No. 21-906

IN THE
Supreme Court of the United States

KLICKITAT COUNTY, ET AL.,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS
OF THE YAKAMA NATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Yakama Treaty of 1855 between the United States and the Yakama Nation establishes the boundaries of the Yakama Reservation. As relevant here, the boundary "pass[es] 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."

Early surveyors had difficulty matching this Treaty language to the topography of the land—a task made more difficult by the loss of the map from the Treaty negotiations. After the map was recovered in 1930, federal engineer Elmer Calvin surveyed the region and confirmed that the Reservation's boundaries encompass an area known as "Tract D," in the southwest corner of the Yakama Reservation. In 1966, the Indian Claims Commission agreed with Calvin's assessment, and the federal government has taken the same view ever since.

In this case, Petitioners seek to overturn that settled conclusion. The questions presented are:

1. Whether the Yakama Reservation's boundaries were altered by a 1904 law that authorized the Secretary of the Interior to sell certain reservation land not situated within Tract D.

2. Whether the district court clearly erred in finding that the Yakama Treaty did not perfectly match the topography, but that Calvin's

boundary provided the best fit to the Treaty text and was consistent with the Yakamas' understanding in 1855.

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INTRODUCTION

This case concerns Petitioners' quixotic effort to overturn the longstanding view of both the United States and the Yakama Nation—the signatories to the Yakama Treaty of 1855—that an area of southern Washington known as "Tract D" lies within the Yakama Reservation. The petition should be denied because the Ninth Circuit's opinion is a fact-bound application of settled law and because Petitioners' arguments are internally inconsistent and largely waived.

The Yakama Treaty sets the Reservation's boundaries. As relevant here, the Treaty states that the boundary will run "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 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." Pet. App. 2a-3a.

In the decades following the Treaty's signing, disputes arose between the Yakamas and the United States over the Reservation boundaries. The problem was that it is impossible to draw a boundary that tracks the Treaty's text in all respects. A federal report by E.C. Barnard, dated January 12, 1900, declares: "Standing on Signal Peak and reading over the treaty, or with the map before us, there is no possible way of making the wording of the treaty agree with the topography of the country." Yakima Indian Reservation, H.R. Doc. No. 56-621, at 8 (1900)

(available at 12-ER-2615).[1] When this Court subsequently resolved a boundary dispute related to a central portion of the Reservation (north of Tract D), it noted there was "confusion" and "irreconcilability" in the Treaty's calls. *N. Pac. Ry. Co. v. United States*, 227 U.S. 355, 362 (1913). Early surveyors were also hindered by the fact that no one could find the map that was used at the 1855 Treaty negotiations. Pet. App. 5a.

In 1930, a federal employee discovered that the Treaty map had been in the government's records all along, misfiled under "M" for Montana rather than "W" for Washington. *Id.* In light of this extraordinary discovery, the United States ordered a new survey with the benefit of the map. The chosen surveyor, cadastral engineer Elmer Calvin, agreed with other surveyors that the "language of the treaty fails to fit the topography on the ground." Pet. App. 6a. He proceeded to draw a boundary that came as close as possible to the Treaty text, viewed in light of the recovered map. He concluded that under the Treaty, Tract D is within the Reservation. *Id.*

The Secretary of the Interior agreed with this conclusion in 1939, the Indian Claims Commission took the same view in 1966, President Nixon took the same view in 1972, and the federal government took the same view in approving yet another survey in 1982. Pet. App. 6a-7a.

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[1] "ER" citations are to the Excerpts of Record below.

For decades, all federal and tribal stakeholders have agreed that Tract D is reservation land, and the State of Washington has not challenged that agreement here, even after the district court invited the State to submit briefing on the issue. In 2017, however, Petitioners sought to overturn that settled view by insisting that—contrary to the views of both parties that signed the treaty—Tract D lies outside the Reservation. The district court and Ninth Circuit took a fresh look at the issue and reached the same conclusion as the Treaty parties: Tract D is within the Reservation. That conclusion is correct.

After hearing extensive expert testimony concerning the history and topography of the region, the district court made two crucial factual findings. First, like every surveyor, federal official, and court that has historically looked at the issue, the district court found that the Treaty language does not match the topography. Specifically, the Treaty requires that the boundary pass "south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers," but no "spur" meeting this description exists. Pet. App. 34a-35a.

Second, the district court found that the southwest reservation boundary that Calvin surveyed is not only the best fit to the Treaty's text, but it is also consistent with the Yakamas' understanding in 1855. Pet. App. 35a, 41a. As the district court explained, Calvin's boundary passes south and east of Mount Adams to a spur, whereas under Petitioners' proposed line, the boundary would not follow a spur at all. *Id.*

The Ninth Circuit reviewed the evidence and found, under the deferential clear-error standard of review, that neither finding was clearly erroneous. Pet. App. 15a. In view of that conclusion, the legal analysis was straightforward. Because the Treaty's text did not match the terrain, the Treaty was ambiguous, opening the door to evidence regarding the Yakama Nation's understanding. Pet. App. 15a-16a. And given the district court's factual finding that the Yakama Nation would have understood the Reservation to encompass Tract D, the Ninth Circuit upheld the district court's decision that Tract D is reservation land. Pet. App. 16a-19a.

Petitioners identify no basis to overturn the Ninth Circuit's decision. In Section I of the petition, Petitioners contend that a 1904 federal statute establishes a boundary line that excludes Tract D. This argument is meritless. The 1904 Act says nothing about reservation boundaries and nothing about Tract D. Instead, it authorizes the Secretary of the Interior to sell certain reservation land, and then provides that a separate tract of land, distinct from Tract D, will be treated as reservation land for purposes of that statute.

Moreover, nine years later, in *Northern Pacific*, this Court confirmed that the Reservation is broader than the land referred to in the 1904 Act. If the Court adopted Petitioners' misguided position that the 1904 Act authoritatively set the reservation boundaries, it would have to formally overrule *Northern Pacific*.

In Section II of the petition, Petitioners combine two arguments which contradict each other and are both waived. In Section II.A of the petition,

Petitioners assert that *Northern Pacific* excludes Tract D from the Reservation. Petitioners did not raise this argument in the Ninth Circuit, and it is wrong. *Northern Pacific* addressed the reservation status of land internal to the Yakama Reservation, and had nothing to say about the dispute over Tract D, which forms the southwestern boundary.

In Section II.B of the petition, Petitioners assert that the Ninth Circuit should have used a boundary that follows the divide between the Klickitat and Pisco Rivers. But Petitioners lack evidentiary support, and the district court disallowed testimony on this theory because Petitioners' proposed expert did not disclose it during discovery. The map that Petitioners now tout, on page 27 of the petition, is not in the evidentiary record, but is actually an excerpt from the Yakama Nation's motion to exclude that exhibit from trial.

In addition to being waived, Petitioners' argument contradicts the boundaries that Petitioners endorse in Sections I and II.A, neither of which follow the Klickitat/Pisco divide. Indeed, in *Northern Pacific*, this Court expressly *rejected* Petitioners' position that the boundary must follow the Klickitat/Pisco divide.

Because the Ninth Circuit is correct, and because Petitioners' arguments contradict each other and are waived, certiorari should be denied.

STATEMENT

In 1855, the United States and the Yakama Nation entered into the Yakama Treaty, in which the Yakamas ceded about 10 million acres of land to the United States. *Wash. State Dep't of Licensing v. Cougar Den*,

Inc., 139 S. Ct. 1000, 1007 (2019) (plurality opinion). In return, the Yakamas reserved certain rights, including the right to a reservation. Pet. App. 1a-2a. The Treaty defines the Yakama Reservation's boundaries according to natural features:

> 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.

Pet. App. 2a-3a.

The Yakama Nation's ancestors could not read the Treaty at the Treaty Council, and were forced instead to rely on verbal descriptions. Governor Isaac Stevens, on behalf of the United States, described the Reservation's southwestern boundary as proceeding "down the main chain of the Cascade mountains south of Mount Adams, thence along the Highlands separating the Pisco and the Sattass [R]iver from the rivers flowing into the Columbia [River]." 9-ER-1971. Stevens also used a large map, on which the United

States drew the Reservation boundaries. On this map, the southwestern boundary extends south between the White Salmon and Klickitat Rivers for miles before turning east to meet the Simcoe Mountains.

Almost immediately after the Treaty's enactment, disputes arose over the Reservation's boundaries. Making matters more difficult, the map that was present at the Treaty negotiations had been misplaced. Pet. App. 4a.

