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

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

Plaintiff,

v.

CITY OF TOPPENISH, a
municipality of the State of
Washington; YAKIMA COUNTY, a
political subdivision of the State of
Washington

Defendants.

Case No.: 1:18-CV-03190-TOR

YAKAMA NATION'S REPLY TO
MOTION FOR PRELIMINARY
INJUNCTION

Date: February 8, 2019
With Oral Argument: 11:00 am
Hearing Location: Spokane, WA
Judge: Chief Judge Thomas O. Rice

1 The Confederated Tribes and Bands of the Yakama Nation (“Yakama
2 Nation”) has standing in federal court to assert and defend its inherent sovereign
3 and Treaty-reserved rights against the jurisdictional incursions of foreign
4 governments. The Yakama Nation has met its burden to obtain a preliminary
5 injunction to prevent further incursions during the pendency of this litigation.
6 The Yakama Nation is likely to succeed on the merits, will suffer irreparable
7 harm to its sovereignty without injunctive relief, the equities tip in favor of an
8 injunction, and an injunction serves the public’s interest by protecting Yakama
9 sovereignty and the rights reserved in the Treaty of 1855.

10 Defendants’ counterargument is largely a motion to dismiss for lack of
11 constitutional standing disguised as a response in which Defendants spend little
12 time addressing the substance of the Yakama Nation’s claim for a preliminary
13 injunction. Defendants’ argument that the scope of federal resumption of federal
14 jurisdiction over Indian Country, pursuant to federal authority, should actually be
15 interpreted under *state* law rather than *federal* law lacks support. Defendants ask
16 the Court to voluntarily defer to the Washington State Court of Appeals in *State v.*
17 *Zack* on this federal issue, without any supporting precedent. Defendants’
18 arguments are unsupported and unpersuasive. The Yakama Nation respectfully
19 requests that the Court grant its Motion for Preliminary Injunction.

20 21 **I. COUNTERSTATEMENT OF FACTS**

22 The Yakama Nation reasserts the facts as stated in its Motion for
23 Preliminary Injunction. ECF 16. In their Response, Defendants do not dispute
24 the Yakama Nation’s assertion that Defendants exercised criminal jurisdiction
25 over enrolled Yakama Members within the Yakama Reservation on September
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1 26, 2018. Despite this apparent concession, Defendants allege facts that are not
2 consistent with the record before the Court. The Yakama Nation offers the
3 following clarification of Defendants' exercise of criminal jurisdiction over
4 enrolled Yakama Members within the Yakama Reservation, and a discussion of
5 the current status of law enforcement and public safety within the Yakama
6 Reservation.

7
8 **A. Toppenish City Police arrested a Yakama Member for alleged crimes**
9 **arising within the exterior boundaries of the Yakama Reservation.**

10 Defendants do not contest that they obtained and executed a search warrant
11 against an enrolled Yakama Member's property within the Yakama Reservation,
12 but Defendants do claim that they did not arrest Ms. Leanne Gunn, an enrolled
13 Yakama Member, during the same incident. ECF No. 20 at 4. On September 26,
14 2018 at 3:38 am, after Toppenish City Police followed their stolen 'bait' car to a
15 residence within the exterior boundaries of the Yakama Reservation, Toppenish
16 City Police Officer Kyle Cameron reported that Toppenish City Police had
17 detained Ms. Leanne Gunn, an enrolled Yakama Member. ECF No. 16-1 at 70.
18 Despite the Yakama Nation Police Department's objections, Toppenish Officer
19 Cameron then told Yakama Nation Police Officer J. Williams that he was taking
20 Ms. Gunn back to the Toppenish Police Station to charge her. *Id.* at 88.

21 Yakama Nation Police Sgt. Alexander stayed at the property until the
22 Toppenish Police Department cleared the scene at 9:30 am. *Id.* at 89. Ms. Gunn
23 remained in detention at the Toppenish Police Station until Toppenish Officer
24 Cameron returned to the Toppenish Police Station after 9:30 am, at which point
25 Toppenish Officer Cameron read Ms. Gunn her constitutional rights and
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1 questioned her about her participation in the ‘bait’ car theft. *Id.* at 69. Toppenish
2 City Police detained Ms. Gunn, stated that they intended to charge her,
3 transferred her five (5) miles from the initial place of detention to the Toppenish
4 Police Station, held her for more than six (6) hours, read Ms. Gunn her
5 constitutional rights, and questioned her. Under this set of facts, it is without
6 question that Toppenish City Police arrested an enrolled Yakama Member for
7 alleged crimes arising within the exterior boundaries of the Yakama Reservation.

8
9 **B. The Yakama Nation has not declined to exercise its jurisdiction over**
10 **crimes involving Indians acting within the Yakama Reservation.**

11 Defendants mischaracterize the facts to suggest that the Yakama Nation
12 voluntarily declined to take the lead in the investigation of the events on
13 September 26, 2018. ECF No. 20 at 3. In fact, Yakama Nation Police objected to
14 Defendants’ extra-jurisdictional actions and declined to obtain a search warrant
15 because there was insufficient evidence. In other words, the facts show that
16 Toppenish Police arrested an enrolled Yakama Member and obtained a search
17 warrant from Yakima County for an enrolled Yakama Member’s property within
18 the Yakama Reservation over the objections of Yakama Nation Police.

