David R. Quesnel, WSBA #38579
Klickitat County Prosecuting Attorney
205 S. Columbus Ave.
MS-CH 18, Room 106
Goldendale, WA 98602
Telephone: (509) 773-5838
Facsimile: (509) 773-6696
Email: davidq@klickitatcounty.org

P. Stephen DiJulio, WSBA #7139
Jeremy (Jake) R. Larson, WSBA #22125
FOSTER PEPPER PLLC
1111 Third Ave., Suite 3000
Seattle, WA 98101
Telephone: (206) 477-4400
Facsimile: (206) 749-1927
Email: steve.dijulio@foster.com
jake.larson@foster.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KLICKITAT COUNTY, a political subdivision of the State of Washington,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR; SALLY JEWEL, in her official capacity as Secretary of the Interior; BUREAU OF INDIAN AFFAIRS; LAWRENCE ROBERTS, in his official capacity as Acting Assistant Secretary-Indian Affairs; STANLEY M. SPEAKS, in his official capacity as Regional Director, Bureau of Indian Affairs,

Defendants.

No. 1:16-cv-03060-LRS

PLAINTIFF KLICKITAT COUNTY'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

August 10, 2016
[Oral Argument Hearing Date & Time Pending]

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

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KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

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KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

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KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

1. INTRODUCTION

Do Department of Interior ("DOI") and Bureau of Indian Affairs ("BIA") intend to exercise jurisdiction pursuant to retrocession within a portion of Klickitat County known as Tract D? The Supreme Court has said Tract D is not within the Yakama Reservation. So has Congress. But both BIA and DOI have previously opined that Tract D is *within* the reservation, and that the federal courts would resolve this fundamental jurisdictional issue.

Defendants were required under statute and executive order to specify the scope of jurisdiction they accepted in approving retrocession of jurisdiction over the Yakama Reservation. Defendants apparently incorrectly persist in asserting that Tract D is part of the Yakama Reservation, resulting in the risk that both the federal government and the County will incompatibly exercise jurisdiction over Tract D. As an initial matter, Klickitat County seeks declaratory relief from this court to have DOI and BIA state whether they intend to assert federal jurisdiction in Tract D as a result of retrocession. This Court should deny Defendants' Motion to Dismiss and allow this case to move forward so that the jurisdictional ambiguity and ongoing risk of imminent harm to Klickitat County and its residents caused by Defendants' approval of retrocession may be resolved.

Defendants' failure to specify the jurisdiction retroceded violates the APA and subjects the County to an actual, imminent, concrete and particularized risk of injury due to the lack of clarity over who has jurisdiction in Tract D.

2. ISSUE PRESENTED

DOI and the BIA failed to "specify the jurisdiction retroceded"—as required by Executive Order and statute—when accepting retrocession of certain jurisdiction over the Yakama Reservation, and DOI and BIA's conduct caused an

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

actual, imminent, concrete and particularized risk that both Klickitat County and the federal government will assert jurisdiction in an area where one of the two must necessarily *not* have jurisdiction. As a result,

2.1. does Klickitat County's Complaint state a claim under the APA?

2.2. does Klickitat County have standing?

2.3. is the requested declaratory and injunctive relief to resolve the jurisdictional conflict ripe for adjudication?

3. SUMMARY OF ARGUMENT

When the DOI and Bureau of Indian Affairs ("BIA") approved retrocession of certain criminal and civil jurisdiction formerly exercised by Washington State over the Yakama Reservation, they failed to specify the geographic scope over which the federal government would exercise retroceded jurisdiction as required by statute.

Defendants have created jurisdictional uncertainty: the State and Klickitat County have exercised jurisdiction over an area known as Tract D for over a century, as Tract D is outside the boundaries of the Yakama Reservation. While the DOI and BIA appear to believe that Tract D is inside the boundaries of the Yakama Reservation, Defendants refuse to specify whether the federal government is exercising expanded jurisdiction over Tract D pursuant to retrocession. Klickitat County is, therefore, left in the precarious position of potentially subjecting itself, its officials, and residents of Tract D to liability and injury resulting from wrongful or conflicting exercise of jurisdiction in Tract D.

