Case Nos. 19-35807 (L), 19-35821

In the

United States Court of Appeals

for the

Ninth Circuit

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

v.

KLICKITAT COUNTY, a political subdivision of the State of Washington,
KLICKITAT COUNTY SHERIFFS OFFICE, an agency of Klickitat County,
BOB SONGER, in his official capacity,
KLICKITAT COUNTY DEPARTMENT OF THE PROSECUTING ATTORNEY,
an agency of Klickitat County, and DAVID QUESNEL, in his official capacity,
Defendants-Appellees.

Appeal from a Decision of the U.S. District Court for the Eastern District of Washington (Yakima), Case No. 1:17-cv-03192-TOR · Honorable Thomas O. Rice, Chief District Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This appeal is about whether the Trump Administration, local jurisdictions, and state courts can illegally reverse a federal decision the Obama Administration made years ago. In 2015, the federal government reassumed Public Law 280 jurisdiction from Washington State concerning the Yakama Reservation. This process, called retrocession, is controlled by federal law: 25 U.S.C. § 1323(a), Executive Order 11435, and applicable federal precedent.

Once Washington State requested retrocession, the federal government made the ultimate decisions pursuant to federal law on: (1) whether to accept retrocession, and (2) the scope of jurisdiction it will reassume within the Yakama Reservation under federal law. Those decisions were fixed at a specific point in time in the federal register and cannot change absent legislation. Retrocession is an issue of federal determination and control after a state makes its formal request. The federal statutory framework does not authorize a new presidential administration to revisit or reverse a previous presidential administration's decision on retrocession; nor are states and their courts permitted to undo what the United States has already decided on retrocession.

Washington State's governor retroceded by proclamation all state criminal jurisdiction for crimes on the Yakama Reservation with one exception: "criminal offenses involving non-Indian defendants and non-Indian victims." At the time of

the proclamation, the United States accepted the "content of the proclamation," interpreted it to be "plain on its face and unambiguous," and declined the state's invitation to re-interpret the proclamation. The United States then issued a memo and flow chart to state and local jurisdictions showing that after retrocession the state had **no criminal jurisdiction over Indians** for crimes on the Yakama Nation Reservation. Years later, a new federal administration has attempted to reverse the United States' retrocession decision finalized in 2016. The Yakama Nation respectfully requests this Court uphold the United States' original agreement and promise. This Court should reverse the judgment of the district court related to retrocession in paragraph four of the district court's declaratory judgment and remand with proper instructions.

JURISDICTIONAL STATEMENT

This case is an appeal from a Declaratory Judgment in a Civil Action by the United States District Court for the Eastern District of Washington. ER at 1-48. The district court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331, 1362, 2201, and 2202. This Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1291, as this is an appeal from a final order and judgment of the district court.

The district court's judgment was issued August 28, 2019. ER at 48. Appellant's Notice of Appeal was timely filed on September 23, 2019, in accordance with Fed. R. App. P. 3(a)(1). ER at 55-57.

ISSUES PRESENTED

1. The United States reassumed Public Law 280 jurisdiction from the State of Washington over crimes committed by Indians within the Yakama Reservation. Years later, state courts and a new presidential administration interpreted the scope of retrocession differently and incorrectly. Did the district court err in holding that Defendant-Appellees retain criminal jurisdiction over crimes involving Indians within the Yakama Reservation following retrocession?

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

STATEMENT OF THE CASE

I. Criminal Jurisdiction in Yakama Indian Country

In the Treaty of 1855, the Yakama Nation reserved the Yakama Reservation for its exclusive use and benefit, as well as all inherent sovereign rights not expressly ceded to the United States therein. Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951 [hereinafter Treaty of 1855]. Pursuant to these reserved rights, the Yakama Nation exercises criminal jurisdiction over Indians within Yakama Indian Country. Within Indian Country, the United States asserts concurrent criminal jurisdiction over Indians under the Indian Country Crimes Act, Major Crimes Act, and Assimilative Crimes Act. 18 U.S.C. §§ 13, 1152, 1153. "Indian Country" is defined, in relevant part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States . . . ." 18 U.S.C. § 1151(a).

II. Public Law 280 And Retrocession

Congress enacted Public Law 280 in 1953. Public Law 280 authorized states to assume limited criminal and civil jurisdiction over Indians in Indian Country. Act of August 15, 1953, 67 Stat. 588. Under this authority, and without the Yakama Nation's consent, the State of Washington assumed general civil and criminal jurisdiction over Yakama Indian Country. Wash. Rev. Code § 37.12.010.

Washington limited its assumption of jurisdiction over Indians on trust land within Yakama Indian Country to: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles on public roads. *Id*. On fee land, Washington assumed general criminal and civil jurisdiction over "Indians and Indian territory, reservations, country, and lands." *Id.* The Yakama Nation unsuccessfully challenged Washington's unilateral assumption of jurisdiction in the Supreme Court of the United States. *Washington v. Conf. Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979).

Understanding the negative impacts of Public Law 280, in 1968 Congress authorized the United States to accept any state's retrocession of jurisdiction under Public Law 280 within Indian Country. 25 U.S.C. 1323(a). President Lyndon Johnson vested authority for effectuating retrocession with the Secretary of the Interior. *See* Exec. Order No. 11435, 3 C.F.R. 752 (1966-70 Compilation). Executive Order 11435 imposed two requirements before the federal government can finalize a retrocession process: (1) acceptance of retrocession must be effected through publication in the Federal Register with such notice specifying "the jurisdiction retroceded and the effective date of the retrocession," and (2) where criminal jurisdiction is retroceded, acceptance may occur "only after consultation by the Secretary with the Attorney General." *Id.*

Nearly 50 years later, the Washington State Legislature codified a process for the state to retrocede Public Law 280 jurisdiction. Wash. Rev. Code § 37.12.160. Believing that the Yakama Nation could finally rectify the injustice of Public Law 280, the Yakama Nation immediately filed a retrocession petition with the State of Washington's Office of the Governor, asking the state to partially retrocede its civil and criminal jurisdiction over "all Yakama Nation Indian country." ER at 2698.

III. Proclamation 14-01

In response, Governor Jay Inslee issued Proclamation 14-01. ER at 2698-2700. The Proclamation retroceded certain Public Law 280 jurisdiction within the Yakama Reservation back to the United States. *Id.* As to criminal jurisdiction, Proclamation 14-01 by its plain and unambiguous terms only retained state jurisdiction when crimes involve "non-Indian defendants **and** non-Indian victims." ER at 2699 (emphasis added).

Governor Inslee sent Proclamation 14-01 to the Department of the Interior ("DOI"). Governor Inslee also sent a cover letter, dated ten days after Proclamation 14-01 ("Cover Letter"). ER at 2701-02. Governor Inslee's Cover Letter asked the United States to retroactively revise Proclamation 14-01 by ignoring the Proclamation's plain terms. *Id.* It seeks to interlineate "or" into the federal government's interpretation of Proclamation 14-01 so that the Proclamation

would claw back state criminal jurisdiction whenever "non-Indian defendants *and/or* non-Indian victims" are involved. *Id.* (emphasis in original).

Years later, Governor Inslee wrote again to the Secretary of the Interior to change Proclamation 14-01 to retain more state jurisdiction than the state had agreed to retrocede. Mot. to Take Judicial Notice 10-11 (Dkt. Entry No. 15). Governor Inslee asked DOI to reread the "clearly expressed" intent in his separate Cover Letter. *Id.* DOI again refused to consider this interpretation. *Id.* at 13. DOI replied that "retrocession was accepted according to the terms of the Proclamation of the Governor 14-01, signed January 17, 2014." *Id.*

IV. Retrocession

DOI exercised its exclusive authority under 25 U.S.C. § 1323 and accepted Proclamation 14-01 on October 19, 2015. Mr. Kevin K. Washburn, DOI Assistant Secretary of Indian Affairs ("Secretary Washburn"), formally rejected Governor Inslee's Cover Letter and accepted the plain terms of the Proclamation "pursuant to 25 U.S.C. § 1323 and the authority vested in the Secretary of the Interior by Executive Order No. 11435 of November 21, 1968, 33 Fed. Reg. 17339, and delegated to the Assistant Secretary-Indian Affairs." ER at 2703, n. 2; *see also* 80 Fed. Reg. 63583.