19 At 3:11 am on September 26, 2018, Yakama Nation Police responded to
20 Toppenish Police’s request for assistance with a stolen car without knowing at the
21 time whether any Indians were involved. ECF No. 16-1 at 87. Yakama Nation
22 Police followed the vehicle to Yakama Member-owned property within the
23 Yakama Reservation, *Id.*, which could have raised jurisdictional issues but for the
24 property owner’s consent to a search of her property. It was not until Toppenish
25 Police informed Yakama Nation Police that they had detained an enrolled Yakama
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1 Member that the first jurisdictional concerns arose. *Id.* at 88. Yakama Nation
2 Police immediately informed Toppenish Police that they did not have jurisdiction,
3 but Toppenish Police persisted in their investigation. *Id.* Toppenish Police asked
4 the Yakima County Sheriff's Office to obtain a search warrant for the property,
5 but they refused. *Id.* Toppenish Police then asked Yakama Nation Police to
6 obtain a search warrant, but Yakama Nation Police stated there was insufficient
7 evidence to obtain a search warrant, making this determination after having
8 already searched the residence and adjacent structure with the voluntary consent
9 of the property owner and finding no evidence of criminal activity, and again
10 reiterating that Toppenish Police did not have jurisdiction. *Id.* at 88-89. The
11 Yakama Nation did not decline to take the lead in the investigation; regardless,
12 Defendants are not authorized to exercise jurisdiction that they do not have.

13 **C. The Yakama Nation recently identified public safety concerns within**
14 **the Yakama Reservation and dedicated significant additional resources**
15 **to address those concerns and reduce crime.**

16 The Yakama Nation Police Department exercises the Yakama Nation's and
17 United States' criminal jurisdiction within the Yakama Reservation pursuant to
18 the Yakama Nation's inherent sovereign and Treaty-reserved rights, and through
19 special law enforcement commissions issued by the United States Bureau of
20 Indian Affairs. *See* Declaration of James Shike in Support of Yakama Nation's
21 Reply to Motion for Preliminary Injunction at 2 (January 2, 2019) [hereinafter
22 "Shike Decl."]. The Yakama Nation currently has 22 officers, 4
23 investigators/detectives and 6 game wardens, all of whom receive training
24 through the Bureau of Indian Affairs Police Academy. Shike Decl. at 4. Officers
25 have also received, in relevant part, specialized training for criminal
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1 investigators, drug investigations, and special law enforcement commissions. *Id.*
2 The Yakama Nation Police Department provides the largest law enforcement
3 presence within the Yakama Reservation. Shike Decl. at 2.

4 Recently, the Yakama Nation heard concerns from Indian and non-Indian
5 residents of the Yakama Reservation regarding increased crime, primarily within
6 the White Swan Community. Shike Decl. at 4. To address these concerns, on
7 February 7, 2018 the Yakama Nation Tribal Council passed Resolution T-057-18,
8 which imposes enhanced criminal penalties for certain types of crimes, opens a
9 Yakama Nation Police Department substation in White Swan, imposes a White
10 Swan curfew for unaccompanied juveniles, and establishes a 24-hour crime
11 reporting hotline. ECF No. 20-1 at 9-10. The Yakama Nation also dedicated
12 significant additional resources to identify and remove condemned structures and
13 debris throughout the Yakama Reservation by its Zoning Program, Solid Waste
14 Program, Environmental Management Program, Water Code Administration,
15 Land Enterprise, Yakama Nation Police Department, and Yakama Nation
16 Housing Authority. *Id.* at 11.

17 This exercise of the Yakama Nation's sovereignty has resulted in the
18 successful improvement of public safety in the White Swan Community. Shike
19 Decl. at 5-6. After a heavy focus by federal and Yakama law enforcement on
20 Indian crime—and by Yakima County on non-Indian crime—within the White
21 Swan Community, arrests were made that significantly reduced the number of
22 emergency calls received by White Swan residents. Shike Decl. at 6-7. For those
23 calls that are still being received, the re-opening of the White Swan substation has
24 allowed Yakama Nation Police to provide faster response times and better
25 service. Shike Decl. at 6. Enforcement of the curfew has also resulted in less
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1 misdemeanor activity. *Id.* T-057-18 is a testament to the success that can be
 2 achieved when community leaders, politicians, law enforcement, and government
 3 programs all work together to address community issues.

