FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a sovereign federally recognized Native Nation, *Plaintiff-Appellant*, v. YAKIMA COUNTY, a political subdivision of the State of Washington; CITY OF TOPPENISH, a municipality of the State of Washington, *Defendants-Appellees*.	No. 19-35199 D.C. No. 1:18-cv-03190-TOR. OPINION

Appeal from the United States District Court
for the Eastern District of Washington;
Thomas O. Rice, Chief District Judge, Presiding

Argued and Submitted March 3, 2020
Seattle, Washington

Filed June 29, 2020

Before: Sandra S. Ikuta, Ryan D. Nelson, and
Danielle J. Hunsaker, Circuit Judges.

Opinion by Judge R. Nelson

COUNSEL

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OPINION

R. NELSON, Circuit Judge.

This case presents the question whether the State of Washington may exercise criminal jurisdiction over members of the Confederated Tribes and Bands of the Yakama Nation who commit crimes on reservation land. To answer that question, we must interpret a 2014 Washington State Proclamation that retroceded—that is, gave back—"in part," civil and criminal jurisdiction over the Yakama Nation to the United States, but retained criminal jurisdiction over matters "involving non-Indian defendants and non-Indian victims." If "and," as used in that sentence, is conjunctive, then the State retained jurisdiction only over criminal cases in which no party—suspects or victims—is an Indian. If, by contrast, "and" is disjunctive and should be read as "or," then the State retained jurisdiction if any party is a non-Indian. We conclude, based on the entire context of the Proclamation, that "and" is disjunctive and must be read as "or." We therefore affirm the district court.

I

A

This case concerns who—among Indians, Washington, and the United States—can exercise criminal jurisdiction over matters involving Indians on reservation land. Historically, the states have possessed criminal jurisdiction over crimes involving only non-Indians on Indian reservations. *Solem v. Bartlett*, 465

U.S. 463, 465 n.2 (1984) (recognizing state jurisdiction over "crimes by non-Indians against non-Indians . . . and victimless crimes by non-Indians") (internal citation omitted); *United States v. McBratney*, 104 U.S. 621, 624 (1881) (recognizing state jurisdiction over crimes committed by non-Indians against non-Indians); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."). But criminal jurisdiction over Indians on Indian reservations has not been as constant. For much of early United States history, criminal jurisdiction over Indians on reservation land was generally concurrent between the United States and independent tribes, subject to some exceptions. *See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470–71 (1979).

That arrangement changed in 1953, when Congress passed Public Law 280, in part to deal with what it perceived to be the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca Cty.*, 426 U.S. 373, 379 (1976). Public Law 280 gave states the "consent of the United States" to voluntarily assume full jurisdiction over crimes and civil causes of action occurring on an Indian reservation, by state legislative act, "at such time and in such manner" as the state decided. Pub. L. 83-280, 67 Stat. 588, 590 (1953). A state could therefore decline to assume jurisdiction or assume only limited jurisdiction at its option. *Yakima Indian Nation*, 439 U.S. at 499.

Washington assumed some of this Public Law 280 jurisdiction in 1963. Wash. Rev. Code § 37.12.010. The State's assumption of jurisdiction depended on the place of the offense and the persons involved. *Id.* For offenses committed by Indians on trust land within a tribe's reservation, the State assumed jurisdiction as to eight subject matter areas: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles. *Id.*[1] But as to reservation lands held in fee, the State assumed criminal and civil jurisdiction for offenses committed by or against Indians, *see Yakima Indian Nation*, 439 U.S. at 475–76,[2] which represented an addition to the jurisdiction the State already had over crimes involving only non-Indians on reservation land, *Oliphant*, 435 U.S. at 212. Based on this legislation, the State had the same jurisdiction on fee lands within Indian reservations as it had anywhere else within Washington's borders. Wash. Rev. Code § 37.12.030.

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[1] The Yakama Nation reassumed jurisdiction over two of these eight areas—adoption proceedings and dependent children—under the Indian Child Welfare Act, Pub. L. 95-608, 92 Stat. 3069 (1978), in 1980. Those areas are not relevant to this appeal.

[2] Reservation land may include both land held in trust, as well as land held in fee. Trust lands are those lands that the United States "holds in trust for an Indian tribe." *Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 546 (1st Cir. 1997). Fee lands, by contrast, are lands owned by parties other than the United States. *Id.*

Five years later, Congress authorized any state to voluntarily give up "all or any measure of the criminal or civil jurisdiction, or both," that it had acquired pursuant to Public Law 280—a process called "retrocession." 25 U.S.C. § 1323(a). The President delegated the authority to accept such a retrocession to the Secretary of the Interior, in consultation with the Attorney General. *See* Designating the Secretary of the Interior to Accept on Behalf of the United States Retrocession by Any State of Certain Criminal and Civil Jurisdiction Over Indian Country, 33 Fed. Reg. 17339-01 (Nov. 23, 1968).

Washington did not elect to retrocede any jurisdiction to the United States for several decades. But in 2012, Washington codified a process for retrocession, which is defined as "the state's act of returning to the federal government" the jurisdiction obtained "under federal Public Law 280." Wash. Rev. Code §§ 37.12.160(9)(a)–(b). Through this process, a tribe can request, via a petition, that Washington retrocede its Public Law 280 jurisdiction to the United States. *Id.* § 37.12.160(2). The State may then "approv[e] the request either in whole or in part." *Id.* § 37.12.160(4). If the request is approved, the Governor must issue a proclamation. *Id.* The proclamation becomes effective only once it is approved by the Secretary of the Interior, in consultation with the Attorney General. *Id.* § 37.12.160(6); 33 Fed. Reg. at 17339.

The Yakama Nation availed itself of this process by filing a retrocession petition in July 2012. In its petition, the Yakama Nation requested, "pursuant to

RCW 37.12," full "retrocession of both civil and criminal jurisdiction on all Yakama Nation Indian country"—that is, the full jurisdiction Washington had assumed on fee lands. The Yakama Nation also requested that full jurisdiction be retroceded on all but one of the remaining categories covering lands held in trust—"mental illness."

In early 2014, Governor Jay Inslee issued a three-page Proclamation regarding the Yakama Nation's petition. The Proclamation recognized that the Yakama Nation was requesting full retrocession of civil and criminal jurisdiction obtained "under federal Public Law 280," other than over issues relating to "mental illness" or "civil commitment of sexually violent predators"[3] "both within and without the external boundaries of the Yakama Reservation." But the Proclamation only granted the Yakama Nation's request "in part." "Outside the exterior boundaries of the Yakama Reservation," Washington did not retrocede any jurisdiction. Within "the exterior boundaries," the Proclamation "grant[ed] in part" the following:

> 1. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede full civil and criminal jurisdiction in the following subject areas of RCW 37.12.010: Compulsory School Attendance; Public

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[3] The State cannot, under its own retrocession procedures, retrocede jurisdiction "over the civil commitment of sexual violent predators." Wash. Rev. Code § 37.12.170(1).

> Assistance; Domestic Relations; and Juvenile Delinquency.
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> 2. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, civil and criminal jurisdiction in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases in the following manner: Pursuant to RCW 37.12.010(8), the State shall retain jurisdiction over civil causes of action involving non-Indian plaintiffs, non-Indian defendants, and non-Indian victims; the State shall retain jurisdiction over criminal offenses involving *non-Indian defendants and non-Indian victims.*
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> 3. 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.*

(Emphasis added).[4]

The State then sent the Proclamation to the Department of Interior ("DOI") with an accompanying cover letter from Governor Inslee. In the cover letter, the Governor asked DOI to accept the retrocession. But the Governor's letter also went a step further by attempting to clarify language in the Proclamation.

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[4] The Proclamation does not mention the status of the land—that is, whether it was held in fee or in trust; instead, it focuses on the "exterior boundaries of the Yakama Reservation."

According to the Governor's letter, the usage of "and" in Paragraphs 2 and 3 to describe the parties over which the State retained jurisdiction—like, for example, the phrase "non-Indian defendants and non-Indian victims" in Paragraph 3—was intended to mean "and/or," not just "and." The letter asked DOI to make this intent "clear in the notice accepting the retrocession Proclamation."

DOI accepted the State's retrocession per the Governor's request. *See* Acceptance of Retrocession of Jurisdiction for the Yakama Nation, 80 Fed. Reg. 63583-01 (Oct. 20, 2015). But DOI's published acceptance simply acknowledged that the United States was accepting "partial civil and criminal jurisdiction over the Yakama Nation which was acquired by the State of Washington under [Public Law 280]," without addressing the Governor's proposal. *Id.* A letter sent to the Yakama Nation the same day as the acceptance did address the Governor's proposal, however. Rather than opine on which interpretation was correct, DOI stated that the Proclamation was "plain on its face and unambiguous" and that if a disagreement developed "as to the scope of the retrocession," a court could "provide a definitive interpretation of the plain language of the Proclamation." The retrocession became effective several months later, on April 19, 2016. 80 Fed. Reg. at 63583.

Since this time, various interpretations of the Proclamation have been offered. The day before retrocession became effective, the United States Attorney for the Eastern District of Washington sent an email to

various state and federal officials taking the position that the State retained jurisdiction only over criminal actions in which no party is an Indian. Then, in November 2016, DOI's Principal Deputy Assistant Secretary for Indian Affairs took the same position, without any substantive analysis, in a memorandum titled "Guidance to State, Local, and Tribal Law Enforcement Agencies on Yakama Retrocession Implementation."

Almost two years later, in March 2018, the Washington Court of Appeals interpreted the text of the Proclamation and reached the opposite conclusion—that when the Proclamation is considered as a whole, the use of "and" in Paragraph 3 means "or." *State v. Zack*, 413 P.3d 65, 69–70 (Wash. Ct. App. 2018), *review denied*, 425 P.3d 517 (2018). Then, a few months after the *Zack* decision, the United States Department of Justice's Office of Legal Counsel ("OLC") sent a 17-page memorandum to DOI analyzing the historical background of retrocession and concluding, based on the text and context of the Proclamation as well as extrinsic evidence, that "and," when considered with the "in part" language in Paragraphs 2 and 3, must mean "or." DOI eventually rescinded the 2016 DOI guidance and replaced it with the OLC memorandum.

B

Before long, the dispute concerning the scope of retrocession as set forth in the Proclamation came to a head. In September 2018, police officers for the City of

Toppenish—which is located within the exterior boundaries of the Yakama Indian Reservation and within Yakima County, Washington—were investigating a stolen "bait car" owned by the County. They tracked the car to an address located both within the City and the Reservation, requested assistance, and Yakama Nation police officers responded to the scene.

Upon arrival, only the passenger of the car was there, and she identified herself as a member of the Yakama Nation. Despite objections from the Yakama Nation officers that the Toppenish officers had no jurisdiction because the passenger was a member of the Yakama Nation, the Toppenish officers arrested the passenger and questioned her at the Toppenish police station. The Toppenish officers also searched the nearby home, which was owned by a member of the Yakama Nation. They then obtained a search warrant to do a further search of the home, over objections from the Yakama Nation police officers that there was no probable cause to do so.

The next month, the Yakama Nation filed suit against the City of Toppenish and Yakima County (the "Defendants"). In its complaint, the Yakama Nation challenged the State's jurisdiction, pursuant to the retrocession, over criminal matters involving Indians. Specifically, the Yakama Nation sought a declaration that "Defendants do not have criminal jurisdiction over alleged crimes occurring within the Yakama Reservation when either the defendant or the victim are an Indian." The Yakama Nation also sought "a preliminary and permanent injunction" "enjoining Defendants

from exercising criminal jurisdiction over alleged crimes occurring within the Yakama Reservation whenever either the defendant or victim are Indian."

Two months later, the Yakama Nation filed a motion for a preliminary injunction, which was converted to a motion for a permanent injunction with the parties' consent. The district court held that the Yakama Nation had Article III standing. The court held, however, that the Yakama Nation had not shown "actual success on the merits" because the Proclamation's retrocession of criminal jurisdiction "in part" would not make sense if the State had "retroceded all criminal jurisdiction assumed under Public Law 280," as the Yakama Nation argued. The district court therefore denied the permanent injunction and entered judgment, and this appeal followed.

II

We first address Article III standing, which we review de novo. *Arakaki v. Lingle*, 477 F.3d 1048, 1056 (9th Cir. 2007). To establish standing, a plaintiff must demonstrate "(1) a concrete and particularized injury that is 'actual or imminent, not conjectural or hypothetical'; (2) a causal connection between the injury and the defendant's challenged conduct; and (3) a likelihood that a favorable decision will redress that injury." *Pyramid Lake Paiute Tribe of Indians v. Nev. Dep't of Wildlife*, 724 F.3d 1181, 1187 (9th Cir. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). At the pleading stage, we "must accept

as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), to determine whether the nonmoving party has "clearly allege[d] facts demonstrating" each element of standing, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotations marks and alterations omitted).

The Yakama Nation has met this standard here. The injury it asserts—infringement on its tribal sovereignty and right to self-government as guaranteed by treaty—is sufficiently concrete, particularized, and imminent to show injury in fact. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468–69 & n.7 (1976) (recognizing a "discrete claim of injury" to "tribal self-government" sufficient to "confer standing" in a case involving Montana's imposition of taxes on "motor vehicles owned by tribal members residing on the reservation"); *see also Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 464 (2d Cir. 2013) (finding injury in fact based on "measurable interference in the Tribe's sovereignty on its reservation"). Moreover, the claimed injury is "fairly traceable" to the Defendants and "likely to be redressed" by an injunction prohibiting Defendants from exercising criminal jurisdiction over Indians or by a definitive interpretation of the Proclamation. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). The Yakama Nation therefore has Article III standing.

III

Next, we address the district court's decision to deny the Yakama Nation's request for a permanent injunction. To be entitled to a permanent injunction, a plaintiff must demonstrate (1) "actual success on the merits"; (2) "that it has suffered an irreparable injury"; (3) "that remedies available at law are inadequate"; (4) "that the balance of hardships justify a remedy in equity"; and (5) "that the public interest would not be disserved by a permanent injunction." *Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013). Here, we need only address the "actual success on the merits" element—specifically, the scope of retrocession based on our interpretation of the Proclamation—and we review the district court's legal conclusions as to that interpretation de novo. *Ting v. AT&T*, 319 F.3d 1126, 1134–35 (9th Cir. 2003) (holding that "any determination underlying the grant of an injunction" is reviewed "by the standard that applies to that determination"); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 719 (9th Cir. 2003) (noting that "questions of statutory interpretation" are reviewed de novo).

Our de novo review is informed by well-established rules of interpretation.[5] First, we "determine whether

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[5] We need not decide whether to apply federal or state law in interpreting the Proclamation. As discussed below, the Proclamation is susceptible to only one plausible interpretation regardless of which law applies. Here, we cite principles of federal law because, were we to apply state law, we would be bound to follow the Washington Court of Appeal's decision in *Zack*. *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 995 (9th Cir. 2007) ("Where

the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). This determination is made "by reference to the language itself, the specific context in which that language is used, and the broader context" of the statute or agreement, *id.* at 341, which can include whether a proposed interpretation would render certain words "meaningless," *United States v. Littlefield*, 821 F.2d 1365, 1367 (9th Cir. 1987). If, based on these criteria, we find the language ambiguous, we may "look to other sources" to determine the meaning of the words in question. *United States v. Nader*, 542 F.3d 713, 717 (9th Cir. 2008).

We begin with the word "and" in the phrase "non-Indian defendants and non-Indian victims" in Paragraphs 2 and 3 of the Proclamation.[6] The most common meaning of the word "and" is as a conjunction expressing the idea that the two concepts are to be taken "together." *Webster's Third New International Dictionary* 80 (2002). Thus, when "and" is used to join two concepts, it is usually interpreted to require "not one or the other, but both." *Crooks v. Harrelson*, 282 U.S. 55,

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there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts.") (internal quotation marks omitted). We reach the same conclusion under either analysis.

