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

11 THE CONFEDERATED TRIBES  
12 AND BANDS OF THE YAKAMA  
13 NATION,

Plaintiff,

14 v.

15 KLICKITAT COUNTY, a political  
16 subdivision of the State of  
17 Washington; KLICKITAT COUNTY  
18 SHERIFF'S OFFICE, an agency of  
19 Klickitat County; BOB SONGER, in  
20 his official capacity; KLICKITAT  
COUNTY DEPARTMENT OF THE  
PROSECUTING ATTORNEY, an  
agency of Klickitat County; DAVID  
QUESNEL, in his official capacity,  
Defendants.

NO. 1:17-cv-03192-TOR

DEFENDANT'S REPLY RE  
MOTION TO DISMISS FOR  
FAILURE TO STATE A CLAIM  
PURSUANT TO FRCP 12(b)(6)  
AND FOR FAILURE TO JOIN  
NECESSARY PARTIES  
PURSUANT TO FRCP 12(b)(7)

21 **I. INTRODUCTION**

22 Pursuant to Rule 12(b)(7), the Defendants moved for dismissal of this  
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1 proceeding in its entirety if the Yakama Nation fails to join numerous county  
2 and state officials who are necessary parties pursuant to Rule 19. The  
3 Defendants concede that the word “necessary” should have appeared in the  
4 caption to its motion rather than the word “indispensable.” When, as here,  
5 jurisdiction can be obtained over the missing officials without defeating  
6 federal jurisdiction over the matter, the only issue is whether they are  
7 “necessary.”

9 Pursuant to Rule 12(b)(6), the Klickitat County Sheriff’s Office and  
10 Klickitat County Department of the Prosecuting Attorney moved for dismissal  
11 from the lawsuit because they lack capacity to be sued apart from Klickitat  
12 County. The County moved for dismissal from the suit because it does not  
13 have the power to limit or control who is arrested, detained, prosecuted,  
14 adjudicated, convicted, sentenced, or incarcerated for a crime committed  
15 anywhere within the borders of Klickitat County.

17 The Yakama Nation opposes both motions. Alternatively, the Yakama  
18 Nation contends that it should be allowed to amend its complaint to overcome  
19 any of the identified problems as to its action against the County, the Office of  
20 the Prosecuting Attorney, and the Office of the Sheriff. The Defendants  
21 submit this reply to their arguments. This reply is intended to supplement the  
22 analysis in the Defendants’ initial motion.  
23

**II. ARGUMENT**

**A. This Court’s Jurisdiction over the Klickitat County Sheriff and the Klickitat County Prosecuting Attorney is Sufficient to Prevent Illegal Arrests of Yakama Members by Those Officers and Their Deputies and Employees.**

The Yakama Nation acknowledges that binding precedent establishes that the Klickitat County Sheriff’s Office lacks the capacity to be sued apart from Klickitat County. *See* Yakama Nation’s Response to Defendant’s Motion to Dismiss (hereinafter referred to as “Response”), at 9. The Yakama Nation, however, refuses to acknowledge that the principle announced in the binding precedent applies to the “Klickitat County Department of the Prosecuting Attorney.” Their refusal flies in the face of Washington Court decisions. *See Worthington v. WestNet*, 182 Wn.2d 500, 515, 341 P.3d 995 (2015) (Justice Yu, dissenting) (noting that courts in Washington have concluded that “boards of county commissioners, the Snohomish County Council, the *Pierce County Prosecuting Attorney’s Office*, the Pierce County Department of Assigned Counsel, the Mason County Jail, and the Seattle Public Library, lack the legal capacity to be sued separate and distinct from the county itself. *See Day v. Pierce County Prosecuting Atty’s Office*, noted at 167 Wn. App. 1052 (2012)” (emphasis added)).

1           The Yakama Nation contends that *Broyles v. Thurston County*, 147 Wn.  
2 App. 409, 195 P.3d 985 (2008), supports its position that the prosecuting  
3 attorney's office may be sued apart from the county. Response, at 9-11. The  
4 *Broyles* case, however, did not involve a lawsuit against the Thurston County  
5 Office of Prosecuting Attorney. The office of the Thurston County  
6 Prosecuting Attorney was not a party and lacked the capacity to be sued apart  
7 from the county. *See Broyles*, 147 Wn. App. at 427-28. The sole issue in the  
8 *Broyle* appeal was whether Thurston County could be held liable to county  
9 employees for the discriminatory employment acts of the prosecuting  
10 attorney. This question was answered in the affirmative. *See Broyles*, 147  
11 Wn. App. at 430.