4 II. ARGUMENT

5 A. The Yakama Nation has standing to challenge Defendants' unlawful 6 exercise of criminal jurisdiction.

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 8 Pursuant to Article III, Section 2 of the United States Constitution, federal
 9 courts may only exercise the “judicial power of the United States” over “[c]ases”
 10 and “[c]ontroversies.” U.S. Const. art. III, § 2; *Spokeo, Inc. v. Robins*, 136 S. Ct.
 11 1540, 1547 (2016). To determine whether a dispute qualifies as a justiciable
 12 case or controversy, courts apply a number of justiciability doctrines, including
 13 standing, *Spokeo*, 136 S. Ct. at 1547. Thus, standing is a justiciability doctrine
 14 rooted within, rather than apart from, the constitutional cases and controversies
 15 requirement. *Id.* Defendants mistakenly frame the case or controversy
 16 requirement as distinct from the standing requirement, thereby arguing
 17 repetitively that the Yakama Nation does not have standing. ECF No. 20 at 8, 12.
 18 However, the Yakama Nation has constitutional standing to challenge
 19 Defendants' *ultra vires* assertion and exercise of criminal jurisdiction over crimes
 20 involving Indians within the Yakama Reservation, and Defendants' arguments to
 21 the contrary rely on precedent that is plainly distinguishable from the facts of this
 22 case.

23 1. The Yakama Nation sustained injury in fact to its sovereignty that 24 is fairly traceable to Defendants' unlawful exercise of criminal 25 jurisdiction, which would be redressed by injunctive relief. 26

1 The United States Supreme Court recognizes three requirements for
2 constitutional standing. *Spokeo*, 136 S. Ct. at 1547. The plaintiff must have (1)
3 suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of
4 the defendant, and (3) that is likely to be redressed by a favorable judicial
5 decision. *Id.* The plaintiff bears the burden of establishing these elements. *Id.*
6 In this dispute, standing exists broadly because Defendants assert and are
7 exercising criminal jurisdiction that violates the Yakama Nation's inherent
8 sovereign and Treaty-reserved rights, and specifically because on September 26,
9 2018, Defendants infringed on the Yakama Nation's sovereignty by exercising
10 *ultra vires* criminal jurisdiction over Yakama Members within the Yakama
11 Reservation.

12 First, to establish injury in fact, the plaintiff must demonstrate "an invasion
13 of a legally protected interest" that is "concrete and particularized." *Id.* at 1548.
14 The injury must be "actual or imminent" rather than "conjectural or
15 hypothetical." *Id.* To be particularized, the injury "must affect the plaintiff in a
16 personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560
17 n.1 (1992). Beyond those foundational requirements, a plaintiff seeking
18 injunctive relief must demonstrate a significant likelihood of future injury in
19 order to satisfy standing. *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975,
20 980 (9th Cir. 2013). State infringement on a Native Nation's sovereignty has
21 been found to constitute concrete injury sufficient to confer standing.
22 *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2nd Cir.
23 2013); *see also*, *Moe v. Confederated Salish and Kootenai Tribes of Flathead*
24 *Reservation*, 425 U.S. 463, 469 n.7 (1976).

1 The injury that the Yakama Nation has sustained, and will continue to
2 sustain without injunction, is a violation of its sovereign legally protected rights.
3 In 1855, the Yakama Nation ceded certain rights to more than 10,000,000 acres
4 of land—roughly 1/3 of the State of Washington—for the reserved right of self-
5 government. Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12
6 Stat. 951 [hereinafter Treaty of 1855]. Any infringement of these inherent
7 sovereign and Treaty-reserved rights by foreign jurisdictions deprives the
8 Yakama Nation of the benefit of its bargain with the United States in the Treaty
9 of 1855, thereby threatening the Yakama Nation’s political integrity reserved
10 thereunder. In other instances, federal courts determined that assertions of state
11 taxing jurisdiction onto Native Nations constituted sufficient injury to establish
12 standing. *See Mashantucket Pequot Tribe*, 722 F.3d at 463; *Moe*, 425 U.S. at 469
13 n.7. Defendants’ incursions against Yakama Members on Yakama land
14 constitutes an even more egregious infringement on sovereignty. The injury is
15 not hypothetical or conjectural; actual investigation and arrest of enrolled
16 Yakamas by Defendants occurred on September 26, 2018. Such injury is clearly
17 particularized, as an attack on the Yakama Nation’s sovereignty is an attack on its
18 very existence.

19 Second, an injury is considered “fairly traceable” to the Defendants’ actions
20 where the injury cannot be caused by “the independent action of some third party
21 not before the court.” *See Allen v. Wright*, 468 U.S. 737, 757 (1984) (quoting
22 *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976)). But for
23 Defendants’ assertion of jurisdiction over crimes within the Yakama Reservation
24 involving Indians in violation of the Yakama Nation’s sovereignty, the Yakama
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1 Nation would not have suffered injury. ECF No. 20 at 7 (asserting jurisdiction
2 under *State v. Zack*).

3 Defendants admit they are continuing to investigate the September 26,
4 2018, incident and hold evidence pursuant to the Yakima County-issued search
5 warrant. ECF Nos. 20-1 at 2-3. Defendants have offered no evidence or
6 argument to counter the Yakama Nation's allegation that Defendants intend to
7 continue exercising *ultra vires* criminal jurisdiction over crimes involving
8 Indians. In fact, Defendants mischaracterize the Yakama Nation's successful
9 public safety efforts in a paternalistic attempt to suggest that the Yakama Nation
10 needs the State of Washington's law enforcement assistance regardless of
11 whether the State actually has such jurisdiction. ECF No. 20 at 18. Defendants'
12 violation of the Yakama Nation's sovereignty is plainly traceable to Defendants'
13 unlawful assertion and exercise of criminal jurisdiction over Yakama Members
14 within the Yakama Reservation on September 26, 2018.

15 Finally, a favorable decision by the Court would redress the Yakama
16 Nation's injury in satisfaction of the third standing element. An injunction
17 stopping Defendants from exercising criminal jurisdiction within the Yakama
18 Reservation over crimes involving Indians would prevent further violations of the
19 Yakama Nation's sovereignty. As such, the Yakama Nation has established that
20 it meets all requirements for standing under Article III: an injury in fact based on
21 a violation of sovereignty, that is fairly traceable to Defendants' illegal exercise
22 of criminal jurisdiction, and which would be remedied by injunctive relief.

1 **2. Civil rights cases wherein non-governmental plaintiffs challenge**
 2 **judicial and police conduct are distinguishable from this case.**

3 Defendants principally rely on three cases to assert that the Yakama Nation
 4 does not have constitutional standing: *O'Shea v. Littleton*, 414 U.S. 488 (1974);
 5 *Rizzo v. Goode*, 423 U.S. 362 (1976); and *Los Angeles v. Lyons*, 461 U.S. 95
 6 (1983). In *O'Shea*, a group of private citizens alleged that members of the county
 7 judicial system participated in systematic racial discrimination. 414 U.S. at 490.
 8 Plaintiffs only alleged past injury without any continuing and present adverse
 9 effects. *Id.* at 496. Future injury would only occur if the plaintiffs failed to abide
 10 by the law and faced prosecution again. *Id.* at 497. Similarly, in *Rizzo*, private
 11 plaintiffs alleged that city residents collectively endured mistreatment by police.
 12 423 U.S. at 366-367. There was a weak causal connection between the plaintiffs'
 13 and the defendants' conduct, as any ongoing or future injuries would likely be
 14 against members of the sizeable class that plaintiffs represented, rather than to the
 15 individual plaintiffs themselves. *Id.* at 371. Finally, in *Lyons*, a private citizen
 16 alleged that police had unlawfully used a chokehold against him. 461 U.S. at 97-
 17 98. As to future injury, the plaintiff merely feared that police would chokehold
 18 him a second time. *Id.* at 98. Again, the plaintiff would likely need to commit
 19 another crime before falling victim to the injurious conduct in the future. *Id.* at
 20 108.

21 These cases all dealt with private individuals alleging that the state violated
 22 their constitutional or civil rights by excessive force, discrimination, or other
 23 misconduct in the exercise of their otherwise lawful jurisdiction. The Yakama
 24 Nation's challenge, on the other hand, is a suit by a sovereign Nation against two
 25 foreign governments. The Yakama Nation is not arguing that Defendants have
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1 abused their authority; rather, Defendants have exercised authority they do not
2 have. Furthermore, the injury at issue here will certainly continue as Defendants
3 maintain they have jurisdiction within Yakama Nation's sovereign territory that
4 they no longer have following retrocession. The Yakama Nation has
5 constitutional standing to assert and defend its inherent sovereign and Treaty-
6 reserved rights against Defendants' illegal jurisdictional incursions in this case.

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8 **B. The Yakama Nation's Motion meets the *Winter* elements required for**
9 **issuance of a preliminary injunction.**

10 The Yakama Nation is likely to succeed on the merits when applying either
11 of the Ninth Circuit's tests for parties seeking a preliminary injunction. Under
12 the first test, the Yakama Nation demonstrated in its Motion for Preliminary
13 Injunction that it is likely to succeed on the merits, that it is likely to suffer
14 irreparable harm to its sovereignty without an injunction, that the balance of
15 equities tips in the Yakama Nation's favor, and that an injunction to protect the
16 rights reserved in the Treaty of 1855 is in the public interest. *See Winter v. Nat.*
17 *Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (providing basic standard for
18 preliminary injunction). Under the second test, the Yakama Nation established
19 that there are "serious questions going to the merits" along with a balance of
20 hardships tipping sharply in the Yakama Nation's favor. *See All. for Wild Rockies*
21 *v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (providing alternative
22 standard for preliminary injunction).

23 Defendants' arguments in response to the Yakama Nation Motion for
24 Preliminary Injunction do not negate the Yakama Nation's ability to meet these
25 standards. Defendants argue that the scope of a federal resumption of federal
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jurisdiction over Indian Country, pursuant to federal authority, should actually be interpreted under *state* law rather than *federal* law. Defendants offer no relevant legal support for that absurd contention. They argue without authority that the recent Washington State Court of Appeals decision in *State v. Zack* is now the status quo, and do so without regard for the years of work by the United States, Yakama Nation, State of Washington, Defendants, and other local law enforcement to implement and execute retrocession consistent with the Yakama Nation's position in this lawsuit. The Defendants' only response to the deference owed to the Department of the Interior's understanding of the scope of retrocession is an uncited footnote, ECF No. 20 at 16, and they provide no argument to counter the lack of deference owed to the Department of Justice Office of Legal Counsel's memorandum opinion, ECF No. 20 at 15-16. Defendants have failed to identify any legally relevant shortcomings in the Yakama Nation's arguments, and for that reason, the Court should grant the Yakama Nation's Motion for Preliminary Injunction.