Ironically, DOI acknowledges the ambiguity in jurisdiction effected by its retrocession decision, emphasizing that "[i]f a disagreement develops as to the

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

scope of retrocession, we are confident the courts will provide a definitive interpretation of the plain language of the Proclamation." Defs.' Mot. to Dismiss, ECF No. 9 at 6-7 (June 6, 2016) (quoting letter from Assistant Secretary of Indian Affairs approving retrocession petition). For obvious reasons, it is imperative that Klickitat County and the federal government know where they have—and don't have—jurisdiction. Now that retrocession—and, therefore, increased federal jurisdiction—is ***in effect*** over a yet-unclear geographic scope, Defendants disingenuously claim that the County lacks standing, that the dispute is unripe, and that the County has failed to state a claim. Defendants are wrong on all counts.

4. ARGUMENT

4.1. Klickitat County's Complaint States a Claim Under the APA because it Alleges that the Challenged Action (a) is Final; (b) Violates the APA and (c) Harms Plaintiff Klickitat County.

4.1.1. Legal Standard. It is well-established that a district court has subject matter jurisdiction over any sufficiently-stated claim for relief under the APA. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63–65 (2004). In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the allegations in the complaint, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). A complaint containing sufficient factual matter, accepted as true, to state a claim to relief that is "plausible on its face" will survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). A claim is facially plausible when there are sufficient factual allegations to draw a reasonable inference that the defendant is liable for the conduct alleged. *Id.* at 678.

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

4.1.2. It is Undisputed that the DOI and BIA's Acceptance of Retrocession Constitutes a Final Agency Action.

The APA creates a comprehensive remedial scheme for those allegedly harmed by agency action. *See* 5 U.S.C. §§ 701–706. Section 702 of the APA states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The APA defines reviewable "agency action" to include "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Additionally, Section 704 of the APA provides a right to judicial review of any "final agency action for which there is no other adequate remedy in a court." *Id.* § 704. To qualify as "final," the action challenged must "mark the consummation of the agency's decision-making process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations and internal quotation marks omitted).

The County's Complaint alleges that the DOI and BIA accepted retroceded jurisdiction without specifying the area over which the federal government would be assuming authority pursuant to the retrocession. The Complaint further alleges that instead of taking any further action with respect to the jurisdictional ambiguity over Tract D caused by their approval of retrocession, the DOI and BIA "left it to the courts to provide a 'definitive interpretation' of their agency action." Complaint, ECF No. 1 at 4-5.

Defendants do not dispute that their approval of retrocession constituted a final agency action under the APA. Furthermore, Defendants admit in their Motion that their action resulted in legal consequences; namely, the assumption by the

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

federal government—rather than State and County government—"over certain categories of offenses within the Yakama Reservation." Defs.' Mot. to Dismiss, ECF No. 9 at 6-7 (6/20/2016) (quoting letter from Assistant Secretary of Indian Affairs approving retrocession petition). As explained in greater detail below in Section 4.3.2, the Defendants' claim that the County must wait until multiple governments, e.g., the County and the United States, actually attempt to exert jurisdiction over Tract D before it can sue, is wrong under well-established Supreme Court precedent.

Thus, taking the allegations in the Complaint as true, the Complaint has adequately alleged that Defendants' action is final and reviewable under the APA.

4.1.3. The Complaint Adequately Alleges that the DOI and BIA's Failure to Specify the Jurisdiction Retroceded Violates the APA and Harms the County.

In their Motion to Dismiss, Defendants Claim that Klickitat County "identifies no injury deriving from Interior's acceptance of Washington's retrocession." Motion to Dismiss, ECF No. 9 at 9 (6/20/2016). To the contrary: the Complaint alleges that the DOI and BIA's approval of retrocession caused an "active dispute between local and federal officials concerning the exercise of civil and criminal jurisdiction within 'Tract D,'" over which the State and County have exercised plenary jurisdiction for over a century.[1] Complaint, ECF No. 1 at ¶¶ 1.2, 1.4, 1.7, 1.8 (4/18/2016). The Complaint also alleges that the dispute between local and federal officials directly resulted from the DOI and BIA's failure to respond to the County's request that they specify whether the government's

[1] Revised Code of Washington Section 36.04.200 defines Klickitat County as including Tract D.

