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Honorable Rosanna Malouf Peterson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Plaintiffs;

v.

Eric H. Holder, Jr.,; et al.,

Defendants.

NO. CV-11-3028-RMP

MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

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1 For the sake of public safety on the Yakama Reservation, this lawsuit seeks
2 to protect and preserve the sovereignty and rights that the United States promised
3 the Yakamas more than 150 years ago – rights still codified as federal law and
4 expressly protected by the United States Constitution.

5 **INTRODUCTION**

6 The Administrative Procedures Act ("APA")[1] and Mandamus Act[2] waive
7 the United States' sovereign immunity for the Yakama Nation ("the Nation" or
8 "Yakamas")'s claims seeking non-monetary relief to enforce federal laws,
9 including The Treaty With The Yakamas ("the Treaty").[3] In 1855, the Yakamas
10 exchanged ownership of vast aboriginal lands for guarantees made in the Treaty,
11 including the United States' promise that the Yakamas' Reservation would be set
12 apart for the Yakamas' "exclusive use and benefit."[4] At that time, the federal
13 government explained to the Treaty signers that besides agents of the Department
14 of Indians, no person would be permitted on the Reservation without the
15 Yakamas' consent.[5] Thus, if that Treaty right means anything, as it must as a
16 matter of law, it means that before non-emergency entry onto Yakama lands by
17 anyone other than those expressly authorized to reside on the Reservation in the

18 [1] 5 U.S.C. §§ 701-706.
[2] 28 U.S.C. § 1361.
19 [3] 12 Stat. 951 (1859).
[4] *Id.*
[5] Declaration of Gabriel S. Galanda In Opposition To Federal Defendants' Motion to Dismiss ("Galanda Decl."), Ex. E at 67.

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1 Treaty, the Yakama tribal government is entitled to at least (a) pre-notification;
2 and (b) law enforcement consultation and coordination. This Treaty right is
3 consistent with federal laws, regulations, executive orders, and fundamental
4 notions of inter-governmental comity and respect – all of which Federal
5 Defendants contend they may ignore. They may not.

6 Because the APA and the Mandamus Act waive the United States'
7 sovereign immunity for the Yakamas' claims, and because the Nation has
8 otherwise advanced claims upon which this Court may grant relief, this Court
9 should deny the Federal Defendants' Motion to Dismiss.

10 **FACTS**

11 At dawn on the morning of February 16, 2011, Federal Defendants and
12 several local law enforcement agencies entered Yakama Reservation trust lands
13 to execute a warrant.[6] The Yakama Nation, as Federal Defendants admit, was not
14 at all the subject of the search.[7] Rather, the Nation is involved only as a
15 government and affected polity. Indeed, as the Ninth Circuit Court of Appeals
16 recently described Plaintiffs:

17 > The Yakama Nation is a sovereign nation, with its own government,
> laws and courts, not a rogue organization or menace to civil order.
18 > [T]he Nation has no interest in promoting, condoning, or protecting
> activities by its members that pose real dangers to public health,

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[6] ECF No. 41 at 19. The Nation does not challenge the facial validity of the warrant, nor does it take any position regarding the alleged criminal activities.
[7] ECF No. 51 at 2-3.

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1 public safety, natural resources, or public infrastructure. The Nation has no such interest . . . because the Yakama Nation and its members
2 share the interest all citizens have in public health, public safety, conservation and equitable exploitation of natural resources, and
3 adequate public infrastructure.[8]

4 Still, Federal Defendants decided to withhold information from the Nation
5 regarding the multi-government incursion into Yakama lands. Yakima and
6 Benton Counties, on the other hand, received one to two days' notice before the
7 impending entry onto Yakama Reservation trust lands (the "Entry").[9]

8 Defendants, at a minimum, concealed all information regarding the Entry
9 from the Nation and its Tribal Police Department until the raid began at 6 a.m. on
10 February 16.[10] One hour before the Entry, Federal Defendants and "members of
11 various other law enforcement agencies"[11] held a "pre-Entry meeting" on the
12 Yakama Reservation.[12] Yakama Tribal Police were not notified of or invited to
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14 [8] *U.S. v. Smiskin*, 487 F.3d 1260, 1271 (9th Cir. 2007).
[9] ECF 41 at 20; Galanda Decl. Ex. A at 13-15; Ex. B at 35-36.
15 [10] Other than a cursory text message inviting a call that went unanswered, that is.
[11] The Pacific Northwest Violent Offender Task Force ("PNVOTF"), a
16 conglomerate of federal, state, and local law enforcement agencies assigned by their respective principals to complete tasks for the U.S. Marshals Service,
17 assisted in the Entry. ECF No. 134 at 1-2. Pursuant to an intergovernmental Memorandum of Understanding ("MOU") between at least Benton County
18 Sheriff's Office and the Marshals, the County assigned at least one officer to take part in the PNVOTF. ECF No. 134 at 2. Under this MOU: "Each Agency shall
19 be responsible for the acts or omissions of its employees. Participating agencies or their employees shall not be considered as agents of any other participating agency." Galanda Decl. Ex. C at 48.
[12] Galanda Decl. Ex. A at 16-26; Ex. B at 35.

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the "pre-Entry meeting."[13] Nor was the Bureau of Indian Affairs ("BIA") Superintendent notified of either the pre-Entry meeting or the Entry, as contemplated by Defendant Department of Justice ("DOJ")'s 1993 MEMORANDUM OF UNDERSTANDING RE INDIAN LAW ENFORCEMENT REFORM ACT.[14]

Defendant FBI told Yakima and Benton County officers "to secure and clear the buildings at the location, and the area, prior to the search," and after doing so, "to proceed to the front of the gate and secure same. . . . No one was to enter by the front gate for the search site, until/unless approved by the FBI."[15] Yakima County, Benton County, and other Defendants' officers turned away several Yakama Tribal Police Officers who responded to the scene of the Entry that morning to help keep the peace.[16]

No exigent circumstances prevented notification or coordination with Yakama Nation authorities for the purpose of keeping the peace and maintaining law and order on the Yakama Reservation.[17] Defendants have refused to provide notice to or consult/coordinate with the Nation under such circumstances going

[13] *See* ECF No. 41 at 22.
[14] Galanda Decl. Ex. F (hereinafter "DOJ MOU") at 73; Ex. G at 76-77.
[15] *Id.*, Ex. B at 35.
[16] ECF No. 41 at 26.
[17] *Id.* at 4.

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1 forward.[18] The full extent of Federal Defendants' acts and omissions regarding
2 the Entry remains unknown since they, and several co-Defendants, refuse to
3 participate in discovery.[19]

4 **STANDARD OF REVIEW**

5 Federal Defendants' Motion falls short of the requisite standards of review
6 for a proper dismissal under Rules 12(b)(1) and 12(b)(6).

7 Dismissal for a Rule 12(b)(1) facial challenge to jurisdiction is proper only
8 when the claim "clearly appears to be immaterial [or] is wholly insubstantial and
9 frivolous."[20] On a 12(b)(1) motion, all allegations of material fact are taken as
10 true and construed in the light most favorable to the nonmoving party.[21]

11

12 [18] *Id.* at 5.