The first survey, completed by George A. Schwartz in 1890, provoked outrage among the Yakamas by excluding a massive swath of land. Pet. App. 5a. The United States commissioned a report by E.C. Barnard, who, in 1900, concluded that Schwartz had wrongfully omitted hundreds of thousands of acres from the Reservation. Pet. App. 36a. His report made clear, however, that there was "no possible way of making the wording of the [T]reaty agree with the topography of the country." Pet. App. 5a.

In 1930, the United States found the lost Treaty map in the government's records. *Id.* Consequently, the United States commissioned a survey by cadastral engineer Elmer Calvin. *Id.* Unlike Barnard, Calvin followed the Treaty's direction of conforming the Treaty boundary to natural features. Although Calvin agreed with Barnard that the "language of the Treaty fails to fit the topography on the ground," Pet. App. 6a, he nonetheless determined that a natural spur existed south of Mount Adams along the main ridge of the Cascades. Pet. App. 41a. He concluded that a boundary following that spur best conforms to the Treaty's command that the boundary pass "southerly

along the main ridge of said mountains, passing south and east of Mount Adams," to a "spur." Pet. App. 34a. Under this boundary, the reservation includes the disputed area in this case, called "Tract D." Pet. App. 5a-6a.

In 1939, the Secretary of the Interior advised Congress that based on "exhaustive study," the Yakamas' claims to Tract D were meritorious. Pet. App. 6a & n.3. Not all components of the federal government agreed, so the Yakama Nation filed a claim in the Indian Claims Commission. Pet. App. 6a. After seventeen years of litigation, the Commission concluded that Tract D is Reservation land. Pet. App. 6a, 42a.

Since 1966, the federal government as a whole has agreed with the Yakamas that Tract D is reservation land. Pet. App. 42a. In 1972, President Nixon issued an Executive Order confirming Tract D's reservation status. *Id.* From 1978 to 1981, a federal surveyor, Ronald Scherler, surveyed the southwestern boundary of Tract D and marked the boundary with iron posts and brass caps. *Id.* The United States Chief Cadastral Surveyor of Washington approved that survey in 1982. *Id.*

In 2014, Petitioners prosecuted a juvenile enrolled Yakama member for committing a crime against a non-Indian on fee land within Tract D. Pet. App. 7a-8a. Although Washington State has jurisdiction to prosecute most criminal offenses involving non-Indians on fee lands within the Reservation, including crimes committed by Indians against non-Indians, only the Yakama Nation and United States have jurisdiction

over offenses by Indian juveniles. Pet. App. 7a-8a & n.5. Petitioners' exercise of jurisdiction over a juvenile Yakama member was therefore unlawful, but for Petitioners' defense that Tract D is not reservation land. Pet. App. 7a-8a.

The Yakama Nation thus initiated this suit seeking a declaration that Tract D is part of the Reservation. The United States filed an amicus brief agreeing with the Yakama Nation that Tract D is reservation land. Pet. App. 42a. Following a three-day bench trial, the district court agreed that Tract D, as surveyed by Calvin and Scherler, is within the Reservation's boundaries. Pet. App. 63a. The district court made two key factual findings supporting its conclusion. First, the district court found that the Treaty is ambiguous because the Treaty calls for a "spur and divide separating the Klickitat River from the Pisco River," yet "these features do not exist between said rivers south of Mount Adams." Pet. App. 35a. Second, because the Treaty is ambiguous, the district court received historical and topographical evidence as to the parties' intentions, and found that "the Yakama Nation would have naturally understood the Treaty of 1855 to include Tract D within the Yakama Reservation." *Id.*

In reaching these conclusions, the district court relied on testimony from expert historian Dr. Andrew Fisher, whom the district court found to be credible. Pet. App. 31a. Dr. Fisher has written extensively on the Reservation's complicated history, including publishing his findings on the Tract D dispute in a peer-reviewed article. 10-ER-2045, 2111.

Petitioners offered only one expert at trial, historian Michael Reis, whose opinions the district court found to be "flawed," "skewed," "wrong," "misinterpretation[s]," "inconsistent," and "unsupportable and incorrect." Pet. App. 43a, 44a, 46a. The district court found Mr. Reis to not be credible, Pet. App. 43a-44a, and Petitioners do not challenge that conclusion. Petitioners have no credible witness testimony on the history of this extremely fact-bound case.

On appeal, with the United States again filing an amicus brief in support of the Nation, the Ninth Circuit affirmed. The Ninth Circuit found no clear error in the district court's determination that there was no "spur" matching the Treaty text. Pet. App. 10a-12a. It likewise found no clear error in the determination that in 1855, the Yakamas would have understood the Treaty to include Tract D within the Reservation. Pet App. 12a-15a.

In view of those factual findings, the Ninth Circuit concluded that the Yakama Reservation includes Tract D. The district court's first factual finding that the Treaty does not match the terrain established, as a matter of law, that the Treaty is ambiguous. Pet. App. 15a-18a. Applying standard principles of treaty interpretation, the court held that the Treaty must be interpreted in the way the Yakama Nation would have understood it—which, in view of the district court's second factual finding, meant that Tract D is reservation land. Pet. App. 18a-19a.

Finally, the Ninth Circuit rejected Petitioners' claim that a 1904 statute had diminished the

Reservation from its original boundaries, identifying no language in that statute establishing Congress's intent to abrogate the Treaty. Pet. App. 21a.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT CORRECTLY INTERPRETED THE YAKAMA TREATY.

The Ninth Circuit correctly held that Tract D lies within the Yakama Reservation. That conclusion follows the longstanding view of both of the Yakama Treaty's signatories—the Yakama Nation and the United States.

This case presents a routine application of well-recognized principles of treaty interpretation: 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).

The Ninth Circuit's conclusion was driven by two factual findings by the district court. The Treaty provides that the boundary passes "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." Pet. App. 34a-35a. The district court's first factual finding is that there *is* no spur south of Mount Adams "whence flows the waters of the Klickitat and Pisco rivers," and so the line cannot pass "thence down

said spur." Pet. App. 34a. Petitioners do not contend that this factual finding is clearly erroneous.

In view of that factual finding, the Ninth Circuit correctly concluded that the Treaty is, as a matter of law, ambiguous. Pet. App. 16a-17a. Because the "spur" described by the Treaty does not exist, the Treaty's plain text does not resolve the correct boundary line. *Id.*

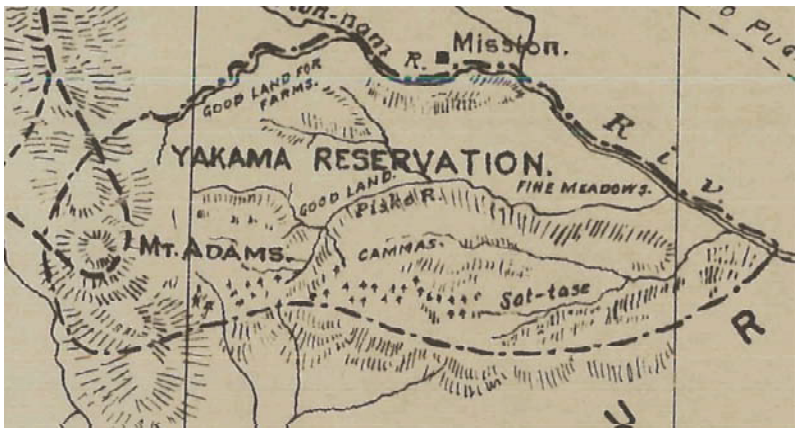
The district court's second factual finding is that the Yakamas would have understood their Reservation to encompass Tract D. Indeed, the district court found that this interpretation not only "best fulfills the Treaty's boundary description," but also aligns with how the Yakamas "would have naturally understood the Treaty of 1855." Pet. App. 35a, 41a. Petitioners do not seriously challenge this factual finding under the clear-error standard of review.

Under any standard of review, that factual finding is correct. There is no "spur" between the waters of the Klickitat and Pisco Rivers south of Mount Adams. Pet. App. 10a-12a. But as Calvin recognized, there *is* a spur south of Mount Adams along the main ridge of the Cascades between the Klickitat and White Salmon River watersheds. Pet. App. 41a.

Hence, Calvin's boundary line is an *almost* perfect match to the Treaty. It passes: (1) south and east of Mount Adams, (2) to the spur whence flows the waters of the Klickitat and White Salmon rivers, (3) thence down said spur to the divide between the waters of said rivers, (4) thence along said divide to the Simcoe

Mountains separating the Satus River to the north from the Columbia River to the south.