[6] Because DOI's acceptance of retrocession does not clarify or interpret what the State retroceded, *see* 80 Fed. Reg. at 63583, we need not determine how much weight to give an interpretive pronouncement in an acceptance of retrocession.

58 (1930); *see also* 1A Norman J. Singer, Statutes and Statutory Construction § 21.14 at 177–79 (7th ed. 2009) ("Statutory phrases separated by the word 'and' are *usually* interpreted in the conjunctive.") (emphasis added).

But just because the ordinary meaning of "and" is typically conjunctive does not mean "and" cannot take on other meanings in context. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) ("context can overcome the ordinary, disjunctive meaning of 'or' "). Indeed, "and" can also mean "or" in some circumstances. *Webster's Third New International Dictionary* 80 (2002) (alternative six of the second definition of "and": "reference to either or both of two alternatives . . . esp[ecially] in legal language when also plainly intended to mean *or*"). That is why "courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.' " *United States v. Fisk*, 70 U.S. 445, 447 (1865); *see also* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 56 (3d ed. 2011) (noting that courts sometimes "recognize that *and* in a given context means *or*. . . ."); *Black's Law Dictionary* 86 (6th ed. 1990) (noting that "and" is "[s]ometimes construed as 'or' "). In fact, it is something we have already done. *See Cal. Lumbermen's Council v. FTC*, 115 F.2d 178, 184–85 (9th Cir. 1940). In *California Lumbermen's Council*, we interpreted an order prohibiting a party from engaging in activities "in connection with the purchase and the offering for sale" of lumber as forbidding the acts "separately or together" because that meaning

was clear "when the order [was] read as a complete article." *Id.* at 185.

Examples of "and" used to mean "or" abound. For example, a child who says she enjoys playing with "cats and dogs" typically means that she enjoys playing with "cats or dogs"—not that cats and dogs must both be present for her to find any enjoyment. Similarly, a statement that "the Ninth Circuit hears criminal and civil appeals," does not suggest that an appeal must have a criminal and civil component for it to be properly before us. Nor would a guest who tells a host that he prefers "beer and wine" expect to receive "a glass of beer mixed with wine." *OfficeMax, Inc. v. United States*, 428 F.3d 583, 600 (6th Cir. 2005) (Rogers, J., dissenting). In each instance, the common understanding is that "and," as used in the sentence, should be construed as the disjunctive "or."

The same is true here when we examine "the broader context" of the Proclamation, *Robinson*, 519 U.S. at 341, in particular the Proclamation's use of the term "in part" in Paragraphs 2 and 3. In both Paragraphs 2 and 3, the State "retrocede[s]" criminal jurisdiction "in part," but retains "criminal jurisdiction" over "offenses involving non-Indian defendants and non-Indian victims." If "and" in those sentences is interpreted to mean "or," the retrocession "in part" makes sense. Under that interpretation, the State has given back a portion of its Public Law 280 jurisdiction—jurisdiction over crimes involving only Indians—but has kept Public Law 280 criminal jurisdiction if a non-Indian is involved.

Interpreting "and" in those Paragraphs as conjunctive, however, does not give "in part" meaning. Under that interpretation, the State has retroceded all jurisdiction that it received under Public Law 280—that is, criminal jurisdiction over all cases involving Indians. If that is the case, Paragraphs 2 and 3 are no different than Paragraph 1, which retroceded "full civil and criminal jurisdiction" over certain subject matters. But that cannot be right, because Paragraph 1 uses the phrase "full," whereas Paragraphs 2 and 3 use the phrase "in part."

At bottom, the Yakama Nation's proposed interpretation changes the Proclamation's use of "in part" in Paragraphs 2 and 3 to "in full," thereby rendering "in part" meaningless. We must give "some significance" to "in part." *See In re Emerald Outdoor Advert., LLC*, 444 F.3d 1077, 1082 (9th Cir. 2006) (requiring courts to interpret language "in a manner that gives meaning to every word") (internal quotation marks omitted). And the only way to do so is to interpret "and" as disjunctive. We therefore conclude that the only plausible interpretation of Paragraphs 2 and 3 is to read them as stating "criminal offenses involving non-Indian defendants [or] non-Indian victims."

The Yakama Nation argues that the "in part" language is not meaningless under its interpretation because "in part" was nothing more than an indication that the State was preserving its "pre-Public Law 280 criminal jurisdiction over non-Indian versus non-Indian crimes." Aside from the problems with this interpretation discussed above, the Yakama Nation's

explanation does not make sense in the context of its request. Specifically, the Proclamation states that "[t]he retrocession petition by the Yakama Nation requests full retrocession of civil and criminal jurisdiction" obtained "in 1963" and full civil and criminal jurisdiction over the five areas listed in Washington Revised Code § 37.12.010, including "Operation of Motor Vehicles on Public Streets, Alleys, Road, and Highways." Given that the Yakama Nation's request was made in the context of Public Law 280—not all state jurisdiction over crimes committed on reservation land—it would make no sense for the Proclamation to retrocede "in part" if it was actually doing so "in full." The Nation's proposed interpretation therefore not only renders "in part" meaningless but also ignores the context of its own request for retrocession as set forth in the Proclamation.

Moreover, the Yakama Nation's argument that "retrocede, in part" merely indicates that the State was retaining pre-Public Law 280 jurisdiction ignores what "retrocede" means under Washington law and in the Proclamation. The statement "retrocede, in part" assumes that the "part" that is not being retroceded can be retroceded, but will not be. That logical conclusion works well if "and" is interpreted as disjunctive because the "part" the State retained is in fact jurisdiction it had authority to retrocede.

But if, as the Yakama Nation argues, the "part" retained was merely pre-Public Law 280 jurisdiction, the use of the word "retrocede" in the phrase "retrocede, in part" takes on a meaning unsupported by both

Washington law and the Proclamation. Washington law defines "criminal retrocession" as "the state's act of returning to the federal government the criminal jurisdiction acquired over Indians and Indian country *under federal Public Law 280.*" Wash. Rev. Code § 37.12.160(9)(b) (emphasis added). And the Proclamation was issued pursuant to that authority, to "retrocede" "civil and criminal jurisdiction *previously acquired by the State . . . under Federal Public Law 280.*" As a result, the Yakama Nation's interpretation would also require us to conclude that the State incorrectly believed it could retrocede pre-Public Law 280 jurisdiction but elected to retain only that "part."

In sum, only one interpretation of the Proclamation is plausible because only one interpretation gives meaning to every word. We therefore conclude, based on the Proclamation as a whole, and to give the phrase "in part" meaning, that the word "and" in the phrase "non-Indian defendants and non-Indian victims" in Paragraphs 2 and 3 should be interpreted as the disjunctive "or." Interpreted as such, the State retained criminal jurisdiction in Paragraphs 2 and 3 over cases in which any party is a non-Indian.

Because there is only one plausible interpretation of the Proclamation, we need not apply the canon of construction that ambiguities be resolved "for the benefit of an Indian tribe." *Artichoke Joe's*, 353 F.3d at 729. Nor need we look to "other sources" to interpret the

Proclamation.[7] *Nader*, 542 F.3d at 717. But even if we did, those sources would support our conclusion.

The contemporaneous evidence strongly favors our interpretation. Governor Inslee's cover letter stating his intention to retain jurisdiction where any party is a non-Indian is consistent with the Proclamation's unambiguous language. Moreover, the Yakama Nation's retrocession petition requested full retrocession "over members of the Yakama Nation pursuant to RCW 37.12." The Yakama Nation was therefore requesting only retrocession of Public Law 280 jurisdiction. Interpreting the Proclamation's partial grant of retrocession as merely preserving pre-Public Law 280 jurisdiction does not make sense in light of the retrocession petition.

Nor is there any contemporaneous evidence as of the time retrocession was accepted that would change this conclusion. The letter sent to the Yakama Nation upon acceptance of retrocession takes no position as to the proper interpretation of the Proclamation. Instead, it states that DOI will not provide an interpretation of the scope of retrocession and that, if a dispute arises, "courts will provide a definitive interpretation of the plain language of the Proclamation." And the formal notice of acceptance of retrocession is similarly neutral, indicating only that the United States accepted

[7] We grant the Yakama Nation's two motions to take judicial notice. But given our conclusion that there is only one plausible interpretation of the Proclamation, we need not consider any of the attached documents. Nor would any of the documents change our conclusion that the available extrinsic evidence generally supports our interpretation of the Proclamation.

"partial civil and criminal jurisdiction over the Yakama Nation." 80 Fed. Reg. at 63583.

Moreover, interpretations of the Proclamation since it was accepted further support our interpretation. The Yakama Nation points to a now-rescinded 2016 DOI memo stating that the State retained "jurisdiction only over civil and criminal causes of action in which no party is an Indian" and an email from the United States Attorney for the Eastern District of Washington. But neither document provides independent reasoning to support its conclusion. By contrast, in *Zack*, the Washington Court of Appeals concluded, in a well-reasoned opinion, that "and" was properly read as disjunctive when read in the context of the whole Proclamation. 413 P.3d at 69–70. Similarly, in an opinion that overrode all prior federal analysis and interpretation of the Proclamation, the OLC memorandum analyzed the entire Proclamation and the history surrounding retrocession, and concluded that, read in the proper context, "and" means "and/or."

IV

In sum, we hold that, under the Proclamation, the State retained criminal jurisdiction over cases in which any party is a non-Indian. Based on this holding, we find that the Yakama Nation has not shown "actual success on the merits" so as to justify a permanent injunction. We therefore affirm the district court.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a sovereign federally recognized Native Nation, Plaintiff, v. CITY OF TOPPENISH, a municipality of the State of Washington; YAKIMA COUNTY, a political subdivision of the State of Washington, Defendants.	NO. 1:18-CV-3190-TOR ORDER DENYING PRELIMINARY AND PERMANENT INJUNCTION (Filed Feb. 22, 2019)

BEFORE THE COURT is Plaintiff's Motion for Preliminary Injunction. ECF No. 16. This matter was heard with oral argument on February 15, 2019. The Court has reviewed the record and files therein, and is fully informed. For the reasons discussed below, Plaintiff's Motion for Preliminary Injunction is **DENIED**.

BACKGROUND

On October 3, 2018, Plaintiff the Confederated Tribes and Bands of the Yakama Nation filed a Complaint against Defendants City of Toppenish and Yakima County. ECF No. 1. Plaintiff alleges a violation of the

Treaty of 1855 arising from "Defendants' *ultra vires* exercise of criminal jurisdiction over enrolled Yakama members for alleged crimes occurring within the exterior boundaries of the Yakama Reservation." *Id.* at 2, ¶ 1.1. Because "Defendants' actions violated, and continue to violate, the rights reserved by the Yakama Nation in the Treaty of 1855," Plaintiff seeks declaratory and injunctive relief. *Id.* at 4, ¶¶ 1.8-1.9.

On December 12, 2018, Plaintiff filed the instant motion for a preliminary injunction. ECF No. 16. Defendants jointly filed a response to Plaintiff's motion on December 26, 2018. ECF No. 20.

FACTS

The following facts are drawn from Plaintiff's Complaint and are essentially undisputed as relevant and material to resolution of the instant motion. As identified in the Complaint, there are two categories of facts in this case—facts that are largely historic and facts relating to the arrest of Leanne Gunn, a Yakama member, by City of Toppenish Police Officers. The facts relating to the arrest are fairly straightforward. On September 26, 2018, Toppenish Police Officers were alerted that a "bait car," deployed by the Toppenish Police Department to combat auto theft, had been moved from its original location and was being driven within the City of Toppenish. ECF No. 1 at 6, ¶ 5.1. Toppenish Police tracked the bait car to 111 Branch Road, Toppenish, Washington, and requested law enforcement assistance at that location. *Id.* at ¶ 5.2.

Yakama Nation Police officers responded to assist with the alleged vehicle theft. *Id*. at ¶ 5.5.

Once at the property, Toppenish Police detained the passenger in the bait car, Ms. Gunn, who identified herself as a Yakama member. *Id*. at ¶¶ 5.3-5.4. According to Plaintiff, Toppenish Police expressed their intent to charge Ms. Gunn under state law despite the protest of Yakama Nation Police Officers who took exception to Toppenish Police's claim of jurisdiction over a Yakama member. *Id*. at ¶ 5.5. Toppenish Police allegedly responded that they were exercising their jurisdiction over Ms. Gunn consistent with the decision of Division Three of the Washington Court of Appeals in *State v. Zack*, 2 Wash. App. 2d 667 (2018), *review denied*, 191 Wash. 2d 1011 (2018). *Id*. at ¶ 5.6.

Toppenish Police then contacted the owner of the real property, Vera Hernandez, who also identified herself as a Yakama member. *Id*. at ¶ 5.7. Toppenish Police requested Ms. Hernandez's consent to search her residence and the garage located on the property to look for the suspected driver of the stolen vehicle. *Id*. at ¶ 5.8. Ms. Hernandez consented to the search of both her residence and the garage. *Id*. Though the suspected driver of the stolen vehicle was not found during the search, another vehicle was found in a nearby field that had been reported stolen in June of 2018. *Id*. at ¶ 5.10.

After the search concluded, Toppenish Police Officer Kyle Cameron asked Yakama Nation Police Officers if they would obtain a search warrant for the premises. *Id*. at ¶ 5.11. The Yakama Nation Police

Officers declined the request, citing insufficient evidence to find probable cause of a crime. *Id*. at ¶ 5.12. Officer Cameron responded that Toppenish Police would obtain a state search warrant for the property. *Id*. at ¶¶ 5.13-5.15. Officer Cameron prepared a telephonic affidavit application for the search warrant, obtained a warrant from a Yakima County Superior Court Judge, and Toppenish Police Officers executed the search warrant on Ms. Hernandez' property. *Id*. at ¶¶ 5.16-5.18.

According to Plaintiff, the facts described above are significant when viewed in the context of the following historical facts. Under the Treaty of 1855, the Yakama Nation reserved all rights not expressly granted to the United States, including its inherent sovereign rights and jurisdiction over its enrolled members and its lands both within and beyond the exterior boundaries of the Yakama Reservation. *Id*. at 5, ¶ 3.1. Jurisdiction over the Yakama Reservation, as with all Indian Country, rests with federal and Yakama authorities "except where Congress in the exercise of its plenary and exclusive power over Indian affairs has expressly provided that State laws shall apply." *Id*. at 9, ¶ 5.21; *Washington v. Confed. Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979).

In 1953, concerned with "the absence of adequate tribal institutions for law enforcement" on "certain Indian reservations," Congress enacted Public Law 280 (Pub. L. No. 83-280, 67 Stat. 588 (1953)), which required some states and authorized others to assume criminal and civil jurisdiction in Indian Country

within a state's borders. *Id*. at 10, ¶ 5.23 (quoting *Bryan v. Itasca Cty., Minn.*, 426 U.S. 373, 379 (1976)); *see* Pub. L. 83-280, 67 Stat. 588, 588-89 (1953). In 1957, Washington enacted a law establishing state jurisdiction over any Indian reservation for any tribe that requested the State's assumption of jurisdiction. ECF No. 1 at 10, ¶ 5.26; *Confed. Bands*, 439 U.S. at 474.

In 1963, Washington passed legislation allowing the State to assume civil and criminal jurisdiction pursuant to Public Law 280 over "Indians and Indian territory, reservations, country, and lands within this state," with certain limited exceptions. ECF No. 1 at 11, ¶ 5.27; *see* RCW 37.12.010. Specifically, Washington did not assume jurisdiction over lands held in trust by the United States or held by a tribe in restricted fee status, unless the tribe consented, except in the following eight areas: (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operations of motor vehicles on public roads. ECF No. 1 at ¶¶ 5.27-5.28; *see* RCW 37.12.010. The Yakama Nation did not consent to State jurisdiction over its trust or restricted fee lands. ECF No. 1 at ¶ 5.29.