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

acceptance of retrocession included jurisdiction over Tract D. Complaint, ECF No. 1 at ¶¶ 1.2, 1.4, 1.7- 1.9 (4/18/2016). In its April 23, 2015 letter to the Assistant Secretary of Indian Affairs, the Klickitat County Prosecuting Attorney's Office "urge[d that] any retroceded jurisdiction specifically exclude the area known as Tract D." Complaint, ECF No. 1-4 at 2 (4/18/2016). The County expressed concern with the "myriad of legal issues that will result from retrocession," including jurisdictional concerns. *Id.* at 1.

The County has an obvious interest in continuing to fulfill its responsibility to exercise criminal and civil jurisdiction over Tract D, as it has been doing for over a century. Additionally, the County faces harm, in the form of increased costs and potential claims arising out of conflicting federal and County assertion of jurisdiction within Tract D. Jurisdictional conflicts can arise from matters as routine as traffic stops and as serious as felony criminal investigations within Tract D. Conflicts can also arise in civil matters such as permitting.

As alleged in the Complaint, there is ample evidence to support the County's concern that the Department of the Interior and BIA believe that retrocession eliminates the County's jurisdiction over Tract D:

1. Despite a 1904 Congressional Act excluding Tract D from the Yakama Reservation, subsequent Congressional inaction in response to the Yakama Nation's request to include Tract D in the Reservation, and compensation to the Yakama Nation from the federal government in 1958 for cession of Tract D (Complaint, ECF No. 1 at ¶¶ 5.9, 5.12, 5.15 (4/18/2016)), the DOI has taken the position that the Reservation includes Tract D. Complaint, ECF No. 1 at ¶ 1.3 (4/18/2016) (depicting a map of the Yakama Reservation published by the Bureau of Indian Affairs depicts the Reservation as including Tract D).

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

> 2. In their formal acceptance of retrocession, the DOI and BIA acknowledged a dispute over the boundaries of the Yakama Reservation, but refused to address whether renewed federal jurisdiction pursuant to retrocession included Tract D. *See* Complaint, ECF No. 1 at ¶ 5.29 (4/18/2016) (BIA stated, "An issue that has been highlighted in several meetings is related to reservation boundaries. . . . If a disagreement develops as to the scope of the retrocession, we are confident that courts will provide a definitive interpretation of the plain language of the Proclamation.").

Additionally, in 1968 (ten years after the Yakama Nation was compensated for the cession of Tract D from its reservation) the BIA took the position that Tract D "remains a part of the Yakima Reservation." Letter from BIA regarding "Jurisdiction in Tracts C and D which were restored to the Yakima Reservation by Decision of the Indian Claims Commission," Exhibit 1 hereto, p. 10 (Sept. 19, 1986). Finally, Defendants' Motion to Dismiss confirms that the federal government is exercising jurisdiction over Tract D: if Defendants did *not* believe that retrocession effected an increase in federal government jurisdiction in Tract D, they could simply have stated as much in the Motion.

In similar cases where the federal government has failed to specify crucial information in taking agency action, courts have held that such failure can cause "injury in fact" under the APA. First, in *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), the Secretary of Interior approved a gaming compact between an Indian tribe and California State without addressing whether the land subject to the compact qualified as "Indian land" as required under the applicable statute. Amador County sued under the APA, claiming that the Secretary acted beyond her authority in approving a compact affecting land that was not "Indian land" and thereby causing injury to the County through increased infrastructure costs that

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

would result from gaming operations taking place pursuant to the approval. The D.C. Circuit ruled that those allegations were "more than sufficient to establish 'concrete and particularized' harm." *Id.* at 378.

Second, in *Pearson v. Shalala*, 164 F.3d 650 (1999), the D.C. Circuit ruled that the Food and Drug Administration's failure to define the criteria it was applying to determine whether preapproval of dietary supplement producers' labeling was required caused harm to the producers by making it impossible for them to know whether they were required to obtain preapproval. *Id.* at 660-61 ("To refuse to define the criteria it is applying is equivalent to simply saying no without explanation. . . . [W]e are quite unimpressed with the government's argument that the agency is justified in employing this standard without definition.").