13 [19] *See* ECF Nos. 43, 102, 105. If the Court believes it lacks subject matter jurisdiction, Plaintiffs are still entitled to conduct discovery regarding the Federal
14 and non-Federal Defendants' behavior in and around February 16, to aid the Court's determination of jurisdiction. *Wells Fargo & Co. v. Wells Fargo Exp.*
15 *Co.*, 556 F.2d 406, 430 (9th Cir. 1977); *see* ECF No. 47 at 9 ("Until Plaintiffs know what Defendants did on February 16, what policies and procedures
16 governed their conduct, and who was on the Reservation, Plaintiffs cannot adequately respond to a motion to dismiss."); ECF No. 118 at 10 ("[L]aydown
17 disclosures and the subsequent narrow discovery will very likely be necessary to respond to Federal Defendants' potential motion to dismiss. Plaintiffs will be prejudiced without it.").

18 [20] *Bell v. Hood*, 327 U.S. 678, 682–83 (1946).

19 [21] *Federation of African Amer. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.2 (5th ed. 2007) ("So long as the federal law to be applied does more than merely create jurisdiction, it is a basis for federal court jurisdiction if it is potentially important in the outcome of the litigation.").

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Rule 12(b)(6) dismissal is proper for either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory."[22] In essence, "[t]he issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims."[23] The Court must determine whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved by the Nation.[24] There is a strong presumption against dismissing an action for failure to state a claim.[25]

The U.S. Supreme Court has directed District Courts to analyze issues touching on tribal sovereignty "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency . . . ."[26]

The Supreme Court and the Ninth Circuit have also directed the District Courts in this Circuit to "see that the terms of the [Yakama T]reaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously

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[22] *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990) (overruled on other grounds).
[23] *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1979).
[24] *Id.*
[25] *Gilligan v. Jamco Dev. Corp.,* 108 F.3d 246, 249 (9th Cir. 1997).
[26] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

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recognizes the full obligation of this nation to protect [the Nation's] interests."[27]

ARGUMENT

I. This Court Possesses Subject Matter Jurisdiction.

The United States has waived its sovereign immunity in at least three applicable ways. First, Federal Defendants lack sovereign immunity under APA Section 702 for "judicial review of federal agency action" – namely, the failure of the Federal Defendants to comply with applicable laws and regulations directing governmental consultation and law enforcement activities on Yakama Reservation trust lands. A second waiver is found under APA Section 702, for "[a]n action in a court of the United States seeking relief other than money damages" – here, that action is the Nation's suit for declaratory and injunctive relief for Federal Defendants' past and ongoing violations of the Treaty and the Tribal Law and Order Act ("TLOA").[28] Third, Federal Defendants lack sovereign immunity for the Nation's claims raised under the Mandamus Act.

A. Section 702 Of The APA Waives The United States' Sovereign Immunity And Renders The Nation's Claims Actionable In This Court.

Section 702 of the APA waives the sovereign immunity of the United States in two ways that allow the Nation to sue Federal Defendants.

[27] *Smiskin*, 487 F.3d at 1264-65 (quoting *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942)) (second alteration in original).
[28] 25 U.S.C. § 2801 *et seq.* (2010).

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Federal Defendants rely on *Gallo Cattle Co. v. U.S. Dept. of Agriculture*[29] for the proposition that the APA's waiver of sovereign immunity is limited to instances where the plaintiff is seeking review of a "final agency action," or where federal law otherwise establishes an independent waiver of sovereign immunity.[30] Specifically, Federal Defendants argue that the APA does not waive federal sovereign immunity where "none of the cited authorities" supply the Court with independent jurisdiction.[31] Federal Defendants are wrong.

A long line of Ninth Circuit cases conflicts with the reading urged by Federal Defendants. Indeed, it has long been recognized that courts in this Circuit have jurisdiction to grant prospective relief requiring governmental officials to obey the law according to *Ex parte Young*.[32] Today, it is the rule of the Ninth Circuit, under *Presbyterian Church (U.S.A.) v. United States,*[33] that the APA effectively adopted *Ex parte Young* as the doctrinal basis for a claim seeking prospective relief ***and*** as a federal sovereign immunity waiver.[34]

Three months ago, the Ninth Circuit's decision in *Veterans for Common*

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[29] 159 F.3d 1194 (9th Cir. 1998).
[30] *Id.* at 1198.
[31] ECF No. 51 at 9.
[32] 209 U.S. 123 (1908); *E.E.O.C. v. Peabody Western Coal Co.*, 610 F.3d 1070, 1085 (9th Cir. 2010).
[33] 870 F.2d 518, 526 (9th Cir. 1989).
[34] *See Peabody Western*, 610 F.3d at 1086 ("[S]ince 1976 federal courts have looked to § 702 of the [APA] to serve the purposes of the *Ex parte Young* fiction in suits against federal officers.").

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Sense v. Shinseki[35] resolved any tension between *Gallo Cattle* and *Presbyterian Church*,[36] holding that as to "claims for 'relief other than money damages,' Section 702 waives sovereign immunity regardless of whether the claims arise from 'agency action' as defined by the APA."[37] The *Shinseki* court stated:

> it is *Presbyterian Church* and not *Gallo Cattle* that controls where . . . a plaintiff's challenge is . . . not dependent on the APA for a cause of action.
>
> The first and second sentences of § 702 play quite different roles, each one significant. The first sentence entitles aggrieved individuals to "judicial review of federal agency action." The second sentence, added to the statute decades later, waived sovereign immunity for "[a]n action in a court of the United States seeking relief other than money damages . . . ." One such action, of course, is a suit for "judicial review of federal agency action" of the sort authorized by the first sentence. But other actions exist too. Injunctions may be sought, for example, to enforce the Constitution itself, <u>courts need no statutory authorization to undertake constitutional review</u>. . . .
>
> *Gallo Cattle* considered a challenge to an agency order denying the plaintiffs . . . interim relief to which the plaintiffs believed themselves entitled by statute and the agency's regulations. The plaintiffs sought "judicial review of agency action" not because it was unconstitutional, but because it violated the rules governing the agency. . . .[38]

The *Shinseki* court went on to state that where a plaintiff challenges an agency action "which does not depend on the cause of action found in the first sentence

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[35] No. 08-16728, 2011 WL 1770944 (9th Cir. May 10, 2011).

[36] In *Gros Ventre Tribe v. U.S.,* 469 F.3d 801 (9th Cir. 2006), the Ninth Circuit previously observed that there was "no way to distinguish *The Presbyterian Church* from *Gallo Cattle*." *Id.* at 809.

[37] *Shinseki*, 2011 WL 1770944, at *16.

[38] *Id.* at 15 (emphasis added).

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of § 702," Section 704's "limitation of that first sentence is thus inapplicable, and the district court's reliance on *Gallo Cattle* [will be] incorrect."[39] Instead, where plaintiffs bring "'[a]n action in a court of the United States seeking relief other than money damages'" that arises under other federal law, "sovereign immunity has been waived by § 702's second sentence."[40]

Under *Shinseki*, which is binding law in this jurisdiction, Section 702 waives sovereign immunity for plaintiffs seeking relief other than money damages against a federal agency when (1) a plaintiff seeks review of a "final agency action" under Section 704, ***or*** (2) a plaintiff states a claim that would otherwise fall within the purview of federal jurisdiction.[41] Here, both avenues serve as waivers of the United States' sovereign immunity; and both provide the Nation with actionable claims under federal law.[42]

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[39] *Id.* at 16. In other words, under *Shinseki* "final agency action" is not necessary for jurisdiction, but, rather, is "a necessary element of a cause of action under the APA." *CareToLive v. Von Eschenbach*, 525 F.Supp.2d 938, 948 (S.D. Ohio 2007).