In 1968, Congress amended Public Law 280 and repealed the option for states to assume jurisdiction over Indian Country without tribal consent, making tribal consent a prerequisite for any state assuming jurisdiction over Indian Country. *Id*. at 12, ¶ 5.34; 25 U.S.C. § 1322(a). For Washington and other states that had already assumed jurisdiction, Congress

authorized the United States to "accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of [Public Law 280] as it was in effect prior to [the 1968 amendments]." ECF No. 1 at ¶ 5.35; 25 U.S.C. § 1323(a). The President delegated the authority to accept retrocessions to the Secretary of the Interior, in consultation with the Attorney General. ECF No. 1 at 13, ¶ 5.36; *see* Exec. Order No. 11435 (Nov. 21, 1968), 33 Fed. Reg. 17339-01 (Nov. 23, 1968).

In 2012, the Washington State Legislature adopted a law codifying the process by which the State could retrocede its Public Law 280 jurisdiction to the United States. *See* RCW 37.12.160. The Yakama Nation filed a petition with the Office of the Governor on July 17, 2012, asking the State to retrocede its civil and criminal jurisdiction over "all Yakama Nation Indian Country" and in five areas listed in RCW 37.12.010. ECF Nos. 1 at 13, ¶ 5.38; 16-1 at 21, 25.

On January 17, 2014, Governor Jay Inslee issued a proclamation partially retroceding civil and criminal jurisdiction previously acquired under Public Law 280 over Indians within the Yakama Reservation. ECF Nos. 1 at 14, ¶ 5.40; 16-1 at 25-27. Particularly relevant here, paragraph 3 of the Governor's retrocession proclamation specified that the State would "retrocede, in part, criminal jurisdiction over certain criminal offenses," and "retain[ ] jurisdiction over criminal offenses involving *non-Indian defendants and non-Indian victims*." ECF No. 6-1 at 26 (emphasis added). In a letter transmitting the proclamation to the

Department of the Interior ("DOI") on January 27, 2014, Governor Inslee explained that the State's retrocession of criminal jurisdiction was intended to retain jurisdiction whenever "non-Indian defendants *and/or* non-Indian victims" were involved. ECF Nos. 1 at 14, ¶ 5.41; 16-1 at 30.

On October 19, 2015, DOI notified the Yakama Nation of the United States' acceptance of "partial civil and criminal jurisdiction over the Yakama Nation." ECF Nos. 1 at 14, ¶ 5.42; 16-1 at 32. Regarding the "extent of retrocession," DOI stated that Governor Inslee's proclamation was "plain on its face and unambiguous." ECF Nos. 1 at 16, ¶ 5.47; 16-1 at 36. Noting its concern that "unnecessary interpretation might simply cause confusion," DOI explained 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." ECF Nos. 1 at 16, ¶ 5.48; 16-1 at 36. Pursuant to the DOI's instructions, the United States formally implemented retrocession on April 19, 2016, following significant coordination between the Yakama Nation, the United States, the State of Washington, and local jurisdictions. ECF No. 1 at 18, ¶ 5.53.

On March 8, 2018, Division Three of the Washington State Court of Appeals issued its decision in *State v. Zack*, 2 Wash. App. 667 (2018). The *Zack* court held that, while the State of Washington had partially retroceded jurisdiction to the Yakama Nation, the State retained criminal jurisdiction over crimes occurring on deeded land within the Yakama Reservation that

involve a non-Indian, whether as a victim or defendant. ECF No. 1 at 19, ¶ 5.57; 2 Wash. App. at 676. On July 27, 2018, the Office of Legal Counsel for the United States Department of Justice ("OLC") issued a memorandum opinion addressing the scope of Washington's retrocession of criminal jurisdiction on the Yakama Reservation, in which OLC concluded that "Washington has retained jurisdiction over criminal offenses where any party is a non-Indian, as the Washington Court of Appeals recently held in *State v. Zack*." ECF Nos. 1 at 19, ¶ 5.58; 16-1 at 51-52.

Plaintiff asserts that, following the United States' acceptance of partial retrocession of jurisdiction within the Yakama Reservation, only the United States, not the State of Washington, "has criminal jurisdiction over non-Indian versus Indian crimes exclusive of Defendants." ECF No. 1 at 20, ¶ 6.3. In other words, Plaintiff maintains that the State retroceded full criminal jurisdiction over all criminal offenses involving Indians as a defendant and/or victim. *See* ECF No. 16 at 2. Plaintiff alleges that, despite retrocession, Defendants have exercised *ultra vires* criminal jurisdiction over Yakama members within the Yakama Reservation, as evidenced by the September 26, 2018, arrest of Ms. Gunn and subsequent search of Ms. Hernandez' property. ECF No. 1 at 20-21, ¶ 6.4.

In the pending motion, Plaintiff requests a preliminary injunction "enjoining Defendants, and all persons acting on Defendants' behalf, from exercising criminal jurisdiction arising from actions within the exterior boundaries of the Yakama Reservation

involving an Indian as a defendant and/or victim." ECF No. 16 at 2.

DISCUSSION

I. Standing

The Court first considers Defendants' argument that Plaintiff lacks Article III standing to challenge the alleged infringement of sovereignty at issue in this case. ECF No. 20 at 7-13. In order for a federal court to have subject-matter jurisdiction over a claim, the plaintiff must have standing under Article III of the Constitution to challenge an alleged wrong in federal court. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Supreme Court has created a three-part test to determine whether a party has standing to sue: (1) the plaintiff must have suffered an "injury in fact," meaning that the injury is a legally protected interest which is (a) concrete and particularized and (b) actual or imminent; (2) there must be a casual connection between the injury and the conduct brought before the court; and (3) it must be likely, rather than speculative, that a favorable decision by the court will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). At the pleading-stage, "the party invoking federal jurisdiction bears the burden of establishing these elements." *Id*. at 561. Though the Court treats pleading-stage factual allegations as true, plaintiff must allege facts that give rise to a plausible inference that plaintiff is entitled to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570-72 (2007).

Here, Defendants' primarily dispute whether Plaintiff has established the existence of a concrete, particularized injury in this case. Defendants argue that Plaintiff fails to identify a "likelihood of substantial and immediate irreparable injury," and therefore lack standing to bring this claim. Plaintiff responds that it has suffered an injury-in-fact because Defendants' exercise of criminal jurisdiction within the Yakama Reservation infringes upon Tribal sovereignty. ECF No. 22 at 8-9. The Court agrees that Plaintiff's allegations are sufficient to confer standing.

Plaintiff alleges that Defendants' assertion of criminal jurisdiction over crimes within the Yakama Nation involving Indians, following the United States' acceptance of Washington's retrocession, constitutes a violation of the Yakama Nation's sovereignty. *Id*. at 9. Thus, "[t]he injury that the Yakama Nation has sustained, and will continue to sustain without injunction, is a violation of its sovereign legally protected rights." *Id*. Defendants do not dispute that they asserted criminal jurisdiction over Yakama members on the Yakama Reservation following retrocession, nor do they deny that they will continue to exercise such jurisdiction in the future. To the contrary, Defendants maintain that they should not be prevented, by Plaintiff or this Court, from "enforcing state criminal laws within their own jurisdictions in contravention of state law." ECF No. 20 at 13.

The Court finds that actual infringements on a tribe's sovereignty, as alleged by Plaintiff in this case, establishes "an invasion of a legally protected interest

which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. A tribe has a legal interest in protecting tribal self-government from a state's allegedly unjustified assertion of criminal jurisdiction over Indians and Indian Country. Congress, too, has a substantive interest in protecting tribal self-government. *See Moe v. Confederate Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 469 n.7 (1976). Accordingly, the Defendants' alleged exercise of criminal jurisdiction over Yakama members on the Yakama Reservation constitutes an affront to sovereignty sufficient to confer standing. Plaintiff has alleged facts from which the Court could reasonably infer concrete, particularized, and actual or imminent injury. *See Lujan*, 504 U.S. at 560.

The Court finds that Plaintiff also satisfies Article III's remaining requirements—plaintiff's injury-in-fact is "fairly traceable" to the "complained-of-conduct of the defendant," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), and a favorable ruling would likely redress plaintiff's injury. *Lujan*, 504 U.S. at 561. As noted, Defendants confirm that they exercised criminal jurisdiction over Yakama members within the Yakama Reservation on September 26, 2018, and do not deny their intent to continue exercising criminal jurisdiction within the Yakama Reservation. And, an injunction preventing Defendants from exercising criminal jurisdiction would unquestionably prevent further alleged violations of the Yakama Nation's

sovereignty. Accordingly, the Court finds that Plaintiff has satisfied Article III's standing requirements.

In finding that Plaintiff's alleged injury satisfies Article III's case-or-controversy requirement, the Court notes that standing in no way depends on the merits of Plaintiff's contention that Defendants' conduct is illegal. *See*, *e.g.*, *Flast v. Cohen*, 392 U.S. 83, 999 (1968). The validity of Plaintiff's claim is not to be conflated with Article III's injury-in-fact requirement. The Court considers the merits of Plaintiff's claim below.

II. Injunction

Pursuant to Federal Rule of Civil Procedure 65, the Court may grant preliminary injunctive relief in order to prevent "immediate and irreparable injury." Fed. R. Civ. P. 65(b)(1)(A). Rule 65 also states that "[b]efore or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing." Fed. R. Civ. P. 65(a)(2).

At oral argument, the Court questioned the parties as to whether there was any reason not to make this action a final injunction. Defendants confirmed that the Court had everything necessary to make a final decision on the case, clarifying that they did not intend to supplement the record further. Plaintiff agreed with Defendants. The Court finds that there is no reason not to decide the issue as a final injunction as it appears that the parties do not have any additional evidence concerning the decision with respect to

Plaintiff's claims. Accordingly, the Court considers Plaintiffs' request for a preliminary injunction as a final injunction.

To obtain a permanent or final injunction, a plaintiff must demonstrate: "(1) actual success on the merits; (2) that it has suffered an irreparable injury; (3) that remedies available at law are inadequate; (4) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction." *Indep. Training & Apprenticeship Program v. California Dep't of Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013). Plaintiff must satisfy each element for injunctive relief. "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Id.* (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987)). Accordingly, the Court's analysis remains largely the same as if it were considering the Plaintiff's original motion for preliminary injunction.

A. Actual Success on the Merits

This case concerns the scope of the State of Washington's retrocession of criminal jurisdiction within the Yakama Reservation. Plaintiff contends that the State retroceded criminal jurisdiction "over all crimes within the Yakama Reservation where an Indian is involved *as a defendant and/or victim*." ECF No. 16 at 15 (emphasis added). Accordingly, Plaintiff insists that

Defendants are violating the Yakama Nation's treaty rights and threatening its sovereignty by exercising criminal jurisdiction over enrolled Yakama members within the Yakama Reservation. *Id.* at 2. Defendants maintain that, while the State retroceded some criminal jurisdiction to the United States, the State retained jurisdiction over criminal offenses involving non-Indian defendants *and/or* non-Indian victims within the Yakama Reservation. ECF No. 20 at 6-7.

Plaintiff provides four reasons why the United States reassumed "the full scope of Public Law 280 criminal jurisdiction" from the State of Washington: (1) in accepting retrocession, DOI interpreted the Governor's proclamation as retroceding all criminal jurisdiction over offenses whenever a Yakama member is involved as either a defendant and/or victim; (2) DOI's acceptance of retrocession should be afforded judicial deference; (3) the United States Office of Legal Counsel's recent memorandum opinion should be afforded no deference; and (4) Washington's attempt to claw back jurisdiction it clearly retroceded is not supported by applicable law. ECF No. 16 at 11-32.

In the Court's view, Plaintiff's arguments hinge entirely on the underlying assumption that DOI, in accepting retrocession, definitively identified the scope of the State's retrocession as (1) retroceding federal jurisdiction over all offenses occurring within the Yakama Reservation whenever an Indian is involved as a defendant and/or victim and (2) retaining criminal jurisdiction only over criminal offenses involving both a non-Indian defendant and non-Indian victim, as well

as non-Indian victimless crimes. ECF No. 16 at 17-18 ("Assistant Secretary Washburn's stated intent in accepting retrocession supports the State no longer retaining concurrent criminal jurisdiction whenever an Indian is involved as a defendant and/or victim."). Assuming this is DOI's interpretation, Plaintiff urges a "federal-focus perspective on interpreting retrocessions," arguing that "the Department of the Interior's actions are controlling, regardless of any other governments' and agencies' contrary interpretation." *Id*. at 12. And, according to Plaintiff, applying the federal-focus perspective to DOI's actions in this case unambiguously support Plaintiff's interpretation of the scope of retrocession—i.e., retroceding criminal jurisdiction over all offenses where a Yakama member is involved. *Id*.

Unlike the Plaintiff, the Court is not convinced that DOI, in accepting retrocession, necessarily understood the Governor's retrocession proclamation as an offer to retrocede criminal jurisdiction over all crimes within the Yakama Reservation whenever an Indian is involved "as a defendant and/or victim." *Id*. at 16-18. The retrocession proclamation, paragraph 3 provides in relevant part:

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

ECF No. 16-1 at 25 (emphasis added). Thus, the State expressly retained jurisdiction over "all criminal offenses involving *non-Indian defendants and non-Indian victims*." ECF No. 6-1 at 26 (emphasis added). As noted, in the letter transmitting the proclamation to DOI on January 27, 2014, Governor Inslee clarified that the State's intent in retroceding criminal jurisdiction was to retain jurisdiction whenever "non-Indian defendants *and/or* non-Indian victims" were involved. ECF Nos. 1 at 14, ¶ 5.41; 16-1 at 30.

In DOI's October 19, 2016, letter notifying the Yakama Nation of retrocession, DOI confirmed that it had accepted the Governor's offer of retrocession and briefly addressed the "extent of retrocession" issue. ECF No. 16-1 at 36. After confirming that "Washington law clearly sets forth the process for retrocession of civil or criminal jurisdiction in Washington State," DOI summarily concluded that the Governor's proclamation was "plain on its face and unambiguous." ECF No. 16-1 at 36. However, DOI then continued:

> We worry that unnecessary interpretation might simply cause confusion. If a disagreement develops as to the scope of the retrocession, we are confident that courts will provide a definitive interpretation of the plain language of the Proclamation. In sum, it is the content of the Proclamation that we hereby accept in approving retrocession.

Id.

Plaintiff maintains that DOI's interpretation of the proclamation as "plain on its face and unambiguous," and its characterization of any subsequent interpretation as "unnecessary," amounts to an express rejection of Governor Inslee's subsequent clarification that the proclamation's intent was to retain state criminal jurisdiction over cases involving "non-Indian defendants *and/or* non-Indian victims." *Id*. at 16. The Court, however, disagrees. Rather than weighing in on the issue, DOI expressly declined to delineate the scope of retrocession, instead leaving it for the courts to "provide a definitive interpretation of the plain language of the Proclamation." ECF No. 16-1 at 36.

Informative and not necessarily binding on this Court, a Washington court has now provided a definitive interpretation of the plain language of the Governor's retrocession proclamation and, in doing so, has clarified the scope of Washington's criminal jurisdiction within exterior boundaries of the Yakama Reservation following retrocession. *See State v. Zack*, 2 Wash. App. 2d 667 (2018), *review denied*, 191 Wash. 2d 1011 (2018). In *State v. Zack*, Division Three of the Washington Court of Appeals considered a jurisdictional challenge to the scope of the State's post-retrocession criminal jurisdiction within the Yakama Reservation, almost identical to Plaintiff's challenge here. The *Zack* court determined that "[t]he jurisdiction issue turns on the meaning of the Governor's proclamation, with the dispositive question being the meaning of the word 'and.'" *Id*. at 672. The *Zack* court is the only court, state or federal, to consider whether the Governor's use of

the word "and" in the contested retrocession provision should be read in the conjunctive or disjunctive.