Accepting the County's allegations as true, as this Court must, the County has alleged injury in fact resulting from Defendants' failure to specify the jurisdiction retroceded.

4.1.4. The Complaint Adequately Alleges that the DOI and BIA's Failure to Specify the Jurisdiction Retroceded Violates the APA.

A plaintiff may challenge an agency action under the APA by showing that it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or "unsupported by substantial evidence." 5 U.S.C. § 706(2); *Guerrero v. Stone*, 970 F.2d 626, 628 (9th Cir. 1992).

Count 1 of Klickitat Country's Complaint alleges, among other things, that:

> [t]he Department of the Interior and BIA acted arbitrarily and capriciously, abused their discretion, and otherwise failed to act in accordance with law by (1) failing to acknowledge or otherwise address the County's request that the government specifically exclude Tract D from any acceptance of retroceded jurisdiction; (2) refusing to either specifically exclude or include Tract D in the government's

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

> acceptance; and (3) leaving it to the courts to provide a "definitive interpretation" of the acceptance as it pertains to Tract D.
>
> [] The Department of the Interior and BIA acted in excess of statutory jurisdiction, authority, limitations and short of statutory right by not expressly excluding Tract D from the government's acceptance of the State's retrocession, thus implicitly assuming federal jurisdiction over Tract D and approving concurrent tribal jurisdiction without authority to do so.

Complaint, ECF No. 1 at 23-24 (4/18/2016). Count 2 requests that Defendants be enjoined from asserting jurisdiction over Tract D. *Id.* at 24-25.

The Complaint specifically alleges that Defendants violated the APA by failing to perform duties they were obligated to perform under the applicable statute and Executive Order.[2] First, under 25 U.S.C. § 1323, the United States is authorized to accept a retrocession of only that jurisdiction "**acquired by [a] State**" under Public Law 280. 25 U.S.C. § 1323 (emphasis added). Indeed, in their acceptance of retrocession in the instant case, the DOI and Bureau of Indian Affairs accepted only the "partial civil and criminal jurisdiction over the Yakama Nation **which was acquired by the State of Washington**, under Public Law 83-280, 67 Stat. 588, codified as amended at 18 U.S.C. 1162, 28 U.S.C. 1360." Complaint, ECF No. 1 at ¶ 5.30 (4/18/2016) (citing 80 FR 63583 (Oct. 20, 2015)) (emphasis added). Public Law 280, in turn, permits state assumption of jurisdiction over "Indian Country" within the State; i.e., no assumption of jurisdiction under Public Law 280 includes areas *outside* Indian Country. 18

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[2] This sufficiently alleges a claim that Defendants unreasonably delayed or unlawfully withheld agency action under the APA. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

U.S.C. 1162; *see* also Complaint, ECF No. 1-3 at 1 (4/18/2016) (Proclamation of Governor Inslee regarding partial retrocession of jurisdiction over "Indian country" of Yakama Nation). "Indian Country" includes "all land *within* the limits of any Indian reservation." 18 U.S.C. § 1151(a) (emphasis added).

Because Tract D is *not* within the Yakama Reservation (i.e., not "Indian Country"), the State could not have *acquired additional* jurisdiction of Tract D when it assumed jurisdiction of certain civil and criminal matters on the Yakama Reservation in 1963. Furthermore, neither 25 U.S.C. § 1323 nor 80 FR 63583 authorizes Defendants to accept retrocession of any area *outside* that acquired by Washington State pursuant to Public Law 280. In other words, because Tract D is not within the Reservation, Tract D is not subject to retrocession under 25 U.S.C. § 1323 and Defendants have acted outside their authority to the extent they have assumed jurisdiction over Tract D pursuant to retrocession.

Second, the Executive Order authorizing the Secretary of Interior to accept retrocession states that the Secretary must publish a notice in the Federal Register "which *shall specify* the jurisdiction retroceded." Executive Order 11435, 33 FR 17339.[3] In approving retrocession without specifying the jurisdiction retroceded as

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[3] Executive Orders are subject to judicial review under the APA when (1) they do not preclude judicial review; (2) they set objective standards; and (3) the agency directives in the Executive Orders "rest upon statute," the directives are issued in accordance with or in furtherance of agency action that is specifically authorized or required by statute. *LASAC v. Brennan*, 608 F.2d 1319, 1330 n.15 (9th Cir. 1979); *see also Silver Dollar Graving Ass'n v. U.S. Fish & Wildlife Serv.*, No. 07-35612, 2009 WL 166924, at *2 (9th Cir. Jan. 13, 2009); *City Of Albuquerque v. U.S. Dep't*

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

required by the Executive Order; i.e., without specifying the geographic area over which the federal government will exercise jurisdiction pursuant to retrocession, Defendants violated Executive Order 11435.