The Treaty map confirms Calvin's conclusion. Mount Adams is the highest mountain in the area and the only mountain identified within the Reservation on the Treaty map. The map shows that the Reservation's boundary passes significantly south of Mount Adams *before* turning east. App. 1a. As a Department of the Interior official explained in 1933, "'from [the] map it is apparent that the makers of the treaty intended to take in a large area south of [Mount] Adams,' including 'the area around [Tract D].'" Pet. App. 14a-15a. The reproduction of the Treaty map illustrates this:



See also App. 1a (larger version of map).[2] By contrast, Petitioners' proposed map at page 27 of their brief, which departs Mount Adams on an abrupt turn to the

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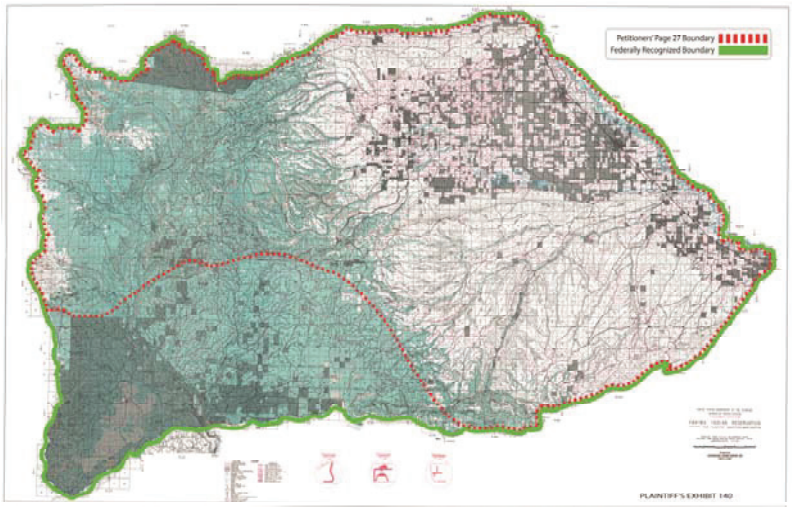
[2] This reproduction of the Treaty map, which the parties agree is an accurate representation of the original Treaty map, is part of the evidentiary record. 10-ER-2230.

north that follows no "spur," looks nothing like the Treaty map and Petitioners offered no credible witness to say otherwise. The following map, which contrasts the federally recognized boundary approved by the Ninth Circuit with Petitioners' proposed boundary at page 27 of their brief, demonstrates that the federally recognized boundary is much closer to the Treaty map.



See also App. 2a (larger version of map).[3]

Because the Treaty is ambiguous, and because the district court made the factual finding that the Yakamas would have understood the Treaty to include Tract D, the Ninth Circuit correctly concluded that Tract D lies within the Reservation. Pet. App. 18a-19a.

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[3] The original version of this map is in the evidentiary record at 12-ER-2813.

II. PETITIONERS' FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW.

In their first question presented, Petitioners contend that the Ninth Circuit's decision "negated" a statute enacted by Congress in 1904. Pet. 16. That contention grossly mischaracterizes the Ninth Circuit's decision and invites a departure from this Court's well-established Indian canon on statutory interpretation and its progeny. Far from "negating" that statute, the Ninth Circuit carefully analyzed the 1904 Act and correctly concluded that it has no bearing on the reservation status of Tract D.

Beyond contradicting the text of the 1904 Act, Petitioners' position would require this Court to formally overrule *Northern Pacific*, which held that the Reservation's boundaries extend beyond the land addressed in the 1904 Act. Petitioners have shown no sound basis for overruling that 110-year-old precedent.

A. Petitioners' position conflicts with the plain text of the 1904 Act.

The plain language of the 1904 Act establishes that it does not exclude Tract D from the Reservation.

Section 1 of the 1904 Act[4] authorizes the Secretary of the Interior "to sell or dispose of unallotted lands embraced in the Yakima Indian Reservation," subject to the proviso that "the claim of said Indians to the

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[4] Act of Dec. 21, 1904, ch. 22, § 1, 33 Stat. 595, 595-96.

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 … is hereby recognized, and the said tract shall be regarded as a part of the Yakima Indian Reservation for purposes of this Act." Pet. App. 67a-68a. Congress identified the purpose of the Act to be "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." Pet. App. 73a.

Petitioners' theory is that because (1) the 1904 Act contains a reference to Barnard's report, and (2) Barnard's report does not include Tract D in the Reservation, it follows that (3) Congress intended to exclude Tract D from the Reservation.

This theory reads words into the statute that do not exist. There is not the slightest indication from the statutory text that it excludes Tract D from the Reservation.

First, the statute does not purport to set any reservation boundaries. Instead, it is an authorization for the Secretary to "sell or dispose of unallotted lands." Pet. App. 67a.

Indistinguishable case law from this Court establishes that statutes that merely authorize the Secretary to sell land do not alter reservation boundaries. For example, two years after the 1904 Act

was passed, Congress passed an almost identically worded statute authorizing the Secretary of the Interior "to sell or dispose of unallotted lands" in the nearby Colville Reservation in Washington. Act of Mar. 22, 1906, ch. 1126, § 1, 34 Stat. 80, 80. This Court subsequently held that the 1906 Act did not alter reservation boundaries but instead "did no more than open the way for non-Indian settlers to own land on the reservation." *Seymour v. Superintendent*, 368 U.S. 351, 356 (1962); *accord Nebraska v. Parker*, 577 U.S. 481, 489 (2016).

Second, the 1904 Act never suggests that Tract D lies outside the Reservation. It simply says that the disputed tract of 293,837 acres "shall be regarded as a part of the Yakima Indian Reservation for purposes of this Act." Pet. App. 67a-68a. It says nothing about Tract D, which is a separate tract of land.

Petitioners do not explain how their reading accords with the statutory text. Petitioners first advance the general proposition that Congress has authority to set reservation boundaries. Pet. 16-17. Of course that is true, but when Congress enacts statutes that set reservation boundaries, the statutes say so. The first statute in Petitioners' string-cite (Pet. 17 n.6) is a good example. It includes language such as: "The boundary of the Crow Indian Reservation shall be the 107th meridian." Crow Boundary Settlement Act of 1994, § 5(a)(1)(A), Pub. L. No. 103-444, 108 Stat 4632, 4635. There is no language like that in the 1904 Act.

When Petitioners turn to the statutory text, they offer a single paragraph of analysis. Petitioners ignore the well-established legal hallmarks of congressional

intent to abrogate or change reservation boundaries because they are not present in the 1904 Act. *See Nebraska*, 577 U.S. at 489. Instead, Petitioners chart a new course by insisting that Congress intended to "approve Barnard's 'findings' on the boundary at issue and to 'define and mark' the boundary of the Reservation along the Barnard line." Pet. 18. This statement misleadingly combines language from two separate sections of the statute. The reference to Barnard's "findings" appears in Section 1 of the 1904 Act, addressed above. The words "define and mark" appear in Section 8 of the 1904 Act, which says nothing about Barnard. Pet. App. 73a-74a. Instead, Section 8 provides that to enable the Secretary of the Interior to sell the land, "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," Congress would appropriate $53,000. *Id.* This provision appropriating money for an additional survey did not enshrine into law the entirety of Barnard's boundary; nor did it exclude Tract D in any sense.

Petitioners then resort to legislative history in the absence of support for their textual argument. Pet. 18-19. That legislative history does not help their case. Petitioners cite a letter by the Secretary of the Interior transmitting Barnard's report to Congress (Pet. 18), but that letter did not mention Tract D and actually referred to a different, never-enacted statute that would have authorized the Secretary of the Interior to

negotiate an agreement with the Yakamas "for the adjustment of their claim[s]" over the 293,837-acre tract. 8-ER-1813-16, 12-ER-2613-14. The other legislative reports (Pet. 18-19) make general statements about resolving land disputes with the Yakamas, but say nothing about Tract D.

Finally, after the Treaty map was recovered, the Secretary of the Interior accepted Calvin's conclusion that Tract D is within the Reservation, and Congress enacted an appropriations bill for "completion of a survey on the disputed boundary of the Yakima Reservation, Washington." Pet. App. 22a (quoting Act of May 10, 1939, ch. 119, 53 Stat. 685, 696, which appropriated funding to survey the western boundary). As the Ninth Circuit explained, "[t]hese actions would not have been necessary if Congress had redefined the Reservation's boundary by statute in 1904." *Id.*

In response, Petitioners quote a concurrence by Justice Scalia deriding "subsequent legislative history." Pet. 21 n.8 (quoting *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part)). However, the 1939 enactment was an Act of Congress, not legislative history. It is perfectly appropriate to rely on subsequent Acts of Congress in construing statutes, as that very Scalia concurrence points out. 496 U.S. at 632 (Scalia, J., concurring in part) (noting that a "provision, if passed, may in turn affect judicial interpretation of the previously enacted statutes, since statutes *in pari materia* should be interpreted harmoniously"). The only way to interpret the two Acts of Congress harmoniously is to hold that the 1904 Act did not redefine the Reservation's boundaries.