Performing a plain language analysis, the *Zack* court concluded that the word "and" should be read in the disjunctive—i.e., "non-Indian defendant *and/or* non-Indian victim"—because the conjunctive interpretation "would render the proclamation internally inconsistent and nonsensical." *Id.* As the court explained, appellant's proposed construction, and the one advanced by Plaintiff in this case, "would mean that the only type of case the State could prosecute would require the involvement of non-Indian defendants who victimized other non-Indians on fee land." *Id.* at 675. However, because "[t]he State already had authority to prosecute non-Indians for offenses committed on deeded lands prior to the enactment of Public Law 280," and the Governor was only authorized to retrocede jurisdiction acquired under Public Law 280, the *Zack* court concluded that the conjunctive construction "would result in the Governor engaging in *ultra vires* action." *Id.* at 675-76 ("Asserting or removing state jurisdiction over non-Indians is not within the scope of Public Law 280 or RCW 37.12.010.). The *Zack* court further observed that excluding Indians from prosecution in all cases "would mean that the Governor intended to return all of the criminal jurisdiction the State assumed by RCW 37.12.010 and the word 'in part' would be rendered meaningless because there would have been total rather than partial retrocession." *Id.* at 675. For these reasons, the court held that "the State retained jurisdiction to prosecute this

assault against a non-Indian occurring on deeded land within the boundaries of the Yakama reservation." *Id.* at 676.

Though the Court is not bound by the decision, the Court finds the *Zack* court's analysis and holding persuasive, particularly when considering the historical patchwork of federal, state, and tribal criminal jurisdiction on the Yakama Reservation. Before the enactment of Public Law 280 or RCW 37.12.010, "the Yakima Nation was subject to the general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary." *Confed. Bands*, 439 U.S. at 470. Under those principles, while Indian tribes generally retain criminal jurisdiction over Indians within Indian reservations, tribes have no "inherent jurisdiction to try and to punish non-Indians." *Id.*; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). Thus, only the state possessed criminal jurisdiction over non-Indians who committed crimes against other non-Indians on Indian reservations. *See*, *e.g.*, *Draper v. United States*, 164 U.S. 240, 242-43 (1896); *United States v. McBratney*, 104 U.S. 621, 624 (1882). Victimless crimes committed by non-Indians in Indian country are also within the exclusive jurisdiction of the state. *See Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984), Neither the federal government nor the Tribe have jurisdiction for these crimes.

Public Law 280 authorized the State of Washington to assume full or partial jurisdiction over criminal offenses and civil causes of action involving Indians in Indian Country within the State's borders. *Confed.*

Bands, 439 U.S. at 471-72. In 1963, the State opted to assume some jurisdiction under Public Law 280. *See* RCW 37.12.010. As the Supreme Court explained, "[f]ull criminal and civil jurisdiction to the extent permitted by Pub. L. 280 was extended to all fee lands in every Indian reservation and to trust and allotted lands therein when non-Indians were involved." *Confed. Bands*, 439 U.S. at 475. However, "state jurisdiction was not extended to Indians on allotted and trust lands unless the affected tribe so requested," except for those eight areas of law specified in RCW 37.12.010(1)-(8). *Id*.

When Congress amended Public Law 280 in 1968, it authorized the United States to "accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction" previously acquired pursuant to Public Law 280. 25 U.S.C. § 1323(a). By Executive Order, the Secretary of the Interior was then empowered to accept "*all or any measure*" of a state's offer of retrocession. *See* Exec. Order No. 11435 (Nov. 21, 1968), 33 Fed. Reg. 17339-01 (Nov. 23, 1968) (emphasis added). However, neither § 1323 nor the Executive Order authorize the Secretary to accept *more* jurisdiction than a state initially acquired under Public Law 280. Under federal law, a state may only retrocede any measure of jurisdiction "acquired by such State pursuant to [Public Law 280]." 25 U.S.C. § 1323(a).

The State of Washington's statute outlining the retrocession process, RCW 37.12.160(1), confirms that the State may only "retrocede to the United States all or part of the civil and/or criminal jurisdiction

previously acquired by the state over a federally recognized Indian tribe, and the Indian country of such tribe." Particularly relevant here, the statute specifically defines "criminal retrocession" as "the state's act of returning to the federal government the criminal jurisdiction acquired over Indians and Indian country under federal Public Law 280." RCW 37.12.160(9)(b).

Plaintiff urges the Court to interpret the Governor's retrocession proclamation, and DOI's acceptance of retrocession, as retroceding all criminal jurisdiction over crimes committed within the Yakama Reservation, including land held in fee by Indian and non-Indian owners, whenever an Indian is involved as a defendant and/or victim. ECF No. 16 at 18. Stated differently, Plaintiff maintains that "[t]he only criminal offenses over which the State retained jurisdiction are those involving both a non-Indian defendant and non-Indian victim, as well as non-Indian victimless crimes." *Id*. at 17-18. Plaintiff claims that DOI's acceptance of retrocession "does not leave open the possibility of the State continuing to play a role in Indian-involved crimes within the Yakama Reservation." ECF No. 16 at 16.

However, interpreting the Governor's retrocession proclamation as Plaintiff insists "would result in the Governor engaging in an *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 and RCW 37.12.010. *Zack*, 2 Wash. App. 2d at 676. As noted, the State's authority to prosecute non-Indians for crimes committed against

non-Indians on the Yakama Reservation preexists Public Law 280 or RCW 37.12.010. Under Plaintiff's interpretation, the State would be "retaining" jurisdiction that it simply did not acquire from the United States pursuant to Public Law 280. The Court accepts the *Zack* court's logical interpretation, which is consistent with Public Law 280 and RCW 37.12.160's instructions.

Reading the Governor's use of the sentence "The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." in context, both historical and in the context of the entire retrocession proclamation, also makes it plain that the State was retaining jurisdiction in two areas—over criminal offenses involving non-Indian defendants and over criminal offenses involving non-Indian victims. The plain reading of the language thus, also shows the limitation of the States' retrocession.

Moreover, Plaintiff's interpretation directly contradicts Governor Inslee's stated intent to "retrocede, *in part*, criminal jurisdiction." ECF No. 16-1 at 26 (emphasis added). Under Plaintiff's view of the scope of retrocession, the State retroceded all criminal jurisdiction assumed under Public Law 280, retaining only that jurisdiction that predated Public Law 280—i.e., the "authority to punish offenses committed by her own citizens upon Indian reservations." *Draper v. United States*, 164 U.S. 250, 247 (1896). This interpretation is at odds with Governor Inslee's stated intent of retroceding some, but not all, criminal jurisdiction acquired under Public Law 280. The Court cannot

reconcile Plaintiff's illogical interpretation of the scope of retrocession with the plain language of the Governor's retrocession proclamation, or federal and state law.

The Court concludes that the State retained jurisdiction over criminal offenses where any party is a non-Indian. This interpretation is consistent with the plain language of the Governor's retrocession proclamation, DOI's acceptance, and federal and state law governing the retrocession process. Accordingly, the Court finds that Plaintiff fails to establish success on the merits of its claims because Defendants have criminal jurisdiction over offenses committed by or against non-Indians within the Yakama Reservation.

B. Irreparable Injury, Hardships, & Public Interests

The Tribes' sovereignty has not been wrongfully diminished by the partial retrocession of jurisdiction preformed in accordance with the governing federal and state law. Accordingly, the Court finds that Plaintiff has not established irreparable harm and there are no hardships or public interests to be considered.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Preliminary Injunction (ECF No. 16), converted to a request for a Permanent Injunction, is **DENIED**.

2. All remaining deadlines, hearings and trial are **VACATED**.

The District Court Executive is directed to enter this Order and Judgment for Defendants accordingly, furnish copies to the parties, and **CLOSE** the file.

DATED February 22, 2019.

[SEAL] /s/ Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge

A true copy of the Record of
the official proceedings at the Council
in the Walla Walla Valley, held jointly by
Tsaac T. Stevens Gov. & Supt. W. T.
and
Joel Palmer Supt. Indian Affairs O. T.
on the part of the United States
with the
Tribes of Indians named in the Treaties
made at that Council

June 9th. and 11th
1855

*   *   *

The Great Father has been for many years caring for his red children across the mountains; there (pointing East) many treaties have been made. Many councils have been held; and there it had been found that with farms and schools and with shops and with laws the red man could be protected.

Why do I say laws? What has made trouble between the white man and the red man? Did Lewis and Clark make trouble? they came from the Great Father; did I and mine make trouble? ‘No! but the trouble had been made generally by bad white men and the Great Father knows it, hence laws.

The Great Father therefore desires to make arrangements so you can be protected from these bad white men, and so they can be punished for their misdeeds and the Great Father expects you will treat his white children as he will make a law they shall treat

you. We are now in council to see if we can arrange the terms which will carry this into effect.

Let us go back to old times across the mountains and see what was there done: the red man received the white man gladly; but after a while difficulties arose; the blood of the red man was spilled and the blood of the white man; ‘there was cold; there was hunger; there was death. But a man came, William Penn, and said I will see if my white children and my red children cannot be friends, and they were friends; Wm Penn and the Indians came

*   *   *

white man cannot enter without the consent of the red man. On all these tracts the red man has schools and farms and mills: they have teachers and physicians and an agent.

Now listen carefully: On these tracts the land was all in common: there were one or more larger fields for the tribes but no man had his special field: the Great Father and his cheifs now think that is not good: the Great Father said, the white man has his farm, his cattle and his horses; the red man shall have his farm his cattle and his horses; the Great Father says that when on that tract of land an Indian has his field, that field should he his.

This brings us now, to the question. What shall we do at this council? We want you and ourselves to agree upon tracts of land where you will live; in those tracts of land we want each man who will work to have his

own land, his own horses, his own cattle, and his own home for himself and children.

On each tract we want an agent to live who shall be your brother, and who' shall protect you from bad white men shall speak more of this Subject by and by.

On each tract we wish to have one or more schools: we want on each tract one or more blacksmiths. one or more carpenters; one or more farmers: we want you and your Children to learn to make ploughs, to learn to make waggons, and every thing.which

* * *

JAY INSLEE
Governor

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • www.governor.wa.gov

PROCLAMATION BY THE GOVERNOR 14-01

WHEREAS, on March 19, 2012, Governor Christine Gregoire signed Engrossed Substitute House Bill 2233, "Creating a procedure for the state's retrocession of civil and criminal jurisdiction over Indian tribes and Indian country"; and

WHEREAS, Engrossed Substitute House Bill 2233, which became Chapter 48, Laws of 2012, creates a process by which the state of Washington (hereafter, "the State") may retrocede to the United States all or part of the civil and criminal jurisdiction previously acquired by the State over a federally recognized Indian tribe, and the Indian country of such tribe, under federal Public Law 280, Act of August 15, 1953; and

WHEREAS, on March 13, 1963, in accordance with federal Public Law 280, Act of August 15, 1953, the State assumed partial civil and criminal jurisdiction, subject to the limitations in RCW 37,12,021 and RCW 37.12.060, within the Indian country of the Confederated Tribes and Bands of the Yakama Nation (hereafter, "Yakama Nation") pursuant to Chapter 36, Laws of 1963; and

WHEREAS, after March 13, 1963, the Yakama Nation did not invoke with the State the provision of RCW 37.12.021 but chose to rely upon the rights and remedies of its Treaty of 1855 with the United States, 12 Stat. 951 and federal laws; and

WHEREAS, on January 11, 1980, the Assistant Secretary-Indian Affairs, United States Department of the Interior, approved the Yakama Nation's petition for reassumption of jurisdiction over Indian child custody proceedings under the Indian Child Welfare Act of 1978. Effective March 28, 1980, the Yakama Nation reassumed jurisdiction over Yakama Indian child custody proceedings; and

WHEREAS, on July 17, 2012, the Yakama Nation filed a retrocession petition with the Office of the Governor. The retrocession petition by the Yakama Nation requests full retrocession of civil and criminal jurisdiction on all of Yakama Nation Indian country and in five areas of RCW 37.12.010, including: Compulsory School Attendance; Public Assistance; Domestic Relations; Juvenile Delinquency; and Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways; and

WHEREAS, Governor Gregoire convened government-to-government meetings with the Yakama Nation to discuss the Nation's retrocession petition. In the course of those meetings, the Yakama Nation and Governor Gregoire confirmed that the Yakama Nation asks the State to retrocede all jurisdiction assumed pursuant to RCW 37.12.010 in 1963 over the Indian country of the Yakama Nation, both within and without the

external boundaries of the Yakama Reservation. However, the Yakama Nation requests that the State retain jurisdiction over mental illness as provided in RCW 37.12.010(4), and jurisdiction over civil commitment of sexually violent predators under RCW 71.09, and acknowledges that the State would retain criminal jurisdiction over non-Indian defendants; and

WHEREAS, Governor Jay Inslee convened further government-to-government meetings between the State and Yakama Nation. The Governor's Office has also consulted with elected officials from the jurisdictions proximately located to the Yakama Nation's Indian country; and

WHEREAS, on July 9, 2013, Governor Inslee exercised the six-month extension provision for issuing a proclamation, pursuant to RCW 37.12.160; and

WHEREAS, strengthening the sovereignty and independence of the federally recognized Indian tribes within Washington State is an important priority for the State; and

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, by virtue of the authority vested in me by Section 37.12.160 of the Revised Code of Washington, do hereby grant in part, and deny in part, the retrocession petition submitted by the Confederated Tribes and Bands of the Yakama Nation, according to the following provisions:

1. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede full civil and

criminal jurisdiction in the following subject areas of RCW 37.12.010: Compulsory School Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency.

2. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, civil and criminal jurisdiction in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases in the following manner: Pursuant to RCW 37.12.010(8), the State shall retain jurisdiction over civil causes of action involving non-Indian plaintiffs, non-Indian defendants, and non-Indian victims; the State shall retain jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims.

3. 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.

4. Jurisdiction over Indian child custody proceedings under RCW 37.12.010(3) and Adoption proceedings and Dependent Children pursuant to RCW 37.12.010(6) and (7), which the Yakama Nation reassumed in 1980 under the Indian Child Welfare Act, shall remain under the exclusive jurisdiction of the Yakama Nation.

5. Outside the exterior boundaries of the Yakama Reservation, the State does not retrocede jurisdiction. The State shall retain all jurisdiction it assumed pursuant to RCW 37.12.010 in 1963 over

the Yakama Nation's Indian country outside the Yakama Reservation.

6. Nothing herein shall affect the State's civil jurisdiction over the civil commitment of sexually violent predators pursuant to chapter 71.09 RCW and the State must retain such jurisdiction notwithstanding the completion of the retrocession process authorized under RCW 37.12.160.

7. Pursuant to RCW 37.12.010, the State shall retain all jurisdiction not specifically retroceded herein within the Indian country of the Yakama Nation.

8. This Proclamation does not affect, foreclose, or limit the Governor's authority to act on future requests for retrocession under RCW 37.12.160.

Signed and sealed with the official seal of the state of Washington, this 17th day of January, A.D. Two-thousand and Fourteen, at Olympia, Washington.

[SEAL] BY:

/s/ Jay Islee
Jay Islee, Governor

BY THE GOVERNOR

/s/ [Illegible]
Secretary of State

JAY INSLEE
Governor

STATE OF WASHINGTON
Office of the Governor

P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • www.governor.wa.gov

January 27, 2014

The Honorable Kevin Washburn
Assistant Secretary of Indian Affairs
U.S. Department of Interior
MS-4141 MIB
1849 C. Street, N.W.
Washington, D.C. 20240

Re: Yakama Nation Retrocession Petition

Dear Assistant Secretary Washburn:

Pursuant to 25 U.S.C. §1323 and Revised Code of Washington (RCW) 37.12, I have included the attached proclamation, signed by me on January 17, 2014. The proclamation addresses a retrocession petition submitted by the Confederate Tribes and Bands of the Yakama Nation in Washington State.

On March 19, 2012, former Washington State Governor Christine Gregoire signed Engrossed Substitute I louse Bill 2233. This important piece of legislation created a process by which the state of Washington may retrocede to the United States civil and criminal jurisdiction previously acquired by the State over a federally recognized Indian tribe under federal Public Law 280 in 1953. The bill gives the Governor of the state of Washington the authority to approve, in whole or in

part, a retrocession petition submitted by a Washington State Indian tribe. Final approval rests with the U.S. Department of the Interior.

On July 17, 2012, the Yakama Nation filed a retrocession petition with the Office of the Governor requesting full civil and criminal jurisdiction on all of Yakama Nation Indian country in five specific areas of RCW 37.12.010. I believe that the enclosed Proclamation is a great first step towards strengthening the sovereignty and independence of the Yakama Nation.

In paragraph one of the proclamation, the State grants exclusive civil and criminal jurisdiction within the exterior boundaries of the Yakama Reservation in four subject areas of RCW 37.12.010: Compulsory School Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency.

In paragraph two, the proclamation also grants to the Yakama Nation civil and criminal jurisdiction within the exterior boundaries of the reservation in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases which do not involve non-Indian plaintiffs, non-Indian defendants, or non-Indian victims. I would note that the proclamation itself states that the State will retain jurisdiction in these cases over civil causes of action involving "non-Indian plaintiffs, non-Indian defendants, *and* non-Indian victims," as well as in criminal cases involving "non-Indian defendants *and* non-Indian victims." The intent set forth in paragraph two, however, is for the State to retain jurisdiction in this area where *any* party is non-Indian, and

therefore may be more properly read in both instances as the State retaining jurisdiction in those cases involving "non-Indian plaintiffs, non-Indian defendants *and/or* non-Indian victims." I respectfully request that the Department make this clear in the notice accepting the retrocession Proclamation.

Finally, in paragraph three of the proclamation, the State is also retroceding criminal jurisdiction within the exterior boundaries of the reservation over all offenses not specifically addressed in paragraphs one and two, which do not involve non-Indian defendants or non-Indian victims. Again, I would note that in this paragraph the proclamation states that the State retains jurisdiction over criminal offenses involving "non-Indian defendants *and* non-Indian victims," but the intent is for the State to retain such jurisdiction in those cases involving non-Indian defendants *and/or* non-Indian victims."

The proclamation does deny part of the petition by the Yakama Nation, and allow the State to retain existing civil and criminal jurisdiction in a limited number of areas. First and foremost, the State is retaining its existing jurisdiction outside of the exterior boundaries of the Yakama Reservation, including all trust and fee lands. Moreover, consistent with the description above, the State is retaining civil and criminal jurisdiction in Operation of Motor Vehicle cases that involve non-Indian plaintiffs, non-Indian defendants, and/or non-Indian victims.

It is important to note that nothing in the proclamation changes the existing jurisdiction the Yakama Nation has over Indian child custody proceedings under RCW 37.12.010(3) and Adoption proceedings and Dependent Children pursuant to RCW 37.12.010(6) and (7). The Yakama Nation reassumed jurisdiction over these subjects in 1980 under the Indian Child Welfare Act, and shall remain under the exclusive jurisdiction of the Yakama Nation.

Similarly, nothing in the proclamation shall affect the State's civil jurisdiction over the civil commitment of sexually violent predators pursuant to chapter 71.09 RCW and the State must retain such jurisdiction notwithstanding the completion of the retrocession process authorized under RCW 37.12.160.

Thank you for accepting this proclamation on behalf of the state of Washington and for working to bring the retrocession petition to fruition. I look forward to continue working with you and the Yakama Nation on this issue moving forward.

Sincerely,

/s/ Jay Inslee
Jay Inslee
Governor

[SEAL] **U.S. Department of Justice**

Office of Tribal Justice

Room 2318, RFK Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

(202) 514-8812
FAX (202) 514-9078

July 29, 2015

Kevin Washburn
Assistant Secretary for Indian Affairs
Department of the Interior
Washington, DC 20240

Dear Assistant Secretary Washburn:

In a letter dated June 16, 2014 you asked that the Attorney General consult with the Department of the Interior regarding a retrocession request from the State of Washington concerning the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation). I have been asked to respond to your letter.

As you are aware the Department of Justice has actively engaged in consultation with the Department of the Interior regarding the Yakama Nation retrocession request. This included a number of visits to the Yakama Nation, continuing communications with the Tribe, and frequent meetings with the staff of the Bureau of Indian Affairs (BIA). One of the more productive visits to the Yakama Nation related to our consultation with the Department of the Interior involved you, the Deputy Director for the Office of Justice

Services at BIA, and the U.S. Attorney for the Eastern District of Washington.

The Department of Justice believes that consultation between our agencies has been very thorough and extremely useful. As a result of almost a year of ongoing communication, the consultation requirement contained in Executive Order 11435 has clearly been satisfied. In recognizing the end of our consultation on the State of Washington's retrocession request, we note one additional issue for your consideration.

If you accept the retrocession request from the State of Washington, the Department of Justice would recommend a period of at least six months between the date of acceptance and the actual transfer of jurisdiction. This period would allow for an orderly transfer of jurisdiction from the State of Washington to the Federal government. The Department of Justice would be happy to provide such assistance as would be appropriate in realizing the transfer of jurisdiction.

I want to thank you and your talented staff for the Department of the Interior's thoughtful participation in this consultation. We look forward to your decision in this matter.

Sincerely,

/s/ Tracy Toulou
Tracy Toulou
Director
Office of Tribal Justice

[SEAL] **United States Department of the Interior**
OFFICE OF THE SECRETARY
Washington, DC 20240

OCT 19 2015

The Honorable JoDe Goudy
Chairman, Confederated Tribes
and Bands of the Yakama Nation
P.O. Box 151, Fort Road
Toppenish, Washington 98948

Dear Chairman Goudy:

I am pleased to notify you of our acceptance of retrocession to the United States of partial civil and criminal jurisdiction over the Yakama Nation (Nation).[1] The Department of the Interior (Department) congratulates the State of Washington (State) and the Nation on the careful and deliberative process used to reach agreement on retrocession.[2] We have attempted to be equally deliberative in our process. We explain below the process of our decisionmaking, the reasons for our

[1] Jurisdiction was previously acquired by the State of Washington pursuant to Public Law 83-280, 67 Stat. 588, codified as amended at 18 U.S.C. 1162, 28 U.S.C. 1360, and as provided in Revised Code of Washington 37.12.010, 37.12.021, 37.12.030, 37.12.040, and 37.12.060 (1963), and 37.12.050 (1957).

[2] The intended acceptance is pursuant to 25 U.S.C. § 1323 and authority vested in the Secretary of the Interior by Executive Order No. 11435 of November 21, 1968, 33 Fed. Reg. 17339, and delegated to the Assistant Secretary – Indian Affairs. It is also pursuant to the request by the State of Washington reflected in the Proclamation of the Governor 14-01, signed on January 17, 2014, and transmitted to the Assistant Secretary – Indian Affairs in accordance with the process set forth in RCW 37.12.160 (2012).

decision, and the effective date of complete implementation.

It is important to understand what retrocession means. Some correspondence and media reports reflect confusion about the meaning of retrocession. Retrocession does not affect the Nation's formal legal authority or jurisdiction in any way. Indeed, the Nation's authority neither contracts nor expands in light of retrocession. The Nation's jurisdiction simply will no longer be concurrent with the State's; rather, the Nation's jurisdiction will be exclusive for certain purposes. In its retrocession request, the State wishes to give up a portion of the authority that had been delegated to it by Congress under Public Law 280. The sole legal effect of retrocession is to restore Federal authority to the Federal Government over certain categories of offenses within the Yakama Reservation. In short, the primary effect of retrocession is that the State will transfer back to the Federal Government Federal authority that the State had been delegated under Public Law 280. As 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 has always been.

The road to retrocession has been a long one for the Nation. We commend the State for establishing a formal procedure on retrocession of state criminal and civil jurisdiction to address this issue proactively and thoughtfully. Engrossed Substitute House Bill 2233, enacted in 2012, provided a path for the State and tribal nations to follow in addressing retrocession.

After filing the retrocession petition with the Governor in July of 2012, the Nation engaged in government-to-governments meetings with the State. The Nation also entered into a 2013 Memorandum of Understanding with Yakima County regarding the procedures to serve state court arrest warrants on tribal members on trust land within the Yakama Reservation. After following the procedures set forth in House Bill 2233, including a 6-month extension by the State, the Governor submitted the Proclamation for our approval in January of 2014.

From the time the Proclamation was submitted, the Office of Justice Services (OJS) within the Bureau of Indian Affairs (BIA) has engaged with the Yakama Nation Tribal Police Department and Corrections to determine the capacity of the Nation's law enforcement services. In preparation for retrocession, the Nation committed additional resources to their law enforcement services. The Nation has nearly doubled the size of the police department by funding 10 new police officer positions. In September of 2014, OJS finalized an assessment of the Nation's Police Department, which found the Nation has the capacity to respond to an increased number of emergency calls for service and would be prepared to handle increased responsibilities as a result of retrocession.

One of the critical elements of success in preparing for exclusive criminal jurisdiction over some offenses committed by Native Americans is an effective tribal court. In December of 2014, OJS began an assessment of the Yakama Nation Tribal Court. This assessment

provided recommendations for improving tribal court operational activities and assisted in developing a strategic 3-5 year plan for the court. On May 6, 2015, OJS issued the tribal court assessment and strategic plan, including findings and recommendations. As a result of these findings, $149,000 in one-time Federal funding was provided to address the following issues: 1) assistance in acquiring necessary equipment, including computers, scanners, and other items, related to the infrastructure of the court; 2) increased salary of law-trained judges; 3) hiring a legal assistant to assist civil pro-se litigants; 4) hiring a court administrator; 5) providing training to tribal judges and tribal prosecutors and defenders on issues involving domestic violence, child abuse, and neglect; and 6) providing relevant training to the court administrator. Discussions have also occurred regarding Fiscal Year 2016 funding for a court management system. Together these efforts will help the Nation further the pursuit of justice and ensure that individuals' rights are protected.

The OJS has also actively engaged in developing partnerships and opening lines of communication between the Nation's police, local law enforcement, county prosecutor's office, the Federal Bureau of Investigation (FBI), and the U.S. Attorney's Office. This has created a more cooperative relationship between law enforcement agencies. As a result, crimes are now less likely to go uninvestigated or unprosecuted.

As is our practice when reviewing retrocession requests, the Department worked closely with the

Department of Justice (DOJ) in evaluating the request. In March of 2014, the Department participated in meetings with the DOJ Office of Tribal Justice and the U.S. Attorney's Office in the Eastern District of Washington. On June 16, 2014, the Department formally requested, as set forth in Executive Order No. 11435, the consultation and opinion of the Attorney General with respect to retrocession of criminal jurisdiction. We must work closely with the DOJ in making this decision because, while the decision is vested with the Department, DOJ has significant equities in light of the additional investigative and prosecution work that is likely to be required of FBI and the United States Attorney's Office in the Eastern District of Washington.

United States Attorney Michael C. Ormsby has been key to our consideration of retrocession. In a letter dated April 3, 2015, to the Acting Deputy Attorney General, the U.S. Attorney expressed caution and stressed the need for careful implementation, but he also noted that the relevant Federal and tribal partners have worked hard in recent years to improve communication and have developed what he described as a "strong, collaborative working relationship[.]" He also noted that the Nation has developed a "symbiotic working relationship with FBI and the USAO" in particular.

The U.S. Attorney vowed to make retrocession successful if it occurs. In his letter, the U.S. Attorney identified with great specificity what needs to happen if retrocession is approved, as well as what has not yet occurred.

His guidance has been very helpful. Since law enforcement agencies tend to address matters by priority, it is sometimes difficult to prioritize matters that remain hypothetical. This letter provides the concrete decision that will enable the interested jurisdictions to prioritize plans for implementation.

The U.S. Attorney proposed an implementation period of 6-12 months for law enforcement agencies to develop transition plans. As the chief Federal law enforcement officer in the Eastern District of Washington, his leadership will be crucial in ensuring successful implementation. Accordingly, we have worked his proposal into our decision.

On January 26, 2015, the Department held a formal tribal consultation with the Nation, DOJ, and the United States Attorney's Office to discuss the proposed retrocession. On that occasion, we heard from the Nation the importance of retrocession. We also toured some of the Nation's police training and criminal justice facilities. Since long before statehood for the State of Washington, the Nation and the United States Government have had a government-to-government relationship, evidenced most clearly by the Nation's Treaty with the United States of 1855. The consultation continued that relationship.

During our meetings on the Yakama Reservation, Councilmember Virgil Lewis, who chairs the Tribal Council's Law and Order Committee, advised us of the steps that the Nation has taken to prepare for implementation. He assured us that the Nation has the staff

and the employees to undertake law enforcement for the Nation. He was frank and transparent about the opportunities as well as the challenges that retrocession would create. While the Nation's detention center, for example, is a state-of-the-art facility, the tribal court and the police department have certain needs. Following retrocession, the State will no longer have jurisdiction over tribal members as to the offenses for which retrocession has been granted. Thus, the entire responsibility for policing such offenses will rest on the shoulders of the Nation and the United States. As noted above, the Nation's authority has not expanded, but the weight of its responsibility has indeed increased. Accordingly, tribal leadership and the U.S. Attorney, rather than State, county or municipal leadership, will now bear the responsibility and the accountability to tribal members for public safety on the Yakama Reservation. Following our meetings on the reservation, I am confident that the Nation is committed to carrying the weight of this responsibility.

In March of 2015, FBI finalized a report on the implications of retrocession. This report was written at the request of the Office of Tribal Justice. The report concluded that the impact of retrocession was unknown but indicated similarly sized tribes have experienced positive impacts from retrocession. We note that, as a result of retrocession, FBI and U.S. Attorney's Office 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.

On April 30, 2015, I met with the Governor's General Counsel to discuss retrocession. An issue that has been highlighted in several meetings is related to reservation boundaries. We have assured anyone who has asked that this process is not a mechanism for redrawing reservation boundaries. The scope of the Yakama Nation's territorial jurisdiction will be governed by Federal law. The decision before my Office is nothing more than an acceptance of the State's request for retrocession. As explained to the Governor's office, this decision is not intended to affect the boundaries of the reservation in any way. As noted above, this decision does not expand tribal jurisdiction; it merely eliminates State authority over certain offenses on the reservation.

The Department also received correspondence from local government representatives about the retrocession request from the State. For example, a letter from Yakima County, signed by Prosecuting Attorney Joseph A. Brusic, Sheriff Brian Winter, and all three County Commissioners, expressed a strong desire to see the retrocession process succeed. They asked for an opportunity to have discussions with the Nation and the Federal Government in an effort to reach agreement on protocols. We will be happy to convene meetings to help facilitate implementation of retrocession. We note, however, that it would constitute extreme hubris for a Federal official more than 2,500 miles away in Washington, D.C., to attempt to resolve disputes between neighbors in the Yakima Valley. That said, the County's request is consistent with the request of the U.S.

Attorney and DOJ, and we certainly are willing to create time and space for such discussions.

We appreciate the unanimous expression of support from Yakima County officials. We expect cooperation to be forthcoming. It is our experience that law enforcement officers tend to share a strong esprit de corps and a mutual respect that crosses jurisdictional and even sovereign lines. It comes from the common experience of performing a very difficult job every day as well as a common commitment to protecting the public. Whatever the views of political leadership, when the chips are down and danger is afoot, officers on the beat tend to support one another. We are confident that, police officers working on the ground will be able to develop agreements on mutual aid, cross-deputation, and other needed mechanisms for cooperation. Indeed, in light of increasing fiscal constraints, cooperation in stretching resources is more important than ever. Moreover, in this age of tremendous scrutiny of law enforcement, it is entirely appropriate that police officers arresting Native Americans on the Yakama Reservation be more responsive to tribal officials. It is also appropriate for tribal suspects to answer to tribal institutions, such as tribal courts and tribal juries. This will increase the legitimacy of criminal justice decisions. We hope that this is one of the many positive outcomes of retrocession.