Defendants are correct that Interior is not required to resolve potential boundary disputes before accepting a retrocession of jurisdiction, and that "Interior's acceptance of retrocession did not cause any boundary dispute between Plaintiff and the [Yakama] Nation." Mot. to Dismiss, ECF No. 9 at 3, (6/20/2016). But this argument misses the point. Interior's acceptance of retrocession effected expanded jurisdiction exercised by the *federal government* over the Yakama Reservation—jurisdiction formerly exercised by the State and counties.

Absent Defendants' approval of retrocession, there would be no expansion of federal authority within the as-yet-unclear area subject to the retrocession. In other words, if Defendants had never approved retrocession, there would have been no need for Klickitat County to file a Complaint to resolve who, as between the federal and County governments, has jurisdiction over Tract D. Defendants' own Motion to Dismiss highlights the serious concerns resulting from this lack of clarity regarding the geographic area that is subject to retrocession:

> [T]he Governor's Proclamation retroceding jurisdiction and Interior's acceptance of the retrocession ***say nothing of whether Tract D falls***

Of Interior, 379 F.3d 901, 913–14 (10th Cir. 2004) (citing *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997)).

Here, Executive Order 11435 was enacted pursuant to the authority vested in the President by 25 U.S.C. § 9 and 25 U.S.C. § 1323, and contains the objective standard that the Secretary of Interior must publish a notice in the Federal Register "which shall specify the jurisdiction retroceded." Exec. Order 11435, 33 FR 17339.

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

> ***within the Reservation***. The State, the County, the [Yakama] Nation, and the United States all will treat Tract D as subject (or not) to the terms of the retrocession ***depending on their view of the Reservation boundaries*** and that view remains unaltered by the retrocession. . . .
>
> The disagreement regarding Tract D might become ripe when some party, perhaps the County, the [Yakama] Nation, the United States or the State of Washington, attempts to assert jurisdiction over Tract D in a particular context based on its status as either within or outside the Reservation and another party contests that assertion of jurisdiction.

Defs.' Mot. to Dismiss, ECF No. 9 at 11, 13 (6/20/2016) (emphasis added). Defendants' argument that the various parties' views remain unchanged as to whether Tract D is in the Reservation only serves to underscore the imminent risk of injury caused by Defendants in failing to specify the jurisdiction retroceded: multiple parties believe they have enforcement authority in Tract D, and multiple parties will "attempt[] to assert jurisdiction over Tract D . . . based on its [unclear] status as either within or outside the Reservation." *Id.* at 13.

As discussed below in Section 4.3, the ripeness doctrine does not require that this Court wait until an enforcement officer erroneously exercises—or fails to exercise—jurisdiction within Tract D, potentially resulting in civil and criminal liability, before the Court resolves this jurisdictional uncertainty.

The Defendants' actions are arbitrary and capricious and are not in accordance with law, and the County is entitled to seek review under the APA.

4.2. Klickitat County has Standing to Seek a Declaration that Defendants Violated the APA by Failing to Specify the Jurisdiction Retroceded.

4.2.1. Legal Standard. The requirements for Article III standing are familiar. The oft-cited *Lujan v. Defenders of Wildlife* restates the three requirements that must be met for Article III standing: (1) an injury in fact that (2) is fairly traceable to the challenged conduct and (3) has some likelihood of

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

redressability. 504 U.S. 555, 560–61 (1992). "[T]he possibility of future injury may be sufficient to confer standing on plaintiffs; threatened injury constitutes 'injury in fact.'" *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 701 (9th Cir. 2012) (citing *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002)).

