

No. 21-906

In the Supreme Court of the United States

KLICKITAT COUNTY, A POLITICAL SUBDIVISION
OF THE STATE OF WASHINGTON; KLICKITAT
COUNTY SHERIFFS OFFICE, AN AGENCY OF
KLICKITAT COUNTY; BOB SONGER, IN HIS OFFI-
CIAL CAPACITY; KLICKITAT COUNTY DEPART-
MENT OF THE PROSECUTING ATTORNEY, AN
AGENCY OF KLICKITAT COUNTY; DAVID QUES-
NEL, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKAMA NATION, A SOVEREIGN FEDERALLY REC-
OGNIZED NATIVE NATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

**BRIEF OF WASHINGTON FARM BUREAU AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

Maureen L. Mitchell
FOX ROTHSCHