's attempt to claw back jurisdiction it clearly retroceded is not supported by applicable law.

In the Court's view, Plaintiff's arguments hinge entirely on the underlying assumption that DOI, in accepting retrocession, definitively identified the scope of the State's retrocession as (1) retroceding federal jurisdiction over all offenses occurring within the Yakama Reservation whenever an Indian is involved as a defendant and/or victim and (2) retaining criminal jurisdiction only over criminal offenses involving both a non-Indian defendant and non-Indian victim, as well as non-Indian victimless crimes. Assuming this is DOI's interpretation, Plaintiff urges a "federal-focus perspective on interpreting retrocessions," arguing that "the Department of the Interior's actions are controlling,

regardless of any other governments' and agencies' contrary interpretation." And, according to Plaintiff, applying the federal-focus perspective to DOI's actions in this case unambiguously support Plaintiff's interpretation of the scope of retrocession—i.e., retroceding criminal jurisdiction over all offenses where a Yakama member is involved.

Unlike the Plaintiff, the Court is not convinced that DOI, in accepting retrocession, necessarily understood the Governor's retrocession proclamation as an offer to retrocede criminal jurisdiction over all crimes within the Yakama Reservation whenever an Indian is involved "as a defendant and/or victim." The retrocession proclamation, paragraph 3 provides in relevant part:

> Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, criminal jurisdiction over certain criminal offenses not addressed by Paragraphs 1 and 2. The State retains jurisdiction over criminal offenses involving *non-Indian defendants and non-Indian victims.*

Ex. 102 (emphasis added). Thus, the State expressly retained jurisdiction over "all criminal offenses involving *non-Indian defendants and non-Indian victims*." A s noted, in the letter transmitting the proclamation to DOI on January 27, 2014, Governor Inslee clarified that the State's intent in retroceding criminal jurisdiction was to retain jurisdiction whenever "non-Indian defendants *and/or* non-Indian victims" were involved. Ex. 103.

In DOI's October 19, 2015, letter notifying the Yakama Nation of retrocession, DOI confirmed that it had accepted the Governor's offer of retrocession and

briefly addressed the "extent of retrocession" issue. Ex. 104 at 5. After confirming that "Washington law clearly sets forth the process for retrocession of civil or criminal jurisdiction in Washington State," DOI summarily concluded that the Governor's proclamation was "plain on its face and unambiguous." *Id.* However, DOI then continued:

> We worry that unnecessary interpretation might simply cause confusion. If a disagreement develops as to the scope of the retrocession, we are confident that courts will provide a definitive interpretation of the plain language of the Proclamation. In sum, it is the content of the Proclamation that we hereby accept in approving retrocession.

Id.

Plaintiff maintains that DOI's interpretation of the proclamation as "plain on its face and unambiguous," and its characterization of any subsequent interpretation as "unnecessary," amounts to an express rejection of Governor Inslee's subsequent clarification that the proclamation's intent was to retain state criminal jurisdiction over cases involving "non-Indian defendants *and/or* non-Indian victims." The Court, however, disagrees. Rather than weighing in on the issue, DOI expressly declined to delineate the scope of retrocession, instead leaving it for the courts to "provide a definitive interpretation of the plain language of the Proclamation." *Id.*

Informative and not necessarily binding on this Court, a Washington court has now provided a definitive interpretation of the plain language of the Governor's retrocession proclamation and, in doing

so, has clarified the scope of Washington's criminal jurisdiction within exterior boundaries of the Yakama Reservation following retrocession. *See State v. Zack*, 2 Wash. App. 2d 667, *review denied*, 191 Wash. 2d 1011 (2018). In *State v. Zack*, Division Three of the Washington Court of Appeals considered a jurisdictional challenge to the scope of the State's post-retrocession criminal jurisdiction within the Yakama Reservation, almost identical to Plaintiff's challenge here. The *Zack* court determined that "[t]he jurisdiction issue turns on the meaning of the Governor's proclamation, with the dispositive question being the meaning of the word 'and.' " *Id.* at 672. The *Zack* court is the only court, state or federal, to consider whether the Governor's use of the word "and" in the contested retrocession provision should be read in the conjunctive or disjunctive.

Performing a plain language analysis, the *Zack* court concluded that the word "and" should be read in the disjunctive—i.e., "non-Indian defendant *and/or* non-Indian victim"—because the conjunctive interpretation "would render the proclamation internally inconsistent and nonsensical." *Id.* As the court explained, appellant's proposed construction, and the one advanced by Plaintiff in this case, "would mean that the only type of case the State could prosecute would require the involvement of non-Indian defendants who victimized other non-Indians on fee land." *Id.* at 675. However, because "[t]he State already had authority to prosecute non-Indians for offenses committed on deeded lands prior to the enactment of Public Law 280," and the Governor was only authorized to retrocede jurisdiction acquired under Public Law 280, the *Zack* court concluded that the conjunctive construction "would result in the

Governor engaging in *ultra vires* action." *Id.* at 675-76 ("Asserting or removing state jurisdiction over non-Indians is not within the scope of Public Law 280 or RCW 37.12.010.). The *Zack* court further observed that excluding Indians from prosecution in all cases "would mean that the Governor intended to return all of the criminal jurisdiction the State assumed by RCW 37.12.010 and the word 'in part' would be rendered meaningless because there would have been total rather than partial retrocession." *Id.* at 675. For these reasons, the court held that "the State retained jurisdiction to prosecute this assault against a non-Indian occurring on deeded land within the boundaries of the Yakama reservation." *Id.* at 676.

Though the Court is not bound by the decision, the Court finds the *Zack* court's analysis and holding persuasive, particularly when considering the historical patchwork of federal, state, and tribal criminal jurisdiction on the Yakama Reservation. Before the enactment of Public Law 280 or RCW 37.12.010, "the Yakima Nation was subject to the general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary." *Confed. Bands*, 439 U.S. at 470. Under those principles, while Indian tribes generally retain criminal jurisdiction over Indians within Indian reservations, tribes have no "inherent jurisdiction to try and to punish non-Indians." *Id.*; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). Thus, only the state possessed criminal jurisdiction over non-Indians who committed crimes against other non-Indians on Indian reservations. *See, e.g., Draper v. United States*, 164 U.S. 240, 242-43 (1896); *United States v. McBratney*, 104 U.S. 621, 624 (1882). Victimless crimes committed by non-Indians in

Indian country are also within the exclusive jurisdiction of the state. *See Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984). Neither the federal government nor the Tribe have jurisdiction over these crimes.

Public Law 280 authorized the State of Washington to assume full or partial jurisdiction over criminal offenses and civil causes of action involving Indians in Indian Country within the State's borders. *Confed. Bands*, 439 U.S. at 471-72. In 1963, the State opted to assume some jurisdiction under Public Law 280. *See* RCW 37.12.010. As the Supreme Court explained, "[f]ull criminal and civil jurisdiction to the extent permitted by Pub. L. 280 was extended to all fee lands in every Indian reservation and to trust and allotted lands therein when non-Indians were involved." *Confed. Bands*, 439 U.S. at 475. However, "state jurisdiction was not extended to Indians on allotted and trust lands unless the affected tribe so requested," except for those eight areas of law specified in RCW 37.12.010(1)-(8). *Id.*

When Congress amended Public Law 280 in 1968, it authorized the United States to "accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction" previously acquired pursuant to Public Law 280. 25 U.S.C. § 1323(a). By Executive Order, the Secretary of the Interior was then empowered to accept "*all or any measure*" of a state's offer of retrocession. *See* Exec. Order No. 11435 (Nov. 21, 1968), 33 Fed. Reg. 17339-01 (Nov. 23, 1968) (emphasis added). However, neither § 1323 nor the Executive Order authorize the Secretary to accept *more* jurisdiction than a state initially acquired under Public Law 280. Under federal law, a state may only retrocede any measure of jurisdiction

"acquired by such State pursuant to [Public Law 280]." 25 U.S.C. § 1323(a).

The State of Washington's statute outlining the retrocession process, RCW 37.12.160(1), confirms that the State may only "retrocede to the United States all or part of the civil and/or criminal jurisdiction previously acquired by the state over a federally recognized Indian tribe, and the Indian country of such tribe." Particularly relevant here, the statute specifically defines "criminal retrocession" as "the state's act of returning to the federal government the criminal jurisdiction acquired over Indians and Indian country under federal Public Law 280." RCW 37.12.160(9)(b).

Plaintiff urges the Court to interpret the Governor's retrocession proclamation, and DOI's acceptance of retrocession, as retroceding all criminal jurisdiction over crimes committed within the Yakama Reservation, including land held in fee by Indian and non-Indian owners, whenever an Indian is involved as a defendant and/or victim. Stated differently, Plaintiff maintains that "[t]he only criminal offenses over which the State retained jurisdiction are those involving both a non-Indian defendant and non-Indian victim, as well as non-Indian victimless crimes." Plaintiff claims that DOI's acceptance of retrocession "does not leave open the possibility of the State continuing to play a role in Indian-involved crimes within the Yakama Reservation."

However, interpreting the Governor's retrocession proclamation as Plaintiff insists "would result in the Governor engaging in an *ultra vires* action," as the offer of retrocession would be *returning* more jurisdiction to the United States than the State

assumed under Public Law 280 and RCW 37.12.010. *Zack*, 2 Wash. App. 2d at 676. As noted, the State's authority to prosecute non-Indians for crimes committed against non-Indians on the Yakama Reservation preexists Public Law 280 or RCW 37.12.010. Under Plaintiff's interpretation, the State would be "retaining" jurisdiction that it simply did not acquire from the United States pursuant to Public Law 280. The Court accepts the *Zack* court's logical interpretation, which is consistent with Public Law 280 and RCW 37.12.160's instructions.

Reading the Governor's use of the sentence "The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." in context, both historical and in the context of the entire retrocession proclamation, also makes it plain that the State was retaining jurisdiction in two areas—over criminal offenses involving non-Indian defendants and over criminal offenses involving non-Indian victims. The plain reading of the language thus also shows the limitation of the States' retrocession.

Moreover, Plaintiff's interpretation directly contradicts Governor Inslee's stated intent to "retrocede, *in part*, criminal jurisdiction." (emphasis added). Under Plaintiff's view of the scope of retrocession, the State retroceded all criminal jurisdiction assumed under Public Law 280, retaining only that jurisdiction that predated Public Law 280—*i.e.*, the "authority to punish offenses committed by her own citizens upon Indian reservations." *Draper v. United States*, 164 U.S. 250, 247 (1896). This interpretation is at odds with Governor Inslee's stated intent of retroceding some, but not all, criminal jurisdiction acquired under Public Law 280. The

Court cannot reconcile Plaintiff's illogical interpretation of the scope of retrocession with the plain language of the Governor's retrocession proclamation, or federal and state law.

The Court concludes that the State retained jurisdiction over criminal offenses where the perpetrator or the victim is a non-Indian. This interpretation is consistent with the plain language of the Governor's retrocession proclamation, DOI's acceptance, and federal and state law governing the retrocession process. Accordingly, the Court finds that Defendants have criminal jurisdiction over offenses committed by or against non-Indians within the Yakama Reservation.

INJUNCTION AND/OR DECLARATORY JUDGMENT

To obtain a permanent or final injunction, a "plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." e*Bay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also Indep. Training & Apprenticeship Program v. California Dep't of Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013). Plaintiff must satisfy each element for injunctive relief. The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion. e*Bay Inc.*, 547 U.S. at 391.

In 1934, Congress empowered the federal courts to grant a new remedy, the declaratory judgment. The purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy. *Steffel v. Thompson*, 415 U.S. 452, 467 (1974) (quoting *Peres v. Ledesma*, 401 U.S. 82, 111 (1971) (separate opinion of Brennan, J.)). "[A] federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Id.* at 468 (quoting *Zwickler v. Koota*, 389 U.S. 241, 254 (1967)). Different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Steffel*, 415 U.S. at 469 (citations omitted). A declaratory judgment will have a "less intrusive effect on the administration of state criminal laws," "it is a much milder form of relief than an injunction," and noncompliance is not punishable by contempt. *See id.* at 469-71. A failure to demonstrate irreparable injury does not preclude the granting of declaratory relief. *See id.* at 471-72. Thus, the Supreme Court held that, "regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute . . ." *Id.* at 475.

In consideration of the fact that the two state prosecutions which help to predicate this Court's jurisdiction are final, and in consideration of the equities, the Court concludes that an injunction at this time is unnecessary, but rather a declaratory judgment will achieve the purposes of declaring the

southwestern boundary of the Reservation and scope of applicable state laws.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. A Declaratory Judgment shall be entered declaring that: Tract D, as surveyed by Cadastral Engineer Ronald Scherler and approved by the United States in 1982, is located within the exterior boundaries of the Yakama Reservation established by the Treaty of 1855. The boundaries of the area of land referred to as Tract D are those surveyed by E.D. Calvin in 1932, and by Ronald Scherler in 1982, within which there are approximately 121,465.69 acres. Not all of Tract D falls within Klickitat County.
2. A Declaratory Judgment shall be entered declaring that since Tract D is within the Yakama Reservation and the State of Washington retroceded all jurisdiction concerning acts of Juvenile Delinquency committed therein by Indians, state juvenile delinquency law no longer applies to Indians within the Reservation, including Tract D.
3. A Declaratory Judgment shall be entered declaring that since Tract D is within the Yakama Reservation and the State of Washington retroceded "in part, civil and criminal jurisdiction in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases in the following manner: Pursuant to RCW 37.12.010(8), the State shall retain jurisdiction over civil causes of action involving non-Indian plaintiffs, non-Indian defendants, and non-Indian victims; the State

shall retain jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." Thus, traffic offenses committed by Indians are governed by federal and tribal law, not state law.

4. A Declaratory Judgment shall be entered declaring that since Tract D is within the Yakama Reservation and the State of Washington retroceded certain jurisdiction but retained jurisdiction in two areas—over criminal offenses involving non-Indian defendants and over criminal offenses involving non-Indian victims—accordingly, the State and necessarily the Defendants here have criminal jurisdiction over offenses committed by or against non-Indians within the Yakama Reservation, including Tract D.

The District Court Executive is directed to enter this Order, enter Judgment accordingly, furnish copies to counsel, and close this case.

DATED August 28, 2019.

[seal omitted] /s/ Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge

FILED
AUG 18, 2021
MOLLY C. DWYER,
CLERK
U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a sovereign federally recognized Native Nation, Plaintiff-Appellant, v. KLICKITAT COUNTY, a political subdivision of the State of Washington; et al., Defendants-Appellees.	No. 19-35807 D.C. No. 1:17-cv-03192-TOR Eastern District of Washington, Yakima ORDER

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a sovereign federally recognized Native Nation, Plaintiff-Appellee, v.	No. 19-35821 D.C. No. 1:17-cv-03192-TOR

KLICKITAT COUNTY, a political subdivision of the State of Washington; et al.,

Defendants-Appellants.

Before: GOULD and FRIEDLAND, Circuit Judges, and OTAKE,* District Judge.

The panel has unanimously voted to deny Klickitat County's petition for rehearing. Judge Gould and Judge Friedland have voted to deny the petition for rehearing en banc, and Judge Otake so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

* The Honorable Jill A. Otake, United States District Judge for the District of Hawaii, sitting by designation.

PUBLIC ACTS OF THE FIFTY-EIGHTH CONGRESS OF THE UNITED STATES

[33 Stat. 595]

Passed at the third session, which was begun and held at the city of Washington, in the District of Columbia, on Monday, the fifth day of December, 1904, and was adjourned without day on Friday, the third day of March, 1905.

THEODORE ROOSEVELT, President; WILLIAM P. FRYE, President of the Senate *pro tempore*; JOSEPH G. CANNON, Speaker of the House of Representatives.

* * *

CHAP. 22.— An Act To authorize the sale and disposition of surplus or unallotted lands of the Yakima Indian Reservation, in the State of Washington.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands embraced in the Yakima Indian Reservation proper, in the State of Washington, set aside and established by treaty with the Yakima Nation of Indians, dated June eighth, eighteen hundred and fifty-five: *Provided*, That the claim of said Indians to the tract of land adjoining their present reservation on the west, excluded by erroneous boundary survey and containing approximately two hundred and ninety-three thousand eight hundred and thirty-seven acres, according to the findings, after examination, of Mr. E. C. Barnard, topographer of the

Geological Survey, approved by the Secretary of the Interior April seventh, nineteen hundred, is hereby recognized, and the said tract shall be regarded as a part of the Yakima Indian Reservation for the purposes of this Act: *Provided further*, That where valid rights have been acquired prior to March fifth, nineteen hundred and four, to lands within said tract by bona fide settlers or purchasers under the public-land laws, such rights shall not be abridged, and any claim of said Indians to these lands is hereby declared to be fully compensated for by the expenditure of money heretofore made for their benefit and in the construction of irrigation works on the Yakima Indian Reservation.

SEC. 2. That allotments of land shall be made, under the direction of the Secretary of the Interior, to any Indians entitled thereto, including children now living born since the completion of the existing allotments who have not heretofore received such allotments. The Secretary of the Interior is also authorized to reserve such lands as he may deem necessary or desirable in connection with the construction of contemplated irrigation systems, or lands crossed by existing irrigation ditches; also lands necessary for agency, school, and religious purposes; also such tract or tracts of grazing and timber lands as may be deemed expedient for the use and benefit of the Indians of said reservation in common: *Provided*, That such reserved lands, or any portion thereof, may be classified, appraised, and disposed of from time to time under the terms and provisions of this Act.

SEC. 3. That the residue of the lands of said reservation—that is, the lands not allotted and not reserved—shall be classified under the direction of

the Secretary of the Interior as irrigable lands, grazing lands, timber lands, mineral lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, with the exception of the mineral lands, which need not be appraised, and the timber on the lands classified as timber lands shall be appraised separately from the land. The basis for the appraisal of the timber shall be the amount of standing merchantable timber thereon, which shall be ascertained and reported.

Upon completion of the classification and appraisements the irrigable, grazing, and arid lands, and the timbered lands upon the completion of the classification, appraisement, and the sale and removal of the timber therefrom, shall be disposed of under the general provisions of the homestead laws of the United States, and shall be opened to settlement and entry at not less than their appraised value by proclamation of the President, which proclamation shall prescribe the manner in which these lands shall be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars and the Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands when entered shall be that fixed by the

appraisement or by the President, as herein provided for, which shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior, upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry: *And provided further*, That the lands embraced within such canceled entry shall, after the cancellation of such entry, be subject to entry under the provisions of the homestead law, at the appraised value until otherwise directed by the President, as herein provided.

When the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid, he shall be entitled to a patent for the lands entered: *Provided*, That the entryman shall make his final proofs in accordance with the homestead laws within six years; and that aliens who have declared their intention to become citizens of the United States may become such entrvmen, but before making final proof and receiving patent they must have received their full naturalization papers: *Provided further*, That the fees and commissions to be paid in connection with such entries and final proofs shall be the same as those now provided by law where the price of the land is one dollar and twenty-five cents per acre: *And provided*

further, That the Secretary of the Interior may, in his discretion, limit the quantity of irrigable land that may be taken by any entryman to eighty acres, but not to less than that quantity: *And provided further*, That when, in the judgment of the President, no more of the said land can be disposed of at the appraised price, he may, by proclamation, to be repeated at his discretion, sell from time to time the remaining lands subject to the provisions of the homestead law, or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all the interests concerned.

The timber on lands classified as timber lands shall be sold at not less than its appraised value, under sealed proposals in accordance with such rules and regulations as the Secretary of the Interior may prescribe.

The lands classified as mineral lands shall be subject to location and disposal under the mineral-land laws of the United States: *Provided*, That lands not classified as mineral may also be located and entered as mineral lands, subject to approval by the Secretary of the Interior and conditioned upon the payment, within one year from the date when located, of the appraised value of the lands per acre fixed prior to the date of such location, but at not less than the price fixed by existing law for mineral lands: *Provided further*, That no such mineral locations shall be permitted on any lands allotted to Indians in severalty or reserved for any purpose as herein authorized.

SEC. 4. That the proceeds arising from the sale and disposition of the lands aforesaid, including the sums

paid for mineral lands, exclusive of the customary fees and commissions, shall, after deducting the expenses incurred from time to time in connection with the appraisements and sales, be deposited in the Treasury of the United States to the credit of the Indians belonging and having tribal rights on the Yakima Reservation, and shall be expended for their benefit under the direction of the Secretary of the Interior in the construction, completion, and maintenance of irrigation ditches, purchase of wagons, horses, farm implements, materials for houses, and other necessary and useful articles, as may be deemed best to promote their welfare and aid them in the adoption of civilized pursuits and in improving and building homes for themselves on their allotments: *Provided*, That a portion of the proceeds may be paid to the Indians in cash per capita, share and share alike, if in the opinion of the Secretary of the Interior such payments will further tend to improve the condition and advance the progress of said Indians, but not otherwise.

SEC. 5. That the Secretary of the Interior is hereby authorized, in the cases of entrymen and purchasers of lands now irrigated or that may be hereafter irrigated from systems constructed for the benefit of the Indians, to require such annual proportionate payments to be made as may be just and equitable for the maintenance of said systems: *Provided*, That in appraising the value of irrigable lands, such sum per acre as the Secretary of the Interior may deem proper, to be determined as nearly as may be by the total cost of the irrigation system or systems, shall be added as the proportionate share of the cost of placing water on said lands, and when the entryman or purchaser shall have paid in full the appraised value of the land,

including the cost of providing water therefor, the Secretary of the Interior shall give to him such evidence of title in writing to a perpetual water right as may be deemed suitable: *Provided*, That the Secretary of the Interior shall have power to determine and direct when the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense, under such forms of organization and under such rules and regulations as may be acceptable to him: *Provided also*, That the title to and the management and operation of the reservoirs, and the works necessary for their protection and operation, shall remain in the Government until otherwise provided by Congress.

SEC. 6. That the Secretary of the Interior is hereby vested with full power and authority to make all needful rules and regulations as to manner of sale, notice of same, and other matters incident to the carrying out of the provisions of this Act, and with authority to reappraise and reclassify said lands if deemed necessary from time to time, and to continue making sales of the same, in accordance with the provisions of this Act, until all of the lands shall have been disposed of.

SEC. 7. That nothing in this Act contained shall be construed to bind the United States to find purchasers for any of said lands, it being the purpose of this Act merely to have the United States to 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.

SEC. 8. That to enable the Secretary of the Interior to classify and appraise the aforesaid lands as in this Act provided, and to conduct the sales thereof, and to

define and mark the boundaries of the western portion of said reservation, including the adjoining tract of two hundred and ninety-three thousand eight hundred and thirty-seven acres, to which the claim of the Indians is, by this Act, recognized, as above set out, and to complete the surveys thereof, the sum of fifty-three thousand dollars, or so much thereof as may be necessary, is hereby appropriated from any moneys in the Treasury not otherwise appropriated, the same to be reimbursed from the proceeds of the sales of the aforesaid lands: *Provided*, That when funds shall have been procured from the first sales of the land the Secretary of the Interior may use such portion thereof as may be actually necessary in conducting future sales and otherwise carrying out the provisions of this Act.

Approved, December 21, 1904.

Treaty between the United States and the Yakama Nation of Indians. Concluded at Camp Stevens, Walla-Walla Valley, June 9, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATE OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

WHEREAS a treaty was made and concluded at the Treaty Ground, Camp Stevens, Walla-Walla Valley, on the ninth day of June, in the year one thousand eight hundred and fifty-five, between Isaac I. Stevens, governor, and superintendent of Indian affairs, for the Territory of Washington, on the part of the United States, and the hereinafter named head chief, chiefs, headmen and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederate tribes and bands of Indians, occupying lands lying in Washington Territory, who, for the purposes of this treaty, are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its Head Chief, on behalf of and acting for said bands and tribes, and duly authorized thereto by them; which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, Walla-

Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chief, chiefs, headmen and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

ARTICLE I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

Commencing at Mount Ranier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes (119° 10',) which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47°) parallel of latitude;

thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence, in a southeasterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Percé tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White banks," below the Priest's rapids; thence westerly to a lake called "La Lac;" thence southerly to a point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

ARTICLE II. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit:

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains,

passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be

valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE III. *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation,

breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: for the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year; and for the next five years, four thousand per year.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE V. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and ploughmaker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter,

one wagon and ploughmaker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon, to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief; to build for him at a suitable point on the reservation a comfortable house and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood, and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakama nation, and is recognized as such by them and by the commissioners on the part of the United

States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE VI. The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE VII. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities.

Nor will they make war upon any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. tAnd the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

ARTICLE X. *And provided*, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

ARTICLE XI. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,

Governor and Superintendent.		[L. S.]
KAMAIAKUN,	his x mark.	"L. S."
SKLOOM,	his x mark.	"L. S."
OWHI,	his x mark.	"L. S."
TE-COLE-KUN,	his x mark.	"L. S."
LA-HOOM,	his x mark.	"L. S."
ME-NI-NOCK,	his x mark.	"L. S."
ELIT PALMER,	his x mark.	"L. S."
WISH-OCH-KMPITS,	his x mark.	"L. S."
KOO-LAT-TOOSE,	his x mark.	"L. S."
SHEE-AH-COTTE,	his x mark.	"L. S."
TUCK-QUILLE,	his x mark.	"L. S."
KA-LOO-AS,	his x mark.	"L. S."
SCHA-NOO-A,	his x mark.	"L. S."
SLA-KISH,	his x mark.	"L. S."

Signed and sealed in presence of—

JAMES DOTY, *Secretary of Treaties*,

MIE. CLES. PANDOSY, *O. M. T.*,

WM. C. MCKAY,

W. H. TAPPAN, *Sub Indian Agent, W. T.*,
C. CHIROUSE, *O. M. T.*,
PATRICK MCKENZIE, *Interpreter*,
A. D. PAMBURN, *Interpreter*,
JOEL PALMER, *Superintendent Indian Affairs, O. T.*,
W. D. BIGLOW,
A. D PAMBURN, *Interpreter*.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the said Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,

"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the head chief, chiefs, headmen, and delegates of the Yakama, Palouse, and other confederated tribes and bands of Indians, occupying lands lying in Washington Territory, who, for the purposes of this treaty, are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, signed 9th June, 1855.

"Attest: "ASBURY DICKINS, *Secretary*."

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent

of the Senate, as expressed in their resolution of March eighth, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

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In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

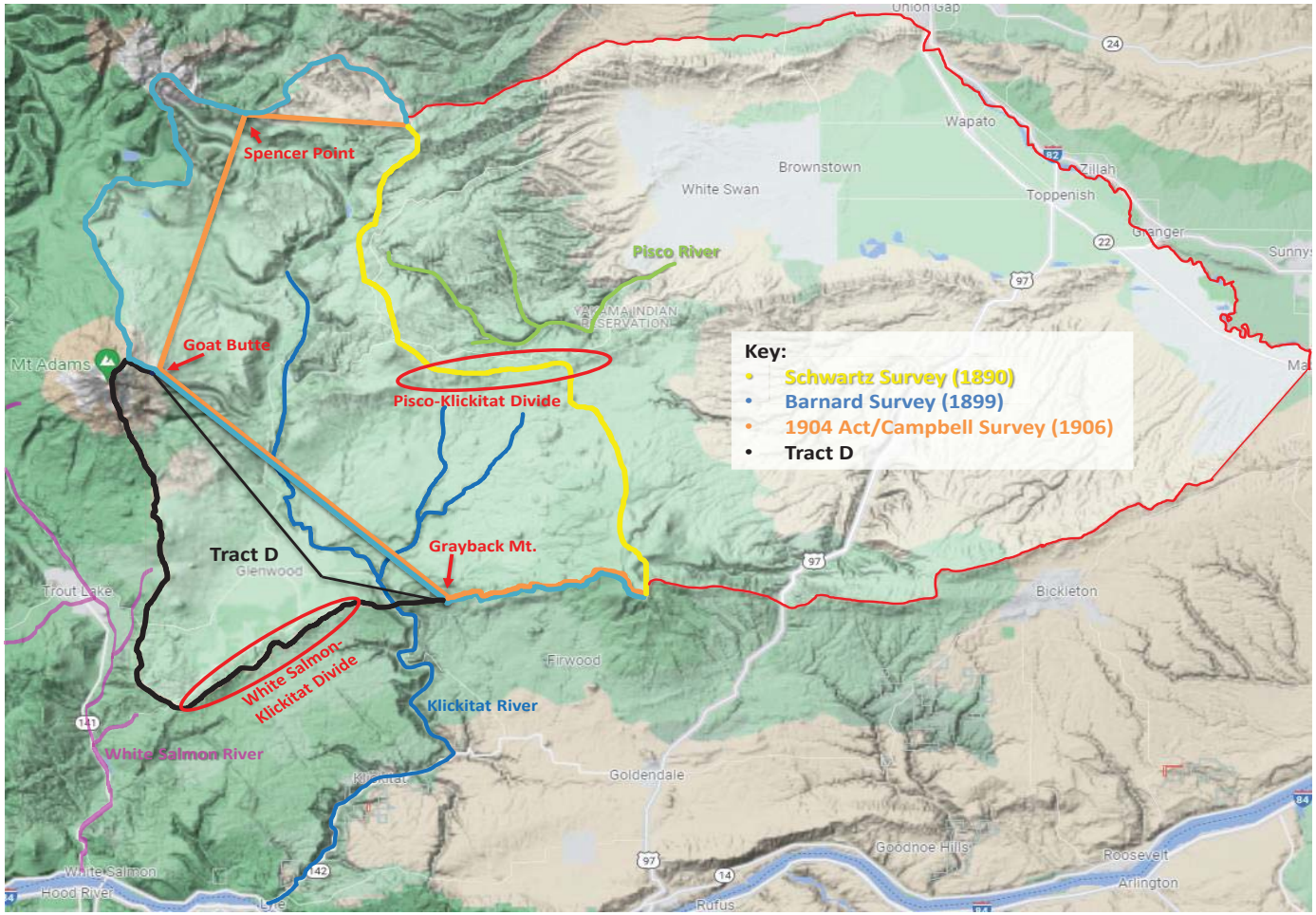
Done at the city of Washington, this eighteenth day of April, the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

[SEAL.]

JAMES BUCHANAN.

By the President:

LEWIS CASS, *Secretary of State.*


Spencer Point
Goat Butte
Mt Adams
Pisco River
Pisco-Klickitat Divide
Grayback Mt.
Tract D
Glenwood
Trout Lake
White Salmon-
Klickitat Divide
Klickitat River
White Salmon River
Firwood
Goldendale
Bickleton
Wapato
Brownstown
White Swan
Toppenish
Zillah
Granger
Sunnyside
Union Gap
Goodnoe Hills
Roosevelt
Arlington
Rufus
White Salmon
Hood River
Lyle
Key:
Schwartz Survey (1890)
Barnard Survey (1899)
1904 Act/Campbell Survey (1906)
Tract D