1. Federal law governs the scope of retroceded jurisdiction.

Defendants concede that the "validity of a State's retrocession of jurisdiction is a question of federal law." ECF No. 20 at 14. However, Defendants assert that the issue of "what jurisdiction was retroceded by Washington" is a "question of state law." *Id.* For this proposition, Defendants effectively rely on three cases. An examination of each of these cases reveals that the authority is either materially distinguishable in terms of legal issues and facts, or is simply inapplicable; in any event, the holdings in these cases do not control this Court's analysis on the merits of the Yakama Nation's claims.

1 *Anderson v. Gladden*, 293 F.2d 463 (9th Cir. 1961), upon which Defendants
2 rely to argue that state law controls, is inapposite. ECF No. 20 at 14-15.
3 *Anderson* arose from a homicide occurring on the Klamath Indian Reservation in
4 1954, where the convicted defendant claimed that the state of Oregon lacked
5 jurisdiction to prosecute him. *Anderson*, 293 F.2d at 464. Congress had passed
6 Pub. L. 83-280 in the prior year and expressly conferred criminal jurisdiction in
7 Indian Country within the State of Oregon to the State, but the defendant argued
8 that the State was first required to pass legislation accepting Pub. L. 83-280
9 jurisdiction before it would become effective. *Id.* at 467. The Ninth Circuit
10 ultimately deferred to state law on whether Oregon State legislation was needed
11 after the federal government expressly conferred criminal jurisdiction in Indian
12 Country to Oregon under Pub. L. 83-280. *Id.* at 467-68. In other words,
13 *Anderson* does not concern retrocession—which had not even been enacted by
14 Congress yet—or the scope of retrocession. *Anderson* does not in any way
15 address how to determine the scope of jurisdiction the federal government
16 reassumed from Washington State through a retrocession process governed by
17 federal law and finalized by federal agency action.

18 Defendants' reliance on *Tyndall v. Gunter*, 840 F.2d 617 (8th Cir. 1988), and
19 *Chapman v. California*, 423 F.2d 682 (9th Cir. 1970) is likewise misplaced.
20 Tyndall was an Omaha Indian Tribal member convicted on October 15, 1970, of
21 crimes committed on the Omaha Indian Tribe Reservation. *Tyndall*, 840 F.2d at
22 618. Retrocession of state criminal jurisdiction over the Omaha Indian Tribe
23 Reservation became effective on October 25, 1970. *Id.* Tyndall was sentenced
24 for the crimes in state court the following day, on October 26, 1970. *Id.* Tyndall
25 argued that Nebraska violated his due process rights by sentencing him
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1 immediately after the State was divested of jurisdiction. *Id.* The central issue in
2 *Tyndall* was how Nebraska courts should handle the state criminal cases pending
3 at the time retrocession went into effect. *Id.* The Eighth Circuit determined that
4 “what Nebraska did with the criminal cases pending in its courts, is a question of
5 state law.” *Id.* There was no question in *Tyndall* regarding whether Nebraska had
6 criminal jurisdiction to arrest and prosecute Tyndall. By contrast, the issue here
7 is whether Defendants have any remaining jurisdiction over crimes involving
8 Indians in Yakama Indian Country after the federal government reassumed its
9 jurisdiction in accordance with the plain language of Washington’s retrocession
10 proclamation. ECF No. 16-1 at 31-37.

11 How *Chapman* may support Defendants’ position is unclear because the
12 issues in that case bear no resemblance to the issues before this Court. 423 F.2d
13 682. The central issue in *Chapman* was whether California, after convicting,
14 sentencing and granting parole to Chapman, waived its jurisdiction because
15 California handed Chapman over to the United States Immigration and
16 Naturalization Service. *Id.* at 683. After deportation to Canada, Chapman
17 illegally reentered the United States and California subsequently revoked his
18 parole. *Id.* The issue in *Chapman* was whether turning over a parolee to United
19 States immigration custody results in a *per se* waiver of state jurisdiction under
20 California law. *Id.* *Chapman* has nothing to do with the jurisdiction the federal
21 government reassumes over Indian Country following retrocession.

22 Defendants attempt to draw a distinction between the validity of
23 retrocession and its scope, arguing the former is a question to be resolved under
24 federal law and the latter is a matter of state law. But as shown *supra*,
25 Defendants cite no authority supporting that distinction. Because there is no
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1 authority indicating that the scope of jurisdiction the federal government
 2 reassumes under federal law is governed by state law and state courts, versus
 3 federal law and federal courts, federal law must control for the reasons cited in
 4 Yakama Nation's Motion for Preliminary Injunction. ECF No. 16 at 11-32.
 5 Briefly, (1) federal law expressly authorizes and governs retrocession, 25 U.S.C.
 6 1323(a); Exec. Order No. 11435, 33 Fed. Reg. 17339 (Nov. 23, 1968), (2) the
 7 federal government must act to effectuate retrocession, and (3) the federal
 8 government's determination regarding the jurisdiction it reassumed must be given
 9 deference. ECF No. 16 at 11-32. The rule handed down in 1976 that
 10 retrocession is a "question of federal law, not state law" and that the federal
 11 government's actions and interpretations control, remains undisturbed after more
 12 than four decades. *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd*
 13 *sub nom. on other grounds by Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191
 14 (1978).

15
 16 **2. *State v. Zack* is not the status quo and does not control this**
 17 **Court's analysis.**

18 Contrary to Defendants' assertion, the Washington State Court of Appeals
 19 decision in *State v. Zack* is not the status quo for jurisdiction within the Yakama
 20 Reservation. *See* ECF No. 20 at 17. The Assistant Secretary of the Interior, Mr.
 21 Kevin K. Washburn, announced his decision to reassume federal jurisdiction from
 22 the State within the Yakama Reservation on October 19, 2015, with the
 23 resumption taking effect on April 19, 2016. ECF No. 16-1 at 32-37. The Yakama
 24 Nation spent six months working with federal, state, and local law enforcement—
 25 including the Defendants—to implement retrocession consistent with the Yakama
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1 Nation's position in this lawsuit. Shike Decl. at 6. From April 19, 2016 to
2 September 6, 2018, when the Washington State Supreme Court denied a petition
3 for review in *State v. Zack*, the Yakama Nation understood Defendants' position
4 to be consistent with its own: the State did not retain criminal jurisdiction within
5 the Yakama Reservation for crimes involving Indian defendants and/or Indian
6 victims. *See, e.g.*, Declaration of Ethan Jones in Support of Yakama Nation's
7 Reply to Motion for Preliminary Inj. Ex. A (January 2, 2019) (repeatedly
8 expressing Yakima County's understanding of retrocession consistent with the
9 Yakama Nation's position in this case). Defendants' recent decision to change
10 their legal position, which immediately prompted this lawsuit, does not
11 unilaterally change the status quo that the Yakama Nation and other jurisdictions
12 spent two years implementing and executing.

13 Further, the Yakama Nation is not attempting to "re-litigate" *State v. Zack*.¹
14 ECF No. 20 at 15. The Yakama Nation was not a party to *State v. Zack*, as it was
15 a criminal proceeding against an individual. The Yakama Nation is asserting that
16 the state court wrongly decided this federal issue. In deciding *State v. Zack*, the
17 Washington State Court of Appeals ignored entirely the application of federal

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19 ¹ Defendants also claim that the Yakama Nation is attempting to re-litigate
20 *Confederated Tribes and Bands of the Yakama Nation v. Holder*, No. CV-11-3028-
21 RMP. ECF No. 20 at 17. *Holder* was a lawsuit principally against federal
22 agencies for failure to consult or seek prior approval before entering the Yakama
23 Reservation for federal law enforcement purposes. *Holder* pre-dates the United
24 States' resumption of jurisdiction within the Yakama Reservation, and was
25 therefore decided under an entirely different jurisdictional framework. *Holder* is
26 inapplicable to the present dispute.

1 law, canons of statutory construction regarding statutes impacting tribal rights,
2 federal agency deference, and the federal government's own determinations
3 regarding the scope of Washington State's retrocession. 2 Wn. App. 2d 667
4 (2018). In any event, a state court's interpretation of what is primarily a federal
5 issue does not control this Court's analysis. *United States v. Kiliz*, 694 F.2d 628,
6 629 (9th Cir. 1982) (federal courts are not bound by state court's interpretation of
7 state laws incorporated under the Assimilative Crimes Act, 18 U.S.C. §§ 7, 13).

8 Because federal law controls, and because the federal government was
9 unambiguous in its resumption of jurisdiction within the Yakama Reservation
10 over crimes involving Indians as defendants and/or victims, the Yakama Nation is
11 likely to succeed on the merits of its claim. Certainly it has presented "serious
12 questions going to the merits" along with a balance of hardships tipping sharply
13 in the Yakama Nation's favor given the ongoing violation of its Treaty rights and
14 inherent sovereignty. Therefore, the Yakama Nation has satisfied both of the
15 Ninth Circuit's tests for securing preliminary injunctive relief.

16
17 **3. The Yakama Nation is likely to suffer irreparable harm without
preliminary injunction relief.**

18 Defendants' refusal or failure to acknowledge the sovereign status of the
19 Yakama Nation highlights the fatal flaw in Defendants' analysis of the irreparable
20 harm element of preliminary injunctive relief. The irreparable harm the Yakama
21 Nation suffers in this case springs from the Yakama Nation's rights of inherent
22 sovereignty and its rights reserved in the Treaty of 1855.

23 The Ninth Circuit has observed that "[t]ribes are, foremost, sovereign
24 nations." *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091,
25 1096 (9th Cir. 2002), *as amended on denial of reh'g* 2002 U.S. App. LEXIS
26

1 15127 (July 29, 2002). One hundred eighty-seven years ago, the United States
2 Supreme Court first recognized that a Native Nation is “a distinct political society
3 . . . capable of managing its own affairs and governing itself.” *Cherokee Nation*
4 *v. Georgia*, 30 U.S. 1, 16 (1831). The Supreme Court described this sovereignty
5 as “the right of reservation Indians to make their own laws and be ruled by
6 them.” *Williams v. Lee*, 358 U.S. 217, 223 (1959).