B. The applicable canons of construction reinforce the Ninth Circuit's conclusion.

If the Court applies the applicable canons of construction, this case becomes even easier to resolve in the Yakamas' favor.

Petitioners contend that the 1904 Act shrinks the Reservation from the Treaty's boundaries. Hence, as the Ninth Circuit rightly held, the Court should apply the canon that "[i]f Congress seeks to abrogate treaty rights, it must clearly express its intent to do so." *Herrera*, 139 S. Ct. at 1698; Pet. App. 19a. There is nothing approaching a clear indication in the 1904 Act that Congress abrogated the Treaty's boundaries.

The Ninth Circuit did not resolve whether the Court should adopt the "diminishment" framework in construing the 1904 Act. Pet. App. 22a n.11; *see Nebraska*, 577 U.S. 481. That framework does apply, and it, too, bolsters the Yakama Nation's position.

Under that framework, statutes will not be construed to diminish Indian reservations unless they contain explicit references to diminishment. Only in the face of statutory ambiguity is it appropriate to look beyond the plain text. *Nebraska*, 577 U.S. at 490-91. Here, Petitioners contend that the 1904 Act diminished the Reservation's boundaries from where they stood in 1855. Hence, the diminishment framework applies. Petitioners do not even attempt to show that the 1904 Act satisfies this rigorous framework.

Petitioners dodge the diminishment framework and treaty-abrogation canon by arguing that Congress "did *not* abrogate treaty rights," but merely "'define[d]' the

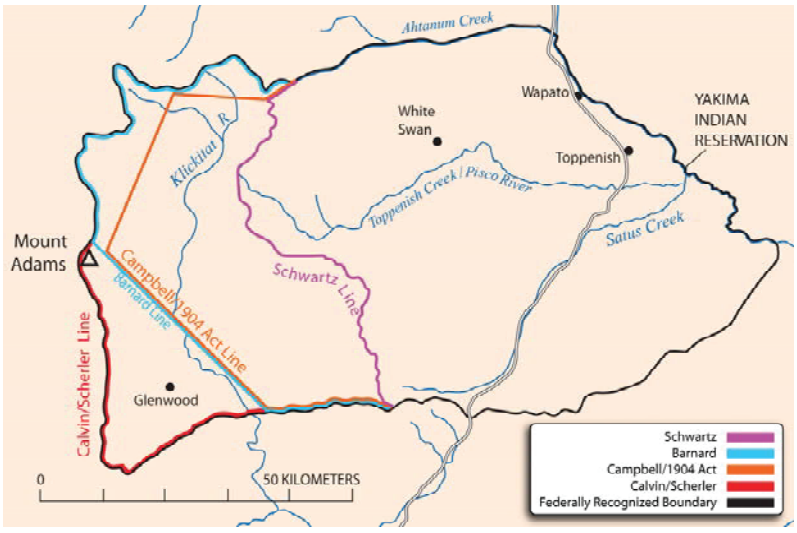
boundary." Pet. 20-21. But Congress could not have merely "defined" a boundary because the Senate-ratified 1855 Treaty *already* set the boundary. The 1904 Act would be relevant only if it changed the boundary; otherwise, the Treaty language would continue to control. And if the 1904 Act did change the boundary, then it would necessarily have abrogated the Treaty's boundary lines, implicating the Treaty-abrogation canon and diminishment framework. But as discussed above, those longstanding interpretive principles further confirm that the 1904 Act is irrelevant here.

C. Petitioners' position would require the Court to formally overrule *Northern Pacific*.

Stare decisis principles support rejecting Petitioners' argument. Adopting Petitioners' position would require discarding *Northern Pacific*'s reasoning and nullifying its ultimate conclusion.

In *Northern Pacific*, this Court resolved a dispute regarding the reservation status of land in the western-most area of the Yakama Reservation. If the 1904 Act authoritatively defined the Reservation's boundaries, one would expect the Supreme Court to have resolved the boundary dispute based on the 1904 Act. But it did not. Instead, the Court merely mentioned the 1904 Act in passing, without suggesting that the statute had any relevance to boundaries. 227 U.S. at 358, 367. As the Ninth Circuit correctly explained, "[t]his suggests that the 1904 Act did not supersede the Treaty's establishment of the southwestern boundary." Pet. App. 21a.

Moreover, *Northern Pacific* actually *rejects* the idea that the 1904 Act's surplus land boundaries are reservation boundaries. Before the passage of the 1904 Act, Barnard proposed a reservation boundary in the northwest extending all the way to the main ridge of the Cascades, yielding an additional 357,878 acres beyond the Schwartz boundary line. 12-ER-2616. But the 1904 Act ultimately resolved the Yakamas' claim with respect to a smaller, 293,837-acre area of land. 12-ER-2616-17; Pet. App. 67a-68a. That smaller area had a straight-line boundary in the northwest that did not extend to the main ridge of the Cascades, as illustrated here:



See App. 3a (larger version of map).[5] In *Northern Pacific*, by contrast, the Court ruled that the western

[5] This map is part of the evidentiary record. 9-ER-2030. This version removes elements not material to the present dispute,

boundary followed the main ridge of the Cascades, as established by the Treaty. 227 U.S. at 359. Hence, if the Court holds now that the 1904 Act set the boundaries, then *Northern Pacific*, which holds that the Reservation goes beyond those boundaries, would have to be overruled.

Petitioners bury this issue in a footnote. They acknowledge that *Northern Pacific*'s line conflicts with the line in the 1904 Act, but insist that *Northern Pacific* and the 1904 Act are in accord with respect to the southwestern boundary. Pet. 11 n.4. This is not a satisfactory response. *See Yakima Tribe v. United States*, 158 Ct. Cl. 672, 680-82 (1962) (rejecting Petitioners' argument). *Northern Pacific* rejected the 1904 Act's boundaries *as to the specific area of the reservation addressed in the 1904 Act*. There is no principled way the Court could hold that the 1904 Act authoritatively set the Reservation boundaries while simultaneously preserving *Northern Pacific*'s holding.

The Court should not take the extraordinary step of overruling *Northern Pacific*.

D. The Ninth Circuit's interpretation of the 1904 Act does not warrant review.

Even if the Court disagrees with the Ninth Circuit's interpretation of the 1904 Act, Petitioners do not show that review is warranted.

Petitioners contend that "[t]his Court routinely grants certiorari when a court of appeals negates a duly

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highlights the relevant boundary lines, and adds the Barnard Line.

enacted Act of Congress," citing *Shelby County v. Holder*, 570 U.S. 529 (2013), for that proposition. Pet. 22; *see also* Pet. 2 (similar comparison to *Shelby County*). Setting aside the fact that the court of appeals upheld the Voting Rights Act in *Shelby County*, the comparison is inapt for the more fundamental reason that the Ninth Circuit did not invalidate the 1904 Act. It interpreted the 1904 Act.

Petitioners' disagreement with that interpretation does not transform the Ninth Circuit's decision into a decision striking down an Act of Congress. And Petitioners offer no other reason that this statutory-interpretation question warrants Supreme Court review.

III. PETITIONERS' SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW.

Section II of the petition is entitled: "The Ninth Circuit's Decision Directly Conflicts With This Court's Precedent." Pet. 22. In Section II, however, Petitioners make two different arguments that are both waived and contradictory.

A. Petitioners' argument based on *Northern Pacific* is waived and meritless.

In Section II.A, Petitioners contend that *Northern Pacific* authoritatively resolved the parties' dispute as to the southwestern boundary. Pet. 22-25.

Petitioners did not make this argument in the Ninth Circuit, and therefore waived it. In its Ninth Circuit

opening brief, Petitioners cited *Northern Pacific* only once. The citation appeared in the "Historical Background" section of the "Statement of the Case."[6] Petitioners did not cite this Court's *Northern Pacific* decision anywhere in the Argument section. In their Ninth Circuit reply brief, Petitioners cited *Northern Pacific* again only once, for the general proposition that 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.'"[7]

Now, in its petition for certiorari, Petitioners argue that *Northern Pacific* authoritatively "recognized a boundary that indisputably excludes Tract D." Pet. 22-25. That is a new argument. Petitioners fault the Ninth Circuit for not addressing this argument (Pet. 25), but that is because the Ninth Circuit never heard it.

Even if this waiver is excused, Petitioners' argument lacks merit. *Northern Pacific* did not address Tract D, but instead addressed land north of Tract D that Barnard recognized as reservation land, but Schwartz did not. 227 U.S. at 358 (stating that the Court was addressing "lands without the Schwartz, but within the Barnard, survey"); *see supra*, at 22 (map illustrating the difference between the Schwartz Line

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[6] Opening Brief on Cross-Appeal of Klickitat County at 19, No. 19-35807 (9th Cir. Mar. 27, 2020), ECF No. 27.

[7] Reply Brief on Cross-Appeal of Klickitat County at 11, No. 19-35807 (9th Cir. Aug. 17, 2020) (quoting *N. Pac.*, 227 U.S. at 362), ECF No. 56.

and the Barnard Line). Petitioners point to language in the opinion referring to the "correctness of the Barnard survey," 227 U.S. at 366, but in context the Court was recognizing the correctness of the Barnard survey *relative to the Schwartz survey*, *i.e.*, that the land *on which the surveys differed* was indeed Yakama land. Petitioners seek to draw indirect inferences from briefs filed by the United States before and afterwards, Pet. 23-24, but this simply underscores that *Northern Pacific* itself had nothing to say about Tract D.

Petitioners also point to a paragraph summarizing statements from an individual named Chief Spencer. That paragraph does not assist Petitioners. The Court cited Chief Spencer's testimony for purposes of corroborating Barnard's discovery of a "blaze forty years old upon one of two large pine trees at the place indicated, both of which had been anciently blazed," which sheds no light on the proper southwestern boundary. 227 U.S. at 365. Moreover, the Court made clear that Chief Spencer had no personal knowledge but was instead merely repeating what "some [G]overnment men ... told him." *Id.* In the proceedings below, the district court made a factual finding, which Petitioners do not challenge, that Chief Spencer had no personal knowledge but was instead told inaccurate information years after the Treaty was signed. Pet. App. 37a, 43a.

Petitioners point to statements from a decades-old government brief interpreting *Northern Pacific* to exclude Tract D, Pet. 24-25, but the Court of Claims rejected that argument. *Yakima Tribe*, 158 Ct. Cl. at 680-82. The Court of Claims' decision was correct and

the United States now supports it and filed amicus briefs in both courts below advancing the position that Tract D is part of the Yakama Reservation and always has been.

B. Petitioners' argument regarding their proposed new treaty boundary rests on non-record evidence and is meritless.

Petitioners declare that they alone have found an interpretation that "gives effect to *all* of the treaty's plain terms," Pet. 27, depicted on the map at page 27 of the Petition. *See also* App. 2a (depicting Petitioners' new line on a full map of the Reservation). Petitioners' argument impermissibly relies on evidence outside the record, and is meritless in any event.

1. Petitioners' argument is based on excluded evidence.

Petitioners' theory is not grounded in the record. Petitioners contend that in the map on page 27, "the red line follows the spur described by the treaty" and follows the rest of the Treaty's calls. Pet. 27. But the map at page 27 was never admitted into evidence. The citation below that map, "5-ER-887," is actually a citation to the Yakama Nation's motion to exclude that exhibit on the ground that Petitioners would be offering it to support an untimely-disclosed legal theory. 5-ER-884-85. As the Yakama Nation explained, Petitioners were attempting to introduce a new boundary line on the eve of trial that—they claimed—satisfied all the calls of the treaty, but that theory was not disclosed during discovery. 5-ER-1056-57.

The district court resolved this issue in the Yakama Nation's favor. At trial, counsel for the Yakama Nation again objected to Petitioners' new proposed boundary line, explaining that "no one has ever come up with this arbitrary line that they've drawn across Peavine Ridge and then totally arbitrarily through and down across east of Highway 97 here on Defendant's Exhibit 606," which is the exhibit reproduced on page 27 of the petition. 3-ER-520. Making matters worse, Petitioners' only witness offered to discuss the new proposed boundary line, Mr. Reis, admitted he was not an "expert in geography, topography, or cartography." 3-ER-567.

The district court sustained the objection "to this witness testifying as to the physical features north of Camas Prairie that could satisfy the calls in the Treaty." 3-ER-522. Neither Exhibit 606, nor the proposed boundary line depicted on it, were ever admitted into evidence.

The Ninth Circuit upheld the district court's finding that no "spur" existed, specifically pointing to the district court's decision to exclude Petitioners' untimely disclosed legal theory and to their expert's admission that he had "no expertise in geography, topography, or cartography." Pet. App. 12a. In their petition for certiorari, Petitioners renew their theory that the red line on page 27 satisfies all of the Treaty's calls, but never cite the district court's opinion excluding that theory or the Ninth Circuit's affirmation.

2. Petitioners' textual interpretation of the Treaty is meritless.

On its merits, Petitioners' exercise in Treaty interpretation fails. The Treaty requires that the boundary pass "south and east of Mount Adams," to a "spur," and then "down said spur." Not only did Petitioners fail to offer any testimony or evidence that their new boundary line follows a spur, but it takes a sharp turn to the *north* after passing Mount Adams, which has zero basis in the Treaty text.

Moreover, the Treaty requires that the boundary proceed along the Klickitat/Pisco divide "to the divide separating the waters of the Satass River from those flowing into the Columbia River." Pet. App. 78a. Having excluded Petitioners' map from the record, the district court made no express findings on whether Petitioners' map tracks this requirement. However, a glance at Petitioners' map shows it does not. The Klickitat/Pisco divide does not connect to the Satus/Columbia divide (which appears at the bottom right of Petitioners' map), so without any evidence Petitioners freehand a new boundary that arbitrarily connects these two features along no readily identifiable topographical features or Treaty calls.

Petitioners also cite the principle that calls for "natural objects" to be prioritized, Pet. 28-29, but that principle powerfully supports the Yakama Nation. The Calvin boundary tracks a "spur"—surely a natural object that the Yakamas were aware of. Petitioners' boundary does not. Indeed, as explained above, Calvin's boundary tracks all "natural objects" in the

Treaty. All spurs, divides, and rivers are accounted for. While Calvin's boundary follows the Klickitat/White Salmon divide rather than the Klickitat/Pisco divide, that matches the boundary described by the United States' Treaty negotiator, depicted on the Treaty Map, and is a much better match to "natural objects" than fabricating a spur.

Petitioners' argument is particularly strange given that their own expert's opinion at trial was the Treaty parties intended a straight-line boundary that would exclude Tract D. Pet. App. 43a-44a. The district court found this view to be "in complete derogation of the calls of the Treaty to follow natural and monumental boundaries." Pet. App. 44a. Petitioners' argument regarding "natural objects" is, in reality, an attack on their own expert.

Left without a credible expert on the voluminous history of this case, Petitioners argue without citation that the "substantial weight of historical evidence showing that the Yakama contemporaneously understood the treaty to exclude Glenwood Valley." Pet. 30-31. This citation-free assertion directly contradicts the district court's factual findings, which the Ninth Circuit upheld. Pet. App. 13a-15a.

Petitioners cite a grab-bag of historical evidence in their Statement of Facts section, but the district court did not clearly err in finding this evidence unpersuasive. For example, Petitioners rely heavily on statements of Chief Spencer, but the district court made factual findings that "Chief Spencer was not a chief of the Yakama Nation that could individually speak for the entire Tribe" and was repeating

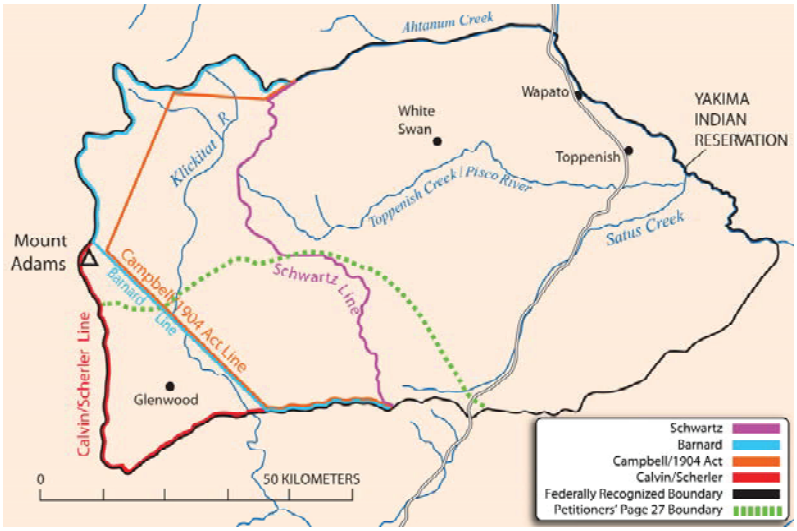
"misinformation" regarding the Treaty boundary that had been told to him by government officials. Pet. App. 37a, 43a. Petitioners cite letters from "Yakama tribal councils, signed by leading chiefs and headmen" purportedly advocating for a boundary that excludes Tract D. Pet. 10. But the cited letters give no indication that they were signed by "leading chiefs and headmen"—as opposed to a small group of individuals—and they say nothing about Tract D, instead addressing the Yakamas' claim to the land at issue in the 1904 Act.

3. Petitioners' new, waived argument contradicts their other arguments.

Petitioners' argument in Section II.B directly contradicts the arguments in Sections I and II.A of the Petition. In Sections I and II.A of the petition, Petitioners argue that the 1904 Act and *Northern Pacific*, respectively, endorsed Barnard's proposed boundary line for the southwestern portion of the Reservation, which was a straight-line boundary from Goat Butte to Grayback Mountain. Pet. 4, 5. Petitioners' expert took the same position. Pet. App. 46a.

But in Section II.B, Petitioners' proposed interpretation that purportedly "gives effect to *all* of the treaty's plain terms," Pet. 27, does *not* follow the straight-line boundary from Goat Butte to Grayback Mountain. Instead, Petitioners' newly discovered boundary abruptly departs Mount Adams and turns back north and east along no spur or divide identified in the Treaty until, several miles to the east, Petitioners

claim their line touches part of the Klickitat/Pisco watershed. *Id.* The following map illustrates the drastic difference between Petitioners' line and Barnard's:



See App. 4a (larger version of map).[8] Petitioners' new boundary would render the Reservation hundreds of thousands of acres smaller than what Barnard proposed—despite Petitioners' own arguments in Sections I and II.A that the Barnard line was authoritative.

Moreover, in Section II.B, Petitioners' legal theory is that the Reservation boundary *must* follow the Klickitat/Pisco divide. Any other boundary line, Petitioners claim, "flagrantly disregard[s] the treaty's

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[8] This map is the same one found *supra* at page 22, with Petitioners' boundary added.

unequivocal terms." Pet. 28. However, the Barnard line *also* does not follow the Klickitat/Pisco divide, and following Petitioners' line would require flagrantly disregarding at least two other Treaty boundary calls between Mount Adams and the Satus/Columbia divide.

Indeed, in *Northern Pacific*, the Supreme Court expressly rejected the argument that the boundary line should follow the Klickitat/Pisco divide. The issue in *Northern Pacific* was whether land lying outside the Schwartz boundary, but inside the Barnard boundary, was reservation land. Schwartz's proposed boundary, like Petitioners' newly proposed line, ignored several Treaty calls but did track some portion of the Klickitat/Pisco line, while Barnard's line did not track the Klickitat/Pisco line but was more faithful to other Treaty calls.

The Court rejected Schwartz's boundary line. As the Court explained, Schwartz "regarded what he conceived to be the divide between the waters of the Klickitat and Pisco rivers as dominating all other calls." 227 U.S. at 362. The Court held that this was wrong: "He gave too much strength to some of the calls of the treaty and against other calls, without attempting to give them all effect from a consideration of the topography of the country and the testimony he was directed to take." *Id.* That holding is exactly why Petitioners' argument in Section II.B regarding the Klickitat/Pisco divide is wrong.

Petitioners' proposed map on page 27 is a kind of jerry-rigged amalgam of the Barnard and Schwartz maps. The *northwestern* corner of the Reservation follows Barnard's line in an apparent effort to conform

Petitioners' position with *Northern Pacific*'s holding. But then, after passing Mount Adams, the boundary line darts to the north and east along no continuous topographic feature to briefly touch the Klickitat/Pisco divide, thus fleetingly following Schwartz's line. Petitioners justify this line based on the identical argument as Schwartz—that any boundary line that does not follow the Klickitat/Pisco line "flagrantly disregards the treaty's unequivocal terms." Pet. 28. It is remarkable that Petitioners fail to disclose that this Court has explicitly rejected that specific argument with respect to those two rivers.

IV. THIS CASE IS HIGHLY FACT-BOUND AND SUFFERS FROM VEHICLE PROBLEMS.

The Court should deny certiorari because this is an idiosyncratic and heavily fact-bound dispute with numerous vehicle problems.

1. Petitioners seek fact-bound error correction.

This is an idiosyncratic case. The issue is undoubtedly important to the Yakama Nation and Petitioners, but contrary to Petitioners' speculation (Pet. 33-35), the Ninth Circuit's decision will not have any wider impact. The disputed language in the Yakama Treaty appears in no other treaty. Moreover, the Treaty's ambiguity arises from the unusual fact that it is impossible to match the Treaty text to the topography of the area.

This case is also fact-bound. The Ninth Circuit's decision was driven by the district court's factual findings concerning the relevant topography. The Ninth Circuit affirmed based on the "highly deferential clear error standard." Pet. App. 15a. This Court rarely grants certiorari to review the accuracy of factual findings.

Petitioners overstate the practical significance of the dispute. Petitioners assert that the outcome of this dispute "controls … Klickitat County's jurisdiction to prosecute serious crimes committed in Glenwood Valley." Pet. 32-33. That is false. Because of specific federal and Washington legislation, Klickitat County possesses authority to prosecute most crimes committed on fee lands in Glenwood Valley involving non-Indians, regardless of whether an Indian is involved. *See Confederated Tribes and Bands of the Yakama Nation v. Yakima County*, 963 F.3d 982, 984-85 (9th Cir. 2020). There is a narrow exception for juvenile delinquency cases, *id.* at 985-86, including the offense by a juvenile that gave rise to this dispute. But the situation in Washington is not like the situation in Oklahoma, where the state lacks criminal jurisdiction to prosecute tribal members on the reservation land recognized in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

Petitioners also complain that the "Ninth Circuit's interpretation disrupts profound reliance interests" and might cause states and localities to "lose much of their preexisting jurisdiction." Pet. 31, 34. But it is Petitioners' position that would disrupt expectations. The Secretary of the Interior has recognized Tract D as

reservation land since the 1930s, and the full federal government has done the same since the 1960s. The State of Washington is not challenging that assessment here. For a half-century, all stakeholders thought the reservation status of Tract D was settled, until Petitioners sought to relitigate this closed issue.

This is not a case that the Yakama Nation filed in order to assert new jurisdiction within Tract D. The Yakama Nation already exercises civil regulatory and criminal jurisdiction in Tract D, as it has for longer than any non-Indian residents of Tract D have been alive. The only reliance interests that would be disrupted here are those of both Treaty parties if their mutual Treaty understanding is upended.

2. This case suffers from multiple vehicle problems.

This case suffers from vehicle problems attributable to Petitioners' litigation strategy.

The first problem is Petitioners' refusal to take a clear position on what the boundary should be. As explained above, the proposed boundaries in Sections I, II.A, and II.B of the petition for certiorari are all irreconcilable.

Not only do Petitioners' proposed boundary lines conflict, but Petitioners' legal theories do too. Section I.A argues that the 1904 Act is authoritative. Section II.A argues that *Northern Pacific*, which treated the 1904 Act as an afterthought, is authoritative. Section II.B argues that the boundary follows the

Klickitat/Pisco divide, even though *Northern Pacific* says it does not follow this divide.

Petitioners might say that all three theories would exclude Tract D from the Reservation. But this is not satisfactory. If this Court grants review, it would not simply announce that Tract D is inside or outside the Reservation. It would give a principled justification for its position, which would have ramifications for the rest of the Reservation. Petitioners' refusal to choose a principled position is a serious vehicle problem.

This case also suffers from preservation issues. As noted above, Petitioners failed to raise the argument in Section II.A in the Ninth Circuit. *Supra*, at 25.

Even worse, in Section II.B, Petitioners now declare that, after over a century of unsuccessful efforts, they have finally discerned a boundary line that "gives effect to *all* of the treaty's plain terms." Pet. 27. If Petitioners truly succeeded in matching the Treaty to the region's topography after so many surveyors and cadastral engineers had failed, that would be an impressive feat. Petitioners' proposed solution to this 167-year-old puzzle was excluded from the record because Petitioners failed to turn it over during discovery. *Supra*, at 28. And, as the Ninth Circuit observed, the expert who tried and failed to present this theory at trial "had no expertise in geography, topography, or cartography." Pet. App. 12a. This leads to multiple layers of waiver: Petitioners waived the right to present their theory because of their discovery violation, and further waived the right to challenge that waiver determination by ignoring it in their petition.

The Court should not grant certiorari to decide the boundaries of the Yakama Reservation when Petitioners' proposed boundary lines are not in the record.