[40] *Shinseki*, 2011 WL 1770944, at *16 (quoting 5 U.S.C. § 702).

[41] *See e.g.*, 28 U.S.C. §§ 1331, 1333, 1361-62, 2201-02; 29 U.S.C. § 1132(e).

[42] Defendants assert that "[i]f a plaintiff fails to identify a final agency action challengeable under the APA, the action should be dismissed for lack of subject matter jurisdiction." ECF No. 51 at 12. In light of *Shinseki*, this cannot be the case. Defendants rely heavily on the District Court case *Western Shoshone Nat'l Council v. United States*, 408 F. Supp. 2d. 1040, 1051 (D. Nev. 2005). To the extent that *Western Shoshone* – or any *Gallo Cattle* progeny for that matter – conflicts with the more recent *Shinseki* ruling, it is no longer good law. Notably, *Western Shoshone* found that were the tribe to show a sovereign immunity waiver

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1. The United States' Sovereign Immunity Is Waived Under The First Sentence of The APA's Section 702.

The APA grants a cause of action and right of review to any "person suffering legal wrong because of" a "final agency action for which there is no other adequate remedy in a court . . . ."[43] Where an agency is under an affirmative duty to act, "failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review."[44] "The Ninth Circuit has confirmed that inaction involves a non-discretionary act" where "'at some level, the government has a general non-discretionary duty'" to take an affirmative action.[45] "It is [now] undisputed that claims of inaction by an agency are reviewable under the APA . . . ."[46]

Federal Defendants' action – and inaction – on February 16, 2011, was a

– a waiver now clearly granted by § 702 per *Shinseki* – a review of their Treaty claim would be proper. *See id.* at 1054.

[43] 5 U.S.C. §§ 702, 704. Tribal governments qualify as a "person" entitled to agency review. *Gallo Cattle*, 159 F.3d at 1086.

[44] *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987).

[45] *Sidhu v. Chertoff*, No. 07-1188, 2008 WL 540685, at *5 (E.D. Cal. Feb. 25, 2008) (quoting *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 n. 6 (9th Cir. 1997)).

[46] *Florida Marine Contractors v. Williams*, No. 03-0229, 2004 WL 964216, at *3 (M.D. Fla. Apr. 22, 2004); *see also Hall v. Norton*, 266 F.3d 696, 975 n. 5 (9th Cir. 2005) (an agency's decision not to consult federal law is itself a "final agency action"); *Natural Resources Defense Council v. Patterson*, 333 F.Supp.2d 906, 916 n.6 (E.D. Cal. 2004) (finding "final agency action" where plaintiffs "point[ed] to specific, albeit repeated, instances in which the government decided not to act, i.e. not to release sufficient water to keep the fish in good condition").

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1 "final agency action"[47] under the APA.[48] "[A]gencies may be required to take
2 actions not only by Congress, but also by themselves."[49] Violations of internal
3 regulations are "arbitrary and capricious," and create a reviewable cause of action
4 under the APA.[50] In *Norton v. Southern Utah Wilderness Alliance*, the Supreme
5 Court went so far as to hold that even a less formal agency "plan" may create "a
6 commitment binding on the agency" if there is "clear indication of binding
7 commitment in the terms of the plan."[51]
8 Federal Defendants contend that the APA "precludes judicial review of
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[47] Here, there was also "final agency action" under the Supreme Court's two-part test in *Bennett*: First, Federal Defendants' decision not to notify or consult the Nation was the consummation of the agency's decision-making, which was neither tentative nor interlocutory; the agency did not, nor did it intend to, change its mind. Second, "legal consequences" flow from this decision, as Yakama's sovereignty has been trampled and Treaty rights diminished. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

[48] Federal Defendants' aiding and abetting of the patently illegal entry by local law enforcement agencies is not mentioned in their Motion, and is apparently not a subject of their request for relief. *See* ECF No. 41 at 31; ECF No. 51. Yet that conduct was also "final agency action" under the APA. Again, Federal Defendants have refused to provide any discovery related to such conduct.

[49] *Shinseki*, 2011 WL 1770944, at *19; *see also I.N.S. v. Chadha*, 462 U.S. 919, 986 (1983) ("[Agency] regulations bind courts and officers of the federal government, . . . and grant rights to and impose obligations on the public. In sum, they have the force of law.").

[50] *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979).

[51] 542 U.S. 55, 69 (2004); *see also Vitarelli v. Seaton,* 359 U.S. 535, 539-40 (1959) (Secretary of the Interior "was obligated to conform to the procedural standards he had formulated in" an internal regulation); *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) ("The legal proposition that agencies may be required to abide by certain internal policies is well-established.") (citing *Morton v. Ruiz,* 415 U.S. 199, 235 (1974)).

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1 agency action committed to the agency's discretion by law,"[52] but fail to note that
2 "[a]s a general rule, an agency pronouncement is transformed into a binding norm
3 if so intended by the agency[,] and agency intent, in turn, is ascertained by an
4 examination of the statement's language, the context, and any available extrinsic
5 evidence."[53] District Court review is therefore "appropriate where agency rules
6 were 'intended primarily to confer important procedural benefits upon individuals
7 in the face of otherwise unfettered discretion.'"[54]

8 Particularly relevant here, courts have found that Exec. Order No. 13,175[55]
9 – by operating to supply "further evidence of [agency] policy, the interpretation
10 of [agency] policy by the [agency] and by the federal government[,] and the
11 tribe's reliance thereon" – requires that federal agencies "engage in meaningful,
12 prior consultation pursuant to [their own] policies and guidelines."[56]

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[52] ECF No. 52 at 12.

[53] *Ngure v. Ashcroft*, 367 F.3d 975, 982 (8th Cir. 2004); *see also Oglala*, 603 F.2d at 718 ("A court need not accept an agency's interpretation of its own regulations if that interpretation . . . is plainly inconsistent with the wording of the regulation, or otherwise deprives affected parties of fair notice of the agency's intentions.").

[54] *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 744, 783 (D.S.D. 2006) (quoting *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970)); *see e.g. Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1074 (9th Cir. 1983) (while BIA regulations did "not expressly require that its procedures be followed . . . a literal reading of the regulation is not enough. Whether the remedies provided in the regulation are exclusive must be determined in light of the intent of Congress in enacting the statute which the regulation purports to implement."); *Loma Linda v. Schweiker*, 705 F.2d 1123, 1126 (9th Cir. 1983).

[55] 65 Fed. Reg. 67,249, 67,251 (Nov. 6, 2000).

[56] *Lower Brule Sioux*, 911 F.Supp. 395, 401-02.

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The Ninth Circuit has also "emphasized that federal agencies owe a fiduciary duty to all Indian tribes, and that *at a minimum this means agencies must comply with general regulations and statutes*."[57] In *Yankton Sioux*, for instance, the court found that Exec. Order No. 13,175 and the BIA's government-to-government consultation policy adopted pursuant to that Order "require[d] the BIA to consult with Tribes" because its own internal "statutes, regulations, and policies indicate[d] an intent to confer important procedural benefits upon the tribes in the face of agency discretion."[58] According to *Yankton Sioux*,

> An agency must comply with its own internal policies even if those are more rigorous than procedures required by the APA. Where the BIA has established a policy requiring prior consultation with a tribe, and therefore created a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, that opportunity must be given. . . . According to BIA's policy, . . . consultation includes the right to be informed of the potential impact of the proposed federal action on the tribes.[59]

The court ultimately held that plaintiffs were "likely to prevail on their claim that the BIA failed to meaningfully consult with them."[60]

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[57] *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F.Supp.2d 1104, 1110 (S.D. Cal. 2010) (emphasis added).
[58] *Yankton Sioux*, 442 F.Supp.2d at 783.
[59] *Id.* at 784 (citations omitted).
[60] *Id.* at 785; *see also Klamath Tribes v. U.S.*, No. 96-0318, 1996 WL 924509, at *8 (D. Or. 1996) ("In practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian Tribe . . . ."); *Oglala*, 603 F.2d at 714 (holding, the BIA's "action was procedurally defective in that it was not made in accordance with the Bureau's own procedure requiring prior consultation with the Tribe.").

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1 In the instant lawsuit, Federal Defendants have, in multiple respects,
2 "established a policy requiring prior consultation" with the Nation, and "therefore
3 created a justified expectation" that such would occur before any federal
4 encroachment upon Yakama police power.[61] To name a select few:

5 • The TLOA, requires Defendant DOJ to "[e]nsure that the Department and its components work with Indian Tribes on a government-to-government
6 basis";[62] and to "ensure meaningful and timely consultation with Tribal leaders in . . . actions that affect the trust responsibility of the United States to
7 Indian Tribes, any Tribal treaty provision, the status of Indian Tribes as sovereign governments, or any other Tribal interest."[63]
8

9 • THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS require that the FBI "share and disseminate information" to tribal
10 governments "as required by statutes, treaties, Executive Orders, Presidential directives, National Security Council directives, . . . memoranda of understanding, or agreements."[64]
11

12 • The DOJ MOU requires that the DOJ notify the BIA when it "receives information indicating a violation of law falling within the investigative
13 jurisdiction of the other agency, the agency receiving the information will notify the other agency."[65]

14 • INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL, includes an
15 entire section on tribal notice, consultation and coordination.[66]

16 Federal Defendants ignored all of these federal laws, rules, and regulations while

17 [61] *See U.S. v. Owens*, 100 F. 70, 71 (D.C. Mo. 1900) (noting that the police power is "a subject intimately related to the health, welfare, and safety" of local
18 governments).
[62] 28 C.F.R. § 0.134(c)(4).
19 [63] *Id.* at § 0.134(c)(7).
[64] Galanda Decl. Ex. D at 56, §§ VI(B)(1)(b), (B)(2).
[65] Galanda Decl. Ex. F at 73, § IV(6).
[66] INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 4.86.1.2 (2011).

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1 invading the Nation's Reservation trust lands for non-emergency purposes – 2 without having provided the Yakamas ***any*** prior notice or 3 consultation/coordination. Federal Defendants acted in an "arbitrary and 4 capricious" manner and in violation of federal law.[67] The final agency action 5 (invading the Yakama Nation's Reservation), and inaction (failing to comply 6 with agency policies, regulations, Executive Orders and federal law), give rise to 7 jurisdiction under the first sentence of the APA's Section 702.

8 ***2. A Second And Independent Waiver Of Federal Sovereign Immunity Is Found Under The Second Sentence of the APA's Section 702.***

9 10 Federal Defendants' suggest that no waiver of sovereign immunity exists 11 where a plaintiff does not point to a distinct legal harm identified in a federal 12 statute that also waives the federal government's sovereign immunity, 13 independent of the APA.[68] Federal Defendants premise their argument on a 14 tortured reading of *Lujan v. National Wildlife Federation*, and other courts 15 concurring with this now-rejected interpretation.[69] But all such cases upon which

16 [67] Plaintiffs are aware of at least this arbitrary and capricious behavior. Because Federal Defendants and several other Defendants have refused to participate in 17 discovery, the full extent of Federal Defendants' behavior remains unknown. *See* ECF Nos. 43, 102, 105.

18 [68] ECF No. 51 at 17.

[69] *Id*. at 11-12 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 19 (1990)). Now overturned *Veterans for Common Sense v. Peake,* 563 F.Supp.2d 1049, 1058 (N.D. Cal. 2008), for instance, noted that *Lujan* "made clear that waiver of sovereign immunity under § 702 is constrained by the provisions contained in § 704."

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1 Federal Defendants rely have been overruled by *Shinseki* and are no longer good
2 law.[70]

3 As it now stands, Section 702 of the APA quite simply "waives sovereign
4 immunity for actions against the United States and its agencies brought under
5 federal question jurisdiction to the extent that relief other than monetary damages
6 is sought."[71] In order to bring a suit under 28 U.S.C. § 1331 or § 1362, for
7 example, an Indian tribe need only assert a "civil action arising under the
8 Constitution, laws, or treaties of the United States."[72]

9 *i. Treaty Claim*

10 Indian Treaties constitute "relevant statutes" under federal jurisdiction-
11 granting statutes.[73] Indeed, Indian treaties are not only codified in the United
12 States Statutes at Large but are "the supreme Law of the Land" under the U.S.
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[70] *See id.* To the extent that other Ninth Circuit cases rely on this misreading of *Lujan*, *see e.g. Delano Farms Co. v. California Table Grape Comm'n*, No. 07-1610, 2009 WL 3586056, at *21 (E.D. Cal. Oct. 27, 2009) ("*Lujan*, 497 U.S. at 882 . . . make it clear that § 702's waiver is conditioned upon overcoming § 701 and 704's requirements."), those cases have been overruled as well.

[71] *Pacilli v. U.S. Dept. of Veterans Affairs*, No. 05-1095, 2006 WL 2166574, at *5 (E.D. Cal. July 31, 2006).

[72] *See e.g. Great Lakes Inter-Tribal Council, Inc. v. Voigt*, 309 F.Supp. 60, 64 (D.C. Wis. 1970); *Liu v. Novak*, 509 F.Supp.2d 1, 8 (D.D.C. 2007).

[73] *See Cree v. Flores*, 157 F.3d 762, 768 (9th Cir. 1998) ("The district court had jurisdiction over the Yakama Nation's [Treaty] claims under 28 U.S.C. §§ 1331 and 1362."); *Reich v. Great Lakes Indian Fish and Wildlife Com'n*, 4 F.3d 490, 493 (7th Cir. 1993) ("Indian treaties are deemed the legal equivalent of federal statutes . . . .") (Posner, J.).

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1 Constitution.[74] For this reason, relevant jurisprudence makes clear that "if [a
2 plaintiff] can establish that a cause of action exists under [a] treaty, then a waiver
3 of sovereign immunity is found in section 702 of the APA."[75]

4 In determining the degree of treaty rights retained by the tribes, courts are
5 guided by various well-established principles.[76] To begin with, the signing of a
6 treaty only acts as a limitation on, not a taking of, rights held by the tribe.[77] As
7 such, treaties are appropriately viewed as a reservation of rights by Indians, rather
8 than a grant of rights from the United States.[78] In interpreting these rights, courts
9 must construe treaty language how Indians understood it, and must liberally
10 construe the language in favor of the Indians.[79]

11 Federal Defendants rely on *Ramsey v. United States*[80] to argue that the
12 Nation's Treaty claim should be dismissed because the Treaty does not contain
13 "*express language* within [its] four corners" that grants a right to notice and
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[74] Art. VI, cl. 2; *Antoine v. Washington*, 420 U.S. 194 (1975).
16 [75] *Telesat De Panama v. U.S. Dept. of Defense*, 976 F.2d 746, *6 (Fed. Cir. 1992).
17 [76] Judge Posner's opinion in *Reich*, 4 F.3d 490, offers an exemplary discussion on the Indian canons.
18 [77] *United States v. Winans,* 198 U.S. 371, 381 (1905).
[78] *Id.*
19 [79] *Id.*; *Worcester*, 31 U.S. at 582; *Tulee*, 315 U.S. at 684-85; *Choctaw Nation v. U.S.,* 318 U.S. 423, 432 (1943); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1257, n.6 (9th Cir. 1983).
[80] 302 F.3d 1074 (9th Cir. 2002).

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1 consultation/coordination.[81] Defendants' logic is misguided, for several reasons.
2 To begin with, *Ramsey* was a federal tax case and has never been applied
3 outside of decisions involving federal taxes.[82] The reason is obvious: there is "a
4 universal tax canon with respect to any exemption from income taxation"
5 dictating that "'[a]n exemption from Federal income taxation must be based upon
6 express language in some statute or treaty.'"[83] Contrary to Federal Defendants'
7 implication, *Ramsey* did not overrule almost two hundred years of precedent.
8 Instead, *Ramsey*'s narrow holding is limited to cases involving the application of
9 the "universal tax canon" to claims of exemption from federal taxation.[84]
10 Further, the Treaty's express language promising that the Nation's
11 Reservation would be set apart for the Nation's exclusive use and benefit requires
12 notice and coordination/consultation before uninvited, unauthorized federal
13 agencies run roughshod over the Nation's Reservation trust lands. Certainly, the
14 Yakama's Treaty is unique in that it **does** contain "*express language* within [its]
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[81] ECF No. 51 at 13 (emphasis in original).
[82] *See e.g. Kyle v. U.S.*, Nos. 02-0935, 06-0427, 2007 WL 2429393, at *2 (S.D. Cal. 2007). *Blue Lake Rancheria v. U.S.*, the other Ninth Circuit case applying *Ramsey*, was recently overturned. No. 08-4206, 2010 WL 144989, at *4 (N.D. Cal. Jan. 8, 2010), *overruled by*, No. 10-15519, 2011 WL 3506092 (9th Cir. Aug. 11, 2011).
[83] John Lentz, *When Canons Go to War in Indian Country, Guess Who Wins?*, 35 AM. INDIAN L. REV. 211, 214 (2011) (quoting *Hill v. Comm'r*, 70 T.C.M. (CCH) 13 (1995)).
[84] *U.S. v. Arrington*, 757 F.2d 1484, 1486 (4th Cir. 1985) (where a case does not purport to overrule another, it must be read in conjunction with previous cases).

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four corners" to support the Nation's position that tribal "permission" is required, when the United States promised that the Nation's Reservation:

> 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[. No] white man, excepting those in the employment of the Indian Department, [shall] be permitted to reside upon the said reservation ***without permission of the tribe*** . . . .[85]

The Treaty further guaranteed that United States citizens would not "enter upon" the lands "included in the reservation . . . ."[86] Critically, Defendants ignore that the Treaty *explicitly* requires "permission of the tribe." The law requires that this mean something.[87] It cannot, as Defendants claim, mean nothing.[88] The only evidence regarding the Nation's understanding of the Treaty supports Plaintiffs' reading. Article II was explained to the Yakamas in 1855 as follows:

> Looking Glass: Will the agent be there that long to keep the whites from pushing into our country?
>
> Gen. Palmer said: Certainly.
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> Looking Glass: Will you mark the piece of country that I have marked

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[85] 12 Stat. 951, Art. II (emphasis added).

[86] *Id.*

[87] *See Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 397 (1968) ("To construe the treaty as giving the Indians no rights but such as they would have without the treaty would be an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the Nation for more.") (internal quotation omitted).

[88] *See Yakama Indian Nation v. Flores*, 955 F.Supp. 1229, 1262 (E.D. Wash. 1997) ("The Yakama Nation thus understandably assigned a special significance to each part of the Treaty at the time of signing and continues to view the Treaty as a sacred document today.").

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> and say the agent shall keep the whites out?
>
> Gen. Palmer: No one will be permitted to go there but the agent and the persons employed, without your consent.[89]

In Article VII, the Treaty further states:

> The [tribes] acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof . . . . And 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.[90]

This clause was explained to the Yakama: "when any of [the Yakama] do wrong to the whites then it is the duty of the chiefs to punish the offender."[91]

It is clear that, at the very least, the Treaty contemplates Tribal involvement when tribal members "do wrong." Taking "permission," "deliver[y]" and "the duty of the chiefs," together, it is not possible to honor any of these separate rights without some form of communication to the Nation before an Entry like that of February 16.[92] As important, Federal Defendants do not, and cannot, argue that federal law has abrogated or limited this right.

In *Confederated Tribes and Bands of Yakama Nation v. U.S. Dept. of Agriculture*[93] this Court preliminarily enjoined a federal agency based, in part, on

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[89] Ex. E at 67; *see also Flores*, 157 F.3d at 767 (Treaty minutes accurately capture what United States told the Yakamas at the Treaty negotiations).
[90] 12 Stat. 951, Art VIII.
[91] Galanda Decl. Ex. E at 68.
[92] *Smiskin*, 487 F.3d at 1266-67.
[93] No. 10-3050, 2010 WL 3434091 (E.D. Wash. Aug. 30, 2010).

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1 "serious questions about whether Defendants adequately consulted with the
2 Yakama Nation ***as required by the Yakama Treaty of 1855*** and federal Indian
3 trust common law."[94] In short, *Yakama v. USDA* stands for the proposition that
4 the Treaty requires notice and consultation/coordination, at minimum, in the
5 Treaty-resource context.[95] Federal Defendants have offered no reason why the
6 same does not apply in the physical entry context. In fact, the Treaty language
7 and interpretive tools counsel for an even more profound federal obligation to
8 provide notice and consult/coordinate in the circumstances giving rise to this
9 action. Lives, not merely resources, are at issue here.

10 Even if the Court could find that the Yakama Treaty of 1855 does not
11 require notice and consultation/coordination per Articles II and VII or otherwise,
12 determining the degree of rights retained by the Nation would present a question
13 of fact that this court cannot decide on a 12(b) motion.[96] When a "material fact"
14 is presented, courts are barred from deciding the issue of subject matter
15 jurisdiction under 12(b)(1) because, as here, "the jurisdictional issue and the issue
16 on the merits are . . . factually so completely intermeshed, that the question of
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[94] *Id.* at *4 (emphasis added).

[95] *See Smiskin*, 487 F.3d at 1265-69 (applying, as a matter of law, an earlier court's interpretation of the Yakama Treaty).

[96] *See Cree v. Waterbury*, 78 F.3d 1400, 1405 (9th Cir. 1996) ("A factual investigation into the historical context and parties' intent at the time the Treaty was signed is necessary to determine the precise scope of the [Treaty] right."); *see also generally Flores*, 955 F.Supp. 1229.

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jurisdiction is dependent on decision of the merits."[97] A "material fact" is one that "might affect the outcome of the suit under the governing law."[98] The presence of a "material fact" also disposes of a Rule 12(b)(6) motion because it prevents a party from showing beyond a doubt "that no relief could be granted under any set of facts that could be proved consistent with the allegations."[99]

Here, the necessity of conducting a "factual investigation into the historical context and parties' intent at the time the Treaty was signed" presents a "material fact" that cannot be disposed of with Federal Defendants' 12(b) motion. In nearly all instances – such as here – where a federal defendant asserts a sovereign immunity defense and a plaintiff presents a waiver of that immunity, the procedural roadblock is lifted and a motion to dismiss will be denied.[100]

Finally, even were the Court to conduct a "factual investigation into the historical context and parties' intent at the time the Treaty was signed," a right to notice and coordination/consultation clearly exists. Signing the Treaty was a limitation on, not a taking of, rights previously held by the Tribe. This doctrine "applies [to] reserved or retained rights of [political] sovereignty" as well as other

[97] *St. Clair v. City of Chico*, 880 F.2d 199, 202 (9th Cir. 1989) (internal citations and quotations omitted).
[98] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).
[99] *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).
[100] *See e.g., Flett v. Vail*, No. 09-0091, 2010 WL 1712720 (E.D. Wash. Feb. 24, 2010); *Griffin v. West Bay Prop.*, No. 10-7072, 2011 WL 2437493 (C.D. Cal. June 17, 2011).

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1 aspects of sovereignty.[101] Reserved rights to inherent sovereignty "arise by
2 implication [a]nd . . . are buttressed by the canons of treaty interpretation
3 requiring a narrow construction of the grant made by the Indians."[102]

4 Together, these "foundations of federal Indian law require that advance
5 consultation rights attach in 'notice situations'"[103] – situations where an agency
6 has knowledge that its actions are likely to disturb inherent aspects of sovereignty
7 implicitly guaranteed by Treaty.[104] Thus, in *Okanogan Highlands Alliance v.*
8 *Confederated Tribes of the Colville Reservation*,[105] the court held that:

9 > In practical terms, the trust relationship gives rise to a procedural
10 > requirement that the federal government at the very least . . . investigate and consider the impact of its action upon a potentially affected Indian tribe. . . . This duty requires the government to
11 > consult with an Indian tribe in the decision-making process . . . .[106]

12 Again, Federal Defendants provide no proof that Congress has explicitly – or
13 implicitly – divested the Nation of their Treaty right to notice and
14 consultation/coordination. To the contrary, federal common law, statute and

15 [101] *U.S. v. State of Mich.*, 471 F.Supp. 192, 254 (D.C. Mich. 1979).
16 [102] *Id.* at 254; *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (Indian tribes possess all "inherent powers of a limited sovereignty which has never been extinguished" by explicit congressional command).
17 [103] Lucus Ritchie, *Indian Burial Sites Unearthed: The Misapplication of the Native American Graves Protection and Repatriation Act*, 26 PUB. LAND &
18 RESOURCES L. REV. 71, 88 (2005).
19 [104] *See Northwest Sea Farms, Inc. v. U.S. Army Corps*, 931 F.Supp. 1515, 1520 (W.D. Wash. 1996) (in carrying out the U.S.'s fiduciary duty, agencies owe a "responsibility to ensure that Indian treaty rights are given full effect").
[105] No. 97-0806, 1999 WL 1029106 (D. Or. Jan. 12, 1999).
[106] *Id.* at *16 (internal citations and quotations omitted).

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1 regulation all make abundantly clear that federal agencies must honor this right.
2 Adopting Federal Defendants' argument that the Treaty right is meaningless
3 would violate the general rule that in approving the Treaty, Congress "intended to
4 enact an effective law, and [that] legislature is not to be presumed to have done a
5 vain or futile thing in the enactment of a statute."[107]

6 *ii. Tribal Law And Order Act Claim*

7 The TLOA was passed in 2010 in order to fulfill the federal government's
8 "distinct legal, treaty, and trust obligations to provide for the public safety of
9 Indian country" by "clarify[ing] the responsibilities of Federal, State, tribal, and
10 local governments with respect to crimes committed in Indian country [and]
11 increase[ing] coordination and communication among Federal, State, tribal, and
12 local law enforcement agencies."[108] To advance these goals, Section 2802(c)(12)
13 requires that Defendant DOJ "conduct[] meaningful and timely consultation with
14 tribal leaders and tribal justice officials" before taking any "actions that affect
15 public safety and justice in Indian country." Here, by entering upon Yakama
16 Reservation and interfering with the Nation's exercise of its police power –
17 without notice or consultation/coordination – Federal Defendants have violated
18 not only the spirit of the TLOA generally, but an explicit mandate as set forth in

19 [107] 73 AM. JUR. 2d Statutes § 164; *see also In re Bake*r, 430 F.3d 858, 860 (7th Cir. 2005) ("Canons of statutory construction discourage an interpretation that would render a statute meaningless . . . .").
[108] Pub. L. No. 111-211, §§ 202(a), (b)(1)-(2), 124 Stat 2258, 2262-63 (2010).

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1 25 U.S.C. § 2802(c)(12). And as with the Treaty, the TLOA is to be liberally
2 construed for the benefit of the Yakamas, with any doubtful expressions therein
3 resolved in favor of the Yakamas.[109]

4 B. The Mandamus Act Provides Yet Another Independent Waiver Of The United States' Sovereign Immunity.

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6 Title 28 U.S.C. § 1361, otherwise known as the Mandamus Act, grants
7 District Courts original jurisdiction to compel an officer, employee, or agency of
8 the United States to perform a duty owed to the plaintiff.[110] It is clear that
9 Section 1361 confers an independent basis of jurisdiction.[111] Further, although
10 there is some *dicta* in the Ninth Circuit stating otherwise,[112] many cases indicate

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[109] *See Alaska Pacific Fisheries Co. v. U.S.*, 248 U.S. 78, 89 (1918) (it is a "general rule that statutes passed for the benefit of [Indians] are to be liberally construed, doubtful expressions being resolved in their favor"); *E.E.O.C. v. Navajo Health Foundation-Sage Memorial Hospital, Inc.*, No. 06-2125, 2007 WL 2683825, at *1 (D. Ariz. Sept. 7, 2007) (noting the same).

[110] *Hill v. U.S. Bd. of Parole*, 257 F.Supp. 129, 130 (D.C. Pa. 1966).

[111] *See Simmat v. Unites States Bureau of Prisons*, 413 F.3d 1225, 1234-1235 (10th Cir. 2005); 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 105.42[3] (3d ed. 2011) ("Section 1361 is clearly a jurisdictional statute. Mandamus is an original process, jurisdictional in itself.").

[112] *See e.g. Smith v. Grimm*, 534 F.2d 1346, 1353 n.9 (9th Cir. 1976). Citing to *Smith*, Defendants argue that "it is well settled that the mandamus statute . . . does not by itself waive sovereign immunity." ECF No. 51, p. 10. The issue is far from "well settled." As discussed in a leading treatise: "Many of the cases that hold or state that the Mandamus Act does not waive sovereign immunity do so in a perfunctory manner, without any substantial analysis. They might be better construed as standing for the proposition that mandamus is not an available remedy on the facts of the cases, given the stringent standards that must be met before the writ will issue." 16 MOORE'S FEDERAL PRACTICE § 105.42[4].