7 The edifice of Defendants’ position on irreparable harm crumbles upon
8 acknowledgment of the Yakama Nation’s sovereign status. Exercise of
9 jurisdiction in violation of a Native Nation’s sovereignty is, in and of itself,
10 generally considered irreparable harm. *EEOC v. Karuk Tribe Hous. Auth.*, 260
11 F.3d 1071, 1077 (9th Cir. 2001); *see also Kiowa Indian Tribe of Oklahoma v.*
12 *Hoover*, 150 F.3d 1163, 1171–72 (10th Cir. 1998) (irreparable harm established
13 as a matter of law where sovereign Native Nation’s inherent right to self
14 government is interfered with); *Prairie Band of Potawatomi Indians v. Pierce*,
15 253 F.3d 1234, 1251 (10th Cir. 2001) (infringement of tribal sovereignty
16 constitutes irreparable injury); *Winnebago Tribe v. Stovall*, 216 F. Supp. 2d 1226,
17 1233 (D. Kan. 2002); *United States v. Washington*, 20 F. Supp. 3d 777, 789 (W.D.
18 Wash. 2004); *United States v. Michigan*, 534 F. Supp. 668 (W.D. Mich. 1982).
19 Defendants’ actions interfere with the Yakama Nation’s sovereignty. The
20 assertion of Defendants’ intent to continue such interference establishes the
21 requisite likelihood of continued irreparable harm required for preliminary
22 injunctive relief.

23 Defendants assert in their opposition that “federal courts may intervene in
24 the state judicial process only to correct wrongs of a constitutional dimension.”
25 ECF No. 20 at 15. They further contend that “the Yakama Nation has not
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1 articulated any wrong of a constitutional dimension.” *Id.* Defendants’ argument
2 fails.

3 The matter of “constitutional dimension” at issue here—and another
4 showing of irreparable harm—springs from specific rights reserved to the
5 Yakama Nation through the Treaty of 1855. The Treaty of 1855 is codified
6 federal law and is expressly subject to the protection of the Supremacy Clause to
7 the United States Constitution. U.S. Const. art. VI, cl. 2; *see also United States v.*
8 *Michigan*, 508 F. Supp. 480, 492 (W.D. Mich. 1980), *aff’d*, 712 F.2d 242 (6th Cir.
9 1983) (state government violation of treaty rights is a federal constitutional issue,
10 and “damage is presumed to be irreparable”).

11 The Treaty rights that Defendants have violated and promise to continue
12 violating were central components of the United States’ negotiation efforts to
13 convince Yakamas to cede title to their vast territory—namely, the reserved right
14 to be recognized as a sovereign Native Nation, and the reserved right to the
15 exclusive use and benefit of its Reservation. With respect to the former, the
16 preamble of the Treaty of 1855 identifies each of the fourteen Tribes and Bands
17 of the Yakama Nation, noting that “for the purposes of this treaty [they] are to be
18 considered as one nation, under the name of ‘Yakama.’” Treaty of 1855,
19 preamble. The latter right is reserved to the Yakamas in Article II, wherein the
20 reservation boundaries are described and “set apart . . . for the exclusive use and
21 benefit of said confederated tribes and bands of Indians, as an Indian
22 reservation.” Treaty of 1855, Art. II. The Treaty rights at stake here are the
23 supreme law of the land and are expressly protected under the United States
24 Constitution from state government interference or infringement.

25 A recent decision written by then-Circuit Judge Neil Gorsuch of the Tenth
26

Circuit is instructive—*Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015). The *Ute* case, like this one, arose from state government prosecution of a tribal member for offenses committed in Indian Country and a sovereign federally recognized Native Nation’s corresponding request to enjoin such prosecutions. *Id.* at 1004-05. The Tenth Circuit found “the harm to tribal sovereignty” arising from the state’s prosecution of Indians for actions arising in Indian Country, “perhaps as serious as any to come our way in a long time.” *Id.* at 1005. Citing to “the United States Constitution and the authority that document provides the federal government to regulate Indian affairs,” the Tenth Circuit found there was:

no room to debate whether the defendants’ conduct creates the prospect of significant interference with tribal self-government that this court has found sufficient to constitute ‘irreparable injury.’ By any fair estimate, that appears to be the whole point and purpose of their actions.

Id. (internal quotations and citations omitted).

Although *Ute* involved a long-standing boundary dispute, the central issue there is indistinguishable from the matter before this Court. Defendants’ *ultra vires* exercise of criminal jurisdiction over Indians in Yakama Nation’s territory directly interferes with the Yakama Nation’s inherent sovereign and Treaty-reserved rights. That interference, including Defendants’ promised future interference, establishes a certainty of irreparable harm to the Yakama Nation and its members in the absence of injunctive relief.