Additionally, "[f]or a plaintiff to have prudential standing under the APA, the interest sought to be protected by the complainant must be arguably within the zone of interests to be protected or regulated by the statute in question," *Nat'l Credit Union Admin. v. First National Bank & Trust Co.*, 522 U.S. 479, 488 (1998); i.e., there must be a "rough correspondence of the plaintiff's interests with the statutory purpose," *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 870 (9th Cir. 2002). The test "'is not meant to be especially demanding' ... keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable.'" *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2210 (2012) (quoting *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399 (1987)).

4.2.2. Defendants' Failure to Specify the Jurisdiction Retroceded Has Caused an Imminent Risk of Injury to Klickitat County.

DOI and BIA's failure to specify the jurisdiction retroceded has resulted in an concrete, particularized, actual and imminent risk of civil and criminal liability arising from multiple governments asserting jurisdiction over Tract D. As the D.C. Circuit held in *Amador County v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011) and *Pearson v. Shalala*, 164 F.3d 650 (1999), the "injury in fact" element of the standing inquiry is satisfied where the agency in question fails to specify important information relating to the agency's action. In *Amador County*, the Secretary's failure to address whether land subject to a proposed gaming compact was Indian

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

land harmed the plaintiff county because the Secretary's approval of the compact subjected the county to increased costs relating to the gaming activity. 640 F.3d at 378. In *Pearson*, the FDA's failure to define what criteria it was using to determine whether dietary supplement producers needed to obtain preapproval of their labeling made it impossible for the producers to discern whether they were required to obtain approval, thereby satisfying the "injury in fact" requirement. 164 F.3d at 660-61.

Similarly, the DOI and BIA's failure to specify the geographic scope of jurisdiction retroceded subjects Klickitat County to imminent harm from incurred costs, potential liability or injuries arising from both County and federal government's asserting conflicting jurisdiction over Tract D.

4.2.3. The County's Injury is Redressable Because if the County Succeeds and Obtains a Declaration Regarding Whether Tract D is Within the Jurisdiction Retroceded, the Jurisdictional Uncertainty will be Resolved.

Just as in *Amador County, supra*, where the legality of the Secretary of the Interior's approval of a tribal gaming compact depended on whether the subject land was "Indian land," here the legality of Defendants' exercise of jurisdiction pursuant to their approval of retrocession depends on whether the subject land is Indian Country.

The federal government may not assert jurisdiction over Tract D pursuant to retrocession because Tract D is not Indian Country. Defendants' failure to specify the geographic scope of the jurisdiction retroceded leaves the legality of their action unresolved, and poses an imminent risk of liability and other injury to the County from wrongful exercise of jurisdiction in Tract D. In *Amador County*, the court found that "[t]he County . . . easily satisfies the requirements of causation and redressability [b]ecause the Tribe may proceed with gaming only with

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

secretarial approval of the compact"; i.e., there was a "direct causal connection" between the Secretary's approval and the alleged harm. 640 F. 3d at 378. The court also held that the County met the redressability requirement "because if the County succeeds on the merits and obtains a declaration that the [land] does not qualify as Indian land, the Secretary would have to reject the compact." *Id.*

So too here: absent the DOI and BIA's approval, the County would not be subject to the ongoing risk of harm arising from both the County and the federal government asserting jurisdiction over Tract D. *See also Patchak v. Salazar*, 632 F.3d 702, 704 (D.C. Cir. 2011) (finding all Article III standing requirements met in a challenge by a neighboring landowner to the Secretary's decision to take tribal land into trust, thereby allowing the tribe to proceed with plans to construct a gambling facility). If the County succeeds on the merits and obtains a declaration that Defendants must specify the jurisdiction retroceded, then the County will know where Defendants are asserting jurisdiction and can proceed accordingly. If Defendants are not asserting jurisdiction over Tract D, then the County has no dispute with them. If Defendants *are* asserting jurisdiction, then this case should proceed to address the County's request for declaratory relief that Defendants acted arbitrarily and capriciously or contrary to law in asserting such jurisdiction. However, Defendants first need to establish in this action exactly the scope of jurisdiction Defendants approved in accepting retrocession.

Just as in *Amador County*, Klickitat County satisfies the redressability requirement because if it succeeds on the merits, the jurisdictional relationship between Plaintiff and Defendants will be clarified, allowing the County to proceed accordingly.

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

4.2.4. The County is in the Zone of Interests Sought to be Protected by 25 U.S.C. § 1323.

As a neighboring community directly impacted by the DOI and BIA's decision, Klickitat County is within the zone of interests sought to be protected by the statute authorizing retrocession.[4] As the Supreme Court stated in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), a statute that concerns land use necessarily impacts neighbors to the land, "so neighbors to the use . . . are reasonable—indeed, predictable—challengers of the Secretary's decisions: Their interests, whether economic, environmental, or aesthetic, come within [the statute's] regulatory ambit." *Id.* at 2211-12 ("If the Government had violated a statute specifically addressing how federal land can be used, no one would doubt that a neighboring landowner would have prudential standing to bring suit to enforce the statute's limits."). The statute authorizing retrocession, 25 U.S.C. § 1323, concerns jurisdiction over particular lands, which necessarily impacts neighbors—especially the County whose century-old jurisdiction is potentially affected by retrocession.

In sum, the County satisfies all three requirements for Article III standing, and is in the zone of interests of Public Law 280 such that it also has prudential standing.

4.3. Klickitat County's Claims are Ripe Because the Defendants' Action is Final Under the APA and Effected Legal Consequences that Pose Serious Risks to the County

4.3.1. Legal Standard. An agency action is final and ripe for review

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[4] Of course, the County also holds extensive property interests in Tract D, such as its extensive network of roads.

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

where the plaintiff's "rights or obligations have been determined" or where "legal consequences will flow" from the agency decision. *Pac. Fleet Submarine Mem'l Ass'n v. U.S. Dep't of the Navy*, 524 F. App'x 315, 320 (9th Cir. 2013) (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). The Ninth Circuit takes a "'pragmatic and flexible view of finality,' looking to 'whether the [challenged] administrative action is a definitive statement of an agency's position; whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms.'" *Pac. Fleet Submarine Mem'l Ass'n v. U.S. Dep't of the Navy*, 524 F. App'x 315, 319 (9th Cir. 2013) (quoting *Assoc. of Am. Med. Colleges v. U.S.*, 217 F.3d 770, 780 (9th Cir. 2000)).

4.3.2. Discussion. Defendants do not dispute that their approval of retrocession constituted a final agency action under the APA. Furthermore, Defendants admit in their Motion that their action has resulted in legal consequences; namely, the assumption by the federal government—rather than State and County government—"over certain categories of offenses within the Yakama Reservation." Defs.' Mot. to Dismiss, ECF No. 9 at 6-7 (6/20/2016) (quoting letter from Assistant Secretary of Indian Affairs approving retrocession petition). Indeed, when Yakama Nation challenged the State's assumption of jurisdiction under Public Law 83-280 in the 1970s, the United States emphasized that the jurisdictional question "directly implicates federal law enforcement responsibilities, for, if the judgment is affirmed, much of the jurisdiction relinquished by the State will return to the federal government." *Brief for the U.S.*

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

As Amicus Curiae, No. 77-388, 1978 WL 223123, at *2 (U.S. June 7, 1978).[5] Likewise, the jurisdictional issue directly implicates County law enforcement responsibilities to the extent Defendants believe retrocession includes Tract D.

Defendants disingenuously claim that "there is no likelihood of this case ever becoming ripe," but proceed to admit that:

> [t]he disagreement regarding Tract D might become ripe when some party, perhaps the County, the [Yakama] Nation, the United States or the State of Washington, attempts to assert jurisdiction over Tract D in a particular context based on its status as either within or outside the Reservation and another party contests that assertion of jurisdiction.

Defs.' Mot. to Dismiss, ECF No. 9 at 13 (6/20/2016) (emphasis added). The risk of both the United States and the County attempting to assert jurisdiction over Tract D is imminent and ongoing since retrocession became effective on April 19, 2016. *See* Complaint, ECF No. 1 at ¶5.30-31, Exh. 6 (4/18/2016). Indeed, if at any time an enrolled member of the Yakama Nation is apprehended for a major crime within Tract D, a jurisdictional dispute between the County and the United States can be expected to result from the conflicting exertion of police power. Such exercise of conflicting police power carries with it the risk of serious civil and criminal penalties for wrongful exercise of jurisdiction, including but not limited to claims of constitutional violations by residents of Tract D.