V. THE COURT SHOULD NOT HOLD THIS CASE FOR *PENOBSCOT*.

On January 10, 2022, Petitioners filed a supplemental brief urging the Court to hold this case for *Penobscot Nation v. Frey*, No. 21-838, and *United States v. Frey*, No. 21-840 (collectively, "*Penobscot*"). Those petitions were docketed 13 days before Petitioners filed their Petition. Hence, Petitioners' supplemental brief violates Supreme Court Rule 15.8 by raising matters that were available to Petitioners when they filed their Petition. Regardless, Petitioners make no persuasive argument for holding this case for *Penobscot*.

The question in *Penobscot* is whether the use of the word "islands" in the statutory definition of "Penobscot Indian Reservation" excludes the waters surrounding those islands from the reservation. That question is unrelated to the issues presented here.

Trying to link the two cases, Petitioners assert that the two cases implicate a "conflict over how to apply the Indian canon." Supp. Br. 4. This argument fails for several reasons. First, Petitioners' generalized reference to "the Indian canon" is intended to obscure that the two cases involve different canons. This case involves the interpretation of a *treaty*, and hence implicates the canon that a treaty must be interpreted in accordance with the understanding of the tribe that

signed the treaty. *Herrera*, 139 S. Ct. at 1699. That is why the district court held a trial and made a factual finding concerning the Yakamas' expectation in 1855. *Penobscot*, by contrast, involves the interpretation of a *statute*. Tribes do not sign statutes, so there would be no reason to make such a factual finding in a statutory interpretation case.

Moreover, the ambiguity in this case arises because it is impossible to match the Treaty to the region's topography. No comparable ambiguity arises in *Penobscot*, where everyone agrees that the islands referred to in the statute exist.

Petitioners also attempt to link the dispute over the 1904 Act to the statutory-interpretation dispute in *Penobscot*. Supp. Br. 4. The disputes are nothing alike. In *Penobscot*, all parties agree that the statute sets the reservation's boundaries; the dispute is over what the boundaries are. Here, the plain text of the 1904 Act makes clear it has nothing to do with reservation boundaries or Tract D. *Supra*, at 16-17.

Finally, Petitioners assert that because *Penobscot* is important, this case must also be important. Supp. Br. 5-6. In *Penobscot*, the Justice Department's petition (at 29-30) argues that the First Circuit's decision would "strip the Nation of all sovereign authority over a river that lies at the heart of its historical livelihood and cultural identity, and leave it even worse-off than it was" under "exploitative 1796 and 1818 agreements." Here, the Ninth Circuit's decision leaving the status quo intact, and agreeing with the longstanding views of both parties to the Treaty that Tract D is reservation land, does not result in similar consequences.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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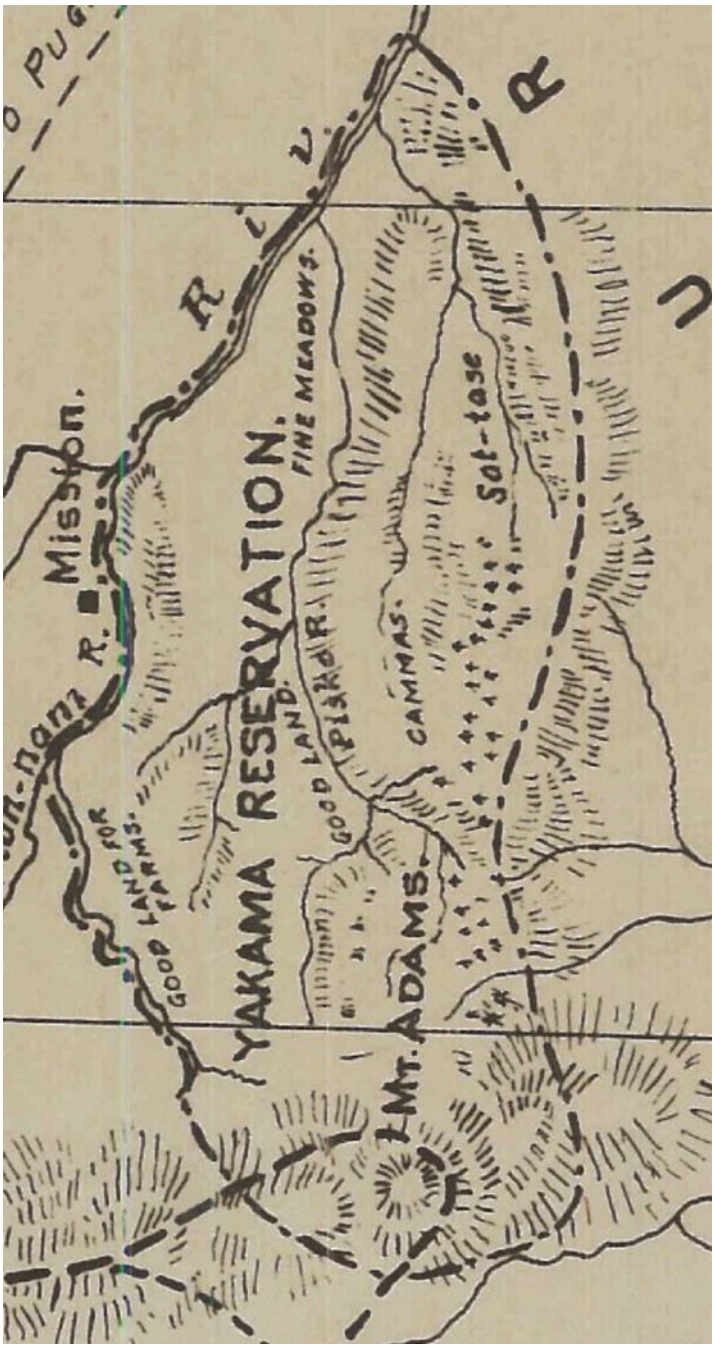
APPENDIX