While Congress assigned the decision on retrocession to officials in Washington, DC, it will require careful cooperation between the Nation and the local

subdivisions of state government, such as the counties and municipalities, to make it work well.

In early August of 2015, the Department received the DOJ's response to our letter requesting the Attorney General's views on retrocession. The DOJ declined to state a position in favor of or against retrocession. It did, however, recommend that the Department consider a 6-month waiting period between the date of acceptance and actual transfer of jurisdiction in order to allow for an orderly transfer of authority from the State to the Federal Government.

In deference to the counsel of DOJ, a specific period to allow the relevant agencies to coordinate their actions going forward is granted. I am confident that the Nation, working with the U.S. Attorney's Office and BIA OJS can accomplish all of the tasks needed for actual implementation in six months. Accordingly, our decision is that retrocession will be implemented completely as of 12:01 a.m. PST on April 19, 2016.

It is worth noting one final issue has been raised regarding the extent of retrocession. Washington law clearly sets forth the process for retrocession of civil or criminal jurisdiction in Washington State.[3] The process requires the Governor to convene a government-to government meeting, within 90 days of receiving a retrocession resolution, for the purpose of considering the Nation's resolution.[4] Within one year of receipt of

[3] RCW 37.12.160.

[4] *See* RCW 37.12.160(3).

the resolution the Governor must issue a proclamation, approving the request either in whole or in part, and formally submit the proclamation to the Federal Government.[5] We understand the Proclamation to be the final product resulting from the formal government-to-government meetings. We also believe that the Proclamation is plain on its face and unambiguous. We worry that unnecessary interpretation might simply cause confusion. If a disagreement develops as to the scope of the retrocession, we are confident that courts will provide a definitive interpretation of the plain language of the Proclamation. In sum, it is the content of the Proclamation that we hereby accept in approving retrocession.

The Nation has long awaited retrocession and will soon take the next step towards greater control over its tribal justice system. While tribal self-governance has long been the Federal Government's guiding principle for Federal Indian policy, it has been slow in coming in the area of criminal justice. Tribal self-governance is more important in this area of public policy and government service than perhaps any other. It would be difficult for this office to reject an agreement reached between the State of Washington and the Yakama Nation, especially one that seeks to facilitate greater tribal self-governance over a matter as important as law enforcement and public safety. We believe that this step will advance tribal self-governance and tribal sovereignty for the Nation. More importantly, we believe

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[5] *See* RCW 37.12.160(4).

that it will produce improved public safety for the Nation and its people.

If you have questions, please contact Mr. Darren Cruzan, Director, Bureau of Indian Affairs, Office of Justice Services, 1849 C Street, NW, Mailstop 2615, Washington, DC 20240, or by telephone (202) 208-5787.

Sincerely,

/s/ Kevin K. Washburn
Kevin K. Washburn
Assistant Secretary – Indian Affairs

cc: Governor, State of Washington
Director, Office of Tribal Justice, U.S. Department of Justice
United States Attorney, Eastern District of Washington

[SEAL]

OFFICE OF THE SECRETARY
OF THE INTERIOR
EXECUTIVE SECRETARIAT
Correspondence Transmittal

Date ES Received: 1210512016
Date Forwarded for Signature: 1210512016

ES Tracking #: ESO-00073772

To:	Cruzan, Darren
From:	Roberts, Lawrence S. Principal Deputy Assistant Secretary – Indian Affairs
Subject:	Guidance to State, Local, and Tribal Law Enforcement Agencies on Yakama Retrocession Implementation
Response Summary:	Guidance to State, Local, and Tribal Law Enforcement Agencies on Yakama Retrocession Implementation

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Lead Response Office: IA – ASIA

Response Writer: L. Roberts

Surnaming Office	Approved By	Date Approved
DOJ	T. Toulon	11/29/2016
IA – COS	S. Wafters	11/29/2016
SOL	J. Cummings	11/29/2016
SOL – DIA	E. Shepard	11/29/2016

Deputy Secretary	__________	________
Associate Deputy Secretary	__________	________
Executive Secretariat	W	11/30/06
Secretary	__________	

SIGMAC: **Other (NOT SECRETARY):** __________

COMMENTS:

[SEAL]

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

NOV 30 2016

TO: Darren Cruzan
Director, Office of Justice Services
Bureau of Indian Affairs

FROM: Lawrence S. Roberts
Principal Deputy Assistant Secretary

SUBJECT: Guidance to State, Local, and Tribal Law Enforcement Agencies on Yakama Retrocession Implementation

In October 2015, the Department of the Interior (Department) issued a decision regarding the retrocession of jurisdiction over the Yakama Reservation. This guidance is issued to assist Federal, tribal, state and local law enforcement in their implementation of the Department's decision. The jurisdictional matrix

provided in this guidance is intended to provide law enforcement officers, prosecutors, and other officials tasked with maintaining public safety on the Yakama Reservation a simple tool to promote consistency in their on-going implementation within the Yakama Reservation.

On January 17, 2014, Governor Inslee signed a Proclamation retroceding jurisdiction over civil and criminal matters within the bounds of the Yakama Reservation. Former Assistant Secretary – Indian Affairs Kevin Washburn's October 19, 2015 decision (attached) explains clearly the scope of the United States jurisdiction post-retrocession. As Assistant Secretary Washburn noted, the scope of retroceded jurisdiction outlined in the Proclamation "is plain on its face and unambiguous." The Assistant Secretary concluded that the State retroceded full civil and criminal jurisdiction in the areas of compulsory school attendance, public assistance, domestic relations and juvenile delinquency; jurisdiction over operation of motor vehicles on public roads except where civil causes of action involve "non-Indian plaintiffs, non-Indian defendants, and non-Indian victims" and criminal offenses involving "non-Indian defendants and non-Indian victims;" and criminal jurisdiction over all other offenses except when they involve "non-Indian defendants and non-Indian victims."[1] The Assistant Secretary's decision is

[1] Proclamation at 2.

consistent with a recent ruling of the Federal District Court for the Eastern District of Washington.[2]

In other words, Washington State retains jurisdiction only over civil and criminal causes of action in which no party is an Indian. The State has retroceded jurisdiction over all other matters to the United States. This retrocession does not affect the concurrent jurisdiction of the Yakama Nation, which exists at all times and has not been ceded. Additionally, the status of land is no longer a factor in determining criminal jurisdiction, as the Proclamation states "within the exterior boundaries of the Yakama Reservation" and no distinction is made between fee and trust land. Although jurisdiction was retroceded over a year ago, the importance of collaboration among all government entities with law enforcement responsibilities on and around the Yakama Reservation remains. I respectfully encourage all entities to enter into Intergovernmental Agreements that promote cooperation within and near the Yakama Reservation.

The chart below illustrates the jurisdictional scheme post-retrocession for criminal cases on the Yakama Reservation.

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[2] *See Klickitat County v. Dept of the interior*, No. 1:16-CV-03060-LRS, slip op. at 10 (E.D. Wash. Sept. 1, 2016).

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

* Under the VAWA reauthorization of 2013, Tribes have the authority to exercise special domestic violence criminal jurisdiction, regardless of Indian or Non-Indian status, provided that certain requirements are met. As of September 2016, Yakama is currently not exercising such jurisdiction.

** For the purposes of this chart, criminal traffic offenses fall under this category.

Attachment
Cc: Office of Tribal Justice, U.S. Department of Justice

From: Brian Winter <brian.winter@co.yakima.wa.us>
Date Thu, Apr 21, 2016 at 6 25 PM
Subject: Yakima County Retrocession Documents
To: bobs@klickitatcounty.org <bobs@klickitatcounty.org>, Adam Diaz <adiaz@cityoftoppenish.us>, Richard Needham <rneedham@wapato-city.org>, Cobb, Gregory (Gregory.Cobb@uniongapwa.gov) <Gregory.Cobb@uniongapwa.gov>
Cc Richard Melville richard melville@bia gov

Gentlemen,

I realized I had not sent these documents out. Attached are the 2 jurisdictional flow charts we are currently using, and the PowerPoint presentation on Retrocession that I gave to a group today (provides the "backstory" for Retrocession). I hope they are u eful in ome way to you

Brian

Sheriff Brian Winter

Yakima County Sheriff' Office

1822 S. 1st Street

Yakima, WA 98903

(509) 574-2600

—

Bob Songer
Sheriff
Klickitat County, Washington
Cell # 509-261-1833
Office # 509 773 4455

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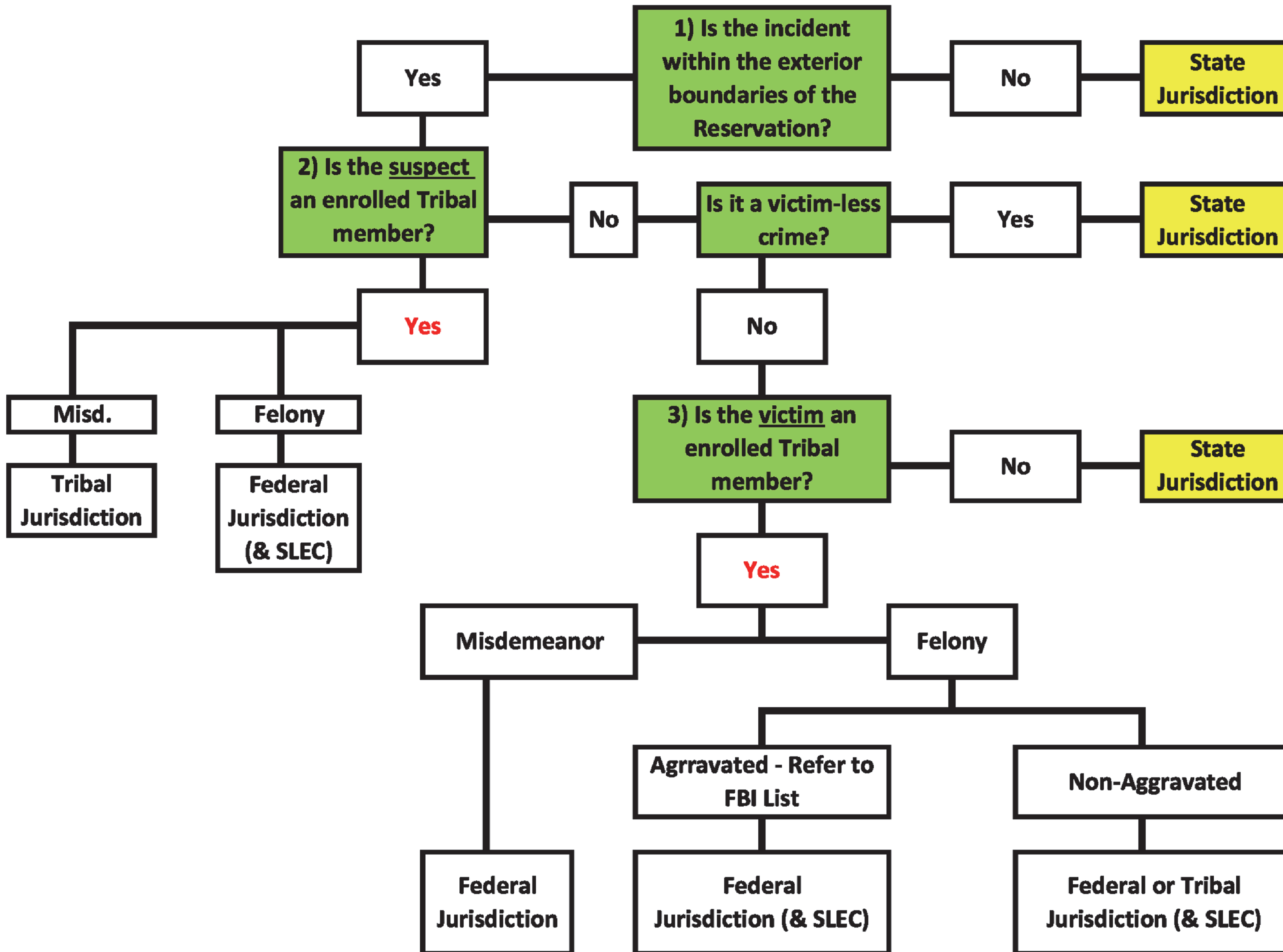
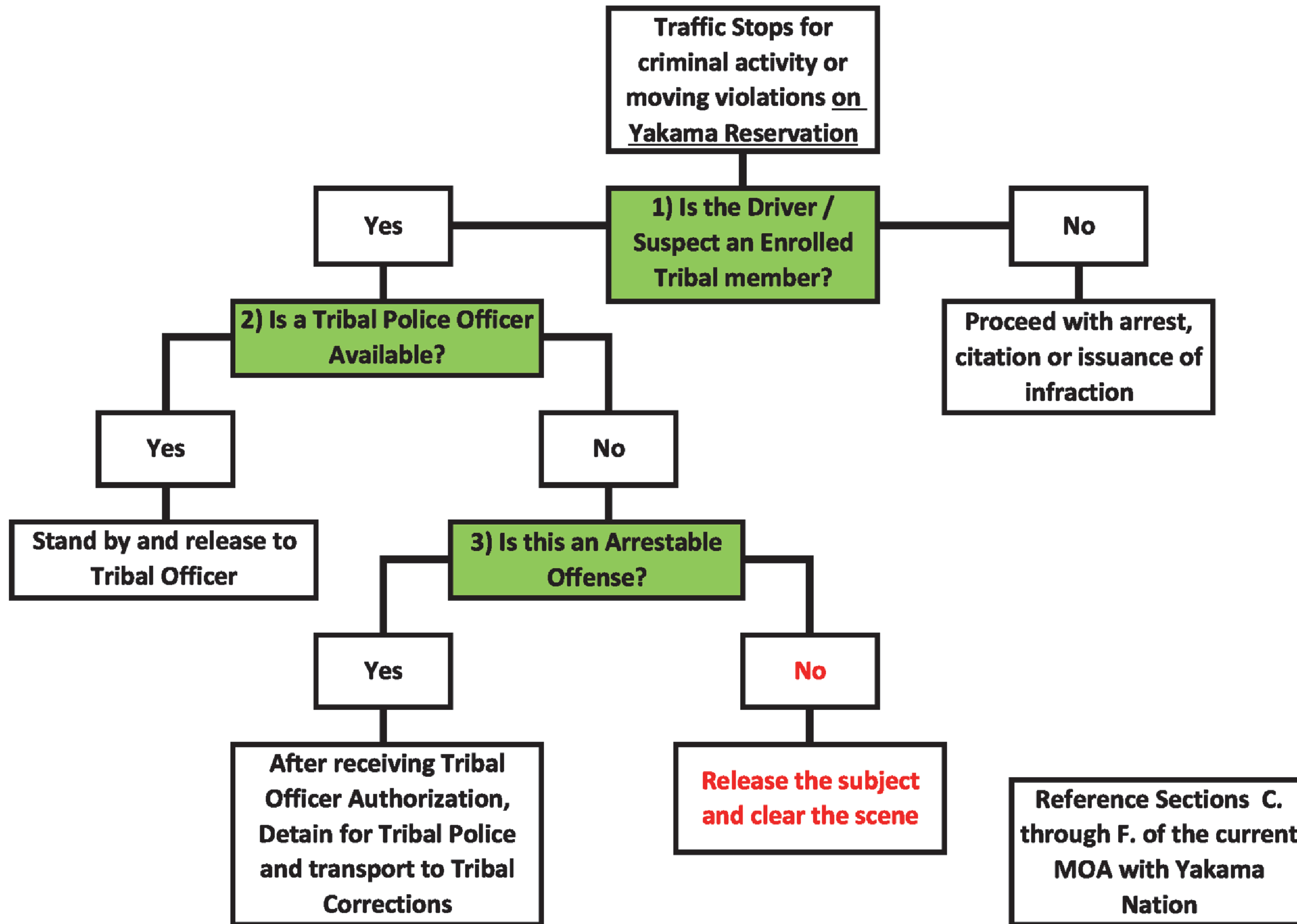
2 attachments

Post-Retrocession Jurisdictional Flow Charts v2 4-19-16.xlsx 17K

Yakama Nation Retrocession.pptx 117K

Post-Retrocession Criminal Jurisdiction Flow Chart v2 Effective 4-19-16




Post-Retrocession Traffic Stop Flow Chart v2 Effective 4-19-16
Traffic Stops for criminal activity or moving violations on Yakama Reservation
1) Is the Driver / Suspect an Enrolled Tribal member?
Yes
No
Proceed with arrest, citation or issuance of infraction
2) Is a Tribal Police Officer Available?
Yes
Stand by and release to Tribal Officer
No
3) Is this an Arrestable Offense?
Yes
After receiving Tribal Officer Authorization, Detain for Tribal Police and transport to Tribal Corrections
No
Release the subject and clear the scene
Reference Sections C. through F. of the current MOA with Yakama Nation

Retrocession on the Yakama

Reservation

April 19, 2016

(What does it mean for the residents of the Yakama Reservation and the rest of Yakima County?)