12  
13  
14           The Yakama Nation contends that if it cannot obtain an injunction  
15 against the "Sheriff's Office" it will "be left without recourse in preventing  
16 the reoccurrence of illegal arrests of Yakima Members." Response at 11.  
17 Presumably this concern also underlies the Yakama Nation's desire to precede  
18 against the "Klickitat County Department of the Prosecuting Attorney." Its  
19 concerns lack a legal basis.

20  
21           Washington law allows for actions to be maintained against the  
22 Klickitat County Prosecuting Attorney and the Klickitat County Sheriff.  
23 Washington law also establishes that an injunction that curtails the authority

1 of these officials, will also bind their deputies. *See* RCW 36.28.020 (“Every  
2 deputy sheriff shall possess all the power, and may perform any of the duties,  
3 performed by the sheriff, and shall serve or execute, according to law, all  
4 process, prescribed by law to be writs, precepts, and orders, issued by lawful  
5 authority.”); RCW 36.27.040 (“The prosecuting attorney may appoint one or  
6 more deputies who shall have the same power in all respects as their  
7 principal.”). Accordingly, there is no legal basis for denying the motion to  
8 dismiss Defendants Klickitat County Sheriff’s Office and Klickitat County  
9 Department of the Prosecuting Attorney from this action.  
10

11 **B. Klickitat County Lacks Control Over Actions Taken By the**  
12 **Prosecuting Attorney or the Klickitat County Sheriff on Behalf of**  
13 **the State of Washington.**

14 The Yakama Nation concedes that Klickitat County lacks control over  
15 actions taken by the prosecuting attorney when the prosecuting attorney  
16 represents the State in criminal cases. Response at 10. The Yakama Nation  
17 concedes the same rule applies with respect to the sheriff. Response at 11.  
18 The Yakama Nation does not dispute that Klickitat County lacks the authority  
19 to make arrests, detain individuals, prosecute, or sentence anyone for  
20 violations of State law. In light of these concessions, there is no amendment  
21 that Yakama Nation could make to its complaint that would prevent the  
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1 dismissal of Defendant “Klickitat County.” The county, therefore, should be  
2 dismissed from this action.

3 **C. Non-Party County and State Officials Will Continue to Exercise**  
4 **Criminal Jurisdiction over Yakama Members as Authorized by**  
5 **State Law Absent Their Joinder in this Lawsuit.**

6 The Yakama Nation contends that the Klickitat County Sheriff and  
7 Prosecuting Attorney’s realistic concern that they will be subject to  
8 inconsistent obligations absent the joinder of other county and state officials  
9 who exercise criminal jurisdiction within the Yakima Nation’s reservation is  
10 speculative. Response at 17. The Yakama Nation also contends that the other  
11 county and state officials have not demonstrated any interest in the subject  
12 matter of this action. *Id.*, at 13-14.

14 First, both Yakima County and the Washington Attorney General have  
15 demonstrated an interest in exercising criminal jurisdiction, post-entry of the  
16 Governor’s Proclamation, over adult Indians within the Yakama Nation’s  
17 lands for crimes committed upon fee property against non-Indian victims.  
18 Their interest is demonstrated by the Yakima County Prosecuting Attorney’s  
19 defense of the exercise of such criminal jurisdiction, assisted by the  
20 Washington Attorney General’s Office in *State v. Zack*, 2 Wn. App. 2d 667,  
21 668, 413 P.3d 65 (2018) (“Joseph A. Brusic, Prosecuting Attorney, and David  
22 B. Trefry, Deputy; and Robert W. Ferguson, Attorney General, and Fronda  
23

1 Woods, Assistant, for respondent.”), petition for review filed April 9, 2018,  
 2 Washington Supreme Court Cause No. 95792-4.

3         Second, the question of how to properly interpret the Governor’s  
 4 Proclamation is an issue of Washington state law. While the Yakama Nation  
 5 wishes the outcome had been otherwise, the Washington Court of Appeals  
 6 held that the Governor’s Proclamation retained State jurisdiction to prosecute  
 7 offenses occurring on deeded land within the boundaries of the Yakama  
 8 Reservation if either the adult defendant or the victim is a non-Indian. *Zack*, 2  
 9 Wn. App. 2d at 674. Because this Court’s opinions do not bind Washington  
 10 State courts,<sup>1</sup> an injunction issued against the Klickitat County Sheriff and  
 11 Prosecuting Attorney “would not control on issues of enforcement between  
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14 <sup>1</sup> See generally *Johnson v. Williams*, 568 U.S. 289, 133 S. Ct. 1088, 1098, 185  
 15 l. Ed.2d 105 (2013) (“views of the federal courts of appeals do not bind the  
 16 California Supreme Court when it decides a federal constitutional question”);  
 17 *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n. 11, 117 S. Ct.  
 18 1055, 137 L. Ed. 2d 170 (1997) (the Ninth Circuit’s view in *Yniguez v. State*  
 19 *of Ariz.*, 939 F.2d 727, 736-37 (9th Cir. 1991), that state courts are bound by  
 20 decisions of the federal circuit courts is not supported by precedent);  
 21 *Lockhart v. Fretwell*, 506 U.S. 364, 122 L. Ed. 2d 180, 113 S. Ct. 838, 846  
 22 (1993) (Thomas, J., concurring) (state courts not bound by a lower federal  
 23 court’s interpretation of federal law); *Owsley v. Peyton*, 352 F.2d 804, 805  
 (4th Cir. 1965) (“Though state courts may for policy reasons follow the  
 decisions of the Court of Appeals whose circuit includes their state ... they are  
 not obliged to do so.”); *State v. Glasmann*, 183 Wn.2d 117, 124, 349 P.3d 829  
 (2015) (“the Ninth Circuit’s decisions are not binding” on the Washington  
 Supreme Court).

1 Defendants and their fellow state jurisdictions in the future.” Response at 17-  
2 18.

3 To ensure full relief to all parties, to prevent the substantial risk that the  
4 Sheriff and the Prosecuting Attorney will be subjected to a substantial risk of  
5 incurring inconsistent obligations, and to defend society’s interest in the  
6 orderly, expeditious administration of justice, the motion to compel the  
7 joinder of the identified necessary parties should be granted. Because their  
8 joinder may be obtained without defeating this Court’s jurisdiction over this  
9 case, it would be inequitable to resolve the matter in their absence.  
10

### 11 **III. CONCLUSION**

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13 The Defendants respectfully request that this Court dismiss all claims  
14 against the Klickitat County, Klickitat County Sheriff’s Office and Klickitat  
15 County Department of the Prosecuting Attorney pursuant to Rule 12(b)(6).

16 The Defendants respectfully request that this Court dismiss this action  
17 in its entirety if the Yakama Nation does not join the following necessary  
18 parties by the date selected by this Court: (1) Honorable Joseph Brusic,  
19 Yakima County Prosecuting Attorney; (2) Honorable Brian Winter, Yakima  
20 County Sheriff; (3) Honorable Bob Ferguson, Washington State Attorney  
21 General; (4) Chief Law Enforcement Officer, Washington State Dept. of Fish  
22 and Wildlife; (5) Captain Sheri Lopez, Liquor and Cannabis Board; (6) Chief  
23



1 Larry Raedel, Natural Resources Police; (7) Chief John R. Batiste,  
2 Washington State Patrol; (8) Mac Pevey, Department of Corrections,  
3 Assistant Secretary, Community Corrections Division; (9) Kenneth W. Raber,  
4 Toppenish City Prosecutor; (10) Curt Ruggles, Toppenish Police Chief; (11)  
5 Tony Swartz, Wapato City Prosecutor; (12) Chief of Police, City of Wapato;  
6 (13) Greg Cobb, Union Gap Chief of Police; and (14) Bronson Brown, City of  
7 Union Gap Attorney.  
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9 Respectfully submitted this 5th day of June, 2018.  
10  
11

12 /s/ David R. Quesnel

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