Case No. 19-35807 x 19-35821

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,
Plaintiff/Cross-Appellant/Appellee,

v.

KLICKITAT COUNTY, et al.,
Defendants/Appellees/Cross-Appellants.

Appeal from the United States District Court
for the Eastern District of Washington, Yakima
No. 1:17-cv-03192 (Hon. Thomas O. Rice)

OPENING BRIEF ON CROSS-APPEAL OF KLICKITAT COUNTY, ET AL.

Rylan Weythman, WSBA No. 45352
FOSTER GARVEY PC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3296
Telephone: (206) 447-4400
Email: rylan.weythman@foster.com

Pamela B. Loginsky, WSBA No. 18096
KLICKITAT COUNTY SPECIAL
DEPUTY PROSECUTING ATTORNEY
206 Tenth Avenue SE
Olympia, Washington 98501
Telephone: (360) 753-2175
Email: pamloginsky@waprosecutors.org

Attorneys for Defendants/Cross-Appellants
Klickitat County, et al.

CORPORATE DISCLOSURE STATEMENT

Defendants submit this Fed. R. App. P. 26.1 Disclosure Statement by advising that Klickitat County is a municipality within the State of Washington, and the other defendants are individuals; therefore there are no parent corporations or publicly held corporations that own 10 percent or more of their stock.

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INTRODUCTION

This appeal requires the Court to determine whether Klickitat County lawfully exercised criminal jurisdiction when it arrested a Yakama Nation member near the town of Glenwood, Washington. The area in and around Glenwood is often referred to as "Tract D."

To resolve this appeal, the Court must decide whether the arrest took place within the current boundaries of the Yakama Reservation. To do so, the Court must answer two questions:

1. Did the parties to the Yakama Treaty of 1855 intend to include Glenwood in the Reservation?

2. Did Congress subsequently adopt a boundary that excludes Glenwood from the Reservation?

Because the answer to either inquiry leaves Glenwood outside the Reservation, the District Court's boundary determination must be reversed.

The Glenwood Valley has never been part of the Reservation. Both the Treaty and the concurrently created Treaty Map require the Reservation's southwest boundary to follow the divide between the Klickitat and Pisco watersheds. The location of that divide is undisputed, and any boundary touching it necessarily excludes Glenwood. The contemporaneous historical evidence demonstrates that, for at least 75 years following the Treaty, both Treaty parties understood Glenwood to be excluded. Following an erroneous survey in 1890,

Yakama leaders repeatedly advocated a boundary excluding Glenwood. In 1904, Congress adopted Yakama's claimed boundary for the express purpose of settling the dispute. The boundary it adopted excludes all of Tract D.

Ignoring the plain language of the Treaty, the clear depiction on the Treaty Map, and the contemporaneous historical record, the District Court erroneously ruled that the Glenwood Valley was included in the Reservation pursuant to the Treaty. It further erred when it held that Congress did not set the western boundary in 1904. The District Court's rulings on the boundary should be reversed.

Before trial, the District Court also ruled that Washington State retained criminal enforcement jurisdiction on the Reservation over offenses involving either a non-Indian defendant or a non-Indian victim. That ruling, which is consistent with the decisions of Washington's appellate courts and with the legal positions of the United States and Washington, should be affirmed.

JURISDICTIONAL STATEMENT

The U.S. District Court for the Eastern District of Washington ("District Court") had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 2201, and 2202. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Treaty interpretation requires the court to determine the parties' intent when the treaty was signed. Here, the language of the Treaty, the Treaty Map, and statements at the Treaty Council all require the Reservation boundary to traverse north of Glenwood along the Pisco-Klickitat Divide. The contemporaneous historical record further demonstrates the Treaty parties understood the boundary to exclude Glenwood. Did the District Court err in holding that the 1855 Treaty established a Reservation boundary that includes Glenwood and does not touch the Pisco-Klickitat Divide?

2. A Congressional Act changes a reservation boundary when the intent to do so is clear from the Act's language or from the circumstances surrounding its passage. In 1904, Congress settled the longstanding dispute over the Reservation's western boundary by recognizing Yakama's claim to "the disputed tract" and directing that the Reservation's boundary be "marked out" at the western edge of that tract—thereby excluding Tract D. Did the District Court err in holding that the 1904 Act did not set the Reservation boundary?

3. Public Law 280 permitted the State of Washington to assume certain jurisdiction over Indian Country. Pursuant to 25 U.S.C. 1323(a), the United States may accept any measure of PL-280 jurisdiction that a state offers to retrocede. Washington's offer of retrocession pertaining to Yakama reserved PL-280 jurisdiction over crimes involving "non-Indian defendants and non-Indian

victims." Did the District Court correctly interpret the State's offer as retaining PL-280 jurisdiction over criminal offenses involving non-Indian defendants and/or non-Indian victims?

STATUTORY AND REGULATORY AUTHORITIES

Relevant statutory and regulatory authorities appear in the addendum.

STATEMENT OF THE CASE

I. Underlying Action

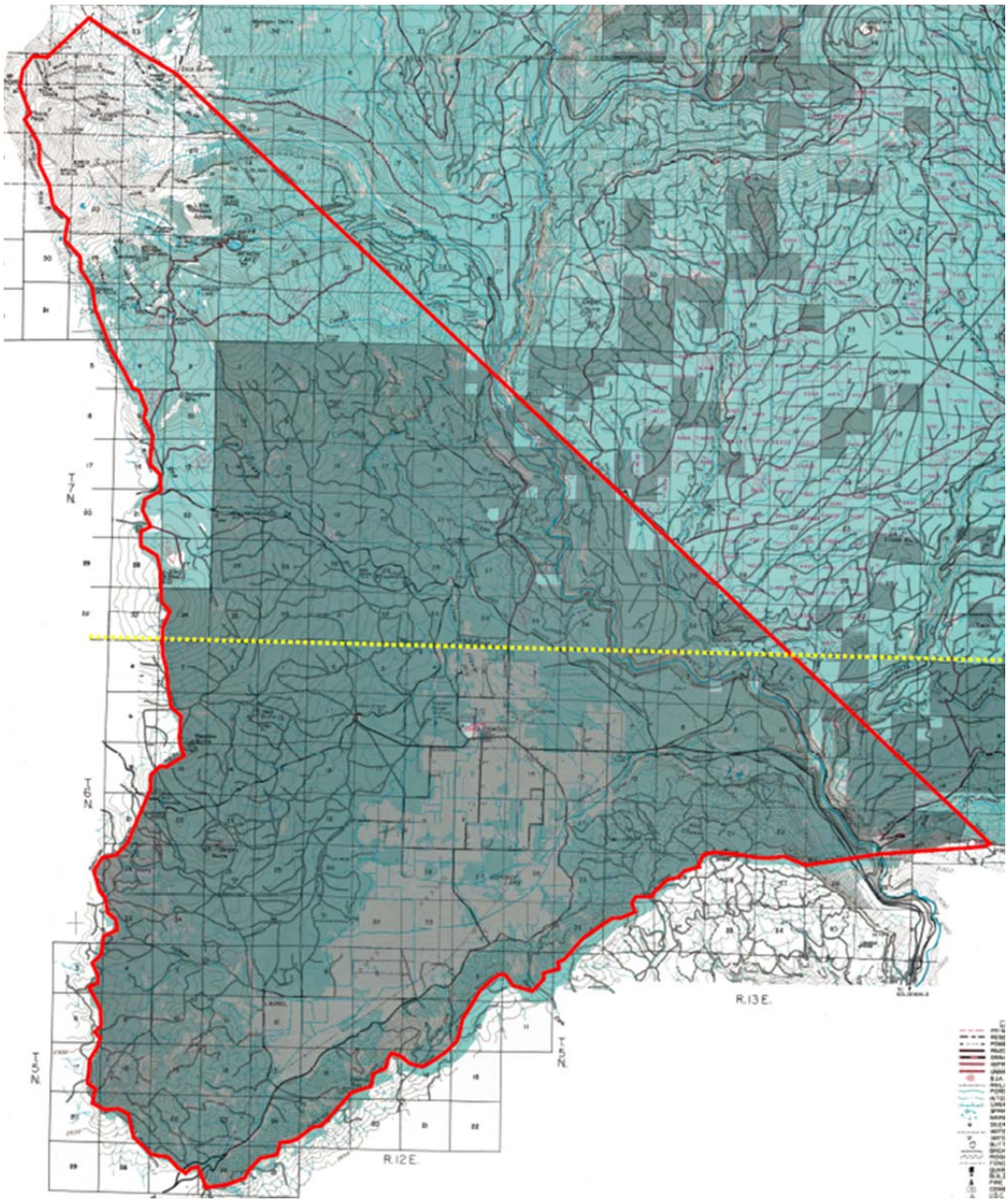
In September 2017, Klickitat County arrested 17-year-old PTS for acts he committed near Glenwood, Washington. ER259, 2780-81. Charged with two counts of rape of a child in the second degree, *see id.*, PTS pled guilty and was sentenced accordingly, ER260.

In November 2017, Yakama filed the underlying action, alleging PTS was an enrolled Yakama member, that his crimes occurred within the Reservation, and that Klickitat County lacked criminal jurisdiction over him. ER1634-43. The County alleged—and continues to allege—that the parties to the 1855 Treaty never intended to include Glenwood in the Reservation and that Congress resolved the dispute in 1904 by adopting a Reservation boundary excluding Tract D. ER5, 81-104.

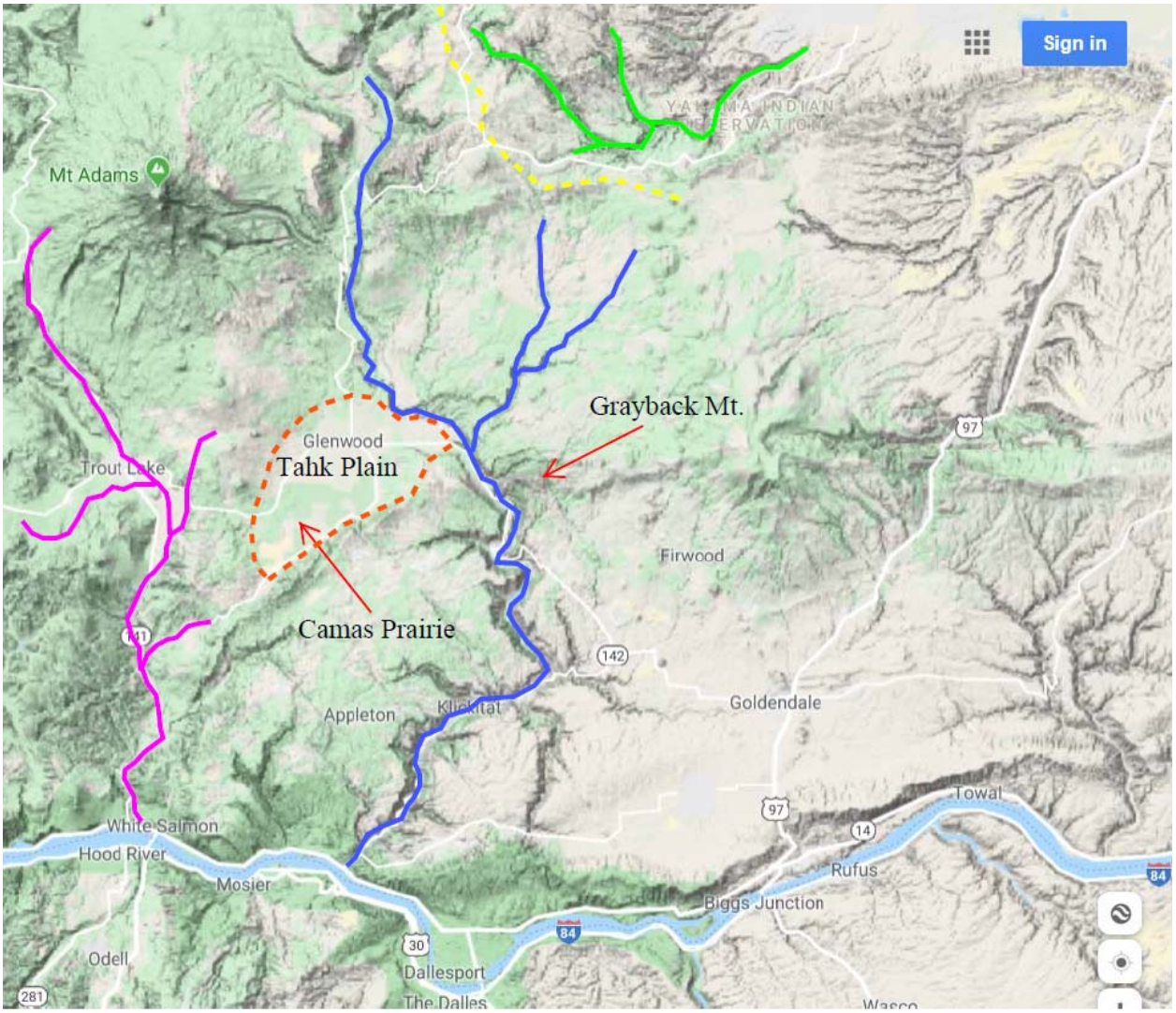
The District Court held that Tract D was included in the Reservation per the 1855 Treaty, ER23, and that the 1904 Act did not alter those original boundaries, ER19. Notwithstanding its boundary determinations, the District Court also held that the County maintained jurisdiction within the Reservation over crimes involving a non-Indian. ER34. The County appeals the findings and rulings on the boundary.

II. Tract D And The Glenwood Valley

The epicenter of this dispute is an area referred to as "Tract D," which consists of 121,465.69 acres and encompasses the Glenwood Valley. ER8. On the map below (ER 2813), Tract D is outlined in red, and the County's northern border is highlighted in yellow. The Glenwood Valley is south of the county line.



An understanding of the geography in and around Tract D is fundamental to this appeal. The Google Map[1] below places Tract D within the broader geographical context:



[1] This Court "may take judicial notice of maps, including Google Maps, to determine distances and locations." *United States v. Schultz*, 537 F. App'x 702, 704 n.1 (9th Cir. 2013) (Berzon, J., concurring); *see also* Fed. R. Evid. 201(b); *McCormack v. Hiedeman*, 694 F.3d 1004, 1008 n.1, (9th Cir. 2012); *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1, (9th Cir. 2012); SER1.

The Glenwood Valley, indicated by the dashed orange line, was historically called Tahk Plain. At its southern end is Camas Prairie. To the west of Tahk is the White Salmon River drainage (pink); to its east is the Klickitat River drainage (blue). Mt. Adams is northwest of Tahk; Grayback Mountain sits to the east. The Pisco River drainage (green)—now called Toppenish Creek—is located northeast of Tahk. The Pisco-Klickitat Divide (dashed yellow line) is likewise located northeast of Tahk and outside Tract D. The location of this divide is critical to this dispute.

III. Historical Background

1. The Treaty Of 1855

In the spring of 1855, representatives of the tribes and bands that would become the Yakama Nation gathered at the Walla Walla Treaty Council. ER11. Approximately 5,000 Indians attended. ER660. The United States was principally represented by Isaac Stevens, the Governor and Superintendent of Indian Affairs for Washington Territory. ER11.

Stevens first described the proposed Yakama Reservation as extending "from the Attannun river--to include the valley of the Pisco river--and from the Yakama river to the Cascade Mountains." ER1962. He later described the southwest boundary as continuing

> down the main chain of the Cascade mountains south of Mount Adams, thence along the Highlands separating the Pisco and the Sattass river from the rivers flowing into the Columbia

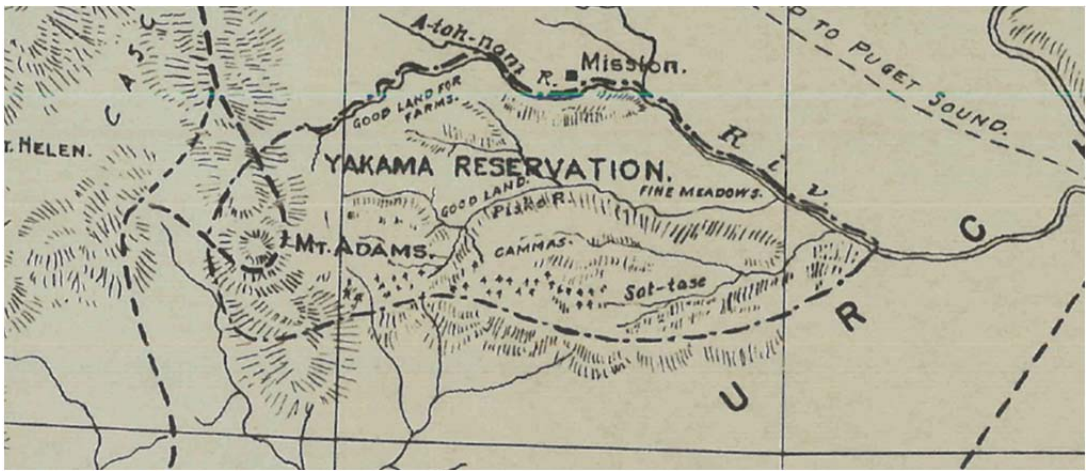
ER 1971.

On June 9, 1855, the parties executed the Yakama Treaty, which defined the Reservation's boundaries, in relevant part, as progressing

> southerly along the main ridge of said [Cascade] mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing in to the Columbia River

ER 1742.

During the Treaty Council, Stevens used a large scale map ("Treaty Map") to further communicate the boundaries to the Indians. ER9, 2229-30.[2] The Indians participated in its creation. ER532. The Treaty Map depicts the Reservation boundary as follows:



Consistent with the Treaty and with Stevens' descriptions at the Council, the Treaty Map confirms the boundary was intended to pass along the Pisco-Klickitat Divide.

[2] ER2230 is a reproduction of the original Treaty Map. *See* ER12.

2. The Treaty Map And Reservation Description Derive From The Pacific Railroad Surveys.

In addition to his duties as Governor and Superintendent, Stevens also led the Northern Pacific Railroad Surveys, tasked by Congress with finding the best railroad route from the Mississippi River to the Pacific Ocean.[3] ER653; SER83-160. Immediately preceding the Treaty Council, Stevens directed on-the-ground investigations of much of the Pacific Northwest. One of Stevens' teams spent several days surveying in and around Tahk Plain. SER150.

In his Survey Reports, Stevens explained how his survey work naturally informed negotiations with the Indians. SER140-41; ER529. Indeed, Stevens' knowledge of the area in and around Tahk derived exclusively from the Railroad Surveys. ER795, 798-99.

3. For The First 75 Years, Yakama Claims A Boundary That Excludes The Glenwood Valley.

a. U.S. agents and early Yakama leaders understand the southwest boundary excludes Camas Prairie.

Following the Treaty Council, Stevens met with Chief Spencer – the first Head Chief of the Yakama – and told him he would send men to "stake out" the Reservation. SER286-87; ER2487. Soon after, U.S. agents took Chief Spencer to the junction of the Indian Trail and Goldendale Road ("Junction") and explained that the boundary went from that point in two directions: northwest to Mt. Adams

[3] Stevens had considerable experience as a geographer, having served in the Topographic Engineering Corps and with the U.S. Coast Survey. ER663, 399-400.

and southeast to Grayback Mountain. ER2490-92. Chief Spencer's home territory included Camas Prairie. SER286-87; ER645. After learning the southwest boundary, he left Camas Prairie and moved "on to the reservation." ER2493.

A couple of years later, U.S. surveyors pointed out a similar boundary to tribal judge Stick Joe—this time a straight line from Grayback Mountain to Goat Butte. ER2619. Although the Spencer Line and the Stick Joe Line differed slightly,[4] neither man ever wavered in his belief that the boundary ran from Grayback Mountain northwest to Goat Butte, excluding Tahk. Whenever Chief Spencer passed the Junction, he directed other Yakamas to pile rocks to memorialize the boundary. ER497-98, 2488-89.

b. The United States officially surveys the western boundary.

In 1890, George Schwartz surveyed the Reservation's western boundary. SER290. Consistent with the Spencer and Stick Joe Lines, Schwartz reported that the Indians claimed a boundary from Grayback "northwesterly … to the base of Mt. Adams." SER316. However, believing that a boundary crossing the Klickitat River violated the Treaty, SER309-10, Schwartz surveyed a western boundary approximately 20 miles east of the Cascade Mountains, ER417-18. A year later, Examiner J.E. Noel—who was instructed to review Schwartz' work—conducted additional interviews with the Indians and independently confirmed their claim

[4] The difference between the Spencer Line and the Stick Joe Line became known as the Pecore Triangle. ER2782.

"that the line should follow … to Gray Back thence in a N. W'ly direction to the foot of Mount Adams." SER329.

c. Yakama leaders reject Schwartz and demand the "Old Line" be reinstated.

The western boundary quickly became the principal point of contention for Yakama. As the Indian Agent explained,

> much more than half the time of every council I have held with these people, commencing with the general council in May 1892 to the present time, as well as every talk had with the separate tribes or bands composing the Yakima Nation, in fact the talk had with almost every family has been consumed by them in laying their grievances in this boundary question before me.

SER175-76.

In 1892, Head Chief Joseph Stwire (White Swan)[5] and tribal chiefs Captain Eneas and We-yal-up formally protested the Schwartz Survey and petitioned the government to send "a good eastern man" to investigate the boundary. SER168-69, 171-73. Yakama felt Schwartz had cut off significant acreage from the Reservation's western end. SER168. Both White Swan and Eneas, who had attended the 1855 Treaty Council, SER193, 345, stated with certainty that "there is no mistake about the old boundary line," and they identified Stick Joe and "Old Spencer" as witnesses "to prove that old line," SER168-69.

[5] White Swan was the first elected Head Chief of the Yakama and held that position for nearly forty years. ER817, 423; SER161.

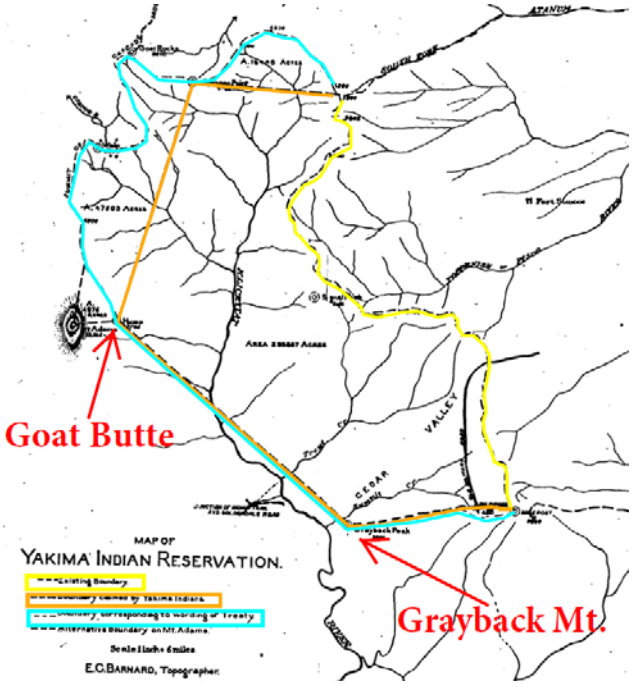
d. Congress tries but fails to purchase the disputed lands.

For the next six years, Congress attempted to purchase surplus Yakama lands, including those between the Schwartz Line and Yakama's claimed boundary. SER178-214; ER2836-47. Led by White Swan and Eneas, Yakama refused to sell any lands until the western boundary was resolved. ER2841-42. Honoring Yakama's wishes, U.S. commissioners instructed tribal leaders to "select men to meet us to settle this boundary line question." ER2842. Yakama leaders again chose Chief Spencer and Stick Joe to identify the correct boundary. SER363-64.

e. The United States sends Barnard to investigate Yakama's claim.

The United States sent E.C. Barnard to investigate Yakama's boundary claim. ER2613-28. He interviewed Spencer and Stick Joe. ER2619-20. Both elders described the boundary as running from Grayback Mountain to Goat Butte. *Id.*

While Barnard interpreted the Treaty to encompass 357,878 acres beyond the Schwartz Line, Interior determined the Indians had only claimed 293,837 acres. ER2613. As shown on Barnard's map (ER2628, right), neither configuration encompassed Tract D. *See also* ER444-45. The Indian Agent, who was familiar with



Yakama's boundary protest, believed Barnard had "reported favorably to the Indians' claim." SER217.

f. Congress acts to settle the "Longstanding Dispute."

In December 1904, Congress recognized Yakama's claim to 293,837 additional acres and adopted the "Barnard Line" (orange line above) as the new western boundary. ER1813-16. In response, Yakama proclaimed its "thanks and appreciation" to Congress for recognizing its claim to "the disputed tract,"[6] SER358 (underlining original), stating, "nor is there any greater acreage of land than should properly belong to them and their heirs forever," SER359 (incorporating SER220). Consistent with historical practice, Yakama spoke through its headmen White Swan and Eneas while other leaders like We-ya-lup and William Tee-i-as affirmed. SER359; *see also* SER226-29.

g. Yakama leaders protest the 1904 Act but repeatedly affirm a boundary excluding Glenwood.

In April 1906, Yakama "in council assembled" petitioned President Roosevelt, claiming Schwartz "deprived [them] of 357878 acres of lands." ER2851; SER233-35. Dozens of Yakama members signed the petition, including leaders like We-ya-lup, Tee-i-as, Eneas, and White Swan. ER2854-56. The petition adopts Barnard's Treaty interpretation of the boundaries, which excludes Tract D. ER444-45, 711.

[6] Congress referred to the 293,837 acres as "the disputed tract." ER1836.

In July 1906, Yakama leaders submitted a second petition protesting the western boundary, expressly requesting

> that this line be established from Grayback west following the old marked trees to junction of Indian trail as indicated on Barnard map; thence in a direct line to hump at foot of Mount Adams.
>
> We feel sure and certain that this was the line intended by the treaty and will feel satisfied if this line is adopted.

ER2864. This line, later surveyed by Chester Pecore, mirrors the line advocated by Chief Spencer and excludes the Glenwood Valley. The petition was signed by tribal chiefs White Swan, Eneas, Charles Wesley, and Leschi Owhi. *Id*. Because Yakama knowledge was passed down through oral tradition, Owhi's signature is particularly significant as he, like Tee-i-as, was the son of a Treaty signer. ER469; SER359.

Contemporaneous with this petition, Yakama's Tribal Council entered an agreement with the Camas Prairie irrigation district to provide water to non-Indian ranchers in Camas Prairie. SER15. A prime example of "intercultural cooperation" between reservation Indians and "off-reservation communities," this agreement is consistent with Yakama's understanding that Camas Prairie was outside the Reservation. SER7, 15; ER412-15.

h. On Yakama's behalf, the United States sues to enforce the "Barnard Line."

In 1908, the United States, as Yakama's trustee and guardian, sought to annul patents issued to the Northern Pacific Railway Company for Reservation

lands outside the Schwartz Line. SER248. To establish the western boundary per the Treaty, the United States relied on Barnard's investigation and conclusions. SER45-80. To establish *Yakama's understanding* of the western boundary, the United States called tribal witness Abe Lincoln. SER24, 36. A line rider whose job it was to patrol the Reservation boundaries, Lincoln personally guided Barnard during Barnard's investigation. SER26.

For nearly 20 years, Lincoln had also been repeatedly chosen by the Indians to interpret formal councils between Yakama and the United States, including councils on the boundary. SER33-35, 192, 344; ER2836; *see also* ER209-11. As to the southwest boundary, Lincoln testified as follows:

> Q: Did you interpret in any of those interviews to the white inspector, or any Government officials down there, where the Indians claimed that their reservation line was?
> A: Yes, I explained that, and the Indians told the inspector. I explained it to the inspector where the boundaries was.
>
> …
>
> Q: Well, take this Exhibit No. 1 [Barnard's Map] and explain your statement either on there or independent of there, and tell where the Indians claimed.
> A: They claimed from the south fork head of the Atanum, a straight line to Goat Rocks, then from Goat Rocks following the divide to Mt. Adams, and *from Mt. Adams a straight line to the junction of the Indian trail and Goldendale road*.
>
> Q: The junction of the Indian trail and the Goldendale road?
> A: And the Goldendale road, and then from the junction of the Indian trail with the Goldendale road right *straight east to Grayback*.

SER35 (emphasis added).

Asked to confirm whether this was the boundary Yakama had always

claimed, Lincoln testified further:

> Q: You are familiar are you with what the Indians claim during all these years?
> A: Yes, sir.
>
> Q: And that is what they claimed, was it?
> A: That is what they claim.
>
> Q: Have they ever consented, so far as you know, to any other reservation?
> A: Well, they all consented and we all consented to where I took Barnard around.
>
> Q: Yes, and no other?
> A: And no other.

SER36.

Based on this and other evidence, the federal trial court held, "it is clearly established that they [Yakama] have contended for boundaries substantially as defined by the Barnard survey." SER277.[7] The Supreme Court affirmed, concluding the weight of the historical evidence "establishes the correctness of the Barnard survey." *N. Pac. Ry. Co. v. United States*, 227 U.S. 355, 365-66 (1913).

4. Interior Rediscovers And Then Misinterprets The Treaty Map.

Following the Council, the Treaty Map was misplaced. ER9. Upon its rediscovery around 1930, individuals within Interior began investigating whether the intended Reservation was larger than previously thought. *See* ER2031-36. In support of a potential claim for Camas Prairie, Interior sought statements from

[7] *See also* SER245 ("The Indians contend, and it is believed rightly, that the boundary as reported by Mr. Barnard is the true boundary").

tribal members for the purpose of litigating the boundary. ER2215. Government representatives explained that "[t]he Indian Office intends to take this matter to the Supreme Court of the United States in order to quiet the title of this land. … They are asking for all the information we can get on the side of the Indians to help fight this case." *Id*. The request returned mixed results. Older tribal leaders including Charley Olney and Lancaster Spencer confirmed the Indians had *never* claimed Camas Prairie as part of the Reservation. SER281-82.[8]

After a "thorough search of all available sources," Interior "failed to locate any additional documentary evidence" supporting the inclusion of Camas Prairie within the Reservation. ER2880-81. It concluded that "nothing has been found which could be considered as having any value as evidence." *Id*. at 1; *see also* ER511; SER333-35. Determining that the Treaty Map excluded Camas Prairie from the Reservation, U.S. Attorney General Cummings declined to file suit. SER335.

In 1949, Yakama filed a takings claim with the Indian Claims Commission, alleging Tract D had been excluded from the Reservation. *See* ER2814-17. The United States argued Tract D was never part of the Reservation, but the parties settled for $2.1 million in 1968. ER2814-17. The ICC proceedings did not alter the boundary. SER336-40.

[8] Charley Olney served as tribal judge, chief of tribal police, and boundary line rider. SER281; ER470, 496. Lancaster Spencer was the son of Chief Spencer. SER281.

IV. State Criminal Jurisdiction Within Yakama Reservation

1. Washington Assumes Criminal Jurisdiction Under PL-280.

Historically, criminal offenses by or against Indians within a reservation were subject only to federal or tribal laws. In the absence of a Congressional act expressly authorizing the extension of state law to a reservation, states could only prosecute non-Indians who commit crimes against non-Indians, *United States v. McBratney*, 104 U.S. 621, 624 (1882), and non-Indians who committed "victimless" crimes, *see State v. Lindsey*, 233 P. 327, 327-29 (Wash. 1925).

In 1953, Congress passed Public Law 83-280 ("PL-280"). *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 498 (1979) ("*Yakima Indian Nation*"); *Bryan v. Itasca Cty.*, 426 U.S. 373, 379-80 (1976). PL-280 authorized individual states to assume jurisdiction over criminal offenses committed by or against Indians in Indian Country. 67 Stat. 588 (1953). PL-280 did not impact a tribe's criminal jurisdiction over crimes committed by Indians. *See Confederated Tribes & Bands of Yakima Indian Nation v. Washington*, 608 F.2d 750, 752 (9th Cir. 1979) ("*Confederated Tribes*"). PL-280 also did not impact the federal government's criminal jurisdiction, *see* 18 U.S.C. § 1152, or alter any criminal jurisdiction a state possessed prior to its adoption of PL-280.

In 1963, Washington assumed partial PL-280 jurisdiction over the Yakama Reservation and other Indian Country in the state. 1963 Wash. Sess. Laws 346, 346-49 (codified in ch. 37.12 RCW). Specifically, Washington assumed criminal jurisdiction over all offenses "committed by or against Indians in [Indian territory,

reservations, country, and lands within this state] to the same extent that this state has jurisdiction over offenses committed elsewhere within this state….” RCW 37.12.010, 030. Unless a tribe consented to jurisdiction, however, the State did not assume PL-280 jurisdiction over “Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States,” except as to eight specified subject-matter categories. RCW 37.12.010.

Yakama did not consent to jurisdiction. *Yakima Indian Nation*, 439 U.S. at 465-66, 475-76. Within the Reservation, therefore, Washington assumed full criminal and civil jurisdiction over Yakama members only on so called “fee lands.” *Id*. at 475. On so-called “trust and restricted lands” within the Reservation, Washington assumed jurisdiction over Yakama members only as to cases within one of the eight specified categories. *Id*. at 475-76. Washington acquired complete jurisdiction over non-Indians anywhere on the Reservation, including jurisdiction over crimes committed by non-Indians against Indians. *See id*. at 498. Washington’s assumption of partial PL-280 jurisdiction within the Reservation was not impacted by subsequent congressional action. *See* Act of Apr. 11, 1968, Pub. L. No. 90-284, § 403(b), 82 Stat. 73, 79 (codified at 25 U.S.C. § 1323(b)) (repealing section 7 of PL-280, which had authorized states to assume jurisdiction without consent, but providing that states would retain any jurisdiction acquired under PL-280 before repeal).

2. The Supreme Court Rejects Yakama's Challenge To Washington's PL-280 Jurisdiction.

Yakama immediately challenged Washington's assumption of criminal jurisdiction on the Reservation, asserting statutory, constitutional, and treaty arguments identical to those it makes in this appeal. *See, e.g.*, Dkt. 16 at 30 of 78. The U.S. Supreme Court rejected all three theories.

> Dispensing with the treaty argument in a footnote, the Court held, in part,
>
> > Although we have stated that the intention to abrogate or modify a treaty is not to be lightly imputed, this rule of construction must be applied sensibly. In this context, the argument made by the Tribe is tendentious. The treaty right asserted by the Tribe is jurisdictional. So also is the entire subject-matter of Pub. L. 280. To accept the Tribe's position would be to hold that Congress could not pass a jurisdictional law of general applicability to Indian country unless in so doing it itemized all potentially conflicting treaty rights that it wished to affect. This we decline to do.

Yakima Indian Nation, 439 U.S. at 478 n.22 (internal citation omitted).

3. Washington Retrocedes Some Of Its PL-280 Jurisdiction.

In 1968, Congress modified PL-280 to permit states to retrocede "all or any measure" of jurisdiction previously assumed under PL-280. 25 U.S.C. § 1323. The President delegated to the Secretary of the Interior the authority to accept retrocession offers. Exec. Order No. 11435, 33 Fed. Reg. 17339 (Nov. 23, 1968). The Secretary's authority is limited to accepting all or part of the PL-280 jurisdiction a state offers to retrocede. 25 U.S.C. § 1323.

In 2012, Washington enacted a process by which an Indian tribe can request retrocession. RCW 37.12.160. Yakama requested full retrocession of civil and

criminal jurisdiction, with the exception of two areas of law not relevant here. ER2698-99. Governor Inslee partially granted Yakama's request through Proclamation 14-01. ER2698-2700. As required by RCW 37.12.160(4), Governor Inslee submitted the Proclamation to Interior, along with a letter describing exactly what jurisdiction was being offered for retrocession. ER2701-02. In pre-retrocession meetings, Yakama "acknowledg[d] that the State would retain criminal jurisdiction over non-Indian defendants." ER2699.

4. The United States Accepts Washington's Partial Offer.

The Secretary accepted Washington's partial retrocession, effective April 19, 2016. 80 Fed. Reg. 63583-01 (Oct. 20, 2015) ("Acceptance"). Specifically, Interior accepted "partial civil and criminal jurisdiction over the Yakama Nation which was acquired by the State of Washington, under Public Law 83-280," as offered in the Proclamation and transmitted under state law. *Id*. The Acceptance did not alter Yakama's authority or jurisdiction in any way. ER2703.

In a letter dated October 19, 2015 ("Washburn Letter"), Interior notified Yakama of its acceptance "of partial civil and criminal jurisdiction." ER2703. Interior explained that "it is the content of the Proclamation that we hereby accept in approving retrocession." ER2707. The Washburn Letter did not interpret the contents of the Proclamation. *Id*. Rather, Interior advised Yakama that, "[i]f a disagreement develops as to the scope of the retrocession, we are confident that

courts will provide a definitive interpretation of the plain language of the Proclamation." *Id*.

Within the Reservation, Paragraph 1 of Proclamation 14-01 retroceded all of Washington's PL-280 civil and criminal jurisdiction over four subject matter areas, including juvenile delinquency. Paragraphs 2 and 3 retroceded Washington's jurisdiction over criminal offenses where only Indians are involved as both perpetrator and victim. But for other offenses, the Proclamation retroceded criminal jurisdiction only "in part," retaining a portion of the PL-280 jurisdiction upheld as lawful in *Yakima Indian Nation*.[9]

In particular, Paragraph 2 of the Proclamation retains jurisdiction over criminal offenses arising from the operation of motor vehicles "involving non-Indian defendants and non-Indian victims." ER2699. Paragraph 3 of the Proclamation provides that the "State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." *Id*. Paragraph 5 of the Proclamation retains jurisdiction over Yakama Indian Country located outside of the exterior boundaries of the Reservation. ER2700. Finally, Paragraph 7 of the Proclamation says, "Pursuant to RCW 37.12.010, the State shall retain all jurisdiction not specifically retroceded herein." *Id*.

[9] Washington's jurisdiction remains subject to the limitations of RCW 37.12.010.

5. Washington Courts Provide A Definitive Interpretation Of Proclamation 14-01 In *State v. Zack*.

The Washington State Court of Appeals addressed precisely what criminal jurisdiction Washington retained under Proclamation 14-01 in *State v. Zack*, 413 P.3d 65, 66 (Wash. App. 2018). The court rejected the criminal defendant's assertion—identical to Yakama's assertion here—that Washington only retained jurisdiction over cases involving both non-Indian defendants and non-Indian victims. *Id*. at 69.

The court viewed "the dispositive question" as "the meaning of the word 'and'" in the phrase "jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." *Id*. at 67-68. It held that the word was "used in a list and should be read in the disjunctive" so as not to "render the proclamation internally inconsistent and nonsensical." *Id*. at 68. The court explained that excluding Indians from prosecution in all cases "would mean that the Governor intended to return *all* of the criminal jurisdiction [that Washington] assumed by RCW 37.12.010 and the words 'in part' would be rendered meaningless…." *Id*. at 69.

The court viewed a literal reading as "nonsensical" because it would mean that Washington could not prosecute crimes involving a single defendant or a single victim. *Id*. at 70. A literal reading would also divest Washington of its pre-PL-280 authority to prosecute non-Indians for victimless crimes. *Id*. Since Washington possessed this authority prior to PL-280, the Governor lacked the

authority to cede this jurisdiction. *Id.* The court ultimately held that Washington retained jurisdiction over criminal offenses occurring within the Reservation when *either* the victim *or* defendant is a non-Indian. *Id*. The Washington Supreme Court denied review. *State v. Zack*, 425 P.3d 517 (Wash. 2018).

6. The United States Declares Its Official Position On Washington's Criminal Jurisdiction Within The Reservation.

Shortly after the *Zack* court interpreted Proclamation 14-01, the Department of Justice's Office of Legal Counsel (OLC) addressed the issue in a formal legal opinion ("OLC Opinion"). ER1577-1593. The OLC Opinion agreed with the Acceptance and the Washburn Letter that the "scope of Washington's retrocession of criminal jurisdiction on the Yakama Reservation is controlled by the terms of the Governor's 2014 proclamation." ER1582. Based on the text of the Proclamation, the OLC Opinion concluded that Washington retained "jurisdiction over criminal offenses when at least one party is a non-Indian." ER1588; *see also* ER1593. The OLC Opinion "represents the legal position of the United States in this matter and replaces all prior guidance or interpretations." ER1293.[10]

The OLC Opinion also described extrinsic evidence that supported the conclusion, *see* ER1588-91, including Yakama's own assurances during government-to-government meetings that its petition for retrocession "'did not

[10] Consistent with the OLC Opinion, the United States filed an *amicus* brief in *Confederate Tribes and Bands of the Yakama Nation v. Yakima County*, No. 19-35199 (August 28, 2019), urging this Court to affirm the District Court's decision in that case. *See* Dkt. 19 at Ex. A.

seek retrocession of state criminal jurisdiction over non-Indians who commit crimes against Indians,'" ER1589. *See also* ER2699.

Finally, the OLC Opinion addressed policy arguments asserted by the Bureau of Indian Affairs ("BIA") and the Office of Tribal Justice ("OTJ") in favor of the interpretation urged by Yakama in this appeal. ER1593. The OLC determined that BIA and OTJ's claim—that the purpose of 25 U.S.C. § 1323(a) was to encourage full retrocession of state jurisdiction—was not supported by the statute's text, which authorizes a state to retrocede "all or any measure" of its PL-280 jurisdiction and which does not suggest that "in deciding whether to 'accept a retrocession by any State,' the United States may accept *more* than the State offered." ER1592 (emphasis original).

7. The District Court Rules Consistent With *State v. Zack*.

Here, the District Court rejected Yakama's claim that Washington only retained criminal jurisdiction over offenses in which no participant is an Indian:

> Reading the plain language of the Governor's use of the sentence "The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims" in context, both historical and in the context of the entire retrocession proclamation, makes clear that the State retained jurisdiction in two areas – over criminal offenses involving non-Indian defendants and over criminal offenses involving non-Indian victims.

ER34; *see also* ER43.[11]

[11] The District Court memorialized its conclusions regarding the scope of retrocession in paragraphs 2-4 of the Judgment. ER2. The use of the word "offense" in the last sentence of paragraph 3, however, may result in confusion. *Id.*

In Washington state law, "offense" generally refers to criminal offenses, while non-criminal traffic offenses are generally referred to as "infractions." *See*, *e.g.*, RCW 46.63.020 (distinguishing "traffic infraction" from "criminal offense"); RCW 46.64.050 (same). Construing "traffic offenses" in the Judgment to include criminal offenses is inconsistent with the rest of paragraph 3 and with paragraph 4. Construing the phrase to refer to traffic infractions is consistent with *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146, 149 (9th Cir. 1991).

SUMMARY OF ARGUMENT

At trial, Yakama had the burden to prove the Glenwood Valley was included within the Reservation pursuant to Treaty. Upon that showing, the burden would have shifted to the County to demonstrate whether Congress ever adopted a boundary excluding the disputed area. As explained below, Yakama failed to meet its burden. The Treaty, Treaty Map, and contemporaneous historical record all confirm the Glenwood Valley was never intended as part of the Reservation. To the extent there was any doubt, Congress adopted a new western boundary in 1904, and that boundary excludes all of Tract D.

I. The District Court Erred When It Held The Glenwood Valley Was Inside The Reservation.

In holding that Tract D is within the Reservation, the District Court committed numerous errors:

First, the Treaty's plain language requires the boundary to go from the Cascade Mountains to the Pisco-Klickitat Divide. The location of this divide is undisputed, and any boundary adhering to this requirement must exclude the Glenwood Valley.

Second, the Treaty Map confirms the boundary must traverse the Pisco-Klickitat Divide. Moreover, by comparing the relevant geographic features on the Treaty Map to those on earlier Railroad Survey Maps, it is clear the boundary shown on the Treaty Map excludes Tahk. The geographic features on the Treaty Map in and around Tahk are drawn with reasonable accuracy, and both experts

agreed the Indians would have recognized those features and understood their relationship to each other.

Third, the historical record shows that "spur" in the Treaty refers to a long, discontinuous ridge extending east from the Cascade Mountains towards the upper Columbia River. There exists only one such spur connecting the Cascade Mountains to the Pisco-Klickitat Divide. That spur is located north of Tahk. Because there is no other interpretation that leaves intact the Treaty language while giving meaning to each call, the District Court erred in holding the call was ambiguous.

In holding that Yakama would have naturally understood Tract D as part of the Reservation, the District Court ignored the overwhelming weight of contemporaneous historical evidence showing the Yakama people understood the Glenwood Valley was outside the Reservation. Prior to 1930, there is no evidence any Yakama member claimed Tahk was within the Reservation. Rather, Yakama's leaders, including its principal chiefs, Treaty Council attendees, and the sons of Treaty signers all *repeatedly* and *consistently* advocated a boundary excluding it.

II. The District Court Erred When It Held The 1904 Act Did Not Establish The Reservation's Western Boundary

Irrespective of what the Treaty parties intended or what they subsequently understood, in 1904 Congress exercised its plenary authority to establish the Reservation's western boundary with the express intent of settling the longstanding boundary dispute. The statute's plain language recognizes Yakama's claim to

additional acreage, adds that acreage to the Reservation, and then instructs Interior to define, mark, and survey the new boundary. Aware that Yakama may have been entitled to even greater acreage under the Treaty, Congress chose a lesser amount. In holding the 1904 Act did not change the Reservation boundary, the District Court erred as a matter of law.

III. The District Court Correctly Held That Washington Retained PL-280 Jurisdiction Over Criminal Offenses Involving A Non-Indian.

PL-280 does not alter Yakama's criminal jurisdiction. It only affects the allocation of non-tribal, concurrent criminal jurisdiction between the United States and Washington. Neither the Treaty, the U.S. Constitution, nor any federal statute provides Yakama with a role in determining which criminal offenses will be investigated and prosecuted by Washington and which will be investigated and prosecuted by the United States.

Under PL-280, Washington assumed partial criminal jurisdiction over the Yakama Reservation and Yakama members in 1963. In Proclamation 14-01, Washington offered to return part of that jurisdiction to the United States. Pursuant to 25 U.S.C. § 1323, the United States could accept all or any part of Washington's offer, but not more than Washington offered.

As interpreted by Washington appellate courts, the Proclamation makes clear that Washington retained criminal jurisdiction within the Reservation over offenses involving a non-Indian. The United States' acceptance of Washington's

offer fixed the scope of retrocession *as offered*—including the State's express reservations.

Post-acceptance agency interpretations of Proclamation 14-01 cannot expand the scope of Washington's offer. Since Washington has not offered to retrocede any of the jurisdiction retained in Proclamation 14-01, the District Court properly ruled that Washington may investigate and prosecute on-Reservation cases involving a non-Indian defendant or a non-Indian victim.

STANDARD OF REVIEW

The interpretation and application of treaty language is reviewed *de novo*, *Cree v. Flores*, 157 F.3d 762, 768 (9th Cir. 1998), as is the interpretation of legislative acts, *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996). Underlying factual findings are reviewed for clear error. *Flores*, 157 F.3d at 768; *Chehalis Indian Reservation*, 96 F.3d at 342. A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). To be affirmed, factual findings must be "plausible in light of the record viewed in its entirety." *United States v. Lummi Indian Tribe*, 841 F.2d 317, 319 (9th Cir. 1988) (citing *Anderson*, 470 U.S. at 573-74).

ARGUMENT

I. The District Court Erred When It Held The Glenwood Valley Was Inside The Reservation Pursuant To Treaty.

While the Treaty "should be understood as bearing the meaning that the Yakamas understood it to have in 1855," *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011 (2019), "Treaty analysis begins with the text," *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019). A court "cannot, under any acceptable rule of interpretation, hold that the Indians [had a certain right] merely because they thought so." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 180 (1947).

"A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979). "[T]he extent of our interpretive deference to the perspective of the Native leaders cannot extend past the meeting of the minds between the parties." *Jones v. United States*, 846 F.3d 1343, 1356 (Fed. Cir. 2017).

"To determine the parties' intent, the court must examine the treaty language as a whole, the circumstances surrounding the treaty, and the conduct of the parties since the treaty was signed." *Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996); *see also Commercial Passenger*, 443 U.S. at 675–76. When analyzing a treaty, courts "look beyond the written words to the larger context that frames the

[t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)).

In holding that "Tract D … is located within the exterior boundaries of the Yakama Reservation", ER23, the District Court erred as a matter of law. The Glenwood Valley is the heart of Tract D. The Treaty, the Treaty Map, and the great weight of historical evidence confirm that neither the United States nor Yakama intended to include the Glenwood Valley within the Reservation.

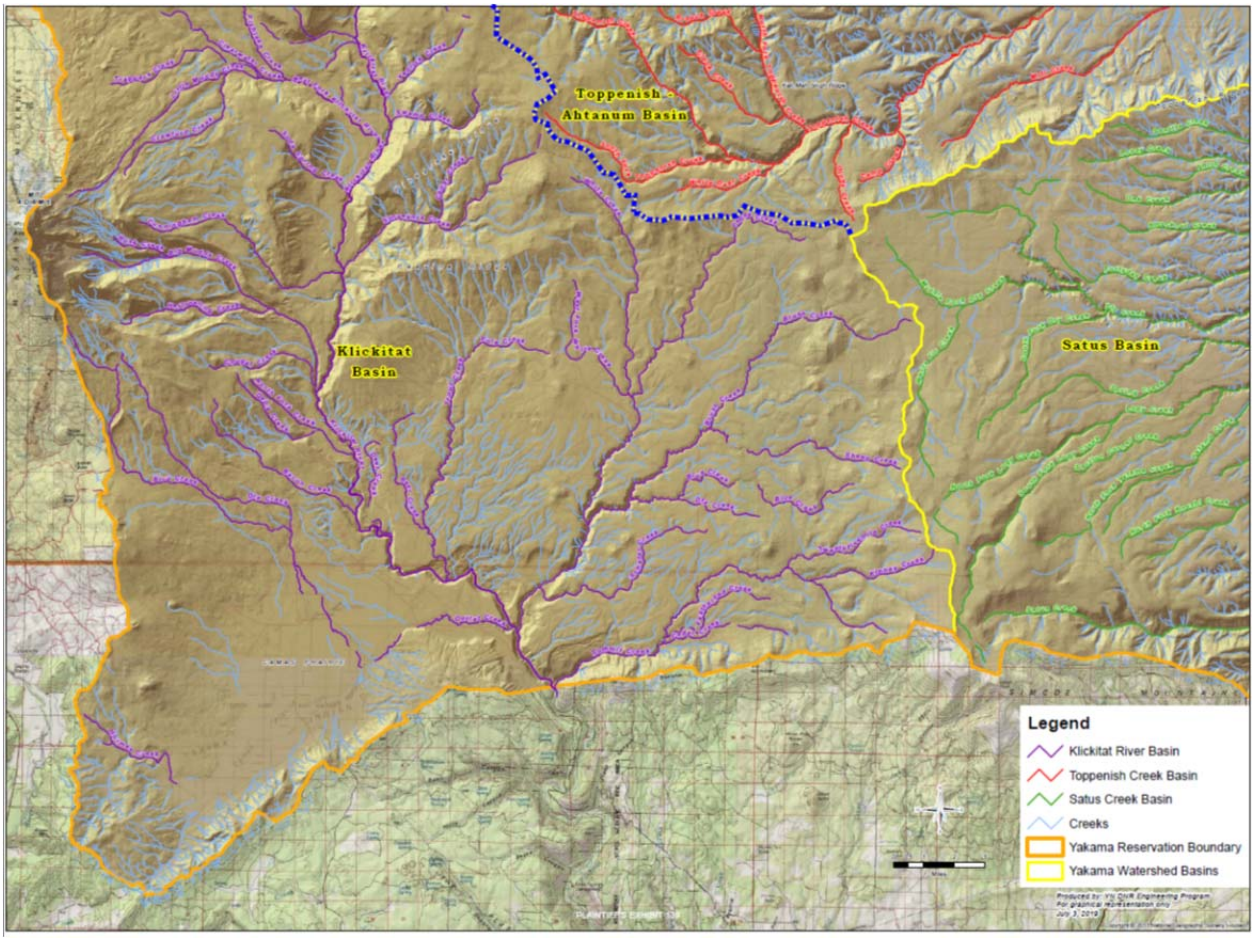
1. The Treaty's Plain Language Requires A Boundary That Excludes The Glenwood Valley.

a. Article II requires the boundary to pass along the Pisco-Klickitat Divide.

The Treaty describes the southwest boundary as "passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco rivers; thence down said spur *to the divide between the waters of said rivers*." ER1742 (emphasis added). The plain language requires the boundary to traverse "the divide" between the Klickitat and Pisco Rivers.

The location of the Pisco-Klickitat Divide was confirmed by Yakama's hydrologist (Mr. Ladd) and GIS personnel (Ms. James). ER871-78, 879-80. Using Yakama's hydrology map below (SER355), both witnesses identified the Pisco-

Klickitat Divide as the ridge separating the Klickitat (purple) and Toppenish (red) Basins:



The southernmost point of the Pisco-Klickitat Divide, indicated by the dashed blue line above, is located east of Mt. Adams and far north of Tahk. Any reasonable boundary connecting the Cascade Mountains to this divide excludes the Glenwood Valley. The boundary adopted by the District Court (orange line) violates the plain language of the Treaty because it never reaches the Pisco-Klickitat Divide. ER880-81. In finding that the Pisco-Klickitat Divide "does not exist," ER15, 21, the District Court clearly erred.

b. The District Court's ruling rewrites the Treaty.

Indian canons cannot "be used to avoid a [treaty's] plain language," *Chickaloon-Moose Creek Native Ass'n. v. Norton*, 360 F.3d 972, 984 (9th Cir. 2004), nor can they salvage a proposed meaning that "give[s] [the treaty] a contorted construction that abruptly divorces" one clause from another, *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506-07 (1986). While "treaties are construed more liberally than private agreements," "even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation*, 318 U.S. at 431-32. As this Court has held, "the meaning to the Yakama people cannot overcome the clear words of the Treaty." *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014).

Pursuant to Article II, after the boundary passes south of Mt. Adams, the relevant calls are broken into three sequential parts:

(1) "to the spur whence flows the waters of the Klickatat and Pisco rivers;"

(2) "thence down said spur to the divide between the waters of said rivers;"

(3) "thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River." ER1742.

Even if Part 1 were ambiguous, Part 2 requires the boundary to touch the Pisco-Klickitat Divide, and Part 3 requires the boundary to go from that divide to a

second, separate divide.[12] Courts "must honor any unambiguous language in the treaty," *Jones*, 846 F.3d at 1352, and "stop short of varying its terms to meet alleged injustices," *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). "The principle according to which ambiguities are resolved to the benefit of Indian tribes is not … a license to disregard clear expressions of tribal and congressional intent." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 349 (1998) (internal quotation marks omitted); *see also Catawba Indian Tribe*, 476 U.S. at 506; *DeCoteau v. Dist. Cty. Court*, 420 U.S. 425, 447 (1975).

The District Court's holding violates "one of the most basic interpretive canons"—that effect must be given to all provisions "so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks omitted). To include the Glenwood Valley within the Reservation, the District Court's ruling (1) replaces "Pisco" with "White Salmon"; (2) deletes the requirement that the boundary traverse the Pisco-Klickitat Divide; and (3) ignores the requirement that the boundary run from that divide to the divide separating the Satus River from those flowing into the Columbia. In effect, the District Court's boundary erases all references to the Pisco. But "courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Or.*

[12] Yakama's hydrologist confirmed that this last divide is different than the Pisco-Klickitat Divide. ER881.

Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985) (quoting *Commercial Passenger*, 443 U.S. at 675); *see also King Mountain Tobacco*, 768 F.3d at 993; *United States v. Washington*, 157 F.3d 630, 650-51 (9th Cir. 1998).

c. Because there is only one plausible interpretation, the Treaty's description is not ambiguous.

Article II requires the boundary to run from the Cascade Mountains "to the spur whence flows the waters of the Klickatat and Pisco rivers." ER1742. The District Court held this call was ambiguous based on its finding that a "spur divide between the Klickitat River watershed and the Pisco River (i.e., Toppenish Creek) watershed does not exist." ER21; *see also* ER15. Whether a provision is ambiguous is a question of law reviewed *de novo*. *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1118 (9th Cir. 2018); *Southland Corp. v. Emerald Oil Co.*, 789 F.2d 1441, 1444 n.2 (9th Cir. 1986). "A term is ambiguous only if it is susceptible to more than one reasonable interpretation." *J.B. v. United States*, 916 F.3d 1161, 1167 (9th Cir. 2019) (internal quotation marks omitted).[13] The call is not ambiguous because there exists only one plausible interpretation.

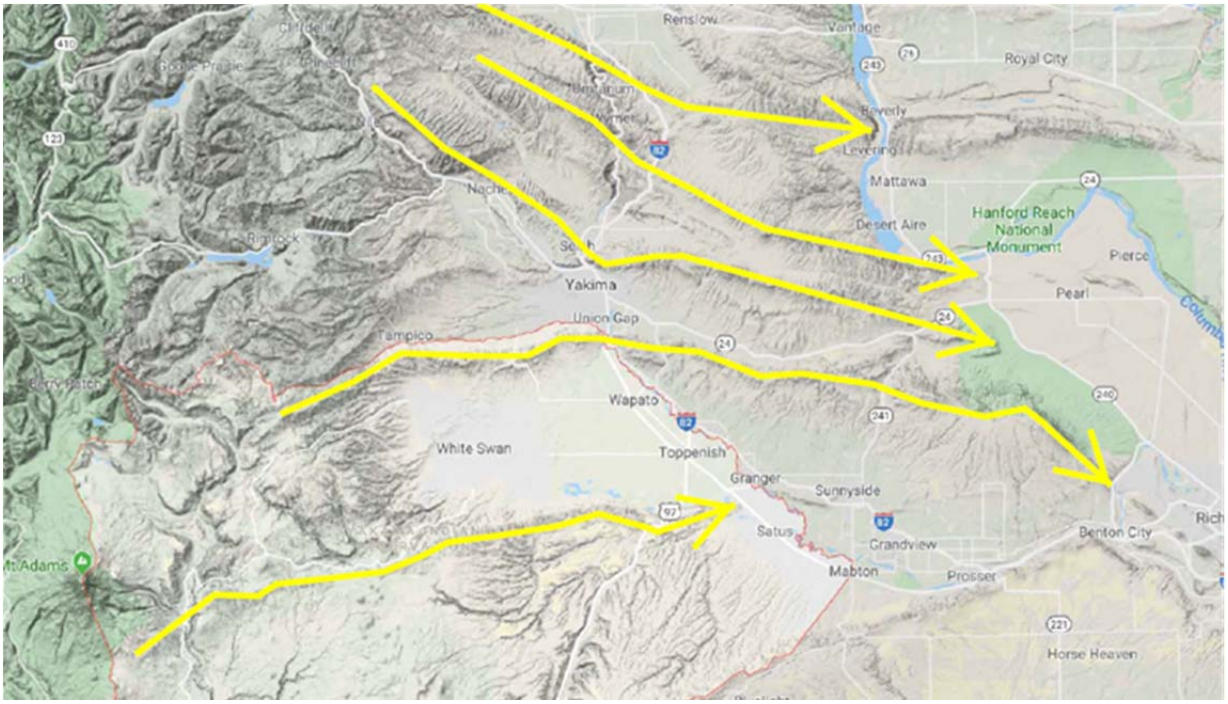
[13] *See also United States v. White Plume*, 447 F.3d 1067, 1074 (8th Cir. 2006) (applying rule to Indian treaty); *United States v. Washington*, 129 F. Supp. 3d 1069, 1112 (W.D. Wash. 2015), *aff'd sub nom. Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157 (9th Cir. 2017) (same).

(1) Only one spur connects the Cascade Mountains to the Pisco-Klickitat Divide.

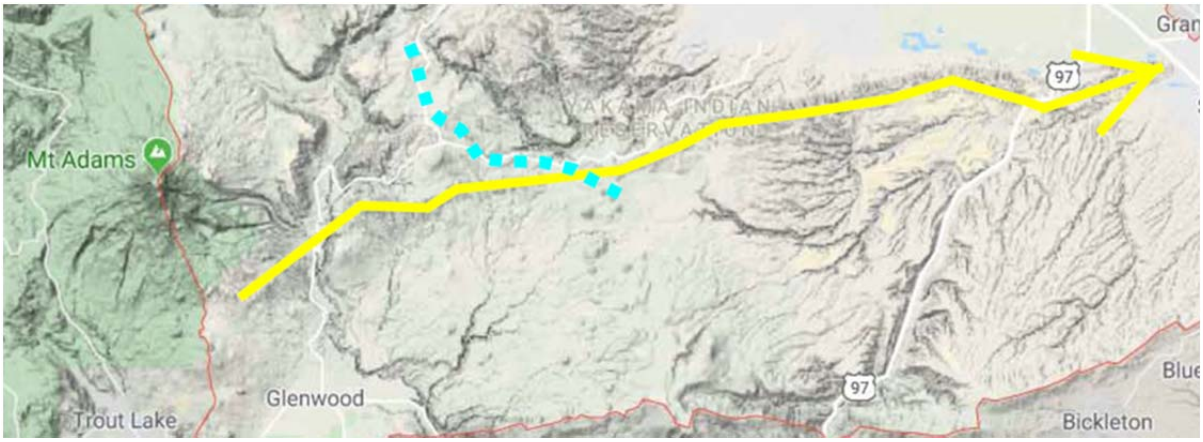
The dispute over this call turns on the word "spur." Stevens' use of the word "spur" is crucial in determining its meaning in the Treaty. *Cf. United States v. Washington*, 129 F. Supp. 3d at 1077 (examining Stevens' use of the word "fish" to determine if he intended "fish" to encompass more than finfish).

In his Railroad Survey Reports, Stevens describes various "spurs" west of the Columbia River. SER159. These "spurs" are "thrown out from the main chain of the Cascades, … extending towards and in some cases reaching the banks of the Columbia." *Id*. Stevens specifically describes the spur "between the Klickitat and Pisko" as a "considerable mountain." *Id*.; *see also* ER534, 535, 536-37.

As shown on the Google Map below, what Stevens described as "spurs" are actually large finger-like ridges, running east from the Cascade Mountains:



Of the "spurs" identified by Stevens, *see* SER159, only one fulfills the Treaty calls:



That "spur" runs east from Mt. Adams and intersects the Pisco-Klickitat Divide (dashed blue line above).

For ambiguity to exist, the term must be "reasonably susceptible to at least two reasonable but conflicting meanings." *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 765 (2018) (internal quotation marks omitted). Yakama offered no evidence of *the parties'* interpretation of "spur." Instead, its hydrologist offered his personal definition—*i.e.*, "higher ground jetting from the edge or side of a ridge." ER877-78. Mr. Ladd's definition cannot create ambiguity in the Treaty because no such "spur" exists. *Id*. Moreover, contrary to Stevens' historical descriptions, Mr. Ladd incorrectly assumed that any "spur" must be continuous (*i.e.*, not split by rivers). *Id*. But "mistaken views about an unambiguous agreement do not create ambiguity." *Chickaloon-Moose Creek*, 360 F.3d at 983.

(2) The District Court's ruling violates fundamental rules of interpretation.

Implicitly adopting Mr. Ladd's interpretation of "spur"—rendering parts of Article II impossible—the District Court violated the longstanding rule that "an agreement should be interpreted in such fashion as to preserve, rather than destroy, its validity." *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 81 (1998). The ruling also disregards the Supreme Court's directive not to interpret words technically, but rather how they would have been naturally understood. *Herrera*, 139 S. Ct. at 1699; *see also Commercial Passenger*, 443 U.S. at 676.

Interpreting "spur" as a large, *discontinuous* ridge not only honors Stevens' descriptions, but it also preserves each of the Treaty calls as written. This interpretation is consistent with the Treaty Map, which shows the "spur" being split by the Klickitat River before reaching the Pisco-Klickitat Divide. ER2230.

The District Court's ruling also contravenes the longstanding rule "that the courses and distances given in the instrument … always give place … to known monuments and boundaries...." *Higueras v. United States*, 72 U.S. (5 Wall.) 827, 835–36 (1865); *see also Brown v. Huger*, 62 U.S. (21 How.) 305, 321 (1859). When interpreting boundary descriptions, "the most material and most certain calls shall control those which are less material, and less certain." *N. Pac. Ry. Co. v. United States*, 191 F. 947, 956 (9th Cir. 1911) (quoting *Newsom v. Pryor's Lessee*, 20 U.S. (7 Wheat.) 7, 10 (1822)), *aff'd*, 227 U.S. 355 (1913). In fact, the Ninth Circuit has already rejected Mr. Ladd's interpretation of "spur" as applied to the

Yakama Treaty, holding that such an interpretation must give way to more certain calls in Article II. *Id*. at 958.

There is no dispute as to the location of the Pisco-Klickitat Divide, and the Treaty unambiguously requires the boundary to proceed along that divide after leaving the Cascade Mountains. If there is any uncertainty about the meaning of "spur," boundary interpretation rules require that references to these known natural objects control. Any such boundary necessarily excludes the Glenwood Valley.

d. The historical record confirms both Treaty parties intended a boundary traversing the Pisco-Klickitat Divide.

The District Court's finding that Stevens "did not know where Camas Prairie was", ER26, is clearly erroneous. Both experts agreed Stevens knew the location of Camas Prairie and that it was material in determining his intent.[14] Both experts further agreed Stevens' knowledge of the Tract D area derived "exclusively from the railroad surveys." ER795, 798-99.

Stevens had specific knowledge about Camas Prairie's location, size, geographic orientation, and features. He knew Tahk was 10 miles long, located 15 miles north of the Columbia River, and spanned the middle third of the distance between Mt. Adams and the Columbia. SER81-82, 150.[15] He also knew that much

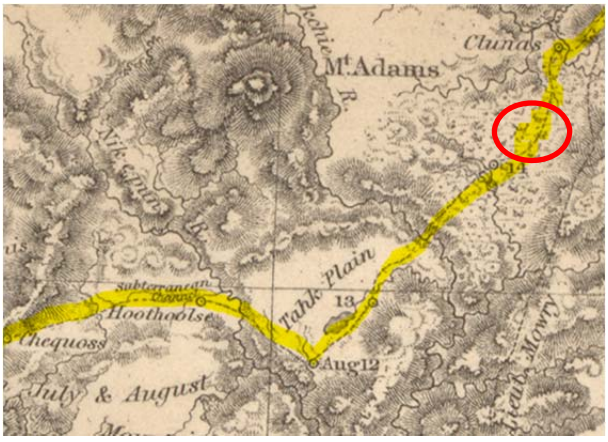
[14] Yakama's expert Dr. Fisher testified that Stevens' expressly intended to place Camas Prairie within the Reservation, ER787, and, to do so, Stevens would have to know where Camas Prairie was located, ER794-95.

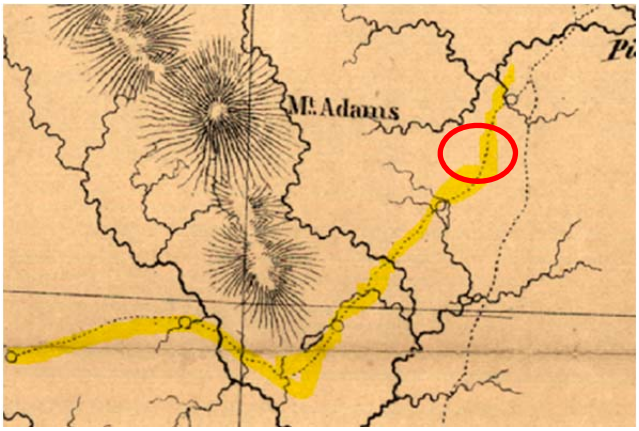
[15] The Railroad Survey Maps (SER81-82) place Mt. Adams approximately thirty-five miles from the Columbia River. They place the southern tip of Tahk Plain approximately fifteen miles from the Columbia River.

of Tahk was located south of the 46th Parallel, ER2230; SER81-82, 121; the significance of which he understood, ER799. Not only do the Railroad Survey Maps show the 46th Parallel bisecting Tahk, SER81-82, but survey data, including precise latitudinal measurements, confirmed its location, SER121; ER798-99.[16]

The Railroad Survey Reports also confirm Stevens knew and understood the relationship between Tahk and the Pisco-Klickitat Divide. After identifying the "spur" between the Klickitat and Pisco, Stevens describes how a team led by McClellan crossed this spur, noting, "the rise from the Klikitat valley to *the divide* is 2,364 feet, and the descent to the Pisko 2,114 feet, the elevation of *the divide* being 3,633 feet above the sea." SER159 (emphasis added); *see also* ER536-37.

The Railroad Survey Maps below (SER81-82) show McClellan's trail (highlighted in yellow) and mark the point at which he crossed the Pisco-Klickitat Divide (circled in red):





[16] Yakama's expert agreed "Stevens' understanding of the location of Tahk Plain … would have been based on these latitudinal measurements." ER798-99.

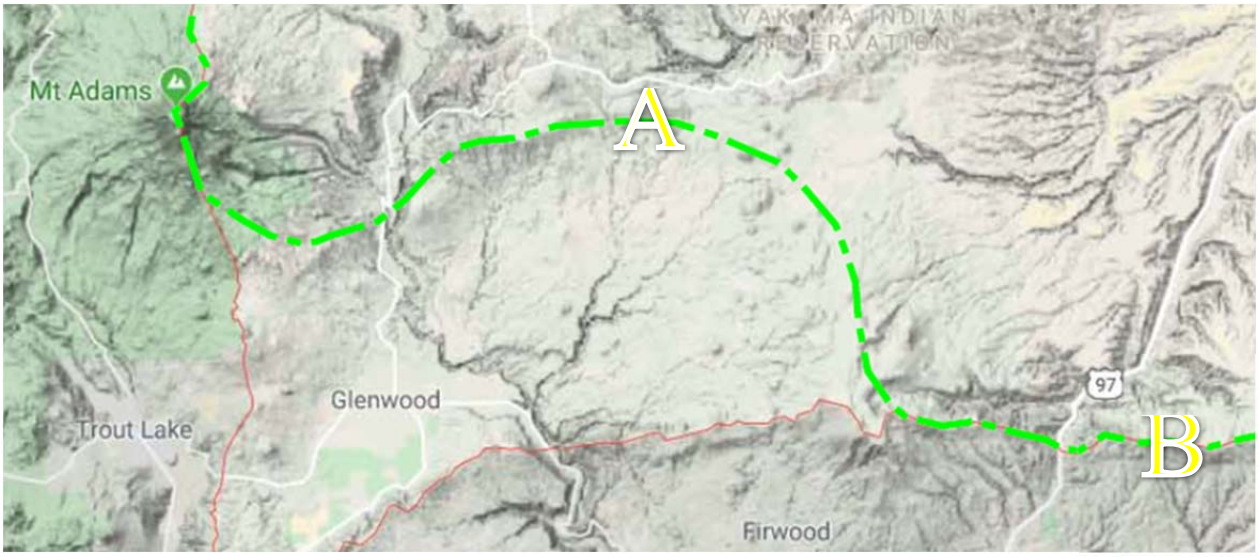
The Railroad Surveys correctly locate the Pisco-Klickitat Divide east of Mt. Adams and north of Tahk. Thus, Stevens knew precisely the relationship between that divide and Tahk when he drafted the Treaty and created the Treaty Map.

As for the Indians, both experts agreed Yakama negotiators would have been intimately familiar with the natural features in and around Tahk, ER846-47, 560-62, including the Klickitat, White Salmon, and Pisco Rivers, the divides between those rivers, and the various forks and branches of those rivers, ER846-47. The Treaty Map provided visual confirmation that the boundary would run along the Pisco-Klickitat Divide. ER2229-30, 532. Other prominent features on the Treaty Map—including the main forks of the Klickitat—are unmistakable landmarks, which the Indians would have recognized and understood. ER561, 295-99. Like Stevens, Yakama negotiators knew the location of the Pisco-Klickitat Divide and that any boundary running along the divide would exclude Tahk.

e. A boundary passing north of Tahk is consistent with descriptions at the Treaty Council.

At the Treaty Council, Stevens twice described the Yakama Reservation. ER1962, 1971. Just like the Treaty, both descriptions expressly reference the Pisco River. There is *no mention* of the White Salmon River or Camas Prairie, or of the divide between the White Salmon and Klickitat Rivers. ER834-35, 838-39. Yakama's expert agreed "nothing in the recorded Council proceedings indicat[es] that Camas Prairie was specified as a place to be reserved." ER834-35.

Stevens described a western boundary that passes south of Mt. Adams then connects to the Pisco-Klickitat Divide. As shown on the Google Map below, such a boundary cannot reasonably encompass the Glenwood Valley:



The green line (above) reflects a boundary that passes south of Mt. Adams and connects to the Pisco-Klickitat Divide ("A") before passing to the divide between the Satus River and the rivers flowing into the Columbia River ("B"). The red line, adopted by the District Court, never approaches the Pisco-Klickitat Divide.

Both the Treaty and Council proceedings describe the boundary in direct relation to the Pisco, and the Treaty Map confirms the boundary follows the Pisco-Klickitat Divide. Ignoring all references to the Pisco, the District Court's boundary runs down the divide between the White Salmon and Klickitat Rivers and then proceeds directly to the divide separating the Satus River from those flowing into the Columbia. There is no mention of the White Salmon River in either the Treaty or Council proceedings, nor is there any reference to the divide between the White

Salmon and Klickitat. ER839. If the Treaty parties intended to include Tahk Plain within the Reservation, they could have easily done so without any reference to the Pisco River. The fact that *every treaty-time description* of the Reservation associates the boundary with the Pisco confirms the parties' intent that the Pisco marks part of the boundary.

2. The Treaty Map Confirms Both Treaty Parties Intended To Exclude The Glenwood Valley.

As Yakama's expert testified, the Treaty Map "shows the correct boundary of the Yakama Reservation as intended by the parties in 1855," ER841, and "is consistent with the Yakama's idea of the topography of the area in and around Tract D in 1855," ER846. Because the Treaty Map excludes Tahk from the Reservation, the District Court's boundary determination must be reversed.

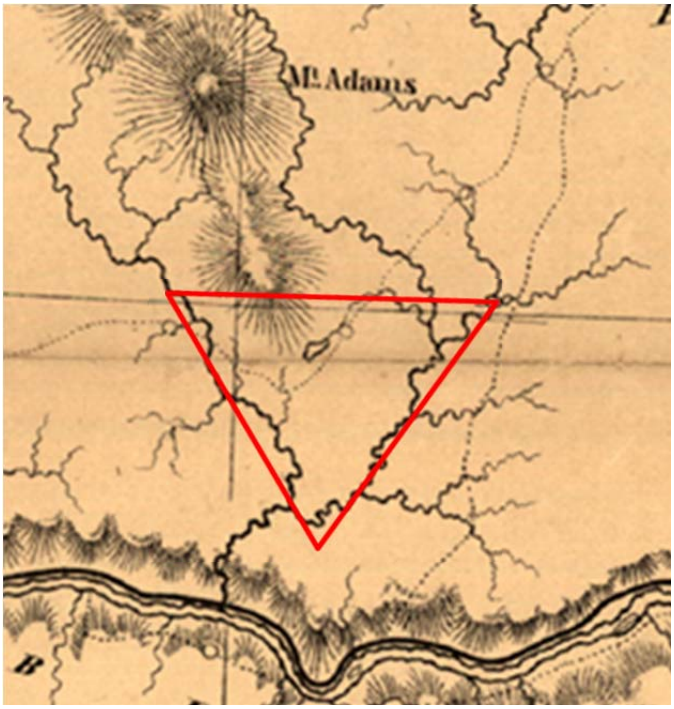
a. The Railroad Survey Maps depict the location of Tahk in relation to other major geographic features.

Both experts agreed the Treaty Map was based on Stevens' prior cartographic work on the Railroad Surveys, including the Railroad Survey Maps. SER81-82; ER793-94. As outlined in the red triangle, the 1853-54 Railroad Survey Map (SER81) shows the location of Tahk.

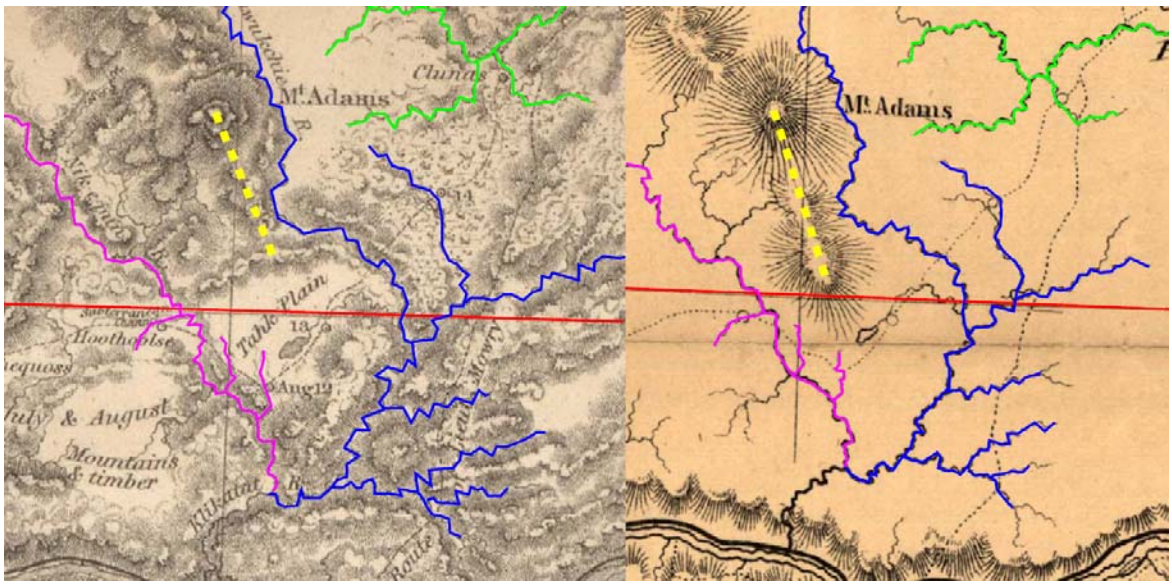
Tahk is located south of the Mt.

Adams foothills, between the White Salmon ("Nikepun") and Klickitat Rivers. In the middle of Tahk is Conboy Lake. To the north and south of Conboy Lake, along the dashed line, are small circles. The dashed line depicts the route of McClellan's 1853 Railroad Survey expedition; the circles designate his two camps in Tahk. The lake and the camps are south of the 46th Parallel, with the northern camp approximately parallel with the main forks of the Klickitat. Significantly, Tahk is located *far south* of the Pisco-Klickitat Divide.

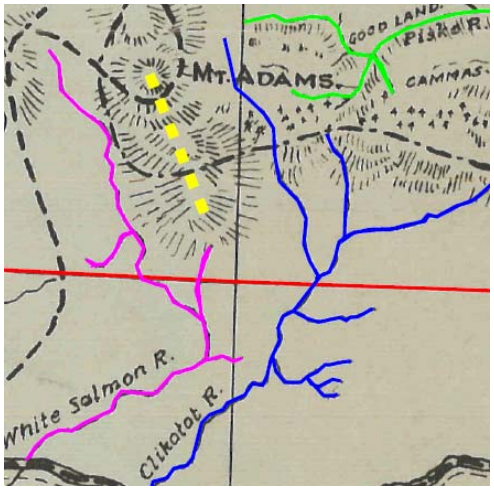
While the 1855 Railroad Survey Map (SER82, below) does not label Tahk, it is easy to locate by reference to the map's other features:



Both Railroad Survey Maps (below) show Conboy Lake, McClellan's trail and camps, the foothills running south from Mt. Adams (dashed yellow line), the main tributaries and forks of the Klickitat (blue), White Salmon (pink), and Pisco Rivers (green), and the 46th Parallel (red line):



b. Comparing the Treaty Map with the Railroad Survey Maps confirms the location of Tahk outside the Reservation.



While Stevens did not label Tahk on the Treaty Map, a simple comparison with his Railroad Survey Maps confirms its placement outside the Reservation. Like the Railroad Survey Maps, the Treaty Map (ER2230, right) shows (1) the foothills running south from Mt. Adams;[17] (2) the major tributaries and forks

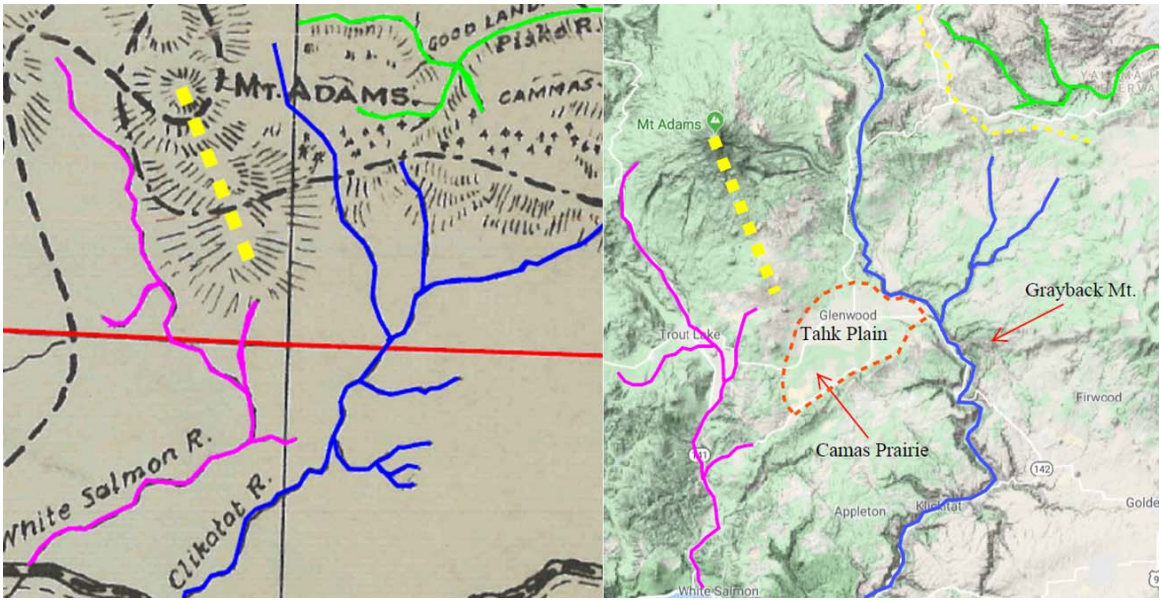
[17] When asked to place Tract D on the Treaty Map, Yakama's expert placed it directly *on top* of the Mt. Adams foothills. SER356; ER842.

of the White Salmon, Klickitat, and Pisco Rivers; (3) the Pisco-Klickitat Divide; and (4) the 46th Parallel.

Consistent with Article II and the descriptions at the Treaty Council, the Treaty Map shows the boundary running along the Pisco-Klickitat Divide, far north of Tahk. Yakama offered *no evidence* to rebut this mapping comparison. As Attorney General Cummings said in 1933, the Treaty Map does not support a claim to Camas Prairie, "but definitely disproves it." SER335.

c. Comparison with a modern map confirms the accuracy of relevant geographic features on the Treaty Map.

As Yakama's expert testified, "in order to determine what aspects of the Treaty Map are geographically accurate, you'd need to compare that map with a modern map." ER845.[18]



[18] The only witness at trial to perform any such comparison was Michael Reis. He concluded the relevant geographic features on the Treaty Map were placed with reasonable accuracy. ER846. His testimony was unrebutted. ER557-58.

Comparing the Treaty Map (above left) to the Google Map (above right) confirms Stevens placed salient geographic features in and around the Glenwood Valley with considerable accuracy.

Contrary to the District Court's findings, *see* ER25, there is no evidence the Treaty Map is geographically inaccurate in and around Tract D. Rather, the unrebutted evidence proves the opposite is true. If anything, it is the eastern part of Satus Ridge that is incorrect on the Treaty Map. ER744-45. Mr. Reis explained that these inaccuracies to the east of Tahk were largely due to the fact that no one had conducted scientific surveys in those areas. ER558.

The historical record supports Mr. Reis' unrebutted testimony. Describing the Satus Mountains, Stevens' wrote:

> South of the Yakima is a low divide separating its waters from the waters flowing into the main Columbia in that portion of the river where, after leaving Fort Walla-Walla, it proceeds westward. This divide has a general parallel course to the Columbia, is nearly east and west some thirty miles from the main river, and between it and the Columbia is a large body of arable land, nearly every acre of it adapted to cereals. This country has not come under the observation of a scientific party with instruments in hand….

SER159. Unsurprisingly, areas that were carefully explored with scientific instrumentation, like Tahk, are depicted with greater accuracy.

The placement of the 46th Parallel on the Treaty Map in relation to Grayback Mountain is not a mistake; Grayback Mountain is *outside* the Reservation boundary as shown on the Treaty Map. As Mr. Reis testified, the boundary shown

on the Treaty Map and described in the Treaty is smaller than the boundary later claimed by the Treaty parties and adopted by Congress. ER211-12, 562-64.

d. The District Court assumed without evidence that Stevens erred in drawing the Glenwood Valley on the Treaty Map.

To include Tahk, the Reservation boundary must extend approximately 23 miles south of Mt. Adams, ER843-44, spanning nearly two-thirds the distance between Mt. Adams and the Columbia River. Stevens was fully aware of these facts. SER81-82. The boundary on the Treaty Map extends *only 10 miles* south of Mt. Adams and spans approximately *one-quarter* the distance between Mt. Adams and the Columbia. ER844, 2229-30.

Stevens also knew where Tahk was located in relation to the area's pertinent geographic features—including the relevant rivers, tributaries, and divides—and he knew Camas Prairie was located south of the 46th Parallel. SER81-82, 121. Given Stevens' knowledge and expertise, it is not plausible he intended to include Camas Prairie in the Reservation yet drew a boundary 13 miles north of its known location. The District Court's conclusion assumes, without evidence, that Stevens disregarded *everything* he knew about the location of Camas Prairie when drawing the Reservation on the Treaty Map.

3. The Great Weight Of Post-Treaty Evidence Proves Both Parties Understood The Glenwood Valley To Be Outside The Reservation.

In addition to the Treaty language and surrounding circumstances, "the court must examine … the conduct of the parties since the treaty was signed."

Waterbury, 78 F.3d at 1403; *see also Seufert Bros. Co. v. United States*, 249 U.S. 194, 198-99 (1919). The parties' contemporaneous post-Treaty actions confirm their intent to exclude the Glenwood Valley from the Reservation.

a. It is undisputed the United States historically treated Tract D as outside the Reservation.

For more than 100 years, the United States demonstrated its understanding that Tract D was outside the Reservation:

- Immediately following the Treaty Council, former Yakama territory was opened to settlement under the General Land Laws, with the first settlers arriving in the Tract D area in the early 1870s and the first land patents issuing in 1879. ER800-01; SER284-85.
- Every pre-1930 survey of the southwest boundary excluded Tract D, including the Schwartz Survey in 1890 (ER2782), the Barnard Reconnaissance in 1898-99 (ER2628), the Campbell Survey in 1906-07 (ER2782), and the Pecore Survey in 1920-24 (*id.*). The District Court clearly erred when it found that the Pecore Survey "recognized an additional 47,593 acres in a triangular shape on the Reservation's southwestern boundary." ER21. Those 47,593 acres are actually located along the western boundary, *north* of Tract D. ER2628.
- In December 1904, Congress passed the 1904 Act, adopting the Barnard Line as the official boundary of the Reservation. ER1813-16,

2628. Congress never even considered whether Tract D was part of the Reservation. ER805-06.

- As Yakama's trustee and guardian, the United States' advocated the Barnard Line in the *Northern Pacific Railway* litigation. *N. Pac. Ry. Co.*, 191 F. at 958; *see also* ER822; SER248. It maintained that position throughout the ICC proceedings. ER2814-34.

b. For its first 75 years, Yakama evinced a consistent understanding that its boundary excluded Tract D.

Between 1856 and 1930, Yakama consistently advocated its understanding of a boundary excluding the Glenwood Valley:

- Schwartz, Noel, and Barnard provided independent accounts of Yakama's claims. SER316, 329; ER2619-20. All were consistent with the lines shown to Chief Spencer and Stick Joe.
- Between 1892 and 1908, tribal leaders, including Treaty Council attendees and descendants of Treaty signers, continually identified Chief Spencer and Stick Joe as authorities on the boundary and expressly endorsed the line outlined in the July 1906 petition (ER2864), which mirrors the boundary shown to Chief Spencer.
- White Swan and Eneas, prominent Yakama leaders throughout the boundary dispute, attended the Treaty Council and would have repudiated a mistaken boundary. SER193, 345. Leschi Owhi and William Tee-i-as, sons of Treaty signers, ER2864; SER357, would

likely have learned the true boundaries from their fathers, and would not have advocated a boundary that deprived the Tribe of land. Yet each expressly endorsed a boundary excluding Tract D.

- The 1906 Camas Prairie irrigation district agreement further evidences Yakama's understanding that Camas Prairie was an off-reservation subsistence site. ER1742, 411-12, 413. Yakama would never have allowed non-Indians to develop on-Reservation communities without protest, much less encourage further settlement by agreeing to provide them with Reservation water.
- Lincoln's testimony during the *Northern Pacific Railway* litigation confirmed that "all the Indians" consented to a boundary substantially similar to the Barnard Line. SER35-36. It is undisputed that Lincoln testified "on behalf of the Yakama Nation," ER824, and there is no contemporaneous evidence in the record that any Yakama member disagreed with Lincoln's testimony.

c. Absent from the historical record are any claims that Tahk was inside the Reservation.

As its general council proclaimed in 1904, Yakama has "at all times sought redress for wrongs." SER219. Yakama's customary method of seeking redress involved councils with government agents, where its headmen would speak, and petitions to federal officials. During the critical period following the Schwartz Survey, every major communication between the United States and Yakama on the

disputed boundary involved Yakama's principle leaders, White Swan and Eneas. Both of these Treaty Council attendees—until their deaths in 1910 and 1908, respectively—claimed a boundary that excluded the Glenwood Valley. As Yakama's expert testified, absent statements by Treaty signers, those who attended the Treaty Council "remain the ultimate voices of authority." ER816-17.

Completely absent from the pre-1930 historical record are *any* claims by Yakama members that Takh was within the Reservation. There are no counter-narratives, no counter-petitions, no meeting minutes where members expressed disagreement with the boundary advocated by tribal leaders like White Swan and Eneas, and no reports by Indian Agents documenting such protests. ER527-28.

Yakama's only explanation for this silence is the lost Treaty Map. *See*, *e.g.*, ER708, 710, 713. But even Yakama's expert conceded "the substance of Article II and Article III are particularly important" to Yakama and "those rights are something tribal members would remember." ER831. The unrebutted evidence is that Yakama would not have needed the Treaty Map to know its boundaries. ER206. The absence of any pre-1930 evidence of Yakama members claiming Tahk or Camas Prairie strongly supports Mr. Reis' opinion that Yakama historically understood its boundary to exclude them.

d. The District Court erred by ignoring the parties' contemporaneous historical understanding of the boundary.

In holding that Yakama understood Tract D to be included in the Reservation, the District Court ignored nearly the entire contemporaneous post-

Treaty record. The District Court mentions "boundary disputes" and Yakama's refusal to sell surplus land "citing outstanding Reservation boundary errors," ER15, but the record demonstrates that those disputes related to areas *other than Tract D*.[19] The same Yakama leaders involved in those disputes—namely White Swan and Eneas—not only endorsed Chief Spencer and Stick Joe as boundary authorities, but also expressly advocated for a line that excluded Tract D. SER168-69; ER2864. While the District Court mentions the Schwartz Survey, ER16, it wholly ignores Yakama's well-documented response to it, *see* SER166-70; ER2851-56.

There is no evidence of any disagreement among the Yakamas on this issue. The District Court does not even mention the repeated, express statements by tribal headmen claiming a boundary excluding Tract D. Nor does the District Court mention Lincoln's sworn testimony affirming the understanding of *all the Indians*.

In the few instances where the District Court attempted to address the historical record, it repeatedly committed clear error. For example, the District Court found that Stick Joe, Chief Spencer, and Abe Lincoln simply "recounted an erroneous boundary" told to them by federal agents rather than by Tribal headmen present at the Treaty Council. ER16-17. These findings ignore that White Swan

[19] *See, e.g.*, ER2851 (claiming Schwartz Survey "deprived [Yakama] of 357878 acres"); ER2864 (protesting exclusion of Pecore Triangle); SER236 (reporting that Yakama protested the Campbell Survey "because it eliminated 64,000 acres of land on the west and north of the boundary"); SER239 (reporting that the "60,000 acre tract … is the subject of [Yakama's] protest" of the Campbell Survey).

and Eneas—who attended the Treaty Council—along with Leschi Owhi and William Tee-i-as—sons of Treaty signers—agreed with the boundary advocated by Stick Joe, Chief Spencer, and Abe Lincoln, SER168-70, 358; ER2851-56, 2864, and each man was specifically chosen as an authoritative voice on the boundary issue, SER35-36, 168-69, 363-64. Approximately 5,000 Indians attended the Treaty Council, and there is no evidence any one of them ever contested the boundary advocated by Chief Spencer and Stick Joe.

e. The District Court misconstrued Michael Reis' opinions regarding the "Barnard Line."

The District Court materially misconstrued Mr. Reis' testimony on the boundary. ER24, 27. Mr. Reis *did not* opine that the Barnard Line represented the boundary described in the Treaty. He testified that the Barnard Line represented the parties' mutual understanding *after the Treaty* (which was later adopted by Congress) and that this line *is different* than what the Treaty and Treaty Map depict. ER211-12, 562-64. The historical record makes clear that soon after the Treaty Council the United States presented Yakama with *a bigger* boundary, and Yakama adopted it. *See, e.g.*, ER2835 (Yakama advocating for the line that they had "been led to believe belonged to them"); SER166 (the Indians "have always recognized a certain indefinite line … which they have been led to believe was the line for many years"). This was the only explanation offered at trial for why Yakama leaders, *for 75 years* and *without opposition*, steadfastly advocated a boundary different from that which was originally promised to them.

II. Irrespective Of Its Treaty Interpretation, The District Court Erred When It Held The 1904 Act Did Not Set The Western Boundary.

The plenary power of Congress to regulate Indian affairs is well established. *See, e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 343; *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993). It includes the exclusive authority to expand or diminish Indian Country. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *see also Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998). Even if the District Court's Treaty interpretation were correct, Congress affirmatively adopted a new boundary in 1904 that excludes Tract D.

In determining whether Congress acted to change reservation boundaries, courts consider three factors: (1) the statutory language; (2) the historical context surrounding the passage of the Act; and (3) the subsequent demographics of the disputed territory. *Hagen v. Utah*, 510 U.S. 399, 411 (1994). Congress need not state that it is diminishing the reservation. *Id.* at 411. Congress need only intend "to change the boundaries." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977).

1. By Its Plain Language, The 1904 Act Established The Reservation's Western Boundary.

"The language of a statute is controlling when the meaning is plain and unambiguous." *United States v. Maria-Gonzales*, 268 F.3d 664, 668 (9th Cir. 2001). Congress' intent to set the Reservation's western boundary is plain on the face of the statute:

In Section 1, Congress affirmatively "recognized" Yakama's claim "to the tract of land adjoining their present reservation on the west … according to the

findings … of Mr. E.C. Barnard" and declared that "said tract shall be regarded as a part of the Yakima Indian Reservation" for the "purposes" of the Act. ER1814.

In Section 8, Congress directed Interior to "define and mark the boundaries of the western portion of said reservation" including the additional tract of land to the west "and to complete the surveys thereof." ER1816.

While both experts agreed the 1907 Campbell Survey "officially fixed the borders recognized in the 1904 Act," ER804, the District Court held "[t]he 1904 Act did not change the Treaty boundaries of the Yakama Reservation," ER19. It further held that the boundary that Congress directed be defined, marked, and surveyed merely "marked the extent of the impacted land" subject to allotment. ER20. Both holdings are erroneous. The District Court's interpretation assumes Congress meant to set a superficial boundary for purpose of allotment, while inexplicably leaving the actual boundary subject to continued dispute.

The Act's recognition of additional lands served multiple "purposes." The first purpose, as explained in more detail in Section II.2., below, was to *settle* the longstanding dispute with Yakama over its western boundary. The second, closely related purpose was to ensure that *all* surplus lands within the Reservation were subject to allotment. The latter purpose necessarily required fulfillment of the former. As Yakama's expert testified, the 1904 Act was meant to "assimilate Indians" and "get at what land they had left within the reservation." ER693.

Congress could not fully open the Reservation to allotment without first defining its boundaries.

"The canon of construction regarding the resolution of ambiguities in favor of Indians … does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *Catawba Indian Tribe*, 476 U.S. at 506; *see also DeCoteau*, 420 U.S. at 447. There is no evidence supporting the District Court's interpretation that Congress intended to establish one boundary for allotment while leaving the actual boundary unresolved. Rather, the surrounding circumstances make clear that Congress intended to settle the boundary once and for all.

2. The Circumstances Surrounding The Passage Of The 1904 Act Confirm Congress' Intent To Finally Settle The Boundary.

"[C]ongressional intent to abrogate tribal rights may be found in the express provisions of an act or in its surrounding circumstances and legislative history." *United States v. Eberhardt*, 789 F.2d 1354, 1361 (9th Cir. 1986). The Ninth Circuit has already recognized that Congress adopted "the Barnard survey … as locating the boundaries of the reservation in accordance with the treaty of June 9, 1855." *N. Pac. Ry. Co.*, 191 F. at 956. In evaluating the effect of the 1904 Act, the District Court failed to follow this Court's prior determination, ignoring the longstanding dispute over the western boundary and Congress' desire to settle it unilaterally.

In response to Yakama's 1892 petition, SER166-70, and in light of its failure to negotiate the sale of Yakama's surplus lands, SER178-214; ER1839, 2632,

2836-47, the United States sent Barnard to investigate "with the view of settling the contentions of the Indians," SER215. With Barnard's findings in hand, ER2613-28, Congress undertook to resolve the boundary dispute unilaterally.

Both House and Senate committee reports for the 1904 Act begin with a discussion of Yakama's boundary claim:

> For many years the Indians have claimed the boundary lines of said reservation as laid out are incorrect and that their reservation includes more lands than have been embraced within the recognized limits of their reservation. Under direction of the Secretary of the Interior Mr. E.C. Barnard … made an investigation of the claims of the Indians and found that the Yakima Indians were entitled to a tract of land estimated to contain about 357,878 acres according to the terms of the treaty. The Indians, however, did not claim so much land as this, but they did claim a tract estimated to contain about 293,837 acres.

ER1836, 2629. Referring to this 293,837 acres as "the disputed tract," *id*., both reports state Congress' belief that, through passage of the 1904 Act, this "long-standing dispute between the Government and the Indians is settled," ER1839, 2632. Regarding Section 8, both reports explain that appropriations will be made "to mark the boundaries of the western portion of said reservation, and to complete the survey of the tract recognized as belonging to the Indians." ER1839, 2631. The reports state that "No agreement has been made with these Indians, and their consent has not been secured." ER1839, 2632.

In this context, "settle" can only mean one thing: Congress is resolving the boundary dispute *unilaterally*. Even Yakama's expert conceded that Congress

believed it was unilaterally settling the Yakama boundary dispute by adopting the Barnard Line. ER804-05.

The committee reports specifically addressing the boundary dispute are the "authoritative source for finding the Legislature's intent" because they "represent[t] the considered and collective understanding of those Congressmen involved in drafting and studying [the] proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (first alteration in original).

3. The Subsequent Demographic History In The Glenwood Valley Supports Maintaining The Area As Non-Reservation Land.

The District Court erred to the extent it held that established expectations are irrelevant. *See Nebraska v. Parker*, 136 S. Ct. 1072, 1081 (2016). "The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges." *Rosebud Sioux Tribe*, 430 U.S. at 604-05. "When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 218 (2005).

Census records show that Klickitat County is over 94 percent non-Indian,[20] and unrebutted trial testimony confirmed the demographics in the Glenwood Valley are even less diverse. ER272-73.[21] Neither the County nor the State of Washington treats the Glenwood Valley as Reservation land. ER253-54; SER2-5.

4. The District Court Erroneously Applied The *Solem* Framework.

In holding that Congress did not set the Reservation boundary in 1904, the District Court looked at "the statutory language used to open the Indian lands," ER17, as well as the "subsequent demographic history of the opened lands," ER18. These are standards set out in *Solem v. Bartlett*, 465 U.S. 463 (1984), for analyzing whether Congressional allotment alters the reservation status *of allotted lands*.

This case has nothing to do with the status of lands that were allotted pursuant to the 1904 Act. Neither the County nor Yakama disputes that such lands were, and continue to be, within the Reservation. The issue in this case is whether Congress, by passing the 1904 Act, intended to set the western boundary of the Reservation when it expressly adopted the Barnard Line and instructed Interior to define, mark, and survey that boundary. Under these circumstances, the District Court's application of the *Solem* framework was erroneous.

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[20] The census data, of which the Court may take judicial notice, can be found at https://www.census.gov/quickfacts/fact/table/klickitatcountywashington,WA/PST045218. *See United States v. Esquivel*, 88 F.3d 722, 726-27 (9th Cir. 1996).

[21] The Klickitat County portion of Tract D largely encompasses the Glenwood Valley. ER253.

Whether Congress intended *to shrink* the Reservation is not the test. *See* ER18. Congress need only intend "to *change* the boundaries." *Rosebud Sioux Tribe*, 430 U.S. at 615 (emphasis added); *see also Solem*, 465 U.S. at 471. Congress was well aware that by adopting and enacting the Barnard Line, which added 293,873 acres, it might be depriving Yakama of more than 64,000 *additional acres* that were arguably within the Reservation per the Treaty. ER1836, 2629. It nevertheless chose the smaller boundary. As the Supreme Court stated in *Klamath*, "since the boundary restoration option would have unquestionably preserved such rights for the Tribe, the rejection of that option is also consistent with an intent not to preserve those rights." *Klamath Indian Tribe*, 473 U.S. at 771; *see also United States v. Dion*, 476 U.S. 734, 739-40 (1986). Here, as it has done in other similar circumstances,[22] Congress clearly intended to settle a boundary dispute by unilaterally fixing a line through legislation.

III. The District Court Correctly Held That Washington State Retained PL-280 Jurisdiction Over Criminal Offenses Involving A Non-Indian.

In 1968, Congress provided a mechanism by which a state could retrocede all *or part* of the jurisdiction the state had assumed under PL-280. *See* Pub. L. No. 90-284, §§ 402-06, 82 Stat. 73, 78-80. The retrocession process between a state and the United States consists of an offer and an acceptance. 25 U.S.C. § 1323.

[22] *See* Act of June 6, 1894, 28 Stat. 86; Act of March 3, 1875, 18 Stat. 476. In both instances, Congress chose a boundary based on a contested survey. *See also Warm Springs Tribe of Indians v. United States*, 95 Ct. Cl. 23, 32-34, 37 (1941); *Chickasaw Nation v. United States*, 94 Ct. Cl. 215, 221 (1941).

While federal law allows the United States to accept an offer of retrocession, only a state can initiate the process, and the state alone has authority to define the offer. 25 U.S.C. § 1323(a). Both Washington and the United States agree that Washington retained PL-280 criminal jurisdiction over crimes committed by non-Indians and crimes involving non-Indian victims within the Yakama Reservation. *See* Dkt. 19 at Exs. A and B.

Consistent with decisions of Washington appellate courts, the District Court independently held that Washington retained PL-280 jurisdiction "over criminal offenses involving non-Indian defendants and over criminal offenses involving non-Indian victims." ER34. Because it best reflects the parties' intent at the time of retrocession, based on the plain language of the Proclamation, this ruling should be affirmed.

1. Yakama's Policy Arguments Provide No Basis To Ignore The Understanding Of The Parties To The Retrocession Agreement.

Yakama urges this Court to overrule the District Court on three principal grounds:

First, Yakama claims that any exercise of non-consensual criminal jurisdiction within the Reservation violates its "Treaty-reserved rights." Dkt. 16 at 72 of 78. This claim, however, was expressly rejected by the Supreme Court in *Yakima Indian Nation*, 439 U.S. at 478 n.22.

Second, Yakama claims that Washington's continued exercise of PL-280 criminal jurisdiction violates its sovereignty. Dkt. 16 at 72 of 78. But Yakama

retains the exact amount of authority and jurisdiction it possessed prior to PL-280. Indeed, Yakama possessed no authority to prosecute non-Indians for crimes committed against Indian victims within its Reservation prior to retrocession and possesses no such authority after retrocession. *See generally Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 900 n.6 (9th Cir. 2017), *as amended* (Aug. 3, 2017). Its authority to prosecute Indians for crimes committed within its Reservation likewise remains unchanged. *Confederated Tribes*, 608 F.2d at 752. Moreover, Yakama's exercise of criminal jurisdiction is not impacted by and does not impact Washington's exercise of criminal jurisdiction. *See generally United States v. Lara*, 541 U.S. 193 (2004); *Ramos v. Pyramid Tribal Court*, 621 F. Supp. 967 (D. Nev. 1985); *State v. Moses*, 37 P.3d 1216 (Wash. 2002). This Court has already determined that "Public Law 280 does not diminish tribal sovereignty." *Bishop Paiute Tribe v. Cty. of Inyo*, 291 F.3d 549, 557 n.2 (9th Cir. 2002), *rev'd sub nom. Inyo Cty. v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003).

Third, Yakama claims the complex jurisdictional scheme maintained by Washington's retention of PL-280 jurisdiction "could allow lawbreakers to evade justice or cause further danger to people in the surrounding communities." Dkt. 16 at 73 of 78. The Supreme Court, however, rejected this argument when it upheld Washington's original assumption of PL-280 criminal jurisdiction. *See Yakima Indian Nation*, at 439 U.S. at 502. Yakama's concern—of which it presented no

supporting evidence in the District Court—contradicts the historical record, which establishes that Washington successfully holds defendants accountable under its PL-280 jurisdiction. *See, e.g.*, *State v. L.J.M.*, 918 P.2d 898 (Wash. 1996); *State v. Hoffman*, 804 P.2d 577 (Wash. 1991); *State v. Fleet*, 699 P.2d 774 (Wash. App. 1985). Furthermore, Yakama concedes it needs more law enforcement, recently declaring a "Public Safety Crisis" on the Reservation citing "an epidemic of drug use, plague of criminal activity, disregard for the rule of law and general civil arrest." SER371-75. Washington's retention of some PL-280 jurisdiction "will mean increased law enforcement resources within the Reservation." Dkt. 19 at 44 of 73.

2. Washington Retained Criminal Jurisdiction When Either The Defendant Or The Victim Is Non-Indian.

Current federal law requires a state's consent before it may be relieved of its pre-1968 PL-280 jurisdiction. *See* 25 U.S.C. § 1323(b). A state tenders such consent through an offer to the United States. *Id*. at § 1323(a). The scope of that offer is a question of state law.[23] *Tyndall v. Gunter*, 840 F.2d 617, 618 (8th Cir.

[23] While Yakama disputes this point, *see* Dkt. 16 at 33-40 of 78, the cases Yakama cites only deal with the *validity* of retrocession, not the *scope* of what the state had retroceded. *See United States v. Lawrence*, 595 F.2d 1149 (9th Cir. 1979) (addressing validity only); *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976) (same), *rev'd on other grounds by Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United State v. Brown*, 334 F. Supp. 536 (D. Neb. 1971) (analyzing the validity of retrocession and whether Interior may accept *less* than what is offered); *Omaha Tribe v. Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971) (addressing validity only).

1988) (although federal law governs the validity of retrocession, the "substance of what [is] retroceded … is a question of state law"); *Goham v. Wolff*, 471 F.2d 52, 54 (8th Cir. 1972) (state courts decide the effect of a valid retrocession). Final decisions of state appellate courts on questions of state law are binding on federal courts. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *Brown v. Ohio*, 432 U.S. 161, 167 (1977).

Washington communicates offers of retrocession by issuing two documents: a proclamation and a transmittal letter. *See* RCW 37.12.160(4). Gubernatorial proclamations are interpreted under the same rules applicable to statutes. *Zack*, 413 P.3d at 68.[24] Courts read the plain language of the proclamation in a manner that renders no portion meaningless, nonsensical, or superfluous. *Id*. at 69-70. Ambiguities in a proclamation are interpreted in a manner consistent with the governor's intent and authority. *Id*. at 68-70. In *Zack*, the Washington Court of Appeals applied these rules to the four corners of Proclamation 14-01, holding that the State's retrocession offer within the Reservation did not extend to crimes involving a non-Indian.[25]

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[24] Each rule of construction applied in *Zack* has a federal counterpart. *See, e.g.*, *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005) (Executive Orders are interpreted the same as statutes); *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (every word in a statute must be given effect, and the words of a statute must be harmonized internally and with each other to the extent possible).

[25] While the *Zack* court did not rely on Governor Inslee's transmittal letter, *Zack*, 413 P.3d at 70, such reliance would have been proper. The contents of the contemporaneous letter became part of the retrocession agreement upon

As recognized in *Zack* and by the District Court, *see* ER34, interpreting Washington's offer turns on the meaning of "and" in the phrase "non-Indian defendants and non-Indian victims," ER2699. The word "and" does not have a single meaning and may be used to indicate the inclusive disjunction "and/or" in which either element or both elements can be present. *See, e.g.*, *And*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 80 (2002). As the United States stated in its amicus brief,

> The word "and" is similarly used in everyday conversation in this disjunctive fashion. A booklover who collects mysteries and autobiographies is almost certainly not restricting her collection to books authored by anonymous serial killers. A child who says he loves "lollipops, ice cream, and tootsie rolls" means that he enjoys any of these (perhaps all at once) — not that he likes them *only* in combination.

Dkt. 19 at 30 of 73 (emphasis in original).

The context[26] in which "and" appears will determine whether the word should be read conjunctively or disjunctively. *See, e.g.*, *Yakima Indian Nation*, 439

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acceptance. *See, e.g., Brown v. Fin'l Serv. Corp., Int'l*, 489 F.2d 144, 149-50 (5th Cir. 1974); *Rodriquez v. Sec'y of the Treasury*, 276 F.2d 344, 349 (1st Cir. 1960); Restatement (Second) of Contracts § 202(2).

[26] The cases Yakama cites in support of its assertion that the plain meaning of the word "and" is unambiguous and is a conjunctive term, Dkt. 16 at 64-67 of 78, confirm the need for contextual review. For example, in *Reese Bros. v. United States*, 447 F.3d 229, 235-37 & n.3 (3d Cir. 2006), the court reviewed the "statute as a whole," considering multiple provisions before reading "and" conjunctively, where that reading was "entirely consistent" with the historical facts and the contrary reading "would be strange."

U.S. at 496-97 (rejecting the argument that the phrase "assumption of civil and criminal jurisdiction" in PL-280 had to be read conjunctively); *United States v. Fisk*, 70 U.S. (3 Wall.) 445, 447 (1866) (to "ascertain the clear intention" of drafters, "courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or'"); *United States v. Bonilla-Montenegro*, 331 F.3d 1047, 1051 (9th Cir. 2003) (a statute's use of disjunctive or conjunctive language is not always determinative, as courts must strive to give effect to the plain, common-sense meaning of an enactment without resorting to an interpretation that "def[ies] common sense"); *Alaska v. Lyng*, 797 F.2d 1479, 1482 n.4 (9th Cir. 1986) (reading the word "and" as "or" in a statute because the "phrase makes sense only if 'and' is read disjunctively").

Absent clear error, the proclamation drafter's intent ultimately controls its meaning. *See Bailey v. Richardson*, 182 F.2d 46, 52 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951), *abrogated on other grounds by Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571 & n.9 (1972). Even if a drafter's intent could "have been more clearly expressed," legal interpretation is a "search … [for] intent, not for perfect drafting." *United States v. Gomez-Hernandez*, 300 F.3d 974, 979 (8th Cir. 2002).

Application of these federal analogs to Proclamation 14-01 leads to the same result reached in *Zack*. Washington's retrocession offer retained jurisdiction over civil actions arising from the operation of motor vehicles on public streets within

the Reservation involving non-Indian plaintiffs, non-Indian defendants, or non-Indian victims as well as criminal jurisdiction over offenses involving non-Indian defendants and crimes committed by adult Indian defendants against non-Indians. This conclusion is the only one that harmonizes and gives effect to every part of the Proclamation, is consistent with the history of Washington's pre- and post-PL-280 jurisdiction, avoids absurd or nonsensical results,[27] and provides the best protection to all residents of the Reservation.

3. The United States Accepted All, But Not More Than, The PL-280 Jurisdiction Washington Offered To Retrocede.

Federal law governs the process by which the United States accepts an offer of retrocession. Pursuant to 25 U.S.C. § 1323(a), the Secretary of the Interior has the authority to accept retrocessions by publishing notice in the Federal Register specifying "the jurisdiction retroceded and the effective date of the retrocession." Exec. Order No. 11435, 33 Fed. Reg. at 17339. Such notice must be preceded by consultation with the Attorney General. *Id*. Publication of the notice makes the

[27] Yakama's fidelity to a literal reading of the Proclamation's retention of "jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims," ER2699 (¶3), is not absolute. In tacit acknowledgment to the absurd result arising from the use of the plural forms of "defendant" and "victim", Yakama does not contend that state jurisdiction is limited to criminal offenses involving multiple non-Indian defendants and multiple non-Indian victims. Aware of the hiatus that would arise if Washington did not exercise jurisdiction over non-Indians who commit victimless crimes on the Reservation, Yakama does not contend that state criminal jurisdiction requires the presence of a non-Indian victim. *See Solem*, 465 U.S. at 465 n.2 (victimless crimes committed by non-Indians in Indian country are within the exclusive jurisdiction of the state).

retrocession effective. *See, e.g.*, *Oliphant v. Schlie*, 544 F.2d at 1012. Neither Yakama nor the County challenges the validity of the Secretary's acceptance of Washington's offer.

In response to a state's retrocession offer, the Secretary has three options: accept the entire offer, accept part of the offer, or reject the entire offer. But any acceptance is limited by what is offered. *See generally Walker v. Rushing*, 898 F.2d 672, 674 & n.5 (8th Cir. 1990); *Tyndall v. Gunter*, 681 F. Supp. 641, 646 n.3 (D. Neb. 1987) ("there is no contention that the United States could, or did, accept back more in the way of jurisdiction … than was offered by Nebraska"); *Brown*, 334 F. Supp. at 542 ("the United States may assume all or any measure of the jurisdiction retroceded by a state").

The two sections of 25 U.S.C. § 1323 must be read in a manner that renders no language in either section superfluous. This requires section (a), which authorizes the United States to accept a retrocession of jurisdiction from a state, to be harmonized with section (b), which expressly leaves untouched the United States' prior cessation of jurisdiction pursuant to section 7 of PL-280. Taken together, this means that the United States cannot unilaterally usurp a state's pre-1968 PL-280 jurisdiction.

The principle that one can accept only what is offered is fundamental, both in everyday usage and in contract law. *Merriam-Webster's Dictionary* defines

"offer" as "to present for acceptance or rejection,"[28] and "accept" as "to receive (something offered) willingly."[29] Thus, a guest who is presented with a slice of pie and a glass of milk accepts the offer by receiving one or both. The guest does not accept the offer by consuming the whole pie or the entire pitcher of milk.

Likewise, under the common law, "if any provision is added to which the offeror did not assent, the consequence is not merely that the addition is not binding and that no contract is formed, but that the offer is rejected, and that the offeree's power of acceptance thereafter is terminated." 2 Williston on Contracts § 6:11 (4th ed.); *accord Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1443 (9th Cir. 1986).

Here, the United States accepted all the PL-280 jurisdiction that Washington offered. *See* Acceptance, 80 Fed. Reg. at 63583-01;[30] ER2707 ("it is the content of the Proclamation that we hereby accept"). The United States did not—nor could

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[28] *Offer*, MERRIAM WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/offer (last visited Jan. 27, 2020).

[29] *Accept*, MERIAM WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/accept (last visited Jan. 27, 2020).

[30] The County agrees with Yakama that the scope of retrocession was "fixed" upon the publication of the Acceptance. Dkt. 16 at 10, 27, 28, 40, 41, and 71 of 78. Subsequent to October 20, 2015, Washington may only reassume that portion of its PL-280 jurisdiction it retroceded with Yakama's consent. *See* 25 U.S.C. § 1321(a). Absent a new Congressional act, Washington may only be divested of that portion of its PL-280 jurisdiction that it retained in Proclamation 14-01 through a new retrocession process. *See* 25 U.S.C. § 1323(b).

it—accept more of Washington's PL-280 jurisdiction than Washington offered. Dkt. 19 at 38 of 73.

As it relates to the scope of Washington's offer, Yakama's claim that deference is owed to the Washburn Letter and various federal communications is misplaced. For starters, the Washburn Letter expressly declines to provide any interpretation as to the scope of retrocession. ER2707. Acknowledging that disputes over the scope may develop in the future, Interior states it is "confident that courts will provide a definitive interpretation of the plain language of the Proclamation." *Id*.

Interior's deference to the courts on the interpretation of state law is consistent with cases explaining the limits of *Chevron* and *Skidmore* deference. While a court gives deference to a federal agency's interpretation of a statute the agency is charged with administering, deference does not extend to an agency's interpretation of state law or of a related state document. *See Renee v. Duncan*, 623 F.3d 787, 798 (9th Cir. 2010) ("while we defer to the Secretary's interpretation of federal law under *Chevron*, we owe no deference to his interpretation of state law"); *cf. Chickaloon-Moose Creek*, 360 F.3d at 980. Courts will not defer to an agency's construction of a state statute when there is any "reason to think that the state courts would construe the statute differently." *United States v Consumer Life Ins. Co.*, 430 U.S. 725, 752 (1977).

When, as here, an agency has no special expertise by virtue of its statutory responsibilities in construing state law, a court reviews the legal question *de novo*. *See Tijani v. Holder*, 628 F.3d 1071, 1079 (9th Cir. 2010) (citation omitted). As explained in section III.2., above, a *de novo* review of Proclamation 14-01 confirms that Washington's partial retrocession of its PL-280 jurisdiction did not extend to crimes in which either the defendant or the victim is a non-Indian—an interpretation with which both the United States and Washington agree. *See generally* Dkt. 19 at Exs. A and B; ER1577-1593.

The U.S. amicus brief, Dkt. 19 at Ex. A, as well as the OLC Opinion, ER1577-93, provide a detailed and persuasive analysis in support of the District Court's ruling on retrocession. Yakama contends this Court should ignore the U.S. official position because the OLC Opinion (1) is purportedly inconsistent with Interior's position at Acceptance, (2) was not preceded by notice to Yakama or government-to-government consultation, and (3) was issued three years after the United States formally accepted Washington's offer. *See* Dkt. 16 at 22, 55-60 of 78.

Yakama's first complaint does not survive the plain language of the Acceptance or the Washburn letter; both of which state that the scope of retrocession is limited to Proclamation 14-01. *See* Acceptance, 80 Fed. Reg. at 63583-01; ER2703; *see also* Dkt. 19 at 48 of 73.

Yakama's second argument fails because neither 25 U.S.C. § 1323 nor Executive Order 11435 require Interior to engage in government-to-government consultations during the retrocession process.[31] But, even if they had, the OLC solicited the views of OTJ which is designated in 28 C.F.R. § 0.134(b) as the "principal point of contact … to listen to the concerns of Indian Tribes and other parties interested in Indian affairs" prior to and during the preparation of its Opinion. ER1578 (n.4). OTJ submitted a memorandum raising the same arguments Yakama makes here. *Id.* The OLC ultimately determined that OTJ did not identify "compelling reasons to interpret the proclamation differently." ER1591-92.

Yakama's final grievance—that the OLC Opinion was issued after Acceptance—applies equally to the documents Yakama identifies as worthy of deference. *See* Dkt. 16 at 44-45, 49-54 of 78.[32] Moreover, the 2016 Guidance Memorandum Yakama cites fails to provide any reasoning for its conclusion, stating only that its interpretation is consistent with a recent ruling of the District Court in *Klickitat County v. Department of the Interior*, No. 1:16-CV-03060-LRS, 2016 WL 7494296 (E.D. Wash. Sept. 1, 2016). ER2709 (n.2). But that decision did not analyze the scope of Washington's retrocession of criminal jurisdiction.

[31] Washington's retrocession process requires at least one government-to-government meeting between the state and the petitioning tribe. RCW 37.12.160(3). Washington complied. *See* ER2699.

[32] Yakama also cites a government brief, but that brief does not address the scope of retrocession or otherwise support the Nation's view. Dkt. 16 at 48-49 of 78; *see also* ER1599-1600 (quoting but not interpreting the Proclamation).

Klickitat Cty, 2016 WL 7494296 at *5. Rather, the opinion merely notes that "[t]he particular areas of civil and criminal jurisdiction were set forth in the proclamation … and that is what DOI accepted." *Id*.

Former U.S. Attorney Mike Ormsby's April 18, 2016, e-mail also does not constitute an interpretation issued at Acceptance. Nor does the email suggest that the author is authorized to speak on behalf of Interior. *See* ER2711. Rather, it appears Mr. Ormsby simply evaluated Proclamation 14-01 to determine which crimes he would prosecute. This does not entitle him to *Chevron* deference. *See Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring).

The District Court correctly held that Washington retained PL-280 jurisdiction on the Reservation over crimes involving a non-Indian. That ruling is consistent with the binding decision in *Zack* and with the positions of the United States and Washington. The decision on retrocession should be upheld.

CONCLUSION

Klickitat County respectfully requests that the District Court's ruling with regard to retrocession be affirmed. Its ruling that the Glenwood Valley is within the Yakama Reservation should be vacated and judgment entered in favor of the County on that issue.

RESPECTFULLY SUBMITTED this 27th day of March, 2020.

/s/ Rylan Weythman
Rylan Weythman, WSBA No. 45352
FOSTER GARVEY PC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3296
Telephone: (206) 447-4400
Email: rylan.weythman@foster.com

/s/ Pamela B. Loginsky
Pamela B. Loginsky, WSBA No. 18096
KLICKITAT COUNTY SPECIAL
DEPUTY PROSECUTING ATTORNEY
206 Tenth Avenue SE
Olympia, Washington 98501
Telephone: (360) 753-2175
Email: pamloginsky@waprosecutors.org
Attorneys for Defendants-Cross Appellants Klickitat County, et al.

STATEMENT OF RELATED CASES

The undersigned certifies that the following are known related cases and appeals before the United States Court of Appeals, the United States District Court, or the BAP:

- Ninth Circuit Case No. 19-35199, *Confederated Tribes and Bands of the Yakama Nation v. City of Toppenish et al.*

Dated: March 27, 2020.

Signed: */s/ Rylan Weythman*
Rylan Weythman, WSBA #45352
Attorneys for Defendants-Appellants Klickitat County, et al.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this second brief on cross-appeal contains 16,482 words, excluding items exempted by Fed. R. App. P. 32(f), and therefore complies with the word limit of Cir. R. 28.1-1(c) as directed in the Court's order, Dkt. No. 26. The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: March 27, 2020.

Signed: */s/ Rylan Weythman*
Rylan Weythman, WSBA #45352
Attorneys for Defendants-Appellants
Klickitat County, et al.

STATUTORY AND REGULATORY ADDENDUM

18 Stat. 476 (1875) A-1

18 U.S.C. § 1152 ..... A-1

25 U.S.C. § 1321 ..... A-2

25 U.S.C. § 1323 ..... A-3

28 C.F.R. § 0.134 ..... A-3

28 Stat. 86 (1894) A-5

28 U.S.C. § 1291 ..... A-5

28 U.S.C. § 1331 ..... A-5

28 U.S.C. § 2201 ..... A-5

28 U.S.C. § 2202 ..... A-6

33 Fed. Reg. 17339 ..... A-6

80 Fed. Reg. 63583-01 ..... A-6

Pub. L. No. 83-280, 67 Stat. 588 (1953) A-7

RCW 37.12.010 ..... A-8

RCW 37.12.030 ..... A-9

RCW 37.12.160 ..... A-9

RCW 46.63.020 ..... A-11

RCW 46.64.050 ..... A-12

18 Stat. 476 (1875)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the boundary-line between the State of Arkansas and the Indian country, as originally surveyed and marked, and upon which the lines of the surveys of the public lands in the State of Arkansas were closed, be, and the same is hereby, declared to be the permeant boundary-line between the said State of Arkansas and the Indian country.

SEC. 2. That the Secretary of the Interior shall, as soon as practicable, cause the boundary-line, as fixed in the foregoing section, to be retraced and marked in distinct and permanent manner; and if the original line, when retraced, shall be found to differ in any respect from what the boundary-line would be if run in accordance with the provisions of the treaties establishing the eastern boundary-line of the Choctaw and Cherokee Nations, then the surveyors shall note such variations and compute the area of the land which in that case would be taken from the State of Arkansas or the Indian country, as the case may be; and the Secretary of the Interior shall also cause any monuments set up in any former survey indicating any line at variance with the survey provided for in this act to be obliterated.

18 U.S.C. § 1152

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively

25 U.S.C. § 1321

(a) Consent of United States

(1) In general

The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(2) Concurrent jurisdiction

At the request of an Indian tribe, and after consultation with and consent by the Attorney General, the United States shall accept concurrent jurisdiction to prosecute violations of sections 1152 and 1153 of Title 18 within the Indian country of the Indian tribe.

(b) Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

25 U.S.C. § 1323

(a) Acceptance by United States

The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Repeal of statutory provisions

Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

28 C.F.R. § 0.134

(a) Organization. The Office of Tribal Justice is headed by a Director appointed by the Attorney General. The Director shall be responsible to, and report directly to, the Deputy Attorney General and the Associate Attorney General and shall be a member of the Senior Executive Service.

(b) Mission. The mission of the Office of Tribal Justice shall be to provide a principal point of contact within the Department of Justice to listen to the concerns of Indian Tribes and other parties interested in Indian affairs and to communicate the Department's policies to the Tribes and the public; to promote internal uniformity of Department of Justice policies and litigation positions relating to Indian country; and to coordinate with other Federal agencies and with State and local governments on their initiatives in Indian country.

(c) Function. Subject to the general supervision and direction of the Deputy Attorney General and the Associate Attorney General, the Office of Tribal Justice shall:

(1) Serve as the program and legal policy advisor to the Attorney General with respect to the treaty and trust relationship between the United States and Indian Tribes;

(2) Serve as the Department's initial and ongoing point of contact, and as the Department's principal liaison, for Federally recognized Tribal governments and Tribal organizations;

(3) Coordinate the Department's activities, policies, and positions relating to Indian Tribes, including the treaty and trust relationship between the United States and Indian Tribes;

(4) Ensure that the Department and its components work with Indian Tribes on a government-to-government basis;

(5) Collaborate with Federal and other government agencies to promote consistent, informed government-wide policies, operations, and initiatives related to Indian Tribes;

(6) Serve as a clearinghouse for coordination among the various components of the Department on Federal Indian law issues, and with other Federal agencies on the development of policy or Federal litigation positions involving Indians and Indian Tribes;

(7) Coordinate with each component of the Department to ensure that each component of the Department has an accountable process to ensure meaningful and timely consultation with Tribal leaders in the development of regulatory policies and other actions that affect the trust responsibility of the United States to Indian Tribes, any Tribal treaty provision, the status of Indian Tribes as sovereign governments, or any other Tribal interest.

(8) Ensure that the consultation process of each component of the Department is consistent with Executive Order 13175 and with the Department's consultation policy;

(9) Serve, through its Director, as the official responsible for implementing the Department's Tribal consultation policy and for certifying compliance with Executive Order 13175 to the Office of Management and Budget; and

(10) Perform such other duties and assignments as deemed necessary from time to time by the Attorney General, the Deputy Attorney General, or the Associate Attorney General.

28 Stat. 86 (1894)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the true northern boundary line of the Warm Springs Indian Reservation, in the State of Oregon, as defined in the treaty of June twenty-fifth, eighteen hundred and fifty-five, made between the United States, represented by Joel Palmer, superintendent of Indian affairs of Oregon Territory, and the confederated tribes and bands of Indians in middle Oregon, in which the boundaries of the Indian reservation now called the Warm Springs Reservation were fixed, is hereby declared to be that part of the line run and surveyed by T. B. Handley, in the year eighteen hundred and seventy-one, from the initial point up to and including the twenty-sixth mile thereof; thence in a due west course to the summit of the Cascade Mountains, as found by the commissioners, Mark A Fullerton, William H. H. Dufur, and James F. Payne, in the report to the Secretary of the Interior of date June eighth, eighteen hundred and ninety-one, in pursuance of an appointment for such purpose under a provision of the Indian appropriation act approved August nineteenth, eighteen hundred and ninety.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 2201

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding

regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

28 U.S.C. § 2202

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

33 Fed. Reg. 17339

By virtue of the authority vested in me by section 465 of the Revised Statutes (25 U.S.C. 9) and as President of the United States, the Secretary of the Interior is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President or of any other officer of the United States, any and all authority conferred upon the United States by section 403(a) of the Act of April 11, 1968, 82 Stat. 79 (25 U.S.C. 1323(a)): Provided, That acceptance of retrocession of all or any measure of civil or criminal jurisdiction, or both, by the Secretary hereunder shall be effected by publication in the FEDERAL REGISTER of a notice which shall specify the jurisdiction retroceded and the effective date of the retrocession: Provided further, That acceptance of such retrocession of criminal jurisdiction shall be effected only after consultation by the Secretary with the Attorney General.

80 Fed. Reg. 63583-01

ACTION: Notice.

SUMMARY: The Department of Interior (Department) has accepted retrocession to the United States of partial civil and criminal jurisdiction over the Yakama Nation from the State of Washington.

DATES: The Department accepted retrocession on October 19, 2015. Complete implementation of jurisdiction will be effective April 19, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. Darren Cruzan, Deputy Director—Office of Justice Services, Bureau of Indian Affairs, (202) 208-5787.

SUPPLEMENTARY INFORMATION: Under the authority of 25 U.S.C. 1323, vested in the Secretary of the Interior by Executive Order No. 11435 of November 21, 1968, 33 FR 17339, and re-delegated to the Assistant Secretary—Indian Affairs, the United States accepts partial civil and criminal jurisdiction over the Yakama Nation which was acquired by the State of Washington, under Public Law 83-280, 67 Stat. 588, codified as amended at 18 U.S.C. 1162, 28 U.S.C. 1360, and as provided in Revised Code of Washington 37.12.010, 37.12.021, 37.12.030, 37.12.040, and 37.12.060 (1963), and 37.12.050 (1957).

This retrocession was offered by the State of Washington in Proclamation by the Governor 14-01, signed on January 17, 2014, and transmitted to the Assistant Secretary-Indian Affairs in accordance with the process in Revised Code of Washington 37.12.160 (2012), and as provided by Tribal Council Resolution No. T-117-12, dated July 5, 2012, in which the Yakama Nation requested that the State of Washington retrocede partial civil and criminal jurisdiction to the Tribe.

Dated: October 14, 2015.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

Pub. L. No. 83-280, 67 Stat. 588 (1953)

(excerpted in relevant part)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

…

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

RCW 37.12.010

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if *chapter 36, Laws of 1963 had not been enacted.

RCW 37.12.030

Upon March 13, 1963 the state of Washington shall assume jurisdiction over offenses as set forth in RCW 37.12.010 committed by or against Indians in the lands prescribed in RCW 37.12.010 to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and such criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

RCW 37.12.160

(1) The process by which the state may retrocede to the United States all or part of the civil and/or criminal jurisdiction previously acquired by the state over a federally recognized Indian tribe, and the Indian country of such tribe, must be accomplished in accordance with the requirements of this section.

(2) To initiate civil and/or criminal retrocession the duly authorized governing body of a tribe must submit a retrocession resolution to the governor accompanied by information about the tribe's plan regarding the tribe's exercise of jurisdiction following the proposed retrocession. The resolution must express the desire of the tribe for the retrocession by the state of all or any measures or provisions of the civil and/or criminal jurisdiction acquired by the state under this chapter over the Indian country and the members of such Indian tribe. Before a tribe submits a retrocession resolution to the governor, the tribe and affected municipalities are encouraged to collaborate in the adoption of interlocal agreements, or other collaborative arrangements, with the goal of ensuring that the best interests of the tribe and the surrounding communities are served by the retrocession process.

(3) Upon receiving a resolution under this section, the governor must within ninety days convene a government-to-government meeting with either the governing body of the tribe or duly authorized tribal representatives for the purpose of considering the tribe's retrocession resolution. The governor's office must consult with elected officials from the counties, cities, and towns proximately located to the area of the proposed retrocession.

(4) Within one year of the receipt of an Indian tribe's retrocession resolution the governor must issue a proclamation, if approving the request either in whole or in part. This one-year deadline may be extended by the mutual consent of the tribe and the governor, as needed. In addition, either the tribe or the governor may extend the deadline once for a period of up to six months. Within ten days of

issuance of a proclamation approving the retrocession resolution, the governor must formally submit the proclamation to the federal government in accordance with the procedural requirements for federal approval of the proposed retrocession. In the event the governor denies all or part of the resolution, the reasons for such denial must be provided to the tribe in writing.

(5) Within one hundred twenty days of the governor's receipt of a tribe's resolution requesting civil and/or criminal retrocession, but prior to the governor's issuance of the proclamation approving or denying the tribe's resolution, the appropriate standing committees of the state house and senate may conduct public hearings on the tribe's request for state retrocession. The majority leader of the senate must designate the senate standing committee and the speaker of the house of representatives must designate the house standing committee. Following such public hearings, the designated legislative committees may submit advisory recommendations and/or comments to the governor regarding the proposed retrocession, but in no event are such legislative recommendations binding on the governor or otherwise of legal effect.

(6) The proclamation for retrocession does not become effective until it is approved by a duly designated officer of the United States government and in accordance with the procedures established by the United States for the approval of a proposed state retrocession.

(7) The provisions of RCW 37.12.010 are not applicable to a civil and/or criminal retrocession that is accomplished in accordance with the requirements of this section.

(8) For any proclamation issued by the governor under this section that addresses the operation of motor vehicles upon the public streets, alleys, roads, and highways, the governor must consider the following:

(a) Whether the affected tribe has in place interlocal agreements with neighboring jurisdictions, including applicable state transportation agencies, that address uniformity of motor vehicle operations over Indian country;

(b) Whether there is a tribal traffic policing agency that will ensure the safe operation of motor vehicles in Indian country;

(c) Whether the affected tribe has traffic codes and courts in place; and

(d) Whether there are appropriate traffic control devices in place sufficient to maintain the safety of the public roadways.

(9) The following definitions apply for the purposes of this section:

(a) “Civil retrocession” means the state's act of returning to the federal government the civil jurisdiction acquired over Indians and Indian country under federal Public Law 280, Act of August 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. Sec. 1162, 25 U.S.C. Secs. 1321-1326, and 28 U.S.C. Sec. 1360);

(b) “Criminal retrocession” means the state's act of returning to the federal government the criminal jurisdiction acquired over Indians and Indian country under federal Public Law 280, Act of August 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. Sec. 1162, 25 U.S.C. Secs. 1321-1326, and 28 U.S.C. Sec. 1360);

(c) “Indian tribe” means any federally recognized Indian tribe, nation, community, band, or group;

(d) “Indian country” means:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

(ii) All dependent Indian communities with the borders of the United States whether in the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

RCW 46.63.020

(excerpted in relevant part)

Failure to perform any act required or the performance of any act prohibited by this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution relating to traffic including parking, standing, stopping, and pedestrian offenses, is designated as a traffic infraction and may not be classified

as a criminal offense, except for an offense contained in the following provisions of this title or a violation of an equivalent administrative regulation or local law, ordinance, regulation, or resolution:

…

RCW 46.64.050

It is a traffic infraction for any person to violate any of the provisions of this title unless violation is by this title or other law of this state declared to be a felony, a gross misdemeanor, or a misdemeanor.

Unless another penalty is in this title provided, every person convicted of a misdemeanor for violation of any provisions of this title shall be punished accordingly.

DECLARATION OF SERVICE

I hereby certify that on March 27, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

I certify that all parties of record to this appeal either are registered CM/ECF users, or have registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

DATED this 27th day of March, 2020.

/s/ *Rylan Weythman*
Rylan Weythman, WSBA #45352
Attorneys for Defendants-Appellants Klickitat County, et al.