2015 – BIA Accepts WA State Retrocession

- On October 19, 2015, the Assistant Secretary of the Bureau of Indian Affairs (BIA), Kevin Washburn, sent out a News Release announcing the acceptance of Retrocession, from the State of Washington, by the United States. In it, he announced that Retrocession would be effective on the Yakama Reservation at 12:01 am on April 19, 2016, 6 months from the date of the News Release. He accepted the original wording in the Proclamation, which was "non-Indian defendants and victims". The state retained jurisdiction in those cases where there is both a non-Indian defendant and a non-Indian victim.
- The Yakama Nation or the United States (FBI/US Atty) has jurisdiction in all cases involving enrolled members as either suspects or victims.

2016 – The Bottom Line

- Retrocession does apply within the Yakama Reservation boundaries.
- Retrocession does give the Yakama Nation civil and criminal authority over enrolled members of federally recognized Indian tribes.
- Retrocession does mean that for purposes of criminal and civil jurisdiction, trust and deeded lands on the Yakama Reservation are treated the same, whether inside or outside of city limits.
- Retrocession does not change the Yakama Reservation boundary.
- Retrocession does not give the Yakama Nation criminal authority over non-tribal suspects, unless there is an enrolled tribal victim, in which case the United States will investigate and prosecute.

Nuts and Bolts

- As of 12:01 am on April 19, 2016, the State of Washington no longer exercises concurrent jurisdiction with the Yakama Nation over enrolled tribal members on the Yakama Reservation.
- If the suspect in an incident is an enrolled member of a federally recognized Indian tribe, Tribal PD and/or the FBI will have jurisdiction.
- Many city Police Officers, WSP Troopers, Yakama Tribal Police Officers and Yakima County Sheriff's Office Deputies recently completed 2 1/2 days of BIA Criminal Jurisdiction in Indian Country

(CJIC) training. As a result, most were granted BIA Special Law Enforcement Commissions (SLEC), which are now in effect on the Yakama Reservation. This will give them limited BIA authority on the Yakama Reservation, and the non-tribal agencies the ability to assist Tribal PD in some criminal investigations.

Nuts and Bolts

(Cont.)

- **Law enforcement (LE) response:** In many incidents or emergencies reported to LE agencies, we do not know whether the suspect is an enrolled tribal member. We will only find that out during the course of the investigation. At the point where a non-tribal LE agency (YCSO, Toppenish PD, Wapato PD, Union Gap PD, or WSP) finds out that the suspect is an enrolled tribal member, they will call Tribal PD and turn the investigation over to Tribal PD.
- Conversely, at the point in an incident or investigation where Tribal PD officers discover that they are dealing with both a non-tribal suspect and victim, they will turn the incident over to a non-tribal LE agency.

Nuts and Bolts

(Cont.)

- **Traffic Stops:** As with response to criminal incidents, all police officers on the Yakama Reservation will continue to stop drivers who are violating traffic laws, through driving behavior or equipment issues. If a non-tribal police officer finds the driver is an enrolled tribal member, he/she will either clear the stop or contact Tribal PD for enforcement action.
- Conversely, if a Tribal police officer finds the driver is not an enrolled tribal member, he/she will either clear the stop, issue a civil infraction, or contact a non-tribal LE agency for enforcement action. This is because Tribal PD already has the authority to issue civil infraction notices to non-tribal members on the Yakama Reservation.

Decision Points – <u>In Order</u>

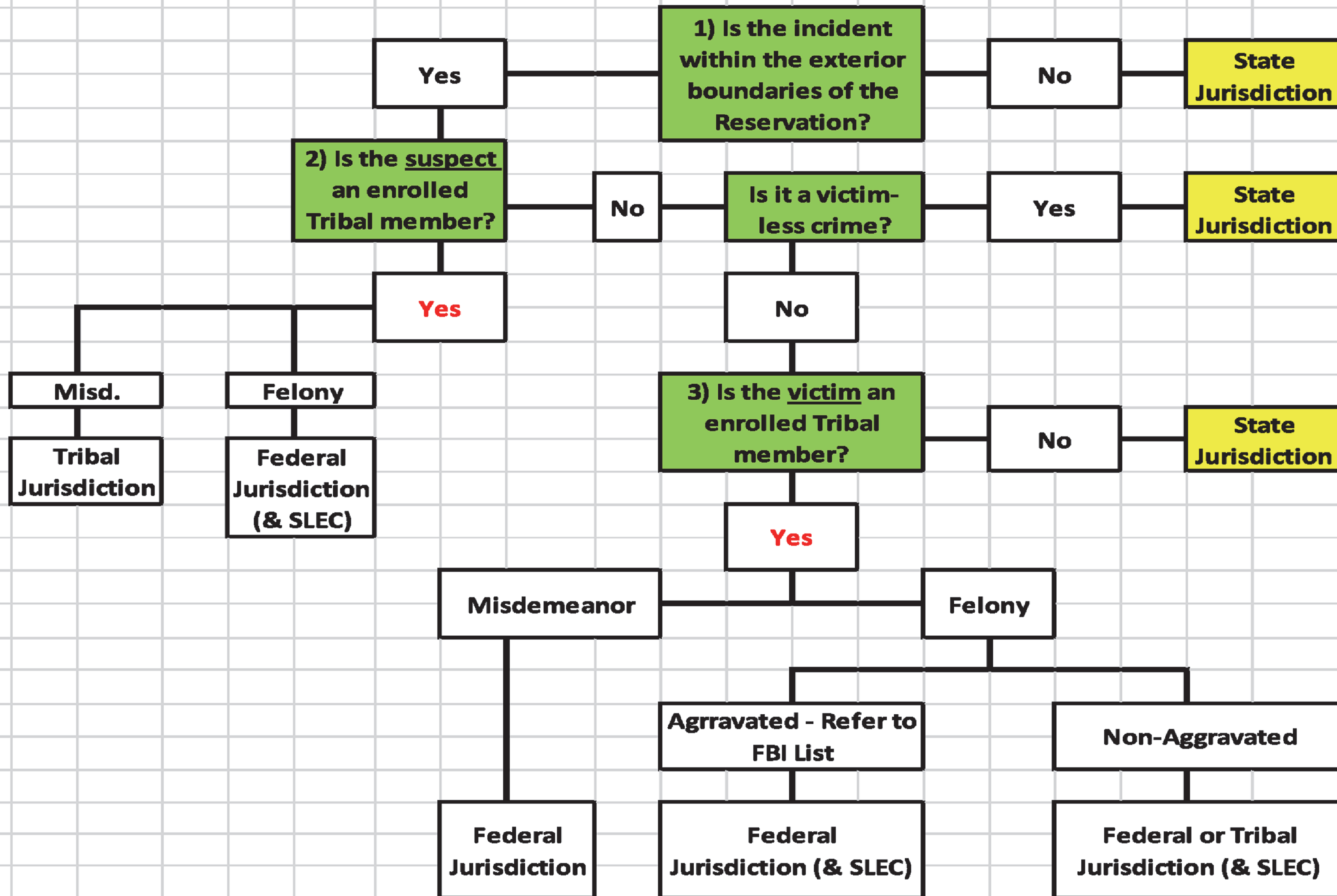
- Decision #1: Is it located on the Yakama Reservation?
    - No = State jurisdiction. Yes = Need further info.
- Decision #2: Is the suspect an enrolled tribal member?
    - Yes = Tribal or US (FBI/US Atty) jurisdiction. No = Need further info.

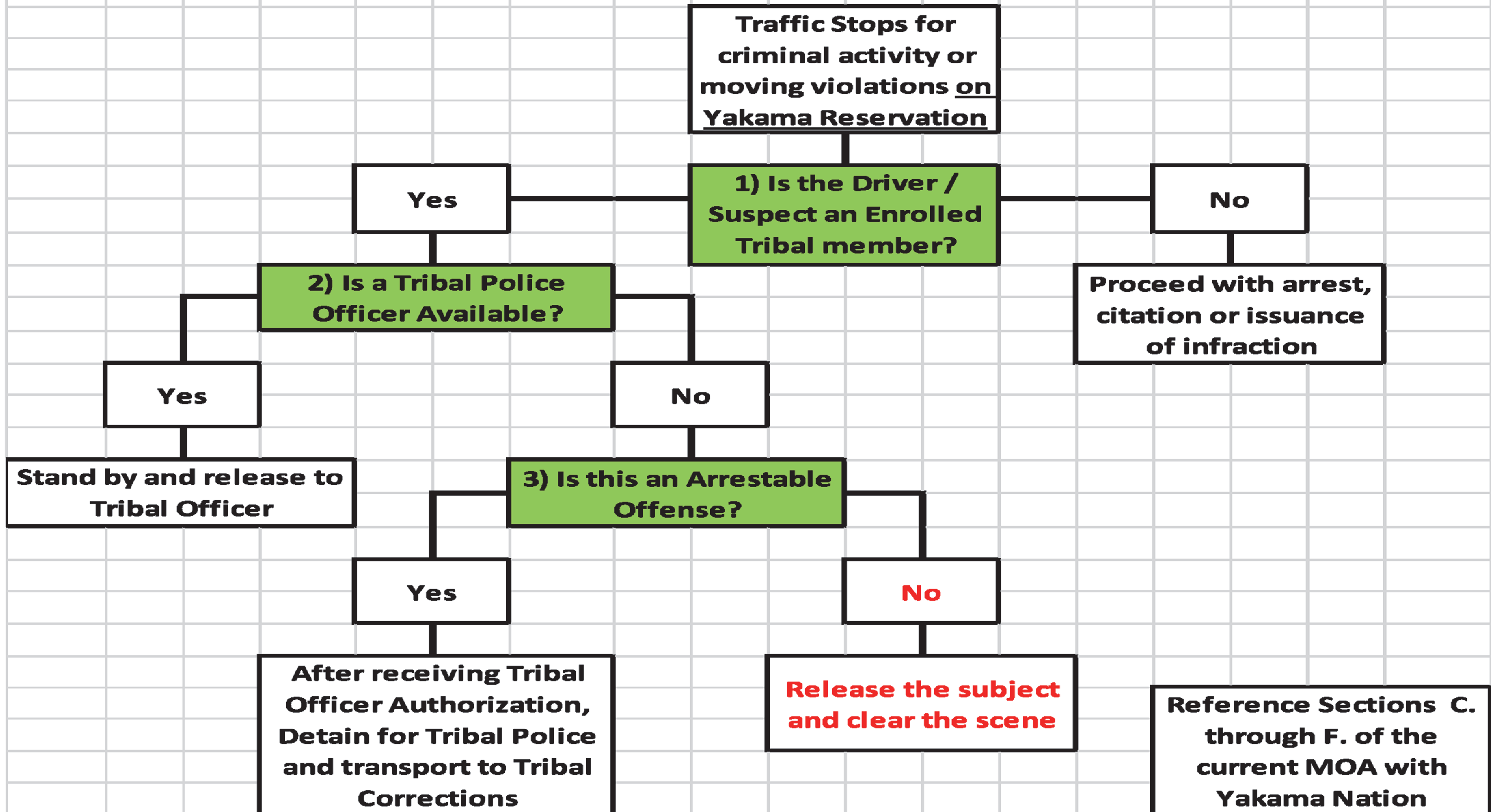
- Decision #3: Is it a "victimless" crime?
  - Yes = State jurisdiction. No = Need further info.
- Decision #4: Is the victim an enrolled tribal member?
  - Yes = Tribal or US (FBI/US Atty) jurisdiction. No = State jurisdiction.
- Decision #5: What is the crime? Is it a misdemeanor or a felony?
  - Misdemeanor = Tribal jurisdiction. Felony = US (FBI/US Atty) jurisdiction.

Retrocession – In Summary

- Retrocession occurred last in 2006 (10 years ago!) in Nebraska.
- Retrocession provides the Yakama Nation with exclusive authority (for certain purposes) over enrolled members of federally recognized Indian tribes on the Yakama Reservation.
- All the LE agencies, both Tribal and non-Tribal, will continue to work together to ensure public safety on the Yakama Reservation. The Yakama Tribal Council has made clear from the start that its #1 priority was public safety. We are all committed to that goal.

- We also have good, open and regular contact and communication with the Yakama Nation Police Department leadership.
- Most people will not notice much of a difference in day-to-day LE operations on the Reservation.


Post-Retrocession Criminal Jurisdiction Flow Chart v2 Effective 4-19-16
1) Is the incident within the exterior boundaries of the Reservation?
Yes
No
State Jurisdiction
2) Is the suspect an enrolled Tribal member?
No
Is it a victim-less crime?
Yes
State Jurisdiction
Yes
No
Misd.
Felony
Tribal Jurisdiction
Federal Jurisdiction (& SLEC)
3) Is the victim an enrolled Tribal member?
No
State Jurisdiction
Yes
Misdemeanor
Felony
Agrravated - Refer to FBI List
Non-Aggravated
Federal Jurisdiction
Federal Jurisdiction (& SLEC)
Federal or Tribal Jurisdiction (& SLEC)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2) Is a Tribal Police Officer Available?
Yes
No
Stand by and release to Tribal Officer
3) Is this an Arrestable Offense?
Yes
No
After receiving Tribal Officer Authorization, Detain for Tribal Police and transport to Tribal Corrections
Release the subject and clear the scene
Reference Sections C. through F. of the current MOA with Yakama Nation

Jeff Chumley

From:	Ormsby, Michael C. (USAWAE) <Michael.C.Ormsby@usdoj.gov>
Sent:	Monday, April 18, 2016 4:54 PM
To:	'brian.winter@co.yakima.wa.us'; 'joseph.brusic@co.yakima.wa.us'; James Shike; adiaz@cityoftop-penish.us'; Richard Needham; Terry Liebrecht; Cobb, Gregory (Greg-ory.Cobb@uniongapwa.gov); David Quesnel (davidq@klickitatcounty.org); 'bobs@klickitatcounty.org'
Cc:	Thayer, Craig (USMS); Kilgore, Kevin (USMS); Hanlon, Thomas J. (USAWAE); Tomson, Steven (USAWAE); Harrington, Joseph H. (USAWAE); Leahy, William J. (SE) (FBI); 'mbarker@waspc.org'; Melville, Richard (richard.melville@bia.gov)
Subject:	Post Retrocession Jurisdiction
Attachments:	Post-Retrocession Jurisdictional Flow Charts 4-19-16.xlsx

Please excuse the e-mail instead of a call or broader discussion, but given that Retrocession takes effect at midnight, I wanted to share this information as quickly as possible with you.

I am attaching the copy of a Jurisdictional Flow Chart that you may be referring to that is problematic in a couple of areas. I wanted to share with you my comments in those areas so that you are aware of them as we move into this new era.

Assuming that the crimes discussed are occurring within the external boundaries of the Yakama Nation Reservation, which is now defined in its entirety as "Indian Country" for the purpose of federal jurisdiction, the chart should be modified to reflect the following:

1) If the suspect is non-Indian and the victim is Indian, misdemeanor jurisdiction lies with the federal government (not the state or the Nation). If the crime is a victimless crime, then jurisdiction would be with the state.

2) This approach would also apply (the federal government has jurisdiction), if the suspect is non-Indian and the victim is Indian and it is a non-aggravated felony.

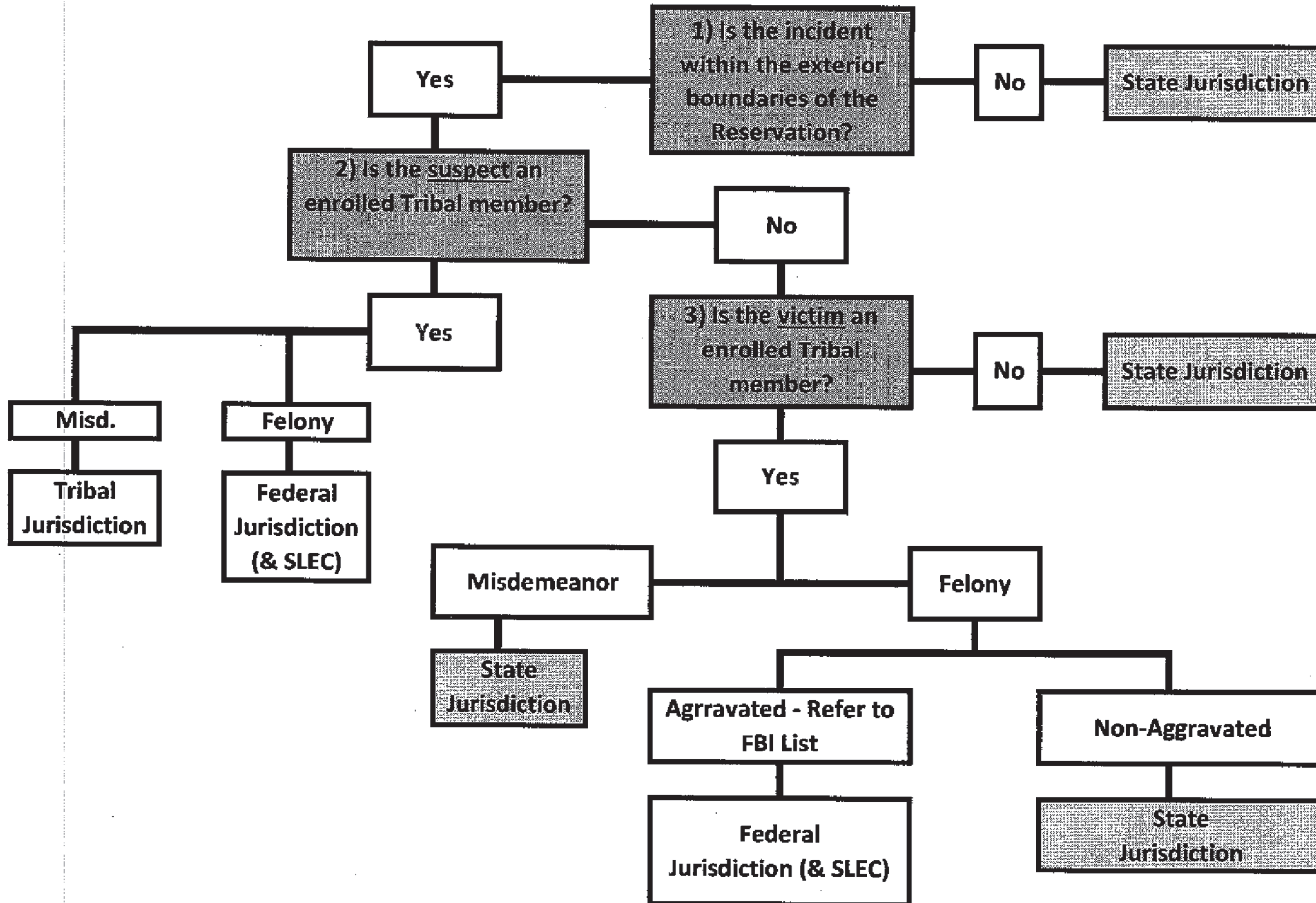
3) To make matters a little more complicated or confusing, and this is really a more technical comment, the chart also provides that if a suspect is Indian and the victim is Indian and it is a felony matter, that the case would be federal. That is correct, but it is also important to remember that the Nation may have a similar or companion charge that they can pursue in Tribal Court. There are some charges (like eluding, which is also a state felony) that would be handled in Tribal Court. So not every felony has to come to the USAO and there are some cases that could be felonies, but if they involve Indian suspects and Indian victims they might be charged in Tribal Court.

This is not an easy area and as we transition into beginning later tonight, there will be stops and starts for all of us. We need to stay in touch with and talk to each

other. I will be in Toppenish on Friday and can arrange to meet with/talk to you if you think that there is any area where I can be helpful. As the week develops, we should feel free to share with each other our experiences and issues that we think need to be addressed.

Thank you all for your positive approach and attitude.

Mike Ormsby
Direct line (509)835-6340
Cell Phone (509)999-6919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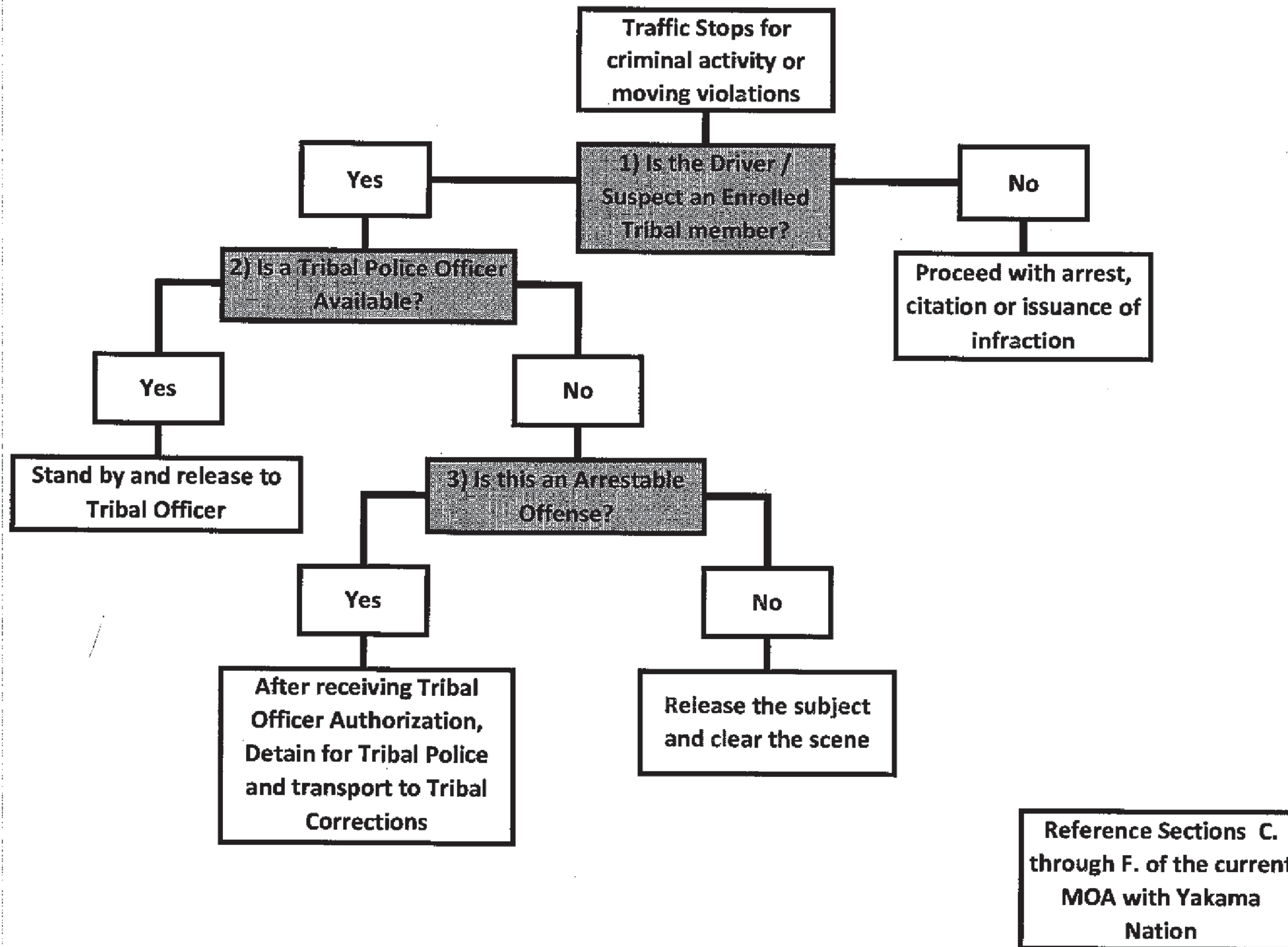
Misd.
Felony
Tribal Jurisdiction
Federal Jurisdiction (& SLEC)
3) Is the victim an enrolled Tribal member?
No
State Jurisdiction
Yes
Misdemeanor
Felony
State Jurisdiction
Agrravated - Refer to FBI List
Non-Aggravated
Federal Jurisdiction (& SLEC)
State Jurisdiction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Yes
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No
Release the subject and clear the scene
Reference Sections C. through F. of the current MOA with Yakama Nation

JAY INSLEE
Governor

STATE OF WASHINGTON
Office of the Governor

April 19, 2016

The Honorable Sally Jewell, Secretary
US Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Secretary Jewell:

Thank you for taking the time to speak with me recently about an important issue of tribal sovereignty, As we discussed, on January 27, 2014, I was pleased to write to the then Assistant Secretary of Indian Affairs Kevin Washburn, informing him that the state of Washington had approved, in part retrocession petition submitted by the Confederated Tribes and Bands of the Yakama Nation, I also included, with my letter, the official Proclamation by which the State conferred jurisdiction back to the Tribe. This was an historic first step by our state to restore some areas of exclusive jurisdiction to the Yakama Nation that had been previously held by the State. We look forward to its successful implementation this week.

Importantly, the Proclamation also denied key portions of the Yakama Nation's petition, and retained the State's authority in many areas. The letter I wrote to Assistant Secretary Washburn and the Proclamation that accompanied it both clearly expressed the State's intent in this regard, and was the full understanding

of the Yakama Nation and impacted local jurisdictions as well,

It was recently brought to my attention, however, that the Department of the Interior may be ignoring the State's intent and the agreement reached by the parties, and that some of the state jurisdiction that it is purporting to eliminate is not the jurisdiction to which the State had agreed, This is deeply troubling. First and foremost, pursuant to Public Law 83-280 and 25 U.S.C. §1323, the federal government cannot legally accept a retrocession of more jurisdiction than the State has authorized and approved, and in this case the State explicitly retained important areas of jurisdiction. Specifically, within the exterior boundaries of the Yakama Reservation, in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases pursuant to RCW 37.12.010(8), the State retained civil and criminal jurisdiction where any party – plaintiff, defendant, or victim – 4s a non-Indian. The State also retained jurisdiction over all criminal offenses involving non-Indian defendants or non-Indian victims in all cases that were not addressed in Paragraphs I and 2 of the Proclamation,

The State's intent was previously expressed in our official communications with the Yakama Nation when the petition was formally approved. On January 21, 2014, when I transmitted our approval to the Tribe, I wrote, in part:

> The Proclamation also grants to the Yakama Nation civil and criminal jurisdiction within

> the exterior boundaries of the reservation in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highway cases which do not involve **non-Indian plaintiffs**, **non-Indian defendants**, or **non-Indian victims**. Finally, also within the exterior boundaries of the reservation, the state is retroceding criminal jurisdiction over all offense which do not involve **non-Indian defendants** or **non-Indian victims**.

An additional step in our retrocession approval process was conferring with the local governments directly impacted by this endeavor. They were all supportive of the tribe's request, but cautious about how quickly and expansively this retrocession would proceed. I know that they greatly appreciated that the State was retaining jurisdiction in those cases that involved any non-Indian parties. They were as surprised as I was to learn that the clearly expressed intent of the State was knowingly disregarded.

Honoring the State's intent will benefit public safety for all people who live or travel within the Yakama Reservation by preserving concurrent jurisdiction where non-Indian citizens are involved. As intended by the State and understood by the Yakama Nation, the State and the Yakama Nation will continue, to have concurrent jurisdiction over crimes involving Indian defendants and non-Indian victims, As intended by the State and confirmed by U.S. Department of Justice regulation in 28 C.F.R. 50.25(a)(2), the State and the United States will continue to have concurrent jurisdiction over crimes involving Indian defendants and

non-Indian victims, and over crimes involving non-Indian defendants and Indian victims.

I hope that your office will follow the State's request in this matter and work to ensure that the original agree exit is followed. I understand that our respective staffs have had numerous discussions about these issues and we look forward to continuing our work together.

Sincerely

/s/ Jay Inslee
Jay Inslee
Governor

[SEAL]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JUN 20 2016

The Honorable Jay Inslee
Governor of Washington
Olympia, Washington 98304

Dear Governor Inslee:

Thank you for your letter of April 19, 2016, addressed to Secretary Jewell regarding the retrocession of jurisdiction at the Yakama Nation (Nation). Secretary Jewell has asked me to respond on her behalf.

Retrocession was accepted by the United States on October 19, 2015, and became effective April 15, 2016, 1 would like to commend the State of Washington (State) and the Nation for working together towards this accomplishment, Retrocession is intended to improve public safety on the Yakama Reservation and advance tribal self-governance and tribal sovereignty for the Nation. The Nation has worked with local governments to address law enforcement concerns, and there is a willingness to cooperate among all law enforcement entities.

In accepting retrocession, the Department of the Interior (Department) appreciates the opportunity to improve public safety for the Nation by restoring Federal criminal jurisdiction, Regarding the concern raised in your letter, retrocession was accepted according to the

terms of the Proclamation of the Governor 14-01, signed on January 17, 2014. It is our view that the Proclamation is the final product resulting from formal government-to-government meetings. The Nation has indicated that it views the scope of retrocession as be guided by the terms of the Proclamation.

I note that the Department of Justice regulation your letter cites applies to the assumption of concurrent Federal criminal jurisdiction A request for concurrent Federal jurisdiction differs from a request for retrocession in both form and effect. The. Proclamation received by' the Department indicated that it was a request for retrocession and was treated as such. However, the subsequent description of the State's intended jurisdictional scheme on the Yakama Reservation is one of concurrent Federal, jurisdiction, which conflicts with the legal effects of retrocession.

Considering these differences, I encourage the State and Yakama Nation to work together to find common ground and resolve any concerns regarding jurisdiction, Improving public safety in Indian Country remains a: priority for the Department, and I look forward to working together to accomplish this important goal.

Sincerely,

/s/ Lawrence Roberts
Lawrence S. Roberts
Acting Assistant Secretary-
Indian Affairs

[SEAL]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

FEB 12 2016

The Honorable Jay Inslee
Governor of Washington
Olympia, Washington 98304

Dear Governor Inslee:

On June 20, 2016, then Acting Assisting Secretary – Indian Affairs, Lawrence Roberts provided your office guidance on the Department of the Interior's views regarding the scope and effect of the retrocession of jurisdiction on the Yakama Indian Reservation. The Department of the Interior is hereby withdrawing that guidance and interpretation.

On July 27, 2018, the U.S. Department of Justice Office of Legal Counsel published the enclosed opinion regarding the Scope of State Criminal Jurisdiction over Offenses Occurring on the Yakama Indian Reservation. This document represents the legal position of the United States in this matter and replaces all prior guidance or interpretations.

Sincerely,

/s/ Tara Sweeney
Tara Sweeney
Assistant Secretary –
Indian Affairs

Enclosure
cc: Chairman, Yakama Nation