Mission
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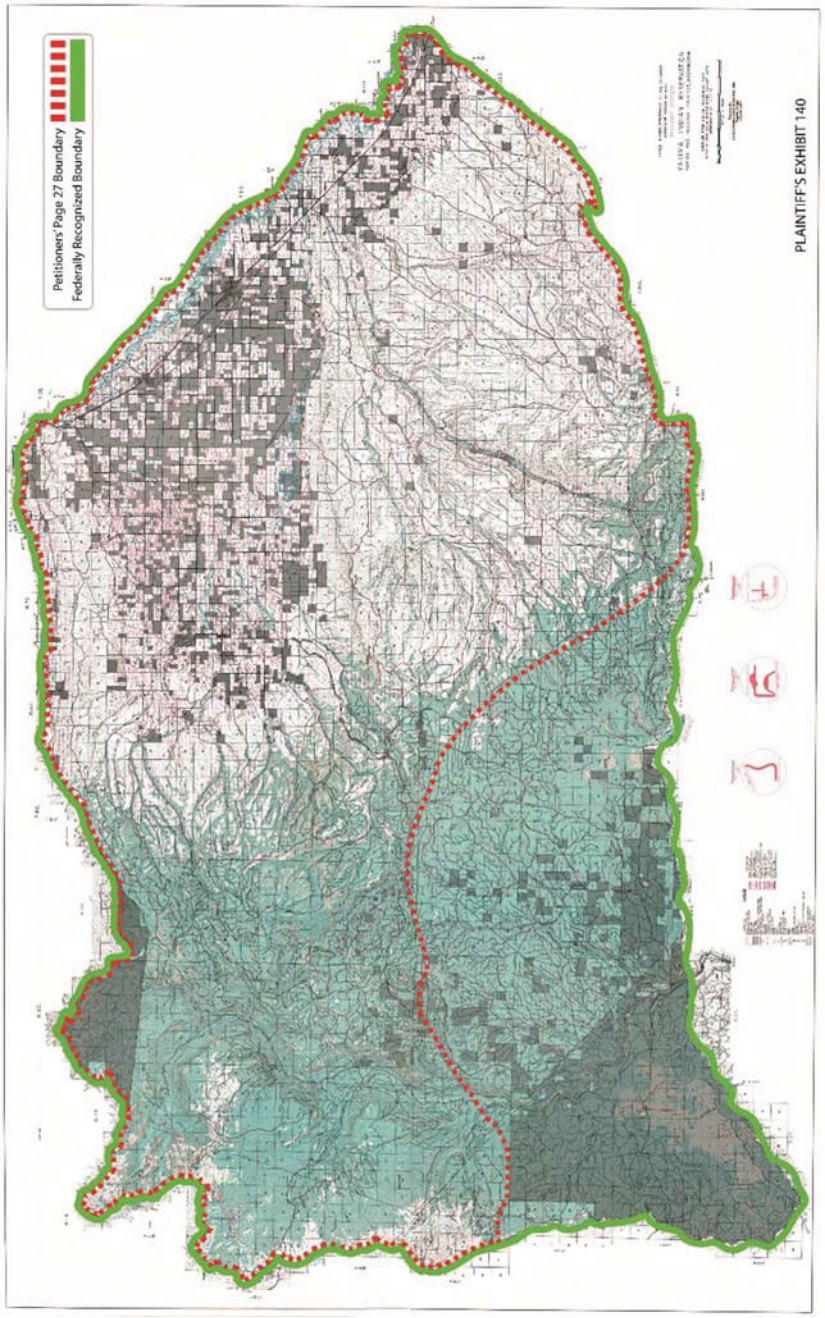
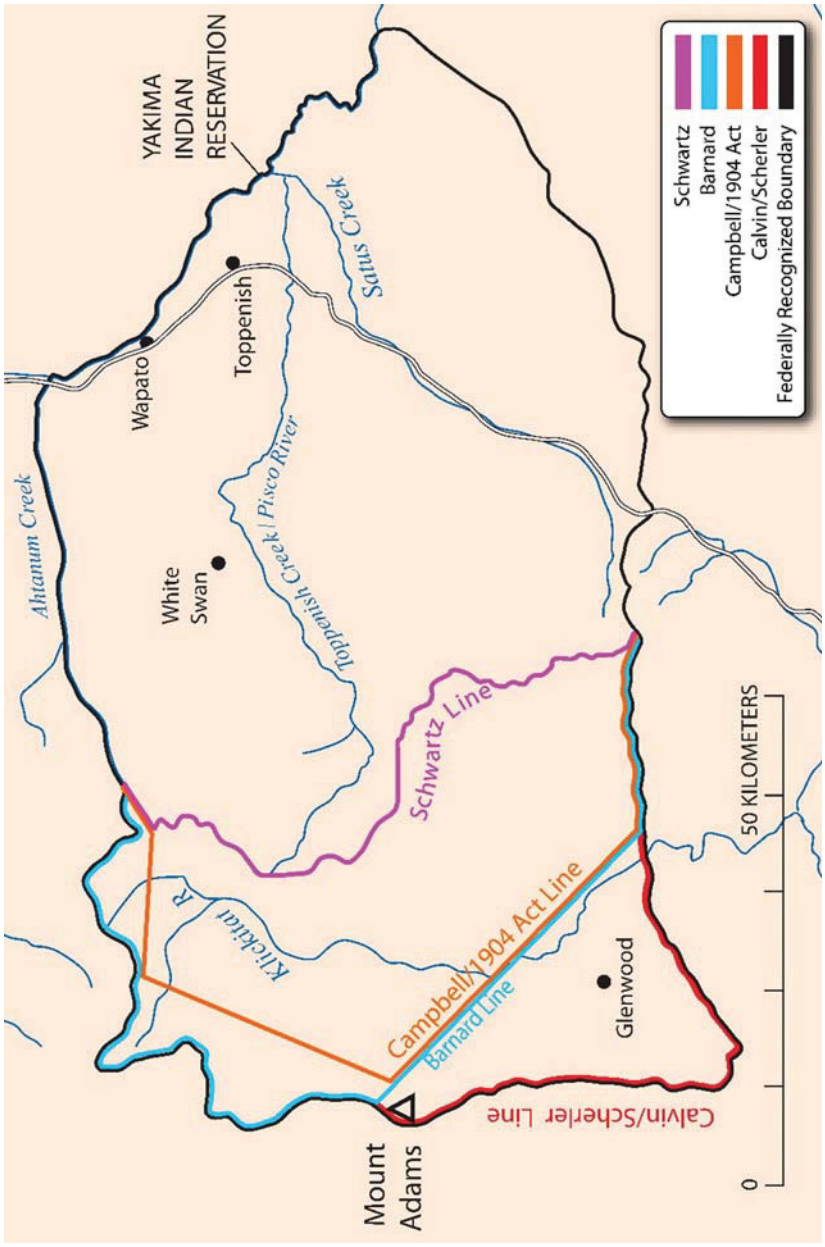
YAKAMA RESERVATION.
FINE MEADOWS.
GOOD LAND.
GOOD LAND FOR FARMS.
CAMMAS.
Sal-tese
Mt. ADAMS.


Petitioners' Page 27 Boundary
Federally Recognized Boundary
PLAINTIFF'S EXHIBIT 140


YAKIMA INDIAN RESERVATION
Wapato
Toppenish
Satus Creek
Ahtanum Creek
White Swan
Toppenish Creek / Pisco River
Schwartz Line
Klickitat R
Campbell/1904 Act Line
Barnard Line
Glenwood
Calvin/Scherler Line
Mount Adams
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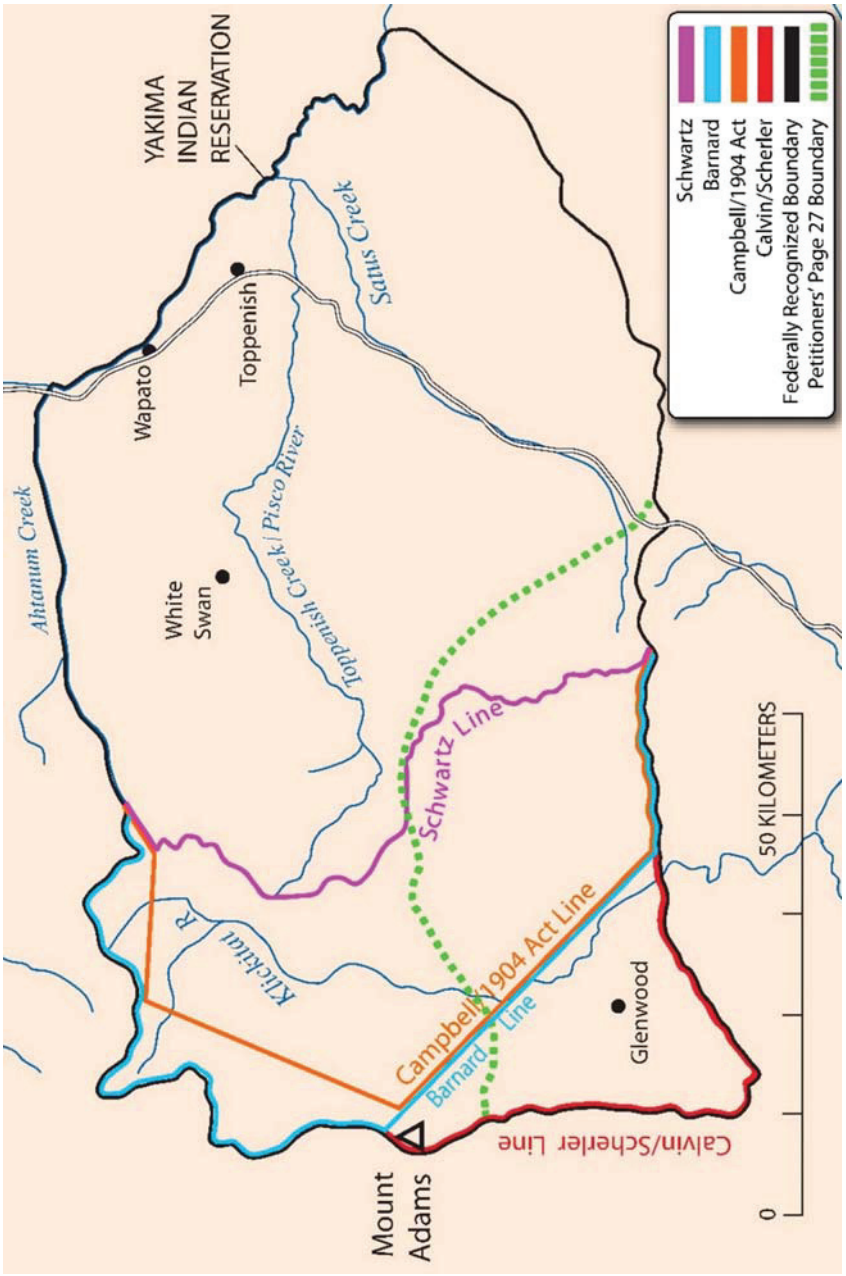
YAKIMA INDIAN RESERVATION
Wapato
Toppenish
Satus Creek
Ahtanum Creek
White Swan
Toppenish Creek / Pisco River
Schwartz Line
Klickitat R.
Campbell/1904 Act Line
Barnard Line
Glenwood
Calvin/Scherler Line
Mount Adams
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50 KILOMETERS
Schwartz
Barnard
Campbell/1904 Act
Calvin/Scherler
Federally Recognized Boundary
Petitioners' Page 27 Boundary