Docket No. 19-35199

In the

United States Court of Appeals

For the

Ninth Circuit

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,
a Sovereign Federally Recognized Native Nation,

Plaintiff-Appellant,

v.

YAKIMA COUNTY, a Political Subdivision of the State of Washington and
CITY OF TOPPENISH, a Municipality of the State of Washington,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Eastern District of Washington,
No. 1:18-cv-03190-TOR · Honorable Thomas O. Rice

BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

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INTRODUCTION

By proclamation, Washington State retroceded jurisdiction over crimes on the Yakama Reservation with one exception: "criminal offenses involving non-Indian defendants and non-Indian victims." The United States accepted the "content of the proclamation," interpreting it to be "plain on its face and unambiguous," and declining the State's invitation to revise its terms. The United States then issued a memorandum and flow chart to state and local jurisdictions showing that the State had no criminal jurisdiction over Indians for crimes on the Yakama Nation Reservation after retrocession. Can a state court, local governments within the State of Washington, and a new federal administration now unravel retrocession by misinterpreting the proclamation to claw back state jurisdiction over Indians for crimes on the Reservation? The answer is no. The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") respectfully requests that the Court reverse the district court and remand this case.

A. Background

In the Treaty of 1855, Yakama Nation reserved, in relevant part, its criminal jurisdiction over Indians in Yakama Indian Country. Under Pub. L. 83-280 ("Public Law 280"), the State of Washington has exercised limited concurrent criminal jurisdiction over enrolled Yakama Members within the Yakama Reservation since 1963 without the Yakama Nation's consent. The Washington

State Legislature provided for the retrocession of Public Law 280 jurisdiction back to the United States in 2012, and the Yakama Nation immediately requested such a retrocession.

After significant negotiations, Governor Jay Inslee issued Proclamation 14-01 offering a partial retrocession of jurisdiction within the Yakama Reservation to the United States. R. at 215-17. Regarding criminal jurisdiction, Governor Inslee reserved state jurisdiction over "criminal offenses involving non-Indian defendants **and** non-Indian victims." R. at 216 (emphasis added). In a subsequent letter, Governor Inslee asked the United States to clarify that he actually meant to reserve State jurisdiction over "criminal offenses involving non-Indian defendants **and/or** non-Indian victims." R. at 219-220 (emphasis added). Instead of the State retaining criminal jurisdiction over crimes solely between non-Indians within the Yakama Reservation, as is stated in Proclamation 14-01, the State would retain concurrent criminal jurisdiction unless only Indians were involved.

The United States declined Governor Inslee's request. In accepting Washington State's offer of Public Law 280 jurisdiction, the United States rejected Governor Inslee's proposed revision, stating "it is the content of the Proclamation that we hereby accept in approving retrocession." R. at 226.

B. Retrocession And The State's Claw Back Of Jurisdiction

The federal government implemented retrocession on April 19, 2016, after which time Appellees did not have jurisdiction over crimes involving Indians within the Yakama Reservation. However, in 2018 the Washington State Court of Appeals issued a decision in *State v. Zack*, 2 Wn. App. 2d 667, 413 P.3d 65 (2018), *review denied*, 191 Wn.2d 1011 (2018), holding that the State retained concurrent criminal jurisdiction over crimes involving Indians on fee land within the Yakama Reservation following retrocession unless only Indians were involved in the crime. Emboldened by this decision, Appellees resumed enforcement of State laws against enrolled Yakama Members for crimes against non-Indians within the Yakama Reservation, which led to this dispute.

The scope of federal jurisdiction within federal lands following the federal government's resumption of Public Law 280 jurisdiction is controlled by 25 U.S.C. § 1323(a), Executive Order 11435, and applicable federal precedent. When considered under federal law, the United States' acceptance of Proclamation 14-01, codification of retrocession, and rejection of Governor Inslee's cover letter dictates that Appellees no longer have criminal jurisdiction over crimes by Indians against non-Indians within the Yakama Reservation.

JURISDICTIONAL STATEMENT

This case is an appeal from a February 22, 2019 Order Denying Preliminary and Permanent Injunction, and Judgment in a Civil Action by the United States District Court for the Eastern District of Washington. R. at 2-26. The District Court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331, 1362, 2201, and 2202. This Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1291, as this is an appeal from a final order and judgment of the District Court.

Appellant's Notice of Appeal was timely filed on May 12, 2019, in accordance with Fed. R. App. P. 3(a)(1). R. at 27-30.

ISSUES PRESENTED

1. The United States reassumed its Public Law 280 jurisdiction from the State of Washington over crimes committed by Indians within the Yakama Reservation. Years later, state courts and the new federal administration's officials unilaterally changed their interpretation of the scope of retrocession. Did the District Court err in holding that Defendant-Appellees retain criminal jurisdiction over crimes by Indians against non-Indians within the Yakama Reservation following retrocession?

2. Federal precedent interpreting the scope of Public Law 280 retrocessions counsels that the federal government's intent in reassuming such jurisdiction governs the scope of retrocession that the federal government ultimately effectuates. The District Court interpreted the United States' resumption of Public Law 280 jurisdiction within the Yakama Reservation using state precedent and state law instead, thereby deferring to state interests. Did the District Court err in applying a state-focused analysis rather than a federal-focused analysis when interpreting the scope of the United States' resumption of Public Law 280 jurisdiction within the Yakama Reservation?

STATEMENT OF THE CASE

In the Treaty of 1855, the Yakama Nation reserved the Yakama Reservation for its exclusive use and benefit, as well as all inherent sovereign rights not expressly ceded to the United States therein. 12 Stat. 951. Pursuant to these reserved rights, the Yakama Nation exercises criminal jurisdiction over Indians within Yakama Indian Country. Within Indian Country, the United States asserts concurrent criminal jurisdiction over Indians under the Indian Country Crimes Act, Major Crimes Act, and Assimilative Crimes Act. 18 U.S.C. §§ 13, 1152, 1153. "Indian Country" is defined, in relevant part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States . . . ." 18 U.S.C. § 1151(a).

In 1953, Congress passed Public Law 280 authorizing state assumption of limited criminal and civil jurisdiction of Indians in Indian Country without obtaining the affected Native Nation's free, prior, and informed consent.[1] Act of

[1] As a matter of policy, the Yakama Nation rejects the United States' assertion of plenary power to ignore the Treaty of 1855 and unilaterally modify jurisdiction within Yakama lands without the Yakama Nation's free, prior, and informed consent, as it did when passing Public Law 280. Congress's claim of such plenary authority is extra-Constitutional and founded in the morally and legally objectionable religious doctrine of Christian discovery, which should be repudiated by modern courts. *See Johnson v. M'Intosh*, 21 U.S. 543 (1823) (adopting the religious doctrine of discovery into federal law to deprive Native rights); *United States v. Kagama*, 188 U.S. 375 (1886) (finding no constitutional basis for plenary authority over Native Nations, the Court justified the plenary power doctrine using

August 15, 1953, 67 Stat. 588. Under this authority, and without the Yakama Nation's consent, the State of Washington unilaterally assumed general civil and criminal jurisdiction over Yakama Indian Country. Wash. Rev. Code § 37.12.010. Washington's assumption of jurisdiction over Indians on trust land within Yakama Indian County was limited to: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles on public roads. *Id*. The Yakama Nation unsuccessfully challenged Washington's unilateral assumption of jurisdiction in the Supreme Court of the United States. *Washington v. Conf. Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979).

In 1968, Congress authorized the United States to accept the retrocession of jurisdiction by any state desiring to relinquish Public Law 280 jurisdiction within Indian Country. 25 U.S.C. 1323(a).[2] Nearly 50 years later, the Washington State Legislature codified a process for the state to retrocede Public Law 280 jurisdiction. Wash. Rev. Code § 37.12.160. The Yakama Nation immediately

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the doctrine of discovery); United Nations Declaration on the Rights of Indigenous Peoples, Resolution 61/295 (Sept. 13, 2007) (requiring States to obtain Native Nations' free, prior, and informed consent before taking legislative actions that affect Native Nations).

[2] In 1968, Congress amended Public Law 280 to require the consent of Native Nations before a state would be permitted to assume any jurisdiction over Indians in Indian Country. Pub. L. 90–284, title IV, § 401, Apr. 11, 1968.

filed a retrocession petition with the State of Washington's Office of the Governor, asking the state to partially retrocede its civil and criminal jurisdiction over "all Yakama Nation Indian country." R. at 211.

Governor Jay Inslee issued Proclamation 14-01 in which the State of Washington agreed to retrocede certain aspects of state jurisdiction over Indians within the Yakama Reservation. As to criminal jurisdiction on the Yakama Reservation, Proclamation 14-01 by its plain and unambiguous terms sought to retain jurisdiction only when crimes involve "non-Indian defendants **and** non-Indian victims." R. at 216 (emphasis added). Governor Inslee sent Proclamation 14-01 to the Department of the Interior ("DOI") under a cover letter, dated ten days after the proclamation. This letter asked the United States to effectively revise Proclamation 14-01's terms concerning the State's retrocession of criminal jurisdiction to reserve state criminal jurisdiction whenever "non-Indian defendants ***and/or*** non-Indian victims" were involved. R. at 219-20 (emphasis in original).

Once a retrocession proclamation is presented to the United States, DOI has the exclusive authority to accept or refuse retrocession of all or part of Public Law 280 jurisdiction. The State plays no further role in the retrocession process after presenting its proclamation to the United States. Executive Order No. 11435 vests final authority for effectuating retrocession with the Secretary of the Interior. *See* Executive Order No. 11435, 33 Fed. Reg. 17339 (Nov. 23, 1968). Executive Order

11435 imposes two requirements before the federal government can finalize the retrocession process: (1) acceptance of retrocession is effected through publication in the Federal Register with such notice specifying "the jurisdiction retroceded and the effective date of the retrocession," and (2) where criminal jurisdiction is retroceded, acceptance may occur "only after consultation by the Secretary with the Attorney General." *Id.*

After Governor Inslee issued Proclamation 14-01, DOI accepted it on its plain terms and declined the state's invitation to revise it after the fact. In 2016, Mr. Kevin K. Washburn, DOI Assistant Secretary of Indian Affairs, formally rejected Governor Inslee's clarifying letter and instead accepted the plain terms of the Proclamation "pursuant to 25 U.S.C. § 1323 and authority vested in the Secretary of the Interior by Executive Order No. 11435 of November 21, 1968, 33 Fed. Reg. 17339, and delegated to the Assistant Secretary-Indian Affairs." R. at 222, fn. 2; R. at 226. In his acceptance letter, Assistant Secretary Washburn found that the scope of retroceded jurisdiction outlined in Proclamation 14-01 "is plain on its face and unambiguous." R. at 226. On October 20, 2015, after consultation with the Department of Justice ("DOJ"), DOI finalized retrocession through publication of notice in the Federal Register. This publication noted that it was accepting the retrocession "offered by the State of Washington in Proclamation by the governor 14-01," and that "[c]omplete implementation of jurisdiction will be

effective April 19, 2016." *See* Acceptance of Retrocession of Jurisdiction for the Yakama Nation, 80 Fed. Reg. 63583 (Oct. 20, 2015).

On the eve of retrocession's implementation, the United States Attorney for the Eastern District of Washington, Mr. Michael Ormsby, issued guidance documents to local law enforcement agencies explaining that following retrocession, the State of Washington no longer retained criminal jurisdiction to prosecute Indians for offenses occurring within the Yakama Reservation. R. at 229-31. Seven months later, the DOI Principal Deputy Assistant Secretary of Indian Affairs, Mr. Lawrence S. Roberts, issued a guidance memorandum confirming DOI's position that the State of Washington had retroceded all criminal jurisdiction within the Yakama Reservation over offenses whenever an Indian was involved as either a defendant and/or victim. R. at 233-34. Mr. Roberts included the following diagram of the framework for criminal jurisdiction within the Yakama Reservation:

Criminal Jurisdiction on the Yakama Reservation post-retrocession		
Victim	Defendant	
	Indian	**Non-Indian**
Indian	Tribe: Yes Federal: Yes State: No	Tribe: No* Federal: Yes State: No
Non-Indian	Tribe: Yes Federal: Yes State: No	Tribe: No Federal: No State: Yes
Victimless**	Tribe: Yes Federal: Yes State: No	Tribe: No Federal: No State: Yes

R. at 234.

The Yakama Nation Police Department exercises the Yakama Nation's and United States' criminal jurisdiction within the Yakama Reservation pursuant to the Yakama Nation's inherent sovereign and Treaty-reserved rights, and through special law enforcement commissions issued by the United States Bureau of Indian Affairs.[3] R. at 92. The Yakama Nation currently has 22 officers, 4 investigators/ detectives, and 6 game wardens, all of whom receive training through the Bureau of Indian Affairs Police Academy. R. at 94. Officers also receive specialized

[3] Yakama Nation's jurisdiction over Yakama Members and other Indians within Yakama Indian Country was not impacted by Public Law 280 and remains unchanged by retrocession.

training for criminal investigations, drug investigations, and special law enforcement commissions. R. at 94. The Yakama Nation Police Department provides the largest law enforcement presence within the Yakama Reservation. R. at 92. Following retrocession, Washington State Patrol has ceased conducting active law enforcement activity on the state's public rights of way within the Yakama Reservation, including on U.S. Route 97. R. at 94.

Recently, the Yakama Nation Tribal Council heard concerns from Indian and non-Indian residents of the Yakama Reservation regarding increased crime, primarily within the White Swan community. R. at 94. To address these concerns, the Tribal Council passed Resolution T-057-18, which imposes enhanced criminal penalties for certain types of crimes, opens a Yakama Nation Police Department substation in White Swan, imposes a White Swan curfew for unaccompanied juveniles, and establishes a 24-hour crime reporting hotline. R. at 94.

This exercise of the Yakama Nation's sovereignty has resulted in the successful improvement of public safety in White Swan. R. at 95-96. After a heavy focus by federal and Yakama law enforcement on Indian crime—and by Yakima County on non-Indian crime—in and around White Swan, arrests were made that significantly reduced the number of emergency calls received from White Swan residents. R. at 96-97. The Yakama Nation is able to provide faster

response times and better service on the reduced volume of emergency calls because of the re-opening of the White Swan substation. R. at 95.

Nearly two years after retrocession, the Washington State Court of Appeals for Division III issued a decision holding that the State retained criminal jurisdiction over crimes occurring on fee land within the Yakama Reservation whenever a non-Indian defendant **or** a non-Indian victim is involved. *State v. Zack,* 2 Wn. App. 2d 667 (emphasis added). In July of 2018, a few months after the state court's decision in *Zack*, the DOJ Office of Legal Counsel issued a memorandum opinion adopting the state court's reasoning, thereby disagreeing with DOI's position at the time it approved and effectuated retrocession and during the years of work spent implementing retrocession. R. at 236-52. Contrary to its trust obligations to the Yakama Nation[4], the Office of Legal Counsel did not consult with the Yakama Nation on a government-to-government basis prior to issuing the Opinion and did not give any prior notice to the Yakama Nation that the Opinion had been requested or was being prepared. R. at 193. DOJ's Office of Legal Counsel has undermined the decisions made by previous administration

[4] United States agencies have the obligation to consult on a government-to-government basis when making decisions affecting the Yakama Nation's sovereign and Treaty-reserved rights. *See, e.g., Confederated Tribes and Bands of the Yakama Nation et al. v. U.S. Dept. of Agric.*, 2010 WL 3434091, *4 (E.D. Wash., Aug. 30, 2010) (noting federal agencies must consult on a government-to-government basis with the Yakama Nation as "required by the Yakama Treaty of 1855 and federal Indian trust common law").

officials effectuating retrocession pursuant to statutory authority. These subsequent federal actions provide no statutory authority that would permit the federal government to unilaterally revisit retrocession after it is effectuated.

On September 26, 2018, City of Toppenish Police Department Officers responded to the theft of a government-owned "bait" car within the exterior boundaries of the Yakama Reservation. R. at 257. The vehicle was tracked to a Yakama Member-owned fee parcel where Toppenish Police arrested a passenger of the vehicle, whom they knew to be an enrolled Yakama Member, over the objections of Yakama Nation Police. R. at 257-58, 278. Toppenish Police then transported the Yakama Member back to the Toppenish Police Station where she was detained and questioned. R. at 257-59.

Toppenish Police asked Yakama Nation Police to obtain a search warrant through the Yakama Nation Court to search the Yakama Member-owned fee parcel. R. at 258. Yakama Nation Police declined the request, citing insufficient evidence to find probable cause of a crime. R. at 278-79. Over the protests of Yakama Nation Police, Toppenish Police sought and obtained a search warrant through the Yakima County Superior Court for the Yakama Member-owned fee parcel within the Yakama Reservation. R. at 259, 268-69. Toppenish Police did not disclose to the Yakima County Superior Court Judge that the property owner was an enrolled Yakama Member. R. at 269.

The Yakama Nation sued Appellees in the United States District Court for the Eastern District of Washington seeking declaratory and injunctive relief from their exercise of criminal jurisdiction over crimes involving Indians within the Yakama Reservation. R. at 371-93. The Yakama Nation thereafter filed a Motion for Preliminary Injunction. R. at 157-94. At the motion hearing, the Yakama Nation argued that the scope of federal resumption of Public Law 280 jurisdiction within Indian Country is subject to interpretation as a matter of federal law, not state law, and that under such an interpretation with appropriate deference given to DOI at the time it reassumed Public Law 280 jurisdiction, the United States reassumed criminal jurisdiction over crimes involving Indians. R at 36-49, 55-57. Appellees argued that Washington's assumption of Public Law 280 jurisdiction was valid, the State's retrocession of such jurisdiction was only partial, Governor Inslee expressed his intent for a limited retrocession subsequent to issuing his proclamation, and the United States recently changed its position on the scope of retrocession to be consistent with Defendants' positions. R. 49-53.

On the eve of the motion hearing set for February 15, 2019, Appellees produced a letter signed by the Assistant Secretary of Indian Affairs, Ms. Tara Sweeney, on February 12, 2019. R. at 60-61. Without citation to any legal authority permitting this reversal of federal policy, Ms. Sweeney purported to withdraw Acting Deputy Assistant Secretary Roberts' 2016 guidance

memorandum on retrocession. R. at 65. The letter also sought to change DOI's position on the scope of retrocession—repudiating the prior administration's decision and adopting instead the late-2018 memorandum opinion produced by the federal Office of Legal Counsel. R. at 65.

At the conclusion of the motion hearing, the District Court asked the parties whether any additional information was necessary before making a final decision in the case. R. at 53-54. Both parties agreed that they did not intend to supplement the record further. R. at 54-55.

On February 22, 2019, the District Court issued an Order denying the Yakama Nation's Motion for Preliminary Injunction. R. at 2-26. The District Court analyzed Assistant Secretary Washburn's 2015 Letter accepting retrocession and found that DOI declined to delineate the scope of retrocession. R. at 18-19. The District Court then interpreted Proclamation 14-01 by looking to Governor Inslee's 2014 cover letter revising the Proclamation, and the Washington State Court of Appeals' decision in *State v. Zack* for guidance. R. at 8, 19.

The District Court also performed a textual analysis of Proclamation 14-01 and found that reading the State's reservation of criminal jurisdiction as limited to crimes involving "non-Indian defendants and non-Indian victims" is inconsistent with the text and law on three accounts. First, the District Court incorporated reasoning from the Washington Court of Appeals that such a reading "'would result

in the Governor engaging in *ultra vires* action' as the offer of retrocession would be *returning* more jurisdiction to the United States than the State assumed under Public Law 280 . . . ." R. at 23 (emphasis in original).

Second, the District Court read the relevant language of Proclamation 14-01 in a historical context and the context of the entire proclamation, finding the plain reading to support a limited retrocession. R. at 24. Third, the District Court reasoned that because Proclamation 14-01 states that criminal jurisdiction is being retroceded "in part," the Yakama Nation's argument for full criminal retrocession was inconsistent with the Proclamation's text. R. at 24-25. Based on this reasoning, the District Court concluded "the State retained criminal jurisdiction over criminal offenses where any party is a non-Indian." R. at 25.

The Yakama Nation seeks review of the District Court's February 22, 2019 Order and Final Judgment determining that the United States did not reassume Public Law 280 jurisdiction over crimes within the Yakama Reservation where any party is an Indian. R. at 27-30.

SUMMARY OF THE ARGUMENT

I(A). This Court Should Review De Novo The District Court's Legal Analysis And Order.

The District Court denied Yakama Nation's requests for injunctive and declaratory relief based on its erroneous interpretation of the United States' resumption of Public Law 280 Jurisdiction from the State of Washington within the Yakama Reservation, which represents a question of law. This Court therefore reviews de novo the District Court's interpretation of this question of law.

I(B). The Scope Of Retrocession Is Governed By The United States' Intent At The Time Retrocession Is Accepted.

25 U.S.C. § 1323 and Executive Order 11435 empower the Secretary of the Interior to accept a state's offer to retrocede Public Law 280 jurisdiction. Federal precedent interpreting the scope of retrocessions under these laws is limited, but it sets out four overarching points on the central issue creating a federal-focused framework. First, the plain language of Section 1323 authorizes the United States to accept "all or any measure" of a State's Public Law 280-derived jurisdiction. Second, the Indian canons of statutory construction dictate that ambiguities or questions on the scope of retrocession should focus on federal action, federal law, and what is in the Yakama Nation's interest. Third, the Court uses a federal-focused analytical framework to determine the validity and scope of retroceded jurisdiction. Fourth, the scope of retrocession is fixed upon federal acceptance

under Section 1323 and Executive Order 11435. The District Court erred by failing to apply this federal precedent.

I(C). The Federal Government Determined That The Plain Language Of Proclamation 14-01 Governed The Scope Of Retrocession.

In accepting retrocession, DOI reassumed Public Law 280 jurisdiction based on Proclamation 14-01's plain language in accordance with its authority under Section 1323 and Executive Order 11435. Applying a federal-focused analysis and resolving any ambiguity to the Yakama Nation's benefit, it is apparent that DOI determined the state no longer had jurisdiction over crimes by Indians against non-Indians within the Yakama Reservation. The United States Attorney for the Eastern District of Washington affirmed this plain-language understanding of Proclamation 14-01 on the eve of retrocession. The Deputy Assistant Secretary of Indian Affairs followed suit later that year with the same affirmation regarding the scope of retrocession. The United States' intent in accepting retrocession was fixed upon acceptance. It cannot legally be changed years later without the Yakama Nation's consent.

The District Court erred by not focusing its analysis on the United States' actions in accepting retrocession. Focusing on this fixed point in time in interpreting the scope of retrocession when it was implemented leaves little doubt

that the State no longer has jurisdiction over crimes committed by Indians against non-Indians within the Yakama Reservation.

I(D). The Department Of The Interior's Acceptance Of Retroceded Jurisdiction Within The Yakama Reservation Should Be Afforded Judicial Deference.

The Federal Register notice codifying retrocession and the accompanying letter from the Assistant Secretary of Indian Affairs should be afforded *Chevron* deference. Under this standard, DOI's determination on the scope of retrocession offered in Proclamation 14-01 should be left undisturbed. The guidance memorandum the Deputy Assistant Secretary of Indian Affairs issued describing the scope of retrocession the United States accepted should be afforded *Skidmore* deference. Applying this standard, the scope of retrocession accepted by the United States in 2015 must be upheld. The reversal of these positions by a new federal administration years after the retrocession process was completed is not entitled to deference.

I(E). Proclamation 14-01 Should Be Interpreted In Accordance With Its Plain Meaning.

To the extent interpreting Proclamation 14-01 is necessary, it should be interpreted in accordance with its plain language, with ambiguities resolved against the drafter (i.e. the state) and interpreted to the Yakama Nation's benefit. Proclamation 14-01's plain language provides that the state does not retain jurisdiction over crimes committed by Indians within the Yakama Reservation.

The inconsistency perceived by the District Court in the State retroceding criminal jurisdiction over all Indians while only retroceding its jurisdiction "in part" is resolved by the State's express reservation of its pre-Public Law 280 jurisdiction over crimes by non-Indians against non-Indians within the Yakama Reservation.

II. Public Policy Supports A Plain Language Reading Of The United States Acceptance Of Proclamation 14-01.

Public Law 280's conveyance of criminal jurisdiction over Indians on the Yakama Reservation not only violated the inherent sovereign and Treaty-reserved rights of the Yakama Nation, it created a jurisdictional mess making law enforcement more difficult on the Yakama Reservation. Retrocession is an opportunity to clarify this jurisdictional confusion and, thereby, enhance public safety on the Yakama Reservation. Courts should not now unravel the progress achieved by retrocession in a way that prejudices the Yakama Nation's exercise of sovereignty and self-determination within its own lands.

ARGUMENT

I. THE UNITED STATES REASSUMED ITS PUBLIC LAW 280 CRIMINAL JURISDICTION OVER CRIMES BY INDIANS AGAINST NON-INDIANS WITHIN THE YAKAMA RESERVATION.

A. This Court Should Review *De Novo* The District Court's Legal Analysis And Order.

This Court reviews de novo the District Court's denial of Yakama Nation's request for declaratory relief. *Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1040 (9th Cir. 2004). This Court reviews for abuse of discretion the District Court's denial of Yakama Nation's request for a preliminary and permanent injunction. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *Cummings v. Connell*, 316 F.3d 886, 897 (9th Cir. 2003). In this context, "[a]n abuse of discretion will be found if the district court based its decision 'on an erroneous legal standard or clearly erroneous finding of fact.'" *Cottrell*, 632 F.3d at 1131) (quoting *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc)).

Because it is a question of law, this Court reviews de novo the District Court's conclusion regarding the United States' resumption of Public Law 280 jurisdiction from Washington State within the Yakama Reservation. *See In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 691 n.3 (9th Cir. 2011). Here, because the District Court's decisions on Yakama Nation's requests for a preliminary injunction, permanent injunction, and declaratory relief all relied on this question

of interpretation of federal and state law, a legal error in that analysis would affect the District Court's decision on all three forms of requested relief. *See Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1071 (9th Cir. 2016). This Court therefore reviews the District Court's order de novo. *Rucker v. Davis*, 237 F.3d 1113, 1118-19 (9th Cir. 2001) (en banc), *rev'd on other grounds*, *Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 130 (2002)); *In re McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc); *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc).

B. The Scope Of Retrocession Is Governed By The United States' Intent At The Time Retrocession Is Accepted.

Federal law authorizes the United States to "accept a retrocession by any State of all or any measure of criminal or civil jurisdiction, or both, acquired by such State" pursuant to Public Law 280. 25 U.S.C. § 1323(a). Executive Order 11435 empowers the Secretary of the Interior to exercise sole authority and discretion to accept such a retrocession of jurisdiction on the United States' behalf with two qualifications: (1) notice of the retrocession must be published in the federal register, and (2) the Secretary must consult with the United States Attorney General. E.O. 11435, 33 Fed. Reg. 17339 (signed Nov. 21, 1968).

Federal common law on how federal courts interpret the scope of retroceded jurisdiction under Section 1323 is limited, but the Court has relied on

precedent that interprets the scope of a retrocession by looking to the relevant actions of federal officials under federal law. *United States v. Lawrence*, 595 F.2d 1149 (9th Cir. 1979) (citing *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971)), and *Omaha Tribe of Neb. v. Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971)); *see also Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), *rev'd on other grounds by Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Interpreting the scope of retrocession by focusing on the federal government's actions is consistent with the United States' assumed plenary power over Indian affairs, under which Congress is not limited by the actions of states when legislating in the field of federal Indian law. *Oliphant v. Schlie*, 544 F.2d at 1012.

Critically, Congress intended Section 1323 to "benefit the Indians." *United States v. Brown*, 334 F. Supp. 536, 542 (D. Neb. 1971). This triggers application of the Indian canon of statutory construction that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003). As applied to Section 1323, this canon requires analyzing the scope of a retrocession by focusing on the Secretary of the Interior's actions and interpretations over and above those of the state, and by generally resolving ambiguities and conflicts in favor of tribes. *Brown*, 334 F. Supp. at 543.

In adopting the federal-focused perspective on interpreting retrocessions, the Court has principally relied on two district court decisions: *United States v. Brown*, 334 F. Supp. 536, and *Omaha Tribe of Neb. v. Village of Walthill*, 334 F. Supp. 823. *Lawrence*, 595 F.2d 1149; *Oliphant*, 544 F.2d 1007. Both of these cases stand for the principle that federal action, determinations, and interpretations regarding retrocession control the resolution of questions on the scope of retrocession. As these cases demonstrate, even if a state violates its own constitution in requesting retrocession, and even if the federal government does not accept retrocession in the manner and scope the state requested it, federal action controls these questions and retrocession does not turn on state law or even state intent.

There were two challenges to federal re-assumption of jurisdiction in Indian Country raised by the criminal defendant in *Brown*. First, Nebraska's "resolution" requesting retrocession was facially invalid under Nebraska's constitution, thereby invalidating the subsequent retrocession. *Brown*, 334 F. Supp. at 540-41. Second, the retrocession was invalid because Nebraska had requested retrocession over two reservations in Nebraska—the Omaha Reservation and the Winnebago Reservation—but the Secretary of the Interior only accepted jurisdiction over one of the reservations (the Omaha Tribe desired retrocession while the Winnebago Tribes did not). *Id.* at 538.

On the first question, the district court in *Brown* reasoned that the United States' plenary authority over Indian affairs conferred upon the federal government the power to accept any form of retrocession request it elected to accept; even requests that, albeit facially valid, violate a state constitution:

> The federal government, having plenary power over the Indians, had the power to prescribe any method or event it desired to trigger its own re-assumption of control over Indian affairs within a state. In fact, the triggering event could have been devoid of any mention of state action at all. . . . The plenary power of the federal government over Indian affairs, the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action, are all factors to be considered and lead the Court to the conclusion that the federal interpretation of the effectiveness of state action triggering the re-assertion of federal jurisdiction is and was controlling. . . .

Id. at 540-41.

Having determined that invalidity of a state's retrocession resolution under state law is immaterial because federal law and federal agency determinations govern the ultimate conclusions of the retrocession process exclusively, the court turned next to the question of whether the federal government had the authority to go beyond the scope of the retrocession Nebraska offered the federal government. The district court answered this question in the affirmative:

> The overall purpose of Chapter 15 of Title 25 U.S.C.A. and, specifically, that subchapter dealing with

> jurisdiction, was to benefit the Indian. It surely was not to make the Indian a political ping-pong ball between the state and federal governments. For these reasons, the Court interprets the provisions of 25 U.S.C.A. § 1323 to mean that the United States may assume all or any measure of the jurisdiction retroceded by a state as well as allowing the state to offer all or any measure of the civil or criminal jurisdiction acquired in 1953. This means that the action of the Secretary of Interior in assuming criminal jurisdiction over the Omaha but not the Winnebago Indian Reservation was within the authority provided by the statute.

Id. at 542. The *Brown* decision provides persuasive reasoning that under Section 1323, federal agencies charged with carrying out federal law must be given deference over and above state law and even state constitutions when it comes to retrocession. And those federal determinations should be considered the final word on retrocession to prevent making "the Indian a political ping-pong ball between the state and federal governments." *Id.*

In *Omaha Tribe*, the court dealt with, in relevant part, the same issues that it would dispose of in *Brown* six days later. *Omaha Tribe* held that interpretations under federal law dictated the validity and scope of retrocession, not state law and state interpretations. 334 F. Supp. at 831. The Omaha Tribe challenged local governments' continued assertions of jurisdiction over enrolled Omaha Members within the Omaha Reservation despite the United States' acceptance of retroceded jurisdiction under Section 1323(a). *Id*. at 828. The court rejected the state's

arguments that (1) the retrocession resolution was invalid because it violated Nebraska's constitution, and (2) the retrocession was invalid because the federal government had not accepted the terms of retrocession the state had offered. *Id*. at 829, 835. In rejecting these arguments, the district court made three observations regarding the legal landscape governing the resolution of retrocession disputes:

- "25 U.S.C. § 1323(a) should be read in light of the legislative and judicial policy of construing statutes in favor of Federal jurisdiction, see *Rice v. Olson*, 324 U.S. 786, 65 S.Ct. 989, 89 L.Ed. 1367 (1945)."
- "25 U.S.C. § 1323(a) should be read . . . according to the familiar rule that legislation affecting the Indians is to be construed in their interest. *United States v. Nice*, 241 U.S. 591, 599, 36 S.Ct. 696, 698, 60 L.Ed. 1192 (1916)."
- "A great deal of weight must be given to the conclusion of the Secretary of Interior as to the extent of his power and authority under 25 U.S.C. § 1323 and Executive Order 11435. *Dixon v. Cox*, 268 F. 285 (8th Cir. 1920)."

Omaha Tribe, 334 F. Supp. at 834. Ultimately, the court determined that the Secretary of the Interior reasonably relied on the State's offer of retrocession when it reassumed federal jurisdiction over the Omaha Reservation, and that the federal acceptance of retrocession need not follow the retrocession offered or intended by the state. *Id.* at 835. Consequently, the retrocession was held valid and the state no longer could exercise the jurisdiction complained of in that case.

Id. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed. *Omaha Tribe of Nebraska v. Walthill*, 460 F.2d 1327 (8th Cir. 1972).

The Court first adopted *Brown* and *Omaha Tribe*'s reasoning in *Oliphant v. Schlie*, 544 F.2d 1007. There the Court was faced with a question addressed in *Brown*: whether a state offer to retrocede jurisdiction that is invalid under state law automatically invalidates the Secretary's acceptance of said jurisdiction. *Id*. at 1012. The Court held that the validity of the state's actions was irrelevant, which the Court supported by adopting and extensively quoting from *Brown*. *Id*. While *Oliphant* was reversed on other grounds, the Ninth Circuit later confirmed that its analytical framework for retrocessions of jurisdiction using *Brown* was "still persuasive" and accordingly rejected any reliance on state law when interpreting the validity and scope of a state retrocession of jurisdiction. *United Lawrence*, 595 F.2d at 1151.

There is no precedent to suggest that the scope of retroceded jurisdiction can change after the United States reassumes such jurisdiction in accordance with Section 1323 and Executive Order 11435. If a state wants to claw back Public Law 280 jurisdiction that it retroceded to the United States, it must first seek the affected tribe's permission. 25 U.S.C. § 1326. In other words, when the United States accepts a state's retrocession of Public Law 280 jurisdiction, the scope of reassumed jurisdiction is fixed upon federal acceptance. Federal law does not

support requiring tribes to chase down a moving target of retroceded jurisdiction as states and federal administrations change their minds about the scope of a prior retrocession.

The foregoing can be distilled into four overarching points. First, the plain language of Section 1323 authorizes the United States to accept "all or any measure" of a State's Public Law 280-derived jurisdiction. Second, the Indian canons of statutory construction dictate that ambiguities or questions on the scope of retrocession should focus on federal action, federal law, and what is in the Yakama Nation's interest. Third, this Court uses a federal-focused analytical framework to determine the validity and scope of retroceded jurisdiction. Fourth, the scope of retrocession is fixed upon federal acceptance under Section 1323 and Executive Order 11435.

The District Court erred by not applying this federal-focused analysis here. The District Court's opinion does not reflect any consideration of *Brown*, *Omaha Tribe*, *Oliphant v. Schlie*, *Lawrence*, or the Indian canons of statutory construction. Rather, the District Court interpreted the scope of retrocession by principally relying on the State's Proclamation 14-01, Governor Inslee's rejected cover letter, and the State Court of Appeals' decision in *State v. Zack*. The District Court also does not grapple with evidence that the state actions and precedent upon which it relies reflect a changed understanding of the scope of

retrocession years after retrocession's scope was established by federal acceptance under Section 1323 and Executive Order 11435. The District Court's opinion reflects that its analysis is principally based on state law, not federal law; and that the District Court generally disregards or does not give proper deference to the Indian canons of statutory construction.

For example, the District Court raises the concern that a plain language reading of Proclamation 14-01 would result in the Governor engaging in an *ultra vires* action by expressly retaining jurisdiction that it did not assume under Public Law 280. R. at 20. The Yakama Nation challenges whether this is *ultra vires*, but regardless, we know from *Brown* that it does not matter whether the State's retrocession offer is lawful under state law. *Brown*, 334 F. Supp. at 540-41. Had the district court applied *Brown*, it would have focused on the United States' interpretation of Proclamation 14-01 as being "plain on its face and unambiguous," rather than relying on whether the State may have acted unlawfully in offering to retrocede its Public Law 280 jurisdiction. R. at 226. The district court erred by applying this state-focused, rather than federal-focused, analysis interpreting the scope of retrocession.

C. The Federal Government Determined That The Plain Language Of Proclamation 14-01 Governed The Scope Of Retrocession.

Applying the aforementioned federal-focused framework, Section 1323 and Executive Order 11435 empowered the Secretary of the Interior—and by delegation the Assistant Secretary of Indian Affairs—to accept all or any measure of Proclamation 14-01. While the evidence shows the United States understood the scope of retrocession at the time it was reassumed consistent with the Yakama Nation's arguments here, actions by the state and a new federal administration years after retrocession was effectuated have injected ambiguity into the scope of retrocession. Federal law does not support this changed understanding of the scope of retrocession years after the fact. However, to the extent such ambiguity exists, the scope of the United States' reassumed Public Law 280 jurisdiction should be interpreted to the Yakama Nation's benefit and against the state (i.e., against the drafter of the instrument creating the so-called ambiguity, Proclamation 14-01). Applying a federal-focused analytical framework for this purpose, the evidence shows that the State offered and the United States reassumed Public Law 280 jurisdiction over all crimes by Indians within the Yakama Reservation.

Starting with the Federal Register notice accepting Proclamation 14-01, the notice simply announces the decision without substantive detail. 80 Fed. Reg.

63583. However, Assistant Secretary Washburn's letter of October 19, 2016, notifying the Yakama Nation of retrocession evinces the United States' intent in resuming its Public Law 280 jurisdiction. R. at 222-27. It describes the primary effect of retrocession as "transfer[ring] back to the Federal Government Federal authority that the State had been delegated under Public Law 280." R. at 222. As a result of this transfer, Assistant Secretary Washburn noted "tribal leadership and the U.S. Attorney, rather than the State, county or municipal leadership, will now bear the responsibility . . . for public safety on the Yakama Reservation." R. at 224. The letter does not leave open the possibility of State criminal jurisdiction over Yakama members for crimes committed within the Yakama Reservation. This is further supported by Assistant Secretary Washburn's identification of the need for the Yakama Nation to develop mutual aid and cross-deputation agreements with local jurisdictions to ensure continued public safety. R. at 225. The need for such agreements is significantly diminished if the State retained most of its criminal jurisdiction within the Yakama Reservation following retrocession's implementation.

Assistant Secretary Washburn's letter also expressly rejected the State of Washington's invitation to revise the scope of Proclamation 14-01 to permit Washington and its subsidiary governments to claw back jurisdiction over Indians on the Yakama Reservation. R. at 226. In rejecting the State's request, Assistant

Secretary Washburn described Proclamation 14-01 as "plain on its face and unambiguous," and characterized any subsequent interpretation—like the interpretation requested by the state—as "unnecessary." R. at 226. Secretary Washburn confirmed that DOI was not going to revisit the state's Proclamation or accept the Governor's proposed revisions, noting: "[i]n sum, it is the content of the Proclamation that we hereby accept in approving retrocession." R. at 226. Secretary Washburn ended his letter by citing the federal Indian policy of self-determination and voicing strong support for the Yakama Nation assuming a greater role in criminal justice within the Yakama Reservation. R. at 226. This express intent would be undermined if the District Court's order is affirmed.

As evidence of the United States' understanding, on the eve of implementing retrocession the United States Attorney for the Eastern District of Washington, Mr. Michael Ormsby, confirmed his understanding that following retrocession the state would no longer have jurisdiction over crimes by Indians against non-Indians. R. at 229-31. In an email to Yakama Nation law enforcement and other local law enforcement departments, Mr. Ormsby commented on jurisdictional flow charts appended to his email that show the state does not have criminal jurisdiction over Indians within the Yakama Reservation regardless of the victim's Indian status. R. at 230. While irrelevant to the United States' understanding of retrocession, it is noteworthy that two days

after retrocession was implemented, the Yakima County Sheriff emailed similar flowcharts confirming his understanding that the state could no longer exercise criminal jurisdiction over Indians within the Yakama Reservation. R. at 101-04.

Later that same year, Principal Deputy Assistant Secretary of Indian Affairs, Mr. Lawrence Roberts, issued a memorandum detailing the practical effects of retrocession. R. at 233-34. In his guidance memorandum, Deputy Assistant Secretary Roberts stated "Washington State retains jurisdiction only over civil and criminal causes of action in which no party is an Indian." R. at 233. The purpose of the memorandum was to provide guidance to "Federal, tribal, state and local law enforcement in their implementation of the [Department of the Interior's] decision." R. at 233. Mr. Roberts then delivered a visual matrix as an aid for determining when the state does and does not have jurisdiction. R. at 234. The matrix was consistent with Mr. Ormsby's direction, affirming that the United States' position was consistent between DOI and DOJ that the state retains no jurisdiction over Indians on the Yakama Reservation.

Considering Assistant Secretary Washburn's federal register notice accepting retrocession, his letter affirming his intent in accepting retrocession, Mr. Ormsby's retrocession-scope email, and the Deputy Assistant Secretary's guidance memorandum reaffirming Assistant Secretary Washburn's intent, the record is unambiguous that on April 19, 2016, the United States intended to

reassume jurisdiction over crimes by Indians against non-Indians within the Yakama Reservation.

The District Court erred in its interpretation of the scope of retrocession by failing to deploy the aforementioned federal-focus in its analysis. The District Court's only interpretation of Assistant Secretary Washburn's letter is its conclusion, without analysis, that the letter is ambiguous and that Assistant Secretary Washburn deferred outright a determination of the scope of retrocession to the courts. Deputy Assistant Secretary Roberts' guidance memorandum is not mentioned, nor is the United States Attorney's email confirming his understanding of the scope of retrocession upon implementation. The District Court did not grapple with the significant evidence supporting the United States' understanding at the time retrocession was implemented that the State no longer had jurisdiction over crimes by Indians within the Yakama Reservation. Persuasive federal precedent suggests that the District Court should have focused its analysis on the United States' actions in accepting retrocession, which would have strongly supported interpreting the scope of retrocession at the time it was implemented such that the State does not have jurisdiction over crimes committed by Indians within the Yakama Reservation.

D. The Department Of The Interior's Acceptance Of Retroceded Jurisdiction Within The Yakama Reservation Should Be Afforded Judicial Deference.

1. The Assistant Secretary Of Indian Affairs' Federal Register Notice And Accompanying Letter Accepting Retroceded Jurisdiction Should Be Afforded Chevron Deference.

In *Chevron* the Supreme Court of the United States created a two-step inquiry for determining the level of deference owed to administrative statutory interpretations. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). First, if Congress has manifested a clear intent with the statutory language, reviewing courts must give force to that intent. *Id*. at 843. Second, if a statute is ambiguous or silent on a given question, the courts must ask whether the agency's interpretation of the statute is based on a permissible construction of the statute—which it is unless the construction is arbitrary and capricious. *Id*. at 843-44. "[C]onsiderable weight [is] accorded to [a federal] executive department's construction of a statutory scheme it is entrusted to administer . . ." *Klickitat Cty.*, No. 1:16-cv-03060, at 10 (E.D. Wash. Sept., 1, 2016) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001)).

Chevron deference does not apply to all agency actions—only those intended to carry the "force of law," and promulgated in the exercise of that authority. *Mead*, 533 U.S. at 226-227. In interpreting *Mead*, the Ninth Circuit has held that an interpretation has the force of law only when it has a precedential

effect that binds third parties. "[T]he precedential value of an agency action [is] *the* essential factor in determining whether *Chevron* deference is appropriate." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc) (quoting *Alvarado v. Gonzales*, 449 F.3d 915, 922 (9th Cir. 2006)) (emphasis in original).

Where an agency action merits *Chevron* deference, courts review the agency action to determine if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Mead*, 533 U.S. at 229 (citing *Chevron*, 467 U.S. at 842-845). Review under this standard is narrow and the reviewing court may not substitute its judgment for that of the agency. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001). Courts may reverse an agency action under the arbitrary and capricious standard only if the agency has relied on factors that Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010).

Applied here, Assistant Secretary Washburn's acceptance of retroceded jurisdiction by federal register notice and his accompanying letter warrant *Chevron* deference. The first agency action at issue is the United States'

resumption of jurisdiction within the Yakama Reservation under Section 1323(a) by publishing a federal register notice and sending a letter explaining the scope of reassumed jurisdiction. 80 Fed. Reg. 63583; Jones Decl. Ex. F. Such a retrocession necessarily eliminates some measure of the state's Public Law 280 jurisdiction and therefore carries the force of law under Section 1323(a) in satisfaction of the first prong of *Mead's* analysis for when *Chevron* deference should apply. Further, Assistant Secretary Washburn promulgated his federal register notice and letter as an exercise of this Section 1323(a) and Executive Order 11435 authority in satisfaction of the second requirement under *Mead*. The agency action also meets this Court's requirement that the action be binding on third parties because the state is bound to no longer exercise criminal jurisdiction over Indians within the Yakama Reservation following the United States' acceptance of retroceded jurisdiction. As a result, *Chevron* deference is appropriate.

Applying *Chevron*, DOI did not act in an arbitrary and capricious manner, abuse its discretion, or otherwise act outside law when it reassumed jurisdiction within the Yakama Reservation over crimes involving Indians to the exclusion of state jurisdiction under Public Law 280. Congress only required one prerequisite to the Executive Branch accepting retroceded jurisdiction under Section 1323(a)—the state offering to retrocede its Public Law 280 jurisdiction back to

the United States—and Assistant Secretary Washburn followed this requirement by acting after the state issued Proclamation 14-01. 25 U.S.C. § 1323(a). Assistant Secretary Washburn's accompanying letter discusses in detail his authority and the process for achieving retrocession, as well as his decision to allow for a six-month implementation period, thereby demonstrating that he carefully considered the important issues associated with retrocession. R. at 222-27. His decision is consistent with a plain reading of Proclamation14-01, which he characterized as "plain on its face and unambiguous." R. at 226. Further, such a plain reading cannot reasonably be considered implausible. Because DOI did not act in an arbitrary and capricious manner when it accepted retroceded jurisdiction over all crimes within the Yakama Reservation involving Indian defendants, the District Court erred in refusing to defer to the agency's 2016 interpretation of retrocession in this case.

2. The Deputy Assistant Secretary Of Indian Affair's Guidance Memorandum Interpreting The Scope Of Retroceded Jurisdiction Should Be Afforded Skidmore Deference.

Decisions not entitled to *Chevron* deference are still entitled to respect based on an agency's specialized expertise under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The decision whether to apply *Chevron* or *Skidmore* is assessed under the factors set forth in *Barnhart v. Walton*, 553 U.S. 212, 221-22 (2002): the "interstitial nature of the legal question, the related expertise of the

Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *See also Fournier v. Sebelius*, 718 F.3d 1110, 1120-21 (9th Cir. 2014).

Where an agency action does not warrant *Chevron* deference, including interpretations contained in advisory letters, policy statements, agency manuals, and enforcement guidelines, such actions are still accorded deference in light of their persuasiveness under *Skidmore*. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000); *Skidmore*, 323 U.S. at 140. Under a *Skidmore* inquiry, courts evaluate the deference owed to an agency action in light of "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* at 140; *see also Mead Corp.*, 533 U.S. at 228 (reaffirming *Skidmore* and directing that deference be assessed on "the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position . . .").

Deputy Assistant Secretary Roberts' guidance memorandum is due judicial deference under the *Skidmore* standard because it is thorough, sound, consistent with prior pronouncements, and otherwise persuasive. The memorandum is thorough insofar as it gives a history of the Assistant Secretary of Indian Affairs'

retrocession decision, explains the plain reading of Proclamation 14-01 called for by the Assistant Secretary, discusses that land status within the Yakama Reservation no longer matters to exercises of criminal jurisdiction following retrocession, and provides a detailed chart clearly explaining which governments have criminal jurisdiction in various situations. R. at 233-34.

The guidance memorandum is also sound in its reasoning. The United States accepted the full measure of jurisdiction retroceded by the state in Proclamation 14-01. R. at 222. The plain language of Proclamation14-01 is that the state retroceded full criminal jurisdiction unless the crime involves "non-Indian defendants **and** non-Indian victims." R. at 216 (emphasis added). Deputy Assistant Secretary Roberts' analysis simply applies this plain language to determine that the state no longer retains criminal jurisdiction when an Indian is involved as a defendant or a victim. R. at 233-34. Legal gymnastics are required to read Proclamation 14-01 otherwise.

The guidance memorandum is consistent with the positions taken by Assistant Secretary Washburn in accepting retroceded jurisdiction, by the Assistant United States Attorney Michael Ormsby, and by DOJ in related litigation. Assistant Secretary Washburn's letter noted that "tribal leadership and the U.S. Attorney, rather than the State, county or municipal leadership, will now bear the responsibility . . . for public safety on the Yakama Reservation." R. at

224. The United States Attorney for the Eastern District of Washington's email confirmed that the state has no jurisdiction over crimes by Indians within the Yakama Reservation. R. at 230. DOJ argued to protect the validity of retrocession in a motion to dismiss by pointing out the plain language of Proclamation 14-01 before dismissing any federal requirement to look beyond the proclamation when reassuming federal jurisdiction. R. at 324. All of these federal actions support the guidance memorandum's position that the United States reassumed concurrent jurisdiction over crimes by Indians within the Yakama Reservation.

The guidance memorandum is persuasive because it provides valid, logical, and well-reasoned explanations in reaching its interpretation. It addresses Proclamation 14-01, Assistant Secretary Washburn's letter, and the United States District Court for the Eastern District of Washington's decision in *Klickitat County v. U.S. Dep't of the Interior et al.* R. at 233-34. Relevant portions of Proclamation 14-01 were quoted, and a plain language interpretation was provided. R. at 233. Deputy Assistant Secretary Roberts then provides both a narrative and an illustrative depiction of DOI's position that "Washington state retains jurisdiction only over civil and criminal causes of action in which no party is an Indian." R. at 233-34. The memorandum's stated intent is to "provide law enforcement officers, prosecutors, and other officials tasked with maintaining

public safety on the Yakama Reservation a **simple tool** to promote consistency in their on-going implementation within the Yakama Reservation." R. at 233. (emphasis added). The guidance memorandum is thorough, sound, consistent with prior pronouncements, and persuasive, and accordingly, the Deputy Assistant Secretary's interpretation of the scope of retrocession is entitled to deference under *Skidmore*.

The District Court erred by not affording *Chevron* deference to Assistant Secretary Washburn's federal register notice and letter, nor *Skidmore* deference to Deputy Assistant Secretary Roberts' guidance memorandum. It is not apparent from the District Court's order that it considered applying this judicial deference to these agency determinations. Instead, the Court erroneously deferred to the state's failed attempt to change Proclamation 14-01 after it was issued, and the state Court's flawed reasoning in *Zack*. R. at 17-21. Had the District Court afforded deference to DOI's decision to accept retrocession, it would have had to grapple with the significant evidence at the time retrocession was implemented that the state no longer has jurisdiction over crimes by Indians within the Yakama Reservation.

3. The United States Office of Legal Counsel's Memorandum Opinion And Assistant Secretary Sweeney's Letter Should Not Be Afforded Deference.

The District Court erred by relying on the United States Office of Legal Counsel memorandum opinion issued on July 27, 2018—more than two years after retrocession was implemented—which takes a different position than the United States held at the time of retrocession. R. at 236-52. This Court is not bound by an opinion of the United States Attorney General. *Pueblo of Taos v. Andrus*, 475 F. Supp. 359, 364 (D.D.C. 1979). Congress did not expressly delegate any authority to the Attorney General in Section 1323(a), and Executive Order 11435 only requires the Secretary of the Interior to consult with the Attorney General prior to the Secretary of the Interior's decision on a request for retrocession. The Attorney General and DOJ have no authority to interpret or render decisions on retrocession or its scope, making *Chevron* deference inappropriate for lack of legal authority. 25 U.S.C. § 1323.

Further, the Office of Legal Counsel's memorandum opinion is contrary to the legal positions taken by DOJ for the first two years following retrocession, making *Skidmore* deference inappropriate for lack of consistency with prior agency actions. The Assistant Secretary of Indian Affairs consulted with the Attorney General under Executive Order 11435 prior to accepting retroceded jurisdiction from Washington, during which time the Attorney General did not

raise any concerns with the United States reassuming jurisdiction over crimes involving Indians. R. at 226. DOJ's only request was that the Yakama Nation be afforded an implementation period before retrocession took effect, and Assistant Secretary Washburn granted that request. R. at 226. The United States Attorney for the Eastern District of Washington then participated in the implementation of retrocession, and as aforesaid, he confirmed his understanding of retrocession consistent with the Yakama Nation's position in this case. R. at 229-31. At the time retrocession was implemented, DOJ understood the scope of retrocession in the same way that DOI and Yakama Nation understood it.

DOJ's supportive position was confirmed in 2016, when it defended DOI in a lawsuit by Klickitat County that challenged the validity of retrocession. R. at 307-27. In DOJ's Motion to Dismiss, it quoted the Proclamation to describe the scope of criminal jurisdiction retroceded by the state as including all offenses except those that involve "non-Indian defendants and non-Indian victims." R. at 312. DOJ then bolstered Assistant Secretary Washburn's decision to ignore the state's attempt to re-write Proclamation 14-01 by arguing:

> the Federal Government, in reassuming its own jurisdiction, need not look behind the terms of the State's retrocession in order for the acceptance of the retrocession to be valid: "In fact, the triggering event [for the federal resumption of jurisdiction] could have been devoid of any mention of state action at all."

R. at 324 (citing *United States v. Brown*, 334 F. Supp. at 540). DOJ's arguments to defend DOI's acceptance of retrocession support the Yakama Nation's arguments in this case, and are inconsistent with the position taken by the Office of Legal Counsel in its memorandum opinion. The Office of Legal Counsel's memorandum opinion does not bind this Court, and should not be afforded deference in this case.

The current administration's Assistant Secretary for Indian Affairs, Tara Sweeney, issued a letter on the eve of the ultimate hearing in this case purporting to withdraw former Deputy Assistant Secretary Roberts' 2016 guidance memorandum, which also should not be afforded deference. Ms. Sweeney provides no legal basis for purporting to change the scope of retrocession almost three years after the fact, making *Chevron* deference inappropriate for lack of legal authority. 25 U.S.C. § 1323. Her letter is also contrary to the legal positions taken by DOI for the first two years following retrocession, making *Skidmore* deference inappropriate for lack of consistency with prior agency actions. Ms. Sweeney's attempt to change the scope of retrocession years after the fact is not supported by law, and should not be afforded deference in this case.

E. Proclamation 14-01 Should Be Interpreted In Accordance With Its Plain Meaning.

1. Under Relevant Canons Of Construction, The Word "And" In Paragraph 3 Of Governor Inslee's Retrocession Proclamation Should Be Interpreted According To Its Plain Meaning.

Proclamation 14-01's plain language should be given effect and no further interpretation is necessary. *See The Pedro*, 175 U.S. 354, 364 (1899) (when the meaning of a proclamation's language is plain, "a proclamation is not open to interpretation since none is needed"). But to the extent inquiry is needed beyond the plain language of Proclamation 14-01, interpretation still favors Yakama Nation's position. Courts construing executive orders and proclamations typically turn to traditional canons of statutory interpretation for aid in their analysis. *See Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005) ("[a]s is true of interpretation of statutes, the interpretation of an Executive Order begins with its text.") (citing *United States v. Hassanzadeh,* 271 F.3d 574, 580 (4th Cir. 2001)). Three rules of construction govern the interpretation of Proclamation 14-01 and each of these rules cut against the district court's judgment.

The first relevant rule of statutory and proclamation interpretation is "to determine whether the language at issue has a plain and unambiguous meaning." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). A court's "inquiry must cease if the statutory [or proclamation] language is unambiguous and the statutory scheme is coherent and consistent." *Id.* (internal quotes and citations omitted).

Second, relevant here is the rule that when the language of an executive order or proclamation is ambiguous and "awkward," the "failure to state explicitly what was meant is the fault of the Government" and "[a]ny ambiguities should therefore be resolved against the Government." *See Cole v. Young*, 351 U.S. 536, 556 (1956). And third, the long-standing rule of construction "that treaties with Indians must be interpreted as they would have understood them . . . and any doubtful expressions in them should be resolved in the Indians favor" applies with equal force "to executive orders no less than treaties." *United States v. State of Washington*, 969 F.2d 752, 755 (9th Cir. 1992) (internal citations omitted) (quoting *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970)).

The dispute on the scope of the retrocession offered in Proclamation 14-01 arises from paragraph three's language the state itself drafted, approved, and dispatched as an official retrocession offer to the United States:

> Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, criminal jurisdiction over all offenses not addressed by Paragraphs 1 and 2. The state retains jurisdiction over criminal offenses involving non-Indian defendants **and** non-Indian victims.

R. at 216 (emphasis added). A state court of appeals in a criminal proceeding that did not involve a Yakama Member or the Yakama Nation as parties erroneously interpreted "and" in this paragraph to mean "or." *State v. Zack*, 2 Wn. App. 2d

667. The *Zack* court's reasoning is flawed and should not have controlled or been given deference by the court below. The plain meaning of "and" as used in Proclamation 14-01 is unambiguous and gives effect to the retrocession the United States accepted. 80 Fed. Reg. 63583.

To determine whether the court in *Zack* was correct in substituting the disjunctive "or" for the conjunctive "and" in Proclamation 14-01, the first step is to discern the plain meaning of the word "and." Although "and" may be interpreted in the disjunctive, the plain meaning of the word "and" is conjunctive: "unless the context dictates otherwise, the 'and' is presumed to be used in its ordinary sense." *Reese Bros. v. United States*, 447 F.3d 229, 235–36 (3d Cir. 2006) (quoting *Am. Bankers Ins. Group v. United States,* 408 F.3d 1328, 1332 (11th Cir. 2005)). Moreover, when terms are "connected by a conjunctive term . . . such as the term 'and' . . . courts normally interpret the statute as requiring satisfaction of both of the conjunctive terms to trigger application" of the provision. *United States v. Ganadonegro*, 854 F. Supp. 2d 1068, 1081–82 (D.N.M. 2012) (citing *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011)). And when a legislature chooses different language—here "and" versus "or"—courts may presume the legislature "understood the effect of this difference in language." *See id.* (citing *McNary v. Haitian Refugee Ctr., Inc.,* 498 U.S. 479, 495, (1991)).

Thus, when Proclamation 14-01 used the word "and" to join terms such as "non-Indian defendants" and "non-Indian victims," the satisfaction of both of those terms together in any criminal matter should be required before triggering the application of state criminal jurisdiction on the Yakama Reservation. Jurisdiction otherwise for crimes on the Yakama Reservation now lies with the federal government or the Yakama Nation and subject to those governments' discretion under applicable laws.

To the extent this provision of Proclamation 14-01 is deemed ambiguous, the responsibility for the "failure to state explicitly what was meant" falls squarely on the state's shoulders. Any such determined ambiguity should "be resolved against the government." *Cole*, 351 U.S. at 556. Instead of reading "and" to mean "or," as the District Court did in this case, the state should bear the responsibility for its failure to use a clearly disjunctive word.

Finally, given the nature of the issue—including the fact that jurisdiction with respect to Yakama Indian Country was transferred from the United States to Washington under Public Law 280 without the Yakama Nation's consent in violation of its inherent sovereignty and the Treaty of 1855—the long-standing rule of construction regarding treaties with Indians and "executive orders," or in this case proclamations, affecting tribal rights should be given effect. To the extent the use of the word "and" joining the terms at issue here is a "doubtful expression," the

term should be resolved in the Yakama Nation's favor. *State of Wash.*, 969 F.2d at 755. Here, this would again lead to the conclusion that Public Law 280 jurisdiction should be restored to the United States. "And" should mean "and," not "or" in this case.

2. Reading "And" Plainly and In The Conjunctive Sense Will Not Render The Proclamation Internally Inconsistent Or Nonsensical.

The *Zack* court reasoned that giving "and" its plain meaning would be inconsistent with the first sentence of paragraph three of the Proclamation, wherein the state retrocedes criminal jurisdiction "in part." This is not true and should not be given precedence over the plain meaning.

Before Public Law 280, the state had criminal jurisdiction over crimes by non-Indians against non-Indians within the Yakama Reservation. *United States v. McBratney*, 104 U.S. 621 (1882). This jurisdiction is exclusive of the Yakama Nation under *Oliphant*, 435 U.S. 191, wherein the Supreme Court deprived Native Nations of their inherent sovereign right to exercise criminal jurisdiction over non-Indians within their lands. When the state retroceded its criminal jurisdiction within the Yakama Reservation back to the United States, it expressly reserved its exclusive pre-Public Law 280 criminal jurisdiction whenever both non-Indian defendants and non-Indian victims are involved in a crime.

When the state said it retroceded its criminal jurisdiction "in part," it referred to jurisdiction in the broad sense rather than only jurisdiction assumed under Public Law 280. The state was preserving its pre-Public Law 280 jurisdiction over non-Indian versus non-Indian crimes. Put another way, interpreting both "and" and "in part" according to their usual and plain meaning simply confirms the state's intent to retain its pre-Public Law 280 criminal jurisdiction over non-Indian versus non-Indian crimes while returning the criminal jurisdiction framework within the Yakama Reservation back to its pre-Public Law 280 status. This is how the United States interpreted this language at the time it effectuated retrocession, and as noted *supra*, that interpretation is entitled to deference the District Court did not afford.

Further, the District Court erred in its reasoning that accepting the Yakama Nation's plain language reading of the Proclamation would result in the Governor taking an *ultra vires* action. R. at 23-24. The district court reasoned the Governor's Proclamation would be *ultra vires* because it "*return[s]* more jurisdiction to the United States than the state assumed under Public Law 280 and RCW 37.12.010." R. at 23. The district court relied on the same reasoning in *Zack*, which claimed retrocession could not remove state jurisdiction over non-Indians in Indian County. This line of reasoning is incorrect for three reasons.

First, under the plain language of the Proclamation, the state retroceded jurisdiction over crimes involving Indians within the Yakama Reservation, all of which is expressly within the scope of Public Law 280. 25 U.S.C. § 1321(a)(1) (describing the scope of Public Law 280 criminal jurisdiction as "criminal offenses committed by or against Indians . . ."). Neither the District Court nor the *Zack* court explain how this plain language reading returns more jurisdiction than the state assumed under Public Law 280.

Second, specific to the *Zack* Court's reasoning adopted by the District Court, neither court has explained why a retrocession cannot remove state jurisdiction over non-Indian crimes against Indians within the Yakama Reservation. Before Public Law 280, the state did not have criminal jurisdiction over crimes by non-Indians against Indians within the Yakama Reservation. *Williams v. United States*, 327 U.S. 711, 714 (1946). If the state assumed such jurisdiction under Public Law 280, that jurisdiction is subject to retrocession to the United States as a matter of federal law. 25 U.S.C. § 1323(a).

Third, the Proclamation's language in question is a reservation of the state's pre-Public Law 280 jurisdiction within the Yakama Reservation. Neither the district court nor the *Zack* court explain why it is beyond the Governor's power to affirm that the state is maintaining its jurisdiction over non-Indians that pre-existed Public Law 280. This clear affirmation of retained jurisdiction serves the

important public policy interest of ensuring all jurisdictions understand that criminal jurisdiction within the Yakama Reservation is returning to its pre-Public Law 280 character. A plain language reading of the Proclamation does not result in an *ultra vires* action by the state.

Notwithstanding, this *ultra vires* analysis is unnecessary. As noted *supra*, under the relevant federal precedent this court has adopted with respect to analysis of the validity of retrocession, violations of state law have no effect on the federal government's process of accepting a facially valid retrocession proclamation and effectuating the retrocession process at a fixed point in time. *Brown*, 334 F. Supp. at 540-41; *see also Omaha Tribe*, 334 F. Supp. at 834. Ultimately, the federal retrocession process and the federal interpretation of the validity and scope of retrocession trump questions of state-law legality, including among other things, questions of whether the scope of a governor's proclamation is *ultra vires*. In short, the federal government has the authority to accept all or any amount of Public Law 280 jurisdiction back from the state government, even if the state committed an *ultra vires* act in its retrocession process.

II. PUBLIC POLICY SUPPORTS A PLAIN LANGUAGE READING OF THE UNITED STATES' ACCEPTANCE OF PROCLAMATION 14-01.

The United States promised the Yakama Nation the exclusive use and enjoyment of the lands reserved to the Yakama People in exchange for cession of the balance of the Yakamas' homeland that the United States needed to support its manifest destiny agenda and pave the way for the establishment of what is now the State of Washington. Art. II, Treaty of 1855. The United States violated that promise by enacting Public Law 280, inserting a foreign entity into the Yakama Nation's exclusive lands and allowing that foreign entity to assume jurisdiction over Yakama Members without the Yakama Nation's free, prior, and informed consent. Public Law 280 was passed in the same year that Congress formally adopted a policy of "termination" aimed at subjecting Native Nations to the same laws as other citizens of the United States and ending the United States' trust responsibility to those Nations. 67 Stat. 132 (1953).

The State's unilateral annexation of jurisdiction over Indians on the Yakama Reservation not only violated the Yakama Nation's sovereign and Treaty-reserved rights, but it also created significant confusion for local law enforcement that has never been resolved. Before Public Law 280, the State only had jurisdiction within

Yakama Indian Country over crimes between non-Indians. Public Law 280's partial cession of jurisdiction to the states inserted confusion into the Indian Country criminal jurisdiction framework, and Washington State's Public Law 280 scheme was particularly egregious. Suddenly, law enforcement was required to consider a complex jurisdictional scheme involving land status, type of crime, and the Indian status of suspects and victims every time they responded to an alleged crime. For example, mistaken or delayed land status determinations in the heat of the moment could allow lawbreakers to evade justice or cause further danger to people in the surrounding communities.

In what should have been an attempt to correct this ongoing affront to the Yakama Nation's sovereignty, the state issued Proclamation 14-01 with plain terms ceding back to the United States criminal jurisdiction over Indians within the Yakama Reservation. The state's attempt to claw back that jurisdiction is an attempt to turn back the clock and continue to impose a system on the Yakama Nation that is not only repugnant to the Yakama Nation's sovereignty, but stands to further perpetuate the United States' violation of the Treaty promises made to the Yakama Nation in 1855.

Retrocession is the mechanism to fix the problems springing from the complexity of several governments claiming concurrent jurisdiction within the exterior boundaries of the Yakama Reservation. This mechanism is consistent with the United States' rejection of termination-era policies and its current policies of consultation and tribal self-determination in furtherance of the United States' trust responsibility to Native Nations.

By accepting Proclamation 14-01's plain terms and permitting the state to only retain criminal jurisdiction within the exterior boundaries of the Yakama Reservation over non-Indians, DOI took an important first step toward resolving the jurisdictional mess that Public Law 280 caused. Even while the state attempted to walk back Proclamation 14-01, the various governments charged with enforcing public safety laws on the Yakama Reservation worked together for more than a year to prepare for and implement retrocession as DOI accepted it. If the District Court's decision in this case is allowed to stand, those agencies will have to go back to a more complicated and less safe jurisdictional scheme.

The Yakama Nation did not ask for the jurisdictional chaos federal and state governments have thrust upon it time and again, including Public Law 280 and retrocession. The Yakama Nation is now left to clean up this mess and that is

precisely what the instant litigation is aimed at doing. Washington State issued a proclamation whose plain terms retrocede jurisdiction over crimes by Indians within the Yakama Reservation. The United States accepted Proclamation 14-01's plain terms. Courts should not now unravel the progress achieved by retrocession in a way that prejudices Yakama Nation's exercise of sovereignty and self-determination within its own lands. This Court should affirm DOI's acceptance of retrocede criminal jurisdiction over all Indian defendants within the Yakama Reservation, including crimes by Indians against non-Indians.

CONCLUSION

For the reasons above stated, the Yakama Nation respectfully requests that the Court reverse the District Court and hold that Defendants do not have concurrent criminal jurisdiction within the Yakama Reservation over crimes involving Indians following the United States' resumption of such "Public Law 280" jurisdiction.

Date: June 20, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,722 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

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STATEMENT OF RELATED CASES

Appellant is unaware of any related cases within the Ninth Circuit.

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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