Explaining the "extent of retrocession," Assistant Secretary Washburn stated that Governor Inslee's proclamation was "plain on its face and unambiguous." ER

at 2707. Noting the concern that "unnecessary interpretation might simply cause confusion," he stated that "[i]f a disagreement develops as to the scope of the retrocession, we are confident that courts will provide a definitive interpretation of this plain language of the Proclamation." *Id*.

DOI worked closely with the Department of Justice ("DOJ") to evaluate the state's request for retrocession. DOI "requested the consultation and opinion of the Attorney General with respect to criminal jurisdiction." ER at 2704-05. Secretary Washburn explained that working with DOJ remained imperative. *Id.* DOJ engaged in consultations and "declined to state a position in favor or against retrocession" but recommended simply a six-month implementation period for "an orderly transfer of authority from the State to the Federal Government." ER at 2707. DOI deferred to DOJ and opened a six-month period "to allow the relevant agencies to coordinate their actions going forward." *Id*.

On April 18, 2016—the eve of retrocession's implementation—the United States Attorney for the Eastern District of Washington, Mr. Michael Ormsby, commented on guidance documents to local law enforcement agencies regarding retrocession. The United States Attorney explained that after retrocession, the State of Washington no longer retained criminal jurisdiction to prosecute Indians for offenses occurring within the Yakama Reservation. ER at 2711-13.

Seven months later, the DOI Principal Deputy Assistant Secretary of Indian Affairs, Mr. Lawrence S. Roberts, released a memorandum to the BIA. ER at 2709-10 ("BIA Guidance"). The BIA Guidance offered a simple "jurisdictional matrix" as a tool to promote consistency in the ongoing implementation of retrocession. *Id.* The BIA Guidance both clarified and illustrated DOI's understanding of its own acceptance at the time of retrocession. *Id.* The BIA Guidance clarified that "Washington State retains jurisdiction only over civil and criminal causes of action in which ***no*** party is an Indian.'" ER at 2709 (emphasis added). *See* Jurisdictional Matrix:

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

ER at 2710.

As illustrated above, the BIA Guidance is unambiguous: "Post-retrocession" the State of Washington no longer possesses criminal jurisdiction over any Indians on the Yakama Reservation for crimes committed in Yakama Indian Country. *Id.* This position of the federal government remained unchanged, and it was relied on by all parties involved, until the Trump Administration reversed course.

V. State v. Zack

A Washington State court determined two years later that DOI's understanding *of its own acceptance* was incorrect. *State v. Zack*, 413 P.3d 65 (Wash. Ct. App. 2018). Neither the Yakama Nation nor the United States were parties to the case. The state 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 68. The state court strained logic and ignored the plain meaning of the word "and" to reach its conclusion that the conjunctive word "and" actually means a disjunctive "or." *Id.* Focusing on the state's interpretation of what the federal government assumed under 25 U.S.C. § 1323, the court claimed Governor Inslee's Cover Letter was "significant contemporaneous evidence" supporting its interpretation, despite DOI's rejection of the Cover Letter's interpretation on several occasions. *Id.*

VI. Federal Office of Legal Counsel Memorandum

Without prior notice to the Yakama Nation or government-to-government consultation, the Trump Administration's Office of Legal Counsel decided to analyze the scope of retrocession following the state court's decision in *State v. Zack*. ER at 1577-93. DOJ parroted the state court's analysis, incorporated Governor Inslee's letter that DOI had refused to consider, and determined that the operative word "and" in the relevant paragraph of Proclamation 14-01 actually means "or." *Id.* On February 12, 2019—again without notice to or government-to-government consultation with the Yakama Nation—Assistant Secretary of Indian Affairs Tara Sweeney withdrew DOI's previous interpretations of retrocession aligning with the Yakama Nation's position in this case in favor of the Office of Legal Counsel's memorandum opinion. ER at 1293.

VII. Proceedings Below

Following Defendants' arrest, prosecution, conviction, and incarceration of a juvenile Yakama Member in 2017 for alleged juvenile delinquency within the Yakama Reservation, the Yakama Nation sued Defendants seeking declaratory and injunctive relief from such *ultra vires* exercises of criminal jurisdiction. ER at 1634-43. Defendants continued to arrest Yakama Members for alleged crimes within the Yakama Reservation despite this lawsuit, prompting the Yakama Nation to file a motion for preliminary injunction. ER at 1509-69.

A. Yakama Nation's Motion for Preliminary Injunction

In the motion for preliminary injunction, the Yakama Nation sought to enjoin Defendants from exercising criminal jurisdiction over Yakama Members within the Yakama Reservation, including an area in the southwest corner of the Reservation known as Tract D. ER at 1568. Defendants responded that their exercise of criminal jurisdiction was lawful because they believe Tract D is not part of the Yakama Reservation, and even if it is within the Yakama Reservation, the State retained criminal jurisdiction over all crimes involving non-Indians following retrocession. ER at 1446-47. Defendants later conceded that the state retroceded criminal jurisdiction over juvenile offenses by Indians within the Yakama Reservation, but otherwise maintained their position. ER at 1191.

The district court denied the motion for preliminary injunction on March 6, 2019. ER at 1217-40. On the issue of Tract D's reservation-status, the district court found "many of [Yakama Nation's] arguments compelling, [but] at this stage of the litigation, substantial questions remain as to the precise location of the Yakama Reservation's southwest boundary." ER at 1236. On the scope of retrocession, the district court ruled against the Yakama Nation for the same reasons provided in the related case of *Confederated Tribes and Bands of the Yakama Nation v. City of Toppenish et al.*, No. 1:18-cv-03190 (E.D. Wash. Feb. 22, 2019), *appeal filed*, No. 19-35199 (9th Cir. 2019). ER at 1225.

As incorporated from *City of Toppenish*, the district court analyzed Assistant Secretary Washburn's 2015 Letter accepting retrocession and found that DOI declined to delineate the scope of retrocession in that letter. ER at 1225; *City of Toppenish et al.*, No. 1:18-cv-03190, ECF 28 at 17-18. The district court then interpreted Proclamation 14-01 by looking to Governor Inslee's 2014 cover letter revising the Proclamation, and relied on the state court's decision in *State v. Zack* for guidance. ER at 1225; *City of Toppenish et al.*, No. 1:18-cv-03190, ECF 28 at 7, 18.

The district court also performed a textual analysis of Proclamation 14-01 and found that reading the State's reservation of criminal jurisdiction as limited to crimes involving "non-Indian defendants and non-Indian victims" is inconsistent with the text and law on three accounts. First, the district court incorporated reasoning from the Washington Court of Appeals that such a reading "'would result in the Governor engaging in *ultra vires* action' as the offer of retrocession would be *returning* more jurisdiction to the United States than the State assumed under Public Law 280 . . . ." *City of Toppenish et al.*, No. 1:18-cv-03190, ECF 28 at 22 (emphasis in original); *see also* ER at 1225. Second, the district court read the relevant language of Proclamation 14-01 in a historical context and the context of the entire proclamation, finding the plain reading to support a limited retrocession. ER at 1225; *City of Toppenish et al.*, No. 1:18-cv-03190, ECF 28 at 23. Third, the

district court reasoned that because Proclamation 14-01 states that criminal jurisdiction is being retroceded "in part," the Yakama Nation's argument for full criminal retrocession was inconsistent with the Proclamation's text. *City of Toppenish et al.*, No. 1:18-cv-03190, ECF 28 at 23-24; *see also* ER at 1225. Based on this reasoning, the district court concluded "the State retained criminal jurisdiction over criminal offenses where any party is a non-Indian." *City of Toppenish et al.*, No. 1:18-cv-03190, ECF 28 at 24; *see also* ER at 1225.

B. Trial On Tract D's Reservation Status

While the Tract D-related reservation boundary arguments were heard during a three-day trial, the district court stated that "it had sufficient evidence and argument in the record to address any outstanding retrocession-related issues without hearing them presented at trial." ER at 927. Still, the Yakama Nation preserved its retrocession arguments in its opening brief, through the admission of evidence at trial, and through the relief requested in closing arguments. ER at 79 (requesting relief in pre-trial order), 1097-98, 1127, 2698-2713.

On August 28, 2019, the district court issued its Findings of Fact, Conclusions of Law, and Declaratory Judgment. ER at 3-48. The Order affirms Tract D's reservation-status, and affirms the state's retrocession of jurisdiction within the Yakama Reservation over juvenile delinquency and traffic offenses. ER at 46-47. The Yakama Nation's is not appealing those judgments. Rather, the

Yakama Nation is appealing the fourth paragraph of the district court's declaratory judgment, which holds that Defendants "have criminal jurisdiction over offenses committed by or against non-Indians within the Yakama Reservation, including Tract D." ER at 47-48. In so holding, the district court re-iterated the reasoning it first announced in *City of Toppenish*, No. 1:18-cv-03190, ECF 28.

VIII. Request On Appeal

The Yakama Nation seeks narrow review of the fourth paragraph of the district court's August 28, 2019, declaratory judgment that determined Defendants retained criminal jurisdiction over offenses committed by or against non-Indians within the Yakama Reservation, including Tract D, following retrocession.

SUMMARY OF THE ARGUMENT

I(A). The United States' Intent At The Time It Accepted Retrocession Controls The Scope Of That Retrocession.

25 U.S.C. § 1323 and Executive Order 11435 empower the Secretary of the Interior to accept a state's offer to retrocede Public Law 280 jurisdiction. Federal precedent interpreting the scope of retrocessions under these laws is limited. But relevant federal authority provides four overarching points on the central issue regarding the scope of retrocession. These points establish that the framework for analysis of this question is federal-focused; the framework is not dependent on a state's laws; it is not subject to a state's interpretation; and it can even be effectuated when a state's retrocession offer violates a state's laws or constitution. The federal government's determination at a fixed point in time—in this case 2015—is dispositive on questions regarding retrocession's scope.

First, the plain language of Section 1323 authorizes the United States to accept "all or any measure" of a State's Public Law 280-derived jurisdiction. Second, the Indian canons of statutory construction dictate that ambiguities or questions on the scope of retrocession should focus on federal action, federal law, and what is in the Yakama Nation's interest; not state law, state courts, and what a state may have intended to retrocede. Third, the Court uses a federal-focused analytical framework to determine the validity and scope of retroceded jurisdiction. Fourth, the scope of retrocession is fixed upon the federal government's acceptance

under Section 1323 and Executive Order 11435. The district court erred by failing to apply this framework rooted in federal precedent.

I(B). The District Court Failed To Consider The Department Of The Interior's Determination Regarding The Scope Of Retrocession.

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

The district court erred by not focusing its analysis on the United States' actions in accepting retrocession. Focusing on this fixed point in time in interpreting the scope of retrocession when it was implemented reveals that the state no longer has jurisdiction over crimes committed by Indians against non-Indians within the Yakama Reservation.

I(C). The Department Of The Interior's Acceptance Of Retroceded Jurisdiction Within The Yakama Reservation Is Entitled To Judicial Deference.

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

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

Proclamation 14-01 should be interpreted according to its plain language, with ambiguities—if any—resolved against the drafter (i.e. the state), and interpreted to the Yakama Nation's benefit. Proclamation 14-01's plain language provides that the state does not retain jurisdiction over crimes involving Indians within the Yakama Reservation. The district court's perceived inconsistency in the State retroceding criminal jurisdiction over all Indians while only retroceding its jurisdiction "in part" is resolved by the State's express reservation of its pre-Public

Law 280 jurisdiction over crimes by non-Indians against non-Indians within the Yakama Reservation.

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

Public Law 280's conveyance of criminal jurisdiction over Indians on the Yakama Reservation not only violated the inherent sovereign and Treaty-reserved rights of the Yakama Nation, it created a jurisdictional mess making law enforcement more difficult on the Yakama Reservation. Retrocession is an opportunity to clarify this jurisdictional confusion and, thereby, enhance public safety on the Yakama Reservation. The Obama Administration's decision to accept the full amount of jurisdiction offered in Proclamation 14-01, interpreting any ambiguity in favor of Yakama Nation, helped simplify law enforcement on the Yakama Reservation. Under the retrocession accepted in 2015, only the Yakama Nation and the United States had jurisdiction over Indians in Indian Country. Courts should not now unravel the progress achieved by retrocession in a way that prejudices the Yakama Nation's exercise of sovereignty and self-determination within its own lands.

STANDARD OF REVIEW

This Court reviews de novo the district court's conclusions of law regarding the United States' resumption of Public Law 280 jurisdiction from Washington State within the Yakama Reservation. *Mull for Mull v. Motion Picture Indus. Health Plan*, 865 F.3d 1207, 1209 (9th Cir. 2017); *Stetson v. Grissom*, 821 F.3d 1157, 1163 (9th Cir. 2016); *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002).

This Court reviews for abuse of discretion the District Court's denial of Yakama Nation's request for a permanent injunction. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *Cummings v. Connell*, 316 F.3d 886, 897 (9th Cir. 2003). In this context, "[a]n abuse of discretion will be found if the district court based its decision 'on an erroneous legal standard or clearly erroneous finding of fact.'" *Cottrell*, 632 F.3d at 1131) (quoting *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc)).

ARGUMENT

I. THE UNITED STATES REASSUMED CRIMINAL JURISDICTION OVER CRIMES INVOLVING INDIANS WITHIN THE YAKAMA RESERVATION.

DOI understood and made clear that the United States reassumed its criminal jurisdiction over crimes involving Indians within the Yakama Reservation. Guidance documents from DOI and DOJ support this understanding of the proper scope of retrocession. The district court erred when it incorrectly determined that Washington State retained jurisdiction over offenses committed by *or* against non-Indians within the Yakama Reservation, including Tract D. ER at 47-58.

A. The United States' Intent At The Time It Accepted Retrocession Controls The Scope Of That Retrocession.

Federal law authorizes the United States to "accept a retrocession by any State of all or any measure of criminal or civil jurisdiction, or both, acquired by such State" pursuant to Public Law 280.[1] 25 U.S.C. § 1323(a). President Lyndon B. Johnson "designated" to the Secretary of the Interior the President's authority to "accept a retrocession by any State of all or any measure of criminal or civil jurisdiction, or both, acquired by such State." Exec. Order No. 11435, 3 C.F.R. 752 (1966-70 Compilation). The Secretary is "empowered to exercise, without approval, ratification, or other action of the President or *any other officer* of the

[1] The Yakama Nation rejects the United States' assertion of plenary power to ignore the Treaty of 1855 and unilaterally modify jurisdiction within Yakama lands without Yakama Nation's free, prior, and informed consent.

United States, *any and all authority* conferred upon the United States" pursuant to section 403(a) of the Act of April, 1968, 82 Stat. 79 (25 U.S.C. 1323(a)) (emphasis added). The Secretary of the Interior delegated this authority to the Assistant Secretary of Indian Affairs. ER at 2703, n. 2. The Assistant Secretary of Indian Affairs' acceptance of retrocession therefore supersedes the analysis or interpretation of any state court, governor, or other officer of the United States.

This Court must analyze questions concerning retrocessions through the lens of federal law and define its scope through the actions of the federal officials that exercise delegated federal authority. *See United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979) (citing *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971); *Omaha Tribe of Neb. v. Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *aff'd sub nom. Omaha Tribe of Neb. v. Vill. of Walthill, Neb.*, 460 F.2d 1327 (8th Cir. 1972); *see also Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), *rev'd on other grounds by Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Interpreting the scope of retrocession by focusing on the federal government's actions is consistent with the United States' assumed plenary power over Indian affairs, under which Congress is not limited by the actions of states when legislating in the field of federal Indian law. *Oliphant v. Schlie*, 544 F.2d at 1012.

Critically, Congress intended Section 1323 to "benefit the Indians." *Brown*, 334 F. Supp. at 542. This intent, coupled with the long-standing canon of

construction directing courts to construe statutes liberally in favor of the Indians with ambiguous terms interpreted to their benefit, supports the Yakama Nation's position here. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003). These legal principles require the Court to analyze the scope of retrocession by focusing on the Secretary of the Interior's actions and interpretations over and above those of the state, and by generally resolving ambiguities and conflicts in favor of tribes. *Brown*, 334 F. Supp. at 543.

Considering the scope of retrocessions through the actions of federal officials and consistent with federal law, the Court relied on two district court decisions: *United States v. Brown*, 334 F. Supp. 536, and *Omaha Tribe of Neb. v. Village of Walthill*, 334 F. Supp. 823. *Lawrence*, 595 F.2d at 1151; *Oliphant*, 544 F.2d at 1012. Both of these cases stand for the principle that federal actions, determinations, and interpretations concerning retrocession control the resolution of questions on the scope of retrocession. As these cases demonstrate, even if a state violates its own constitution in requesting retrocession, and even if the federal government does not accept retrocession in the manner and scope the state requested it, federal action controls these questions and retrocession does not turn on state law or even state intent.

There were two challenges to federal reassumption of jurisdiction in Indian Country raised by the criminal defendant in *Brown*. First, the challenger claimed

Nebraska's "resolution" requesting retrocession was facially invalid under Nebraska's constitution, thereby invalidating the subsequent retrocession. *Brown*, 334 F. Supp. at 540-41. Second, the challenger argued the retrocession was invalid because Nebraska had requested retrocession over two reservations in Nebraska—the Omaha Reservation and the Winnebago Reservation—but the Secretary of the Interior only accepted jurisdiction over one of the reservations[2] *Id.* at 538.

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

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

[2] The Omaha Tribe sought retrocession while the Winnebago Tribes did not; thus, the Secretary of the Interior only accepted retrocession on the Omaha Tribe's reservation.

> *the effectiveness of state action triggering the re-assertion of federal jurisdiction is and was controlling. . .*

Id. at 540-41(emphasis added).

Having determined that invalidity of a state's retrocession resolution under state law is immaterial because federal law and federal agency determinations govern the ultimate conclusions of the retrocession process exclusively, the court turned next to the question: does the federal government have the authority to accept a different scope of retrocession than Nebraska requested? The district court answered this question in the affirmative:

> The overall purpose of Chapter 15 of Title 25 U.S.C.A. and, specifically, that subchapter dealing with jurisdiction, was to benefit the Indian. It surely was not to make the Indian a political ping-pong ball between the state and federal governments. For these reasons, the Court interprets the provisions of 25 U.S.C.A. § 1323 to mean that the United States may assume all or any measure of the jurisdiction retroceded by a state as well as allowing the state to offer all or any measure of the civil or criminal jurisdiction acquired in 1953. This means that the action of the Secretary of Interior in assuming criminal jurisdiction over the Omaha but not the Winnebago Indian Reservation was within the authority provided by the statute.

Id. at 542. The *Brown* decision establishes that under Section 1323, federal agencies charged with carrying out federal law must be given deference over and above state law and even state constitutions when it comes to retrocession. And those federal determinations should be considered the final word on retrocession to

prevent making "the Indian a political ping-pong ball between the state and federal governments." *Id.*

In *Omaha Tribe*, the court dealt with, in relevant part, the same issues that it would dispose of in the *Brown* decision it issued six days later. *Omaha Tribe* held that interpretations under federal law dictated the validity and scope of retrocession, not state law and state interpretations. *Omaha Tribe*, 334 F. Supp. at 831. The Omaha Tribe challenged local governments' continued assertions of jurisdiction over enrolled Omaha Members within the Omaha Reservation despite the United States' acceptance of retroceded jurisdiction under Section 1323(a). *Id*. at 828. The court rejected the state's arguments that (1) the retrocession resolution was invalid because it violated Nebraska's constitution, and (2) the retrocession was invalid because the federal government had not accepted the terms of retrocession the state had offered. *Id*. at 829, 835.

In rejecting these arguments, the district court made three observations regarding the legal landscape governing retrocession disputes. First, courts should read Section 1323(a) "in light of the legislative and judicial policy of construing statutes in favor of Federal jurisdiction . . . ." *Id.* at 834 (citing *Rice v. Olson*, 324 U.S. 786 (1945)). Second, the canon of interpretation that "legislation affecting the Indians is to be construed in their interest . . ." applies with equal force to Section 1323(a). *Id.* (citing *United States v. Nice*, 241 U.S. 591, 599

(1916)). Third, "[a] great deal of weight must be given to the conclusion of the Secretary of Interior as to the extent of his power and authority under 25 U.S.C. § 1323 and Executive Order 11435." *Id.* (citing *Dixon v. Cox*, 268 F. 285 (8th Cir. 1920).

With these standards in mind, the court determined that the Secretary of the Interior reasonably relied on the State's offer of retrocession when it reassumed federal jurisdiction over the Omaha Reservation, and that the federal acceptance of retrocession need not follow the retrocession offered or intended by the state. *Id.* at 835. Consequently, the retrocession was held valid and the state no longer could exercise the jurisdiction complained of in that case. *Id*. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed. *Omaha Tribe of Nebraska v. Walthill*, 460 F.2d 1327 (8th Cir. 1972).

This Court adopted *Brown* and *Omaha Tribe*'s reasoning in *Oliphant v. Schlie*, 544 F.2d 1007. The Court was faced with a question addressed in *Brown*: whether a state offer to retrocede jurisdiction that is invalid under state law invalidates the Secretary's acceptance of jurisdiction *per se*. *Id*. at 1012. The Court held that the validity of the state's actions was irrelevant, which the Court supported by adopting and extensively quoting from *Brown*. *Id*. While *Oliphant* was reversed on other grounds, the Ninth Circuit later confirmed that its analytical framework for retrocessions of jurisdiction using *Brown* was "still

persuasive" and rejected any reliance on state law when interpreting the validity and scope of a state's retrocession. *United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979).

In *United States v. Lawrence*, the Suquamish Tribe requested retrocession from the Governor of Washington, and "by proclamation, [the Governor] retroceded to the United States" jurisdiction over the Suquamish Reservation. 595 F.2d at 1151. The Secretary of the Interior accepted the retrocession. *Id*. Mr. Lawrence challenged federal jurisdiction following the Suquamish retrocession, claiming that it had not been authorized by state legislation. *Id.* This Court recognized that "Indian tribes [remain] critical of Pub. L. 280 because section 7 authorized the application of state law to tribes without their consent and regardless of their needs or circumstances." *Id.* at 1151. Congressional authorization of retrocession attempted to repair this colonial narrative by authorizing "*the United States* to accept retrocession *from* any state." *Id.* (emphasis added).

This Court determined that the Suquamish retrocession was valid, concluding that "the question is one of federal, not state law." *Id.* (citations omitted). This Court refused to consider whether the Governor's proclamation was valid under state law and reasoned that the "acceptance of the retrocession by the Secretary, pursuant to the authorization of the President, [is what] made the

retrocession effective." *Id.* (citations omitted). This conclusion was not impacted by the alleged invalidity of the Governor's proclamation because it is the United States' intent and its own acceptance that is dispositive on the central retrocession question at issue in this appeal.

There is no precedent to suggest that the scope of retroceded jurisdiction can change after the United States reassumes such jurisdiction under Section 1323 and Executive Order 11435, absent additional legislation. In the alternative, if a state wants to claw back Public Law 280 jurisdiction that it retroceded to the United States, it must first seek the affected tribe's permission. 25 U.S.C. § 1326. In other words, when the United States accepts a state's retrocession of Public Law 280 jurisdiction, the scope of reassumed jurisdiction is fixed at the point in time of federal acceptance. Federal law does not support requiring tribes to chase down a moving target of retroceded jurisdiction as states and federal administrations change their minds about the scope of a prior retrocession.

The foregoing highlights four overarching points relevant for this Court's analysis of this appeal. First, the plain language of Section 1323 authorizes the United States to accept "all or any measure" of a State's Public Law 280-derived jurisdiction. Second, the Indian canons of statutory construction dictate that ambiguities or questions on the scope of retrocession should focus on federal action, federal law, and what is in the Yakama Nation's interest. Third, this Court

uses a federal-focused analytical framework to determine the validity and scope of retroceded jurisdiction. Fourth, the scope of retrocession is fixed upon federal acceptance under Section 1323 and Executive Order 11435.

The district court erred by not applying this federal-focused analysis here. The district court's opinion does not show consideration of *Brown*, *Omaha Tribe*, *Oliphant*, *Lawrence*, or the Indian canons of statutory construction. Rather, the district court interpreted the scope of retrocession by principally relying on the state's Proclamation 14-01, Governor Inslee's rejected cover letter, and a state appellate court decision in *State v. Zack*. The district court also does not grapple with evidence that the state actions and precedent upon which it relies reflect a changed understanding of the scope of retrocession years after the retrocession's scope was fixed upon federal acceptance under Section 1323 and Executive Order 11435. The district court erred by applying this state-focused, rather than federal-focused analysis interpreting the scope of retrocession.

B. The District Court Failed To Consider The Department Of The Interior's Determination Regarding The Scope Of Retrocession.

The district court erred when it failed to honor DOI's understanding of its own acceptance of retrocession. DOI's understanding at the time of acceptance must control. *See, e.g., Brown*, 334 F. Supp. at 540. Assistant Secretary Washburn's Letter manifests DOI's acceptance of retrocession within the Yakama Reservation, and outlines DOI's process and reasons for accepting the State's

retrocession. ER at 2706-08. The Yakama Nation and local governments worked together and implemented retrocession in reliance on DOI's guidance memoranda and letters. Acting Assistant Secretary Roberts' Letter and Deputy Assistant Secretary Roberts' BIA Guidance memorandum provide post-implementation evidence of the intent of Assistant Secretary Washburn's acceptance, as well as answers to the Governor's jurisdictional inquiries. ER at 2709-10. Each document clarifies the result of the Assistant Secretary's acceptance and retrocession's implementation. The state court, Governor Inslee's, and DOJ's attempts to change the scope of retrocession two years after its implementation cannot be reconciled with DOI's acceptance and implementation of retrocession. The statutory framework does not permit such an informal reconsideration and reversal of retrocession.

1. The Washburn Letter Accepting Retrocession and Defining the Scope of Post-Retrocession Jurisdiction

Assistant Secretary Washburn understood retrocession's purpose was to benefit the Yakama Nation. He recognized in his Letter that "[t]ribal self-governance is more important in this area of public policy and governmental service than perhaps any other." ER at 2707. He understood that the "State will transfer back to the Federal Government Federal Authority that the State had been delegated under Public Law 280." ER at 2703. He clarified that "[a]s a result, under retrocession, the State has chosen to retract state authority, Federal authority

will resume, and the Nation's authority will remain the same as it always has been." *Id*. Therefore, ". . . tribal leadership and the U.S. Attorney, rather than the State, county or municipal leadership, will now bear the responsibility . . . for public safety on the Yakama Reservation," and the United States "will undertake the same role that their sister offices play on dozens of reservations throughout the western United States, including Arizona, Montana, New Mexico, and South Dakota." ER at 2705-06.

Assistant Secretary Washburn's Letter does not leave open the possibility of State criminal jurisdiction over Yakama members for crimes committed within the Yakama Reservation. This is further supported by Assistant Secretary Washburn's identification of the need for the Yakama Nation to develop mutual aid and cross-deputation agreements with local jurisdictions to ensure continued public safety. ER at 2706. There is no urgent need for such agreements if the state retained most of its criminal jurisdiction within the Yakama Reservation following retrocession's implementation.

2. DOI's Second Affirmation of Post-Retrocession Jurisdiction

Shortly after retrocession took effect, Governor Inslee sent a letter to DOI stating that DOI should have interpreted Proclamation 14-01 in accordance with his January 27, 2014 Cover Letter. Mot. to Take Judicial Notice 10-11 (Dkt. Entry No. 15). Governor Inslee asked DOI to read the "clearly expressed" intent in his

separate Cover Letter. *Id.* at 10. DOI refused again to consider this interpretation. *Id.* at 13. DOI replied that "retrocession was accepted according to the terms of the Proclamation of the Governor 14-01, signed January 17, 2014." *Id.*

Governor Inslee's subsequent attempt to change the scope of retrocession mirrors the situations presented in both *Lawrence* and *Brown* and should have played no part in the district court's analysis regarding retrocession. What the exchange between Governor Inslee and DOI does clearly illustrate is a consistent position by DOI that retrocession was accepted by the federal government pursuant to the plain terms of Proclamation 14-01.

3. U.S. Attorney's Guidance On Eve Of Retrocession

On the eve of implementing retrocession the United States Attorney for the Eastern District of Washington, Mr. Michael Ormsby, confirmed his understanding that following retrocession the state would no longer have jurisdiction over crimes by Indians against non-Indians. ER at 2711-13. In an email to Yakama Nation law enforcement and other local law enforcement departments, U.S. Attorney Ormsby commented on jurisdictional flow charts appended to his email. ER at 2711. These charts show that post-retrocession the state does not have criminal jurisdiction over Indians within the Yakama Reservation regardless of the victim's Indian status. ER at 2712-13.

4. BIA Guidance Following Retrocession

DOI's understanding of retrocession is further reflected in Deputy Assistant Secretary Roberts' memorandum and "jurisdictional matrix" chart that was provided to BIA as a tool to promote consistency in the ongoing implementation of retrocession. ER at 2709-10. The BIA Guidance both clarified and illustrated DOI's understanding of its own acceptance. *Id*. The BIA Guidance explained "the Secretary concluded that the State retroceded . . . criminal jurisdiction over all other offenses except when they involve 'non-Indian defendants and non-Indian victims.'" ER at 2709.

The Court erred in failing to consider the BIA Guidance to discern the scope of jurisdiction reassumed by the United States. The purpose of the memorandum was to provide guidance to "Federal, tribal, state and local law enforcement in their implementation of the [Department of the Interior's] decision." ER at 2709. The matrix was consistent with U.S. Attorney Ormsby's direction, affirming that the United States' position was consistent between DOI and DOJ that the state retains no jurisdiction over crimes involving Indians on the Yakama Reservation.

Considering Assistant Secretary Washburn's federal register notice accepting retrocession, his letter affirming his intent in accepting retrocession, Acting Assistant Secretary Roberts' affirming letter, U.S. Attorney Ormsby's

retrocession-scope email, and Deputy Assistant Secretary Roberts' guidance memorandum reaffirming Assistant Secretary Washburn's intent, there is ample support in the record showing that the United States' original intent was to reassume jurisdiction over crimes involving Indians within the Yakama Reservation.

The district court erred in its interpretation of the scope of retrocession by failing to deploy the required federal-focused analysis. The district court did not grapple with the significant evidence supporting the United States' intent to reassume jurisdiction over crimes involving Indians within the Yakama Reservation following retrocession. This Court's precedent suggests that the district court should have focused its analysis on the United States' actions in accepting retrocession, which support the position that, post-retrocession, the state does not have jurisdiction over crimes committed by Indians within the Yakama Reservation.

To conclude now that the "and" in paragraph three of Proclamation 14-01 actually means "or" simply because Governor Inslee wishes to re-write the Proclamation, or because of a state court's outcome-based analysis favoring the state and ignoring federal Indian law policies like self-determination, would nullify the Secretary's delegated authority. Such deference to state actors is not allowed by federal law governing retrocession. The district court erred in deferring to state

actors instead of giving proper weight to DOI's understanding of the scope of retrocession at the time that it was implemented.

C. The Department Of Interior's Acceptance Of Retroceded Jurisdiction Within The Yakama Reservation Is Entitled To Judicial Deference.

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

The United States Supreme Court established the test for reviewing agency interpretations of federal law. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The Court in *Chevron* created a two-step inquiry for determining the level of deference owed to administrative statutory interpretations. The first step is to determine if Congress manifested a clear intent within the statutory language. *Id*. at 843. If so, the reviewing court must give force to that intent. *Id*. The second step is taken if a statute is ambiguous or silent on a given question. *Id* at 843-44. In that case, the court must ask whether the agency's interpretation of the statute is based on a permissible construction of the statute—unless that construction proves arbitrary and capricious. *Id*.

Congress authorized the Secretary of Indian Affairs "to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State. . . ." 25 U.S.C. § 1323. Two readings can be given to this language. It might first be read to "provide that the state could give back all or any

measure of the jurisdiction received in 1953, but that the United States was limited to taking back all or none." *Brown*, 334 F.Supp at 541. The statute could also "provide flexibility to both the state and federal governments in allowing the state to give all or any measure of the jurisdiction it had received in 1953, and the federal government may take back all or any measure of the jurisdiction set forth in the resolution or proclamation." *See id.* Two readings provide a minor ambiguity; thus, the Court must ask whether the agency's interpretation of the statute is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843-44.

The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844. The principle of deference to administrative interpretations "has been consistently followed by [the] Court whenever [a] decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy . . . has depended upon more than ordinary knowledge" in regard to agency regulations, decisions, and actions. *Id.* (citations omitted).

Assistant Secretary Washburn, pursuant to his presidentially delegated authority, accepted Washington State's retroceded jurisdiction over crimes involving Indians. ER at 2703-08. In later describing retrocession, DOI stated that "retrocession was accepted according to the terms of the Proclamation of the

Governor 14-01, signed January 17, 2014." Mot. to Take Judicial Notice 13 (Dkt. Entry No. 15). Those plain terms remain clear. Washington state retroceded criminal jurisdiction to the United States but "retain[ed] jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." ER at 2699. Secretary Washburn accepted these terms and declined to add the word "or" into the Proclamation.

Deputy Assistant Secretary Roberts echoed the agency's decision and released a memorandum to the BIA. ER at 2709-10. This memo offered the "jurisdictional matrix" to clarify and illustrate the agency's understanding of its own acceptance. ER at 2710. The BIA Guidance remains clear that "the Assistant Secretary concluded that the State retroceded . . . criminal jurisdiction over all other offenses except when they involve 'non-Indian defendants and non-Indian victims.'" ER at 2709.

DOI's decision to accept the plain terms of Proclamation 14-01, thereby rejecting Governor Inslee's cover letter, cannot be arbitrary or capricious when viewed in light of federal authority over Indian affairs. The actions of the federal government here remain consistent with its trust duty when considered through "the interests of the people most affected by these events." *Brown*, 334 F. Supp. at 542. These interests "weigh heavily in a determination of what was intended by the language used in 25 U.S.C. § 1323." *Id.* Specific to jurisdiction, "it would be

anomalous if Congress made [a] provision for the . . . desires of Indians . . . but left the United States no method of [supporting] those desires of individual tribes" and instead left the United States and Courts to favor the interests of the state. *Id.*

DOI's acceptance of the plain terms of Proclamation 14-01 is consistent with Congress's intent that "[t]he federal government, having the power to preempt jurisdiction over the [Yakama] Reservation, ha[s] the power to so define and construe the word 'retrocession' as to remove from the determination of federal assumption of jurisdiction any question of the [scope] of the state's [view] of retrocession." *See Brown*, 334 F. Supp at 541. DOI made the decision to forgo the state's attempts to limit Proclamation 14-01 and accepted retrocession through the Proclamation on its plain and unambiguous terms. ER at 2707, 2709. Those terms remain clear that the state retained jurisdiction only over crimes involving "non-Indian defendants and non-Indian victims." ER at 2699. Considerable weight should be given to DOI's decision to accept retrocession in accordance with Proclamation 14-01's plain terms.

2. Deputy Assistant Secretary Of Indian Affairs' Guidance Memorandum Is Entitled To **Skidmore** *Deference.*

Rulings, interpretations, and opinions of an agency administrator, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). An

agency administrator's interpretation is longstanding and does not "automatically deprive that interpretation of the judicial deference otherwise its due." *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (citing *Chevron*, 467 U.S. at 843).

Agency actions including interpretations contained in advisory letters, policy statements, agency manuals, and enforcement guidelines will be accorded deference in light of their persuasiveness. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000); *Skidmore*, 323 U.S. at 140. Courts evaluate the deference owed to an agency action pursuant to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* at 140; *see also Mead Corp.*, 533 U.S. at 228 (reaffirming *Skidmore* and directing that deference be assessed on "the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position . . .").

The BIA Guidance from Deputy Assistant Secretary Roberts is thorough, sound, persuasive, and consistent with prior pronouncements. *See Skidmore*, 323 U.S. at 140. The BIA Guidance is thorough as it gives a history of the Assistant Secretary of Indian Affairs' retrocession decision. ER at 2709. The BIA Guidance explains that the guidance "is issued to assist Federal, tribal, state and local law enforcement in their implementation of the Department's decision…." and directs the reader's attention to the jurisdictional matrix that reflects DOI's plain reading

of Proclamation 14-01. *Id.* The BIA Guidance discusses that land status within the Yakama Reservation no longer matters to criminal jurisdiction following retrocession, and provides further the express statement that the State retroceded "criminal jurisdiction over all other offenses except when they involve 'non-Indian defendants and non-Indian victims." ER at 2709-10 (citing to Proclamation 14-01).

The BIA Guidance is *sound*. *See Skidmore*, 323 U.S. at 140. The memorandum grounds its authority in "Kevin Washburn's October 19, 2015 decision . . . [that] explains clearly the scope of the United States [*sic*] jurisdiction post-retrocession." ER at 2709. The BIA Guidance mirrors "the scope of retroceded jurisdiction outlined in the Proclamation" stating that the Proclamation "is plain on its face and unambiguous." *Id.* Deputy Assistant Secretary Roberts' analysis simply applies the plain language of the Proclamation to determine that "Washington State retain[ed] jurisdiction only over civil and criminal causes of action in which no party is an Indian." *Id.* The memorandum also cites multiple authorities to ensure sound application of retrocession, such as: the Violence Against Women Act; the Office of Tribal Justice, U.S. Department of Justice; the Proclamation; and, *Klickitat County v. Dept. of Interior*, No. 1:16-CV-03060, slip. op. at 10 (E.D. Wash. Sept. 1, 2016).

The BIA Guidance is *persuasive*. *See Skidmore*, 323 U.S. at 140. The memorandum addresses Proclamation 14-01, Assistant Secretary Washburn's letter, and the United States District Court for the Eastern District of Washington's decision in *Klickitat County v. U.S. Dep't of the Interior et al.* ER at 2709-10. The BIA Guidance does not run afoul of Secretary Washburn's acceptance and states that Assistant Secretary Washburn's acceptance "explains clearly the scope" of retrocession. *Id.* Relevant portions of Proclamation 14-01 are quoted, and a plain language interpretation is provided. *Id*. The BIA Guidance provides both a narrative and illustrative depiction of DOI's position that "Washington state retains jurisdiction only over civil and criminal causes of action in which no party is an Indian." *Id*.

The BIA Guidance is *consistent*. *See Skidmore*, 323 U.S. at 140. The memorandum stands parallel with the positions taken by Assistant Secretary Washburn, U.S. Attorney Michael Ormsby, and by the DOJ in related litigation. Indeed, Assistant Secretary Washburn's letter notes that "tribal leadership and the U.S. Attorney, rather than the State, county or municipal leadership, will now bear the responsibility . . . for public safety on the Yakama Reservation." ER at 2705. U.S. Attorney Ormsby's email, transmitted on the eve of retrocession, was consistent with this conclusion when it confirmed that the state possesses no jurisdiction over crimes by Indians within the Yakama Reservation. ER at 2711.

DOJ argued to protect the validity of retrocession in a case filed shortly after retrocession's implementation, where it directed the court to the plain language of Proclamation 14-01. Defendant's Motion to Dismiss at 6, *Klickitat Cnty. v. U.S. Dep't of the Interior et al.*, No. 1:16-cv-03060-LRS (E.D. Wash. June 20, 2016). Both the reasoning within the BIA Guidance and its jurisdiction matrix run concurrent with each federal action, and preserve the foundational understanding that the State retroceded "criminal jurisdiction over all other offenses except when they involve 'non-Indian defendants and non-Indian victims.'" ER at 2709.

The district court erred by not affording deference to the BIA Guidance. The district court deferred instead to Governor Inslee's separate Cover Letter and the state court's legal gymnastics in *Zack*. ER at 1225; *City of Toppenish et al.*, No. 1:18-cv-03190, ECF 28 at 7, 18. Had the district court correctly afforded deference to DOI's own acceptance and interpretation of retrocession, the district court would have understood that—given the ample evidence from the federal government at the time of retrocession germane to the central dispute in this appeal—the state no longer possesses jurisdiction over crimes involving Indians within the Yakama Reservation.

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

The district court erred to the extent that it relied on the United States Office of Legal Counsel's Memorandum Opinion ("OLC Memo"). ER at 1225; *City of Toppenish et al.*, No. 1:18-cv-03190, ECF 28 at 8. The OLC Memo was issued two years after the implementation of retrocession and in direct conflict with the understanding of the United States at the time of DOI's acceptance of retrocession. ER at 1577-93. The district court likewise erred to the extent that it considered the letter from the current administration's Assistant Secretary for Indian Affairs, Tara Sweeney ("Assistant Secretary Sweeney"). ER at 1240 (taking judicial notice of Sweeney Letter). Assistant Secretary Sweeney issued her Letter on the eve of the hearing on the Yakama Nation's Motion for Preliminary Injunction, purporting to withdraw DOI's previous interpretation of retrocession, including the BIA Guidance. ER at 1293.

The OLC Memo and Assistant Secretary Sweeney's letter reflect a transparent and unlawful attempt by the Trump Administration to undo DOI's under the Obama Administration. This revisionary plot was further demonstrated by the Trump Administration's *amicus curiae* brief filed in *Confederated Tribes and Bands of the Yakama Nation v. City of Toppenish et al.*, which addresses the same issues here. Such transparent political policy shifts have no place in the

implementation of retrocession and its real-world impacts upon the Yakama Nation.

First, this Court is not bound by an opinion of the United States Attorney General. *Pueblo of Taos v. Andrus*, 475 F. Supp. 359, 364 (D.D.C. 1979). Congress did not delegate any authority to the Attorney General in Section 1323(a), and Executive Order 11435 requires only that the Secretary of the Interior *consult* with the Attorney General prior to the Secretary of the Interior's decision on a request for retrocession. The Attorney General and DOJ possess no authority to interpret or render decisions on retrocession or its scope either before or after a retrocession, making any deference inappropriate for lack of legal authority. *See* 25 U.S.C. § 1323.

Second, this Court cannot consider Assistant Secretary Sweeney's letter because it is a complete reversal of policy. A complete reversal of policy requires more than a mere memo or letter. For example, in *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) (hereafter "*Hemp Industries*"), this Court considered whether the Drug Enforcement Administration ("DEA") could reverse its own policy with an internal memo. This Court determined that if a memo or agency action possessed the force of law, it would represent a rule that required more than internal procedures.

Agency actions that carry the force of law "create rights, impose obligations, or effect change in existing law pursuant to authority delegated by Congress." *Id.* Adopting the D.C. Circuit's framework for distinguishing actions that possess the force of law, this Court acknowledged that three circumstances exist in which an action possesses the "force of law." *Id.* First, an action possesses the force of law "when, in the absence of the [action], there would not be an adequate legislative basis for enforcement action." *Id.* The second circumstance occurs when the agency "explicitly invoke[s] its general legislative authority." *Id.* The final circumstance arises "when the rule effectively amends" a previous action. *Id.*

To understand if the action at issue in *Hemp Industries* effectively amended the previous rule, this Court looked to the status of the rule before the issuance of the DEA's reinterpretation. The previous rule explicitly exempted companies' products that consisted of hemp oil and sterilized seed from marijuana's definition. *Id.* The DEA's new interpretation combined marijuana and THC by banning all products containing even trace amounts of THC. The agency action therefore changed an existing legal understanding and effectively amended its previously understood terms. This Court declared that the DEA's promulgation of its new rule represented a "disingenuous interpretation" in an attempt "to evade . . . time-consuming procedures" by changing an existing understanding retroactively. *Id.* at

1091. This Court concluded that the DEA's revised approach rose to the level of an action subject to more than a mere memorandum. *Id.*

The OLC Memo and Assistant Secretary Sweeney's Letter likewise stand contrary to the legal positions taken by both DOJ and DOI at the time of retrocession. Specifically, DOJ confirmed its understanding of retrocession through U.S. Attorney Ormsby's email. DOJ also defended DOI in a lawsuit by Klickitat County that challenged the validity of retrocession. Defendant's Motion to Dismiss, *Klickitat Cnty. v. U.S. Dep't of the Interior et al.*, No. 1:16-cv-03060-LRS (E.D. Wash. June 20, 2016). In DOJ's Motion to Dismiss in that case, it quoted the Proclamation to describe the scope of criminal jurisdiction retroceded by the State as including all offenses except those that involve "non-Indian defendants and non-Indian victims." *Id*. at 6. The DOJ did not interlineate "or" into that sentence from the Proclamation. DOJ then bolstered Assistant Secretary Washburn's decision to ignore the state's attempt to re-write Proclamation 14-01 and argued that:

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

Id. at 18 (citing *Brown*, 334 F. Supp. at 540). DOJ's previous arguments defend DOI's acceptance of retrocession and support the Yakama Nation's arguments here.

Assistant Secretary Sweeney's letter is not just contrary to DOI's previous position, but seeks to unabashedly reverse it. Assistant Secretary Sweeney curiously issued her letter on the eve of a significant hearing regarding the scope of retrocession in this lawsuit, without government-to-government consultation with, or notice to the Yakama Nation. ER at 1293. The Letter attempts to withdraw the BIA Guidance issued by Acting Assistant Secretary and, later, Deputy Assistant Secretary Roberts after retrocession was implemented. Assistant Secretary Sweeney has provided no legal basis for purporting to change the scope of retrocession years after the fact.

Like the DEA in *Hemp Industries*, Assistant Secretary Sweeney's Letter and the OLC Memo "effectively amend" a previous action. *See Hemp Industries*, 333 F.3d 1087. Assistant Secretary Sweeney attempts to withdraw the previously-understood terms of retrocession documented through multiple guidance documents and correspondence. The OLC Memo negates the efforts and conduct of DOJ during retrocession, directly contradicting previous DOJ communications such as U.S. Attorney Ormsby's email to local governments on the eve of retrocession.

This Court should ignore Assistant Secretary Sweeney's Letter and the OLC Memo. These documents represent "disingenuous interpretation[s]" in an attempt "to evade . . . time-consuming procedures." *Hemp Industries*, 333 F.3d at 1091. Assistant Secretary Sweeney cannot, in this case, effectively amend a previous action taken by DOI with a mere letter. *See id.* DOI already accepted Washington's retrocession and implemented its jurisdictional scope after a process of thorough consultation with all impacted parties. At the moment DOI accepted Washington's retrocession and fulfilled the statutory requirements, the process was finalized and is not subject to policy changes of subsequent administrations. If Assistant Secretary Sweeney wishes to give back jurisdiction to Washington State that was reassumed in 2015, she cannot "evade [the] time-consuming procedures" set out by statute. 25 U.S.C. 1321(a), 1322(a) (jurisdiction cannot be assumed without a tribe's permission). DOJ cannot likewise issue a memo two years after-the-fact taking an opposite position than the one it advanced in support of DOI's original reassumption of jurisdiction in 2015. *Hemp Industries*, 333 F.3d at 1091. The actions by both DOJ and DOI in 2018 effectively reverse previously established policies and statutory determinations without undertaking the proper procedure for effectuating such reversals. This they cannot do. *See Hemp Industries*, 333 F.3d 1082.

4. The United States Office of Legal Counsel's Memorandum Opinion Improperly Re-Interpreted Proclamation 14-01.

Should the Court consider the OLC Memo, the analysis therein offers a detailed and improper re-interpretation of Proclamation 14-01. DOJ first takes an analytical leap past review of the Washburn Letter. It justifies this leap by reading ambiguity into the Washburn Letter when no such ambiguity exists. ER at 1578-79. Ignoring the Washburn Letter is ignoring the United States' contemporaneous understanding of its own decision. Ignoring this evidence runs directly counter to the federal laws governing retrocession. 25 U.S.C. § 1323 (empowering DOI to accept a state's retrocession offer). This Court should not ignore the Washburn Letter. It must consider it and defer to Assistant Secretary Washburn's reliance on the plain language of Proclamation 14-01 retroceding state jurisdiction over crimes involving Indians within the Yakama Reservation.

Assistant Secretary Washburn expressly rejected Governor Inslee's attempt to amend the plain language of Proclamation 14-01. Governor Inslee submitted a cover letter with Proclamation 14-01 that purported to read "and/or" where Proclamation 14-01 used only the conjunctive "and." ER at 2701-02. The Washburn Letter dedicates a full paragraph to dismissing Governor Inslee's Cover Letter in favor of the plain language of the Proclamation. ER at 2707. His letter recognized that state law designates the gubernatorial proclamation as the final expression of state intent and clarified that "it is the content of the Proclamation

that we hereby accept in approving retrocession." *Id*. To emphasize the point, Assistant Secretary Washburn describes the content of Proclamation 14-01 as "plain on its face and unambiguous . . .", and warns against "unnecessary interpretation [that] might simply cause confusion." Id.

Assistant Secretary Washburn's plain language interpretation does not stand alone. DOI's statements concerning the scope of retrocession throughout the following year aligns with Assistant Secretary Washburn's federal interpretation at the time the United States accepted retrocession. Two months after the implementation of retrocession, Acting Assistant Secretary Lawrence Roberts responded to a letter from Governor Inslee concerning criminal jurisdiction within the Yakama Reservation. Mot. to Take Judicial Notice 13 (Dkt. Entry No. 15). Consistent with the Washburn letter, Acting Assistant Secretary Roberts describes retrocession, without qualification, as "restoring Federal criminal jurisdiction." *Id.* He then reiterates the point by describing concurrent federal and state criminal jurisdiction within the Yakama Reservation as in "conflict[] with the legal effects of retrocession." *Id.*

As discussed *supra*, then-Deputy Assistant Secretary Roberts also issued the BIA Guidance reaffirming the impact of the Washburn Letter as reassuming full criminal jurisdiction over crimes within the Yakama Reservation involving Indians. ER at 2709-10. DOJ understood and accepted the intent expressed by

DOI at the time retrocession was implemented, as demonstrated by U.S. Attorney Ormsby's April 18, 2019 email. ER at 2711-13. The current DOJ now disagrees with its own position on this matter expressed in 2015 and 2016.

The OLC Memo ignores the Washburn Letter's plain language and the surrounding context confirming Assistant Secretary Washburn's intent by cherry-picking statements out of context. It relies heavily on the Proclamation's broad statement that the State's retrocession was only "in part . . .", but asserts a fallacious position that because the entire retrocession was partial, each element of the retrocession must also be partial. ER at 1586-87. Governor Inslee appropriately described this retrocession as "in part" because he refused to retrocede jurisdiction over off-reservation trust allotments, despite the Yakama Nation's request. ER at 2699. The Yakama Nation also did not request state retrocession of Public Law 280 jurisdiction concerning mental health, meaning the State retained that element of its jurisdiction as well. *Id*. The State's retention of certain aspects of its Public Law 280 jurisdiction is not dispositive of whether the federal government reassumed full jurisdiction over crimes involving Indians.

Regardless, the correspondence issued by the team who decided and implemented retrocession should be given significant weight in an analysis of the scope of that retrocession, and it should be afforded deference in rejecting the subsequent administration's unlawful attempts to limit that scope.

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

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

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

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

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

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

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

ER at 2699 (emphasis added). A state court of appeals in a criminal proceeding that did not involve a Yakama Member or the Yakama Nation as parties erroneously interpreted "and" in this paragraph to mean "or." *State v. Zack*, 2 Wn.

App. 2d 667. The *Zack* court's reasoning is flawed and should not have controlled or been given deference by the court below. The plain meaning of "and" as used in Proclamation 14-01 is unambiguous and gives effect to the retrocession the United States accepted. 80 Fed. Reg. 63583.

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

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

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

Finally, given the nature of the issue—including the fact that jurisdiction over Yakama Indian Country was transferred from the United States to Washington under Public Law 280 without the Yakama Nation's consent in violation of the Yakama Nation's inherent sovereignty and the Treaty of 1855—the long-standing rule of construction affecting tribal rights should be given effect. To the extent the use of the word "and" joining the terms at issue here is a "doubtful expression," the term should be resolved in the Yakama Nation's favor. *State of*

Wash., 969 F.2d at 755. Here, this would again lead to the conclusion that Public Law 280 jurisdiction should be restored to the United States. "And" should mean "and," not "or" in this case. Interpreting it otherwise requires ignoring each long-settled rule of construction described above.

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

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

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

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

Further, the district court erred in its reasoning that accepting the Yakama Nation's plain language reading of the Proclamation would result in the Governor taking an *ultra vires* action. ER at 1225; *City of Toppenish et al.*, No. 1:18-cv-03190, ECF 28 at 22. The district court reasoned the Governor's Proclamation would be *ultra vires* because it "*return[s]* more jurisdiction to the United States than the state assumed under Public Law 280 and RCW 37.12.010." *Id.* The district court relied on the same reasoning in *Zack*, which claimed retrocession could not remove state jurisdiction over non-Indians in Indian County. This line of reasoning is incorrect for three reasons.

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

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

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

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

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

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

In the Treaty of 1855, the Yakama Nation reserved the exclusive use and benefit of its Reservation lands. In exchange, the Yakama Nation ceded certain

rights to the balance of the Yakama Nation's homelands, which the United States needed to support its manifest destiny agenda and pave the way for the establishment of what is now the State of Washington. Art. II, Treaty of 1855. The United States violated that promise by enacting Public Law 280, inserting a foreign jurisdiction into the Yakama Nation's exclusive lands and allowing the State of Washington to assume jurisdiction over Yakama Members without the Yakama Nation's free, prior, and informed consent. Public Law 280 was passed in the same year that Congress formally adopted a policy of "termination" aimed at subjecting Native Nations to the same laws as other citizens of the United States and ending the United States' trust responsibility to those Nations. 67 Stat. B132 (1953).

The State of Washington's unilateral annexation of jurisdiction over Indians on the Yakama Reservation not only violated the Yakama Nation's sovereign and Treaty-reserved rights, but it also created significant confusion for local law enforcement that has never been resolved. Before Public Law 280, the state only had jurisdiction within Yakama Indian Country over crimes between non-Indians. Public Law 280's partial cession of jurisdiction to the states inserted confusion into the Indian Country criminal jurisdiction framework, and Washington State's Public Law 280 scheme was particularly egregious. Suddenly, law enforcement was required to consider a complex jurisdictional scheme involving land status, type of

crime, and the Indian status of suspects and victims every time they responded to an alleged crime. For example, mistaken or delayed land status determinations in the heat of the moment could allow lawbreakers to evade justice or cause further danger to people in the surrounding communities.

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

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

By accepting Proclamation 14-01's plain terms and permitting the State to only retain criminal jurisdiction within the exterior boundaries of the Yakama

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

The Yakama Nation did not ask for the jurisdictional chaos federal and state governments have thrust upon it. The Yakama Nation is now left to clean up this mess and that is precisely what the instant litigation is aimed at doing. Washington State issued a proclamation whose plain terms retrocede jurisdiction over crimes involving Indians within the Yakama Reservation. The United States accepted Proclamation 14-01's plain terms. Courts should not now unravel the progress achieved by retrocession in a way that prejudices the Yakama Nation's exercise of sovereignty and self-determination within its own lands. This Court should affirm DOI's acceptance of retroceded criminal jurisdiction over all crimes involving Indians within the Yakama Reservation.

CONCLUSION

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

Date: January 2, 2020

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CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,802 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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STATEMENT OF RELATED CASES

This appeal shares common issues with those under consideration in *Confederated Tribes and Bands of the Yakama Nation v. City of Toppenish et al.*, No. 19-35199 (9th Cir. 2019).

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

s/ Kirstin E. Largent