The Supreme Court has "long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (internal citation and quotation

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[5] In *Yakima*, the United States unsuccessfully argued that that Washington State's assumption of partial jurisdiction under P.L. 280 was invalid.

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

omitted). In *Hawkes*, property owners sought judicial review of the Army Corps of Engineers' decision that their property was subject to the Clean Water Act's permitting requirements. The Army Corps claimed that its decision could not be considered final and the dispute was not ripe because the property owners had adequate alternatives to APA review in court: (1) they could discharge fill material without a permit, risking an EPA enforcement action during which they could argue that no permit was required; and (2) they could apply for a permit and seek judicial review if dissatisfied with the results. The Supreme Court rejected the Army Corps' "alternatives":

> If respondents discharged fill material without a permit, in the mistaken belief that their property did not contain jurisdictional waters, they would expose themselves to civil penalties of up to $37,500 for each day they violated the Act, to say nothing of potential criminal liability. Respondents need not assume such risks while waiting for EPA to "drop the hammer" in order to have their day in court.

U.S. Army Corps *of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (citing *Sackett v. EPA*, 566 U.S. ——, 132 S.Ct., 1367, 1372 (2012)).

The DOI and BIA's approval of retrocession is a final agency action subject to review because there are no adequate alternatives to APA review. As the Supreme Court held in *Hawkes*, a proposed "alternative" that would subject the plaintiff to serious civil and criminal penalties, as Defendants have suggested here, is not an adequate alternative under well-established Supreme Court precedent. Thus, the County's claims are ripe.

5. CONCLUSION

This Court should resolve the jurisdictional ambiguity affecting both the County and the federal government that Defendants directly caused by approving

KLICKITAT COUNTY PROSECUTING ATTORNEY
205 S. COLUMBUS AVE., MS-CH 18, ROOM 106
GOLDENDALE, WA 98602
PHONE (509) 773-5838 FAX (509) 773-6696

retrocession without "specify[ing] the jurisdiction retroceded" as required by Executive Order No. 11435 (Nov. 21, 1968); 44 F.R. 17339. *See* Complaint, ECF No. 1 at 9, 21-24. Had Defendants specified the territorial reach of their action, there would be no uncertainty regarding where the federal government is exercising its jurisdiction now that retrocession has been implemented.

Defendants *must know* where they are assuming jurisdiction under any retrocession they approve; otherwise, federal law enforcement and other federal officials tasked with exercising jurisdiction over Reservation lands would not know *where* they must exercise such jurisdiction. The County's Complaint, in its simplest form, requires that the Defendants answer that question. Left unanswered, the jurisdictional ambiguity causes an imminent risk of liability and injury to the County, its enforcement officials, and the residents of Tract D.

Klickitat County's Complaint states a ripe claim under the APA. The County has standing under well-established Supreme Court and Ninth Circuit precedent. This Court should deny Defendants' Motion to Dismiss.

DATED this 11th day of July, 2016.

/s/ David R. Quesnel
David R. Quesnel, WSBA #38579
Klickitat County Prosecuting Attorney
205 S. Columbus Ave.
MS-CH 18, Room 106
Goldendale, WA 98602
Telephone: (509) 773-5838
Facsimile: (509) 773-6696
Email: davidq@klickitatcounty.org

/s/ Jeremy R. Larson
P. Stephen DiJulio, WSBA #7139
Jeremy (Jake) R. Larson, WSBA #22125
FOSTER PEPPER PLLC

1111 Third Ave., Suite 3000
Seattle, WA 98101
Telephone: (206) 477-4400
Facsimile: (206) 749-1927
Email: steve.dijulio@foster.com
jake.larson@foster.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Steven Miskinis
Trial Attorney
U.S. Department of Justice
CNRD
Indian Resources Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
Email: steven.miskinis@usdoj.gov
Attorney for Federal Defendants

/s/ *Jeremy R. Larson*
Jeremy R. Larson
FOSTER PEPPER PLLC
1111 Third Ave., Suite 3000
Seattle, WA 98101
Telephone: (206) 477-4400
Facsimile: (206) 749-1927
Email: jake.larson@foster.com