1 **4. The balance of equities tips in the Yakama Nation’s favor and**
 2 **an injunction is in the public interest.**

3 A careful consideration of the balance of equities counsels in favor of a
 4 preliminary injunction in this case. Defendants argue that an injunction would
 5 curtail law enforcement on the Yakama Reservation. ECF No. 20 at 18. This is
 6 not true. Upon the issuance of an injunction, Defendants would simply refer
 7 Indians suspected of crimes occurring within the exterior boundaries of the
 8 Yakama Reservation to the Yakama Nation or the United States government, as
 9 was required before Public Law 280’s passage. As noted *supra*, the true status
 10 quo is what all parties in this case and the United States acknowledged at the time
 11 of retrocession: the state and its subsidiary governments no longer have
 12 jurisdiction to arrest and prosecute crimes arising on the Yakama Reservation
 13 involving Indians as defendants and/or victims. Furthermore, balanced against
 14 whatever hardships we might speculate the Defendants could suffer is the
 15 “paramount federal policy of ensuring that Indians do not suffer interference with
 16 their efforts to develop . . . strong self government.” *Ute Indian Tribe of the*
 17 *Uintah & Ouray Reservation*, 790 F.3d at 1007.

18 Defendants’ argument on public policy are notably similar to arguments
 19 advanced by defendants in the *Ute* case. There, defendants argued that “an
 20 injunction would impede their ability to ensure safety on public rights-of-way.”
 21 *Id.* But the court noted there that nothing in the requested injunction “would
 22 prevent the State and County . . . from stopping motorists suspected of traffic
 23 offenses to verify their tribal membership status . . . [or] from referring suspected
 24 offenses by Indians to tribal law enforcement.” *Id.* The injunction in that case
 25 would simply prohibit the local governments from prosecuting Indians for
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1 offenses in Indian Country, “something they have no legal entitlement to do in
 2 the first place.” *Id.* Based on that, the *Ute* court held that “the defendants’ claims
 3 to injury should an injunction issue shrink to all but ‘the vanishing point.’” *Id.*
 4 quoting *Seneca–Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716
 5 (10th Cir. 1989). The same is true here.

6 The paramount policy of strong tribal self government supports the Yakama
 7 Nation’s position that an injunction here is in the public interest. *Seneca-Cayuga*
 8 *Tribe*, 874 F.2d at 716. The Yakama Nation negotiated a Treaty with the United
 9 States for the exclusive use and benefit of its Reservation. Since the time of the
 10 Treaty’s ratification, various federal policy developments have violated the
 11 express rights the Yakama Nation reserved to itself and its people. One of those
 12 developments was Public Law 83-280’s ratification and Washington State’s
 13 unilateral assumption of jurisdiction within Yakama Indian Country without the
 14 Yakama Nation’s consent. That wrong has been righted through the retrocession
 15 of jurisdiction the federal government accepted from Washington State.
 16 Defendants’ attempt to reverse that positive development directly interferes with
 17 the Yakama Nation’s right to make its own laws and be ruled by them. *State of*
 18 *Ariz. ex rel. Merrill v. Turtle*, 413 F.2d 683, 685 (9th Cir. 1969) (citing *Williams v.*
 19 *Lee*, 358 U.S. at 220). The requested injunction serves to prevent this
 20 interference and promote the public interest and paramount federal policy of
 21 strong Yakama self-government.

22 **C. No bond should be required.**

23
 24 Defendants request an unspecified bond under Fed. R. Civ. P. 65(c) based
 25 on a speculative fear of “unforeseeable civil liability” they believe they might be
 26

1 subject to for adhering to federal law on criminal jurisdiction in Indian Country
2 and honoring a federal court order. ECF No. 20 at 19. This Court has the
3 discretion to deny Defendants' request for security. *Johnson v. Couturier*, 572
4 F.3d 1067, 1086 (9th Cir. 2009). "The district court may dispense with the filing
5 of a bond when it concludes there is no realistic likelihood of harm to the
6 defendant from enjoining his or her conduct." *Jorgensen v. Cassidy*, 320 F.3d
7 906, 919 (9th Cir. 2003) (citing *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237
8 (9th Cir. 1999)).

9 Here, Defendants have presented no realistic likelihood of harm. First,
10 there will be no restrictions whatsoever on Defendants ability to discharge their
11 legal public safety obligations. Second, many federal laws already slow down
12 but do not outright impede law enforcement. The Fourth Amendment to the
13 United States Constitution, for instance, impacts Defendants' ability to meet its
14 public safety obligations. These impacts do not justify Defendants requiring of a
15 bond for their trouble. Accordingly, this Court should issue the requested
16 preliminary injunction without requiring any bond.

17 18 **III. REQUEST FOR RELIEF**

19 Yakama Nation requests that the Court grant its Motion for a Preliminary
20 Injunction enjoining Defendants, and all persons acting on Defendants' behalf,
21 from exercising criminal jurisdiction arising from actions within the exterior
22 boundaries of the Yakama Reservation and involving an Indian as a defendant
23 and/or victim.
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25
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1 DATED this 2nd day of January, 2019.

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