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1 that Section 1361 both grants jurisdiction *and* waives sovereign immunity.[113] At
2 minimum, should this Court find that the Mandamus Act does not create an
3 independent waiver of federal sovereign immunity, a valid waiver exists under
4 the APA. Because federal mandamus jurisdiction is coextensive with the
5 remedies available under the APA, *i.e.*, injunctive relief directed at an agency or
6 officer, this Court, in any event, has Section 1361 jurisdiction.[114]

7 C. The Unique Treaty And Government-to-Government Relationship Creates A Trust Duty To Consult With The Yakama Nation.

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9 Pursuant to the federal common law, the Yakama Nation is owed
10 meaningful notice and consultation/coordination when the United States enforces
11 generally applicable federal law within their sovereign lands.[115] While the
12 common law trust obligation does not in itself create a specific cause of action,[116]
13 the Treaty expressly recognizes and codifies the fiduciary relationship.[117] In turn,
14 District Courts have an obligation to give effect to that trust relationship when

15 [113] *See e.g. Sheehan v. Army & Air Force Exch. Serv.*, 619 F.2d 1132, 1140 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982); *McNutt v. Hills*, 426 F. Supp. 990, 999 n.2, 1001 (D.D.C. 1977).

16 [114] *See Tucson Airport Authority v. General Dynamics Corp.*, 922 F.Supp. 273, 280 (D. Ariz. 1996) ("For claims permitted under the APA's waiver of sovereign
17 immunity, federal district court jurisdiction may be proper under . . . the mandamus statute, 28 U.S.C. § 1361.").

18 [115] *See e.g. Seminole Nation v. U.S.*, 316 U.S. 286, 296 (1942); *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983); *U.S. v. Navajo Nation*, 537 U.S. 488, 490 (2003).

19 [116] *U.S. v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2322-26 (2011).

[117] *See* 12 Stat. 951, Art. VIII ("The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the government of the United States[.]").

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analyzing an alleged treaty breach.[118] This is particularly true in the consultation context.[119] Here, the United States breached its trust duty to give notice and consult/coordinate with the Yakamas for law enforcement and public safety purposes, pursuant to its fiduciary obligations under (1) the Treaty and (2) common law trustee obligations to conduct itself with prudence and loyalty.

1. The Treaty of 1855 Establishes A Trust Duty To Consult And Coordinate With The Yakama Nation.

The "unique relationship" between the Nation and the United States places duties on both parties. The Nation has a duty to allow the United States onto the reservation, if specific procedural requirements are fulfilled.[120] And, the United States – as "something more than a mere contracting party [that has] charged itself with moral obligations of the highest responsibility and trust" – has a reciprocal duty to give the broadest possible application and force to the Treaty.[121] Thus, under the federal common law, a cause of action lies where, in interpreting federal law, federal agencies fail to act with the "most exacting

[118] *Jicarilla Apache Nation*, 131 S.Ct. at 2325.

[119] *See e.g. Quechan*, 755 F.Supp.2d 1104; *Yakama Nation,* 2010 WL 3434091; *Okanogan Highlands Alliance*, 1999 WL 1029106; *Klamath Tribes v. U.S.*, 1996 WL 924509; *Klamath Tribes,* 1996 WL 924509; *Lower Brule Sioux*, 911 F.Supp. 395.

[120] 12 Stat. 951, Art. II*; see also*, ECF 51 at 6; *E.E.O.C. v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1078 (9th Cir. 2001).

[121] *Seminole Nation v. U.S.*, 316 U.S. 286, 296-97 (1942).

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fiduciary standards" toward tribal governments and their citizens.[122]

Contemporary application of the Treaty requires examination of the current relationship between its signatories. As recognized by Federal Defendants, the Nation does

> not argue that the United States lacked the authority to enter the reservation to execute the search warrant. . . . Instead, the Tribe[] . . . argue[s] that the United States is required to notify and consult with the Tribes prior to entering the reservation . . . .[123]

Despite their recognition of the Nation's position, Federal Defendants cite to *U.S. Department of Labor v. Occupational Safety and Health Commission, Warm Springs Forest Products* ("*Warm Springs*")[124] to argue that "[w]hen federal officials are empowered to enforce generally applicable federal laws on Indian reservations, they are likewise empowered and authorized to enter tribal lands to do so."[125] As the Seventh Circuit has noted, however, *Warm Springs* was limited to an intrusion on tribal sovereignty associated with "routine activities of a commercial or service character . . . rather than of a governmental character."[126] Law enforcement matters clearly fall in the latter category[127] and thus, require a

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[122] *Id.*; *see also U.S. v. State of Wash.*, 157 F.3d 630, 643 (9th Cir. 1998).
[123] ECF No. 51 at 7.
[124] 935 F.2d 182 (9th Cir. 1991).
[125] ECF No. 51 at 5.
[126] *Reich*, 4 F.3d at 495.
[127] *Id.*

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more exacting review of federal behavior.[128]

Tribes' alleged "dependent status"[129] has not destroyed tribal sovereignty, nor does it obliterate explicit Treaty rights.[130] Accordingly, numerous Ninth Circuit courts have held that federal laws of general applicability are to be applied, if at all, in a manner where "doing so would [not] abrogate a right guaranteed by Indian treaty."[131] In other words, Federal Defendants' authority to enforce generally applicable law upon the Reservation must be read in light of the limitations placed upon the United States by the Treaty and the inherent sovereignty otherwise retained by the Yakama Nation.[132]

Specifically, assuming *arguendo* that Federal Defendants possess statutory authority to enforce generally applicable federal law on the Yakama Reservation, this authority to enforce law is not without restrictions on the *manner in which*

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[128] *See E.E.O.C. v. Fond du Lac Heavy Equipment and Const. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993) ("the general rule of applicability does not apply" when a tribe's "right of self-government would be affected").

[129] *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) ("Tribal powers are not implicitly divested by virtue of the tribes' dependent status.").

[130] *See U.S. v. Wheeler*, 435 at 323 (although "Indian tribes are, of course, no longer possessed of the full attributes of sovereignty . . . our cases recognize that the Indian tribes have not given up their full sovereignty").

[131] *U.S. v. Wilbur*, No. 09-0191, 2010 WL 519735, at *9 (W.D. Wash. Feb. 4, 2010) (citing *Smiskin*, 487 F.3d at 1264).

[132] *See generally Smiskin*, *supra*.

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1 *they enforce* generally applicable law.[133] In the realm of Treaty hunting and
2 fishing, for instance, federal courts have held that although tribes have a general
3 treaty right to take fish at their "usual and accustomed" areas, the neighboring
4 states' conservation laws may limit this right.[134] However, because these
5 conservation laws touch on aspects of tribal sovereignty, trust and/or treaty rights,
6 the method of their application "must be the least restrictive alternative method
7 available."[135]

8 More generally, courts have consistently found that – although executing
9 clearly valid and applicable law – government agents' actions are severely
10 limited when those actions intrude upon a person's reasonable expectation of
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[133] *U.S. v. State of Mich.*, 653 F.2d 277, 279 (6th Cir. 1981); *State v. Cayenne*, 195 P.3d 521, 524 (Wash. 2008).

[134] *Puyallup Tribe*, 391 U.S. 392; *see also Tulee*, 315 at 684–85 (reversing Yakama's state conviction because statute was not "indispensable to the effectiveness of a state conservation program").

[135] *State of Mich.*, 653 F.2d at 279 (6th Cir. 1981); *see also Tulee*, 315 U.S. at 864-65 ("[e]ven though [the state's law was] both convenient and, in its general impact fair," because it could not "be reconciled with a fair construction of the treaty" it could not be applied to the Tribe); *Smiskin*, 487 F.3d at 1271 ("tribal rights may preclude a state 'from pursuing the most efficient remedy'" available to achieve its legitimate goals) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991)); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 668 F.Supp. 1233, 1236 (W.D. Wis. 1987) ("[I]t would accord with the tribes' understanding at the time of the treaties to confine the state now to the least restrictive alternative available to accomplish its conservation purposes.") (citing *U.S. v. Oregon*, 769 F.2d 1410, 1416 (D. Ore. 1985)); *Cayenne*, 195 P.3d at 524 (same).

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1 privacy, as guaranteed by the Fourth Amendment of the Constitution.[136]

2 Here, to be clear, the Nation is merely seeking to protect its Treaty right to
3 notice and consultation/coordination – a *procedural* requirement that incidentally
4 limits the manner in which Federal Defendants *apply* federal law. The Nation
5 has no interest in escaping the application of generally applicable federal law on
6 the Reservation.[137] To the contrary, the Nation has a vested interest in *working*
7 *with* Federal Defendants, *on a government-to-government basis*, as required by
8 federal law, to maintain law, order, and public safety on the Reservation. Indeed,
9 requiring that Federal Defendants cooperate with the Yakama Nation in Yakama
10 Reservation law enforcement matters is the central aim of this lawsuit.[138]

11 ***2. The U.S Maintains A Procedural Trust Duty To Consult With The Yakama Nation.***

12 Courts in this Circuit have affirmed that "a procedural duty has arisen from
13 the trust relationship such that the federal government must consult with an

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16 [136] *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

[137] *See Smiskin*, 487 F.3d at 1271.

17 [138] "[I]n many parts of the Indian country, the situation is dire. Violent crime has reached crisis proportions on many reservations." *Oversight of the [U.S.] Dep't*
18 *of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 16 (2009) (statement of Eric H. Holder, Jr., Att'y Gen. of the United States). Congress has
19 made clear its position that "increasing the coordination between tribal and federal law enforcement efforts" will be necessary to turn this tide. Gideon M. Hart, *A Crisis in Indian Country: An Analysis of the Tribal Law and Order act of 2010*, 23 REGENT U. L. REV. 139, 141 (2011).

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1 Indian Tribe."[139] In *Okanogan Highlands Alliance*, for instance, the Court
2 explained: "it is clear that the government's trust responsibility requires it to
3 consult with an Indian tribe concerning government actions that could adversely
4 impact reserved rights."[140] But the court also explained that "there are no
5 absolute standards governing the manner in which consultation is to occur" and
6 determined that the United States may fulfill its procedural duty to consult by
7 sending letters to the tribal council, coordinating during a planning process, and
8 facilitating meetings between the parties.[141] Here, Federal Defendants provided
9 no notice or consultation/coordination opportunity whatsoever and, therefore, fall
10 short of even the most conservative threshold for the procedural duty to consult.

11 Federal Defendants breached the United States' common law duty of good
12 faith, prudence, and loyalty when it failed to notify or consult/coordinate with the
13 Yakama Nation. Declaratory relief is a proper remedy.

14 D. Defendants' Arguments Regarding Parens Patriae Are Without Merit.

15 The Nation has standing under a *parens patriae* theory because Federal

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[139] *See Klamath*, 1996 WL 924509, at *8. Federal Defendants, citing to *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998), mistake the trust duty to consult as a performance duty, rather then properly as a conduct or procedural duty. ECF 51 at 19. However, unlike performance-mandating trust duties that are only enforceable where "there is a specific duty" required by statute or treaty, conduct duties are fundamental and inextricably tied to the trust relationship. *Okanogan Highlands Alliance*, 1999 WL 1029106, at * 16-18.

[140] *Okanogan Highlands Alliance*, 1999 WL 1029106, at * 16.

[141] *Id* at *18.

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1 Defendants failed to respect and protect Yakama enrolled membership's quasi-
2 sovereign interests in maintaining the boundaries of the Nation's Reservation and
3 its trust lands. To have standing under *parens patriae* a tribe must sue for (1) the
4 protection of a quasi-sovereign interest, and (2) on behalf of a "substantial
5 portion of the Sovereign's population."[142]

6 It is axiomatic that a tribe can bring a *parens patriae* claim on behalf of all
7 its enrolled citizens.[143] Contrary to Federal Defendants' position, the federal
8 government is not "presumed to represent" the Yakamas exclusively.[144] As the
9 current case shows, the United States here is ill-suited to represent the interests of
10 the more than 10,500 Yakama members whose Treaty rights and privileges have
11 been violated by the United States itself. The Nation meets the two requirements
12 to bring claims in *parens patriae*.

13 **II. Plaintiffs State Claims Upon Which Relief Can Be Granted.**

14 Where, as here, a claim survives a Rule 12(b)(1) attack, "it easily survives
15 the more lenient standard applicable, under Rule 12(b)(6)."[145] In light of the

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[142] *Alfred L. Snapp & Son, Inc. v. 3 Puerto Rico, ex. Rel. Barez*, 458 U.S. 592,
17 600-601 (1982).
[143] *See e.g. Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351 (9th
18 Cir. 1996); *In re Blue Lake Forest Products*, Inc., 30 F.3d 1138 (9th Cir. 1994);
Navajo Nation v. Dist. Court for Utah County, *Fourth Judicial Dist.*, 831 F.2d
19 929 (10th Cir. 1987); *Kiowa Tribe v. Lewis*, 777 F.2d 587 (10th Cir. 1985).
[144] ECF No. 151 at 20; Cami Fraser, *Protecting Native Americans: The Tribe as Parens Patriae, 5* MICH. J. RACE & L. 665, 694 (2000).
[145] *Taverniti v. Astrue*, No. 04-4932, 2008 WL 8448336, at *16 (N.D. Cal. Mar.

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1 numerous claims and theories discussed above, the Nation has presented more
2 than "enough facts to state a claim to relief that is plausible on its face."[146]

3 **CONCLUSION**

4 Based upon the above and foregoing initial factual exposition and law, the
5 Yakama Nation prays that Federal Defendants' Motion to Dismiss be **DENIED**.

6 DATED this 26th day of August, 2011.

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31, 2008).

[146] *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007).

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1 **CERTIFICATE OF SERVICE**

2 I, Gabriel S. Galanda, declare as follows:

3 1. I am now and at all times herein mentioned a legal and permanent
4 resident of the United States and the State of Washington, over the age of
5 eighteen years, not a party to the above-entitled action, and competent to testify
as a witness.

6 2. I am employed with the law firm of Galanda Broadman PLLC,
7 11320 Roosevelt Way NE, Seattle, WA 98125.

3. On August 26th, 2011, I filed the foregoing document, which will
8 provide service to the following via ECF:

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9 The foregoing statement is made under penalty of perjury and under the
10 laws of the State of Washington and is true and correct.
11 Signed at Seattle, Washington, this 26th day of August 2011.

12 s/Gabriel S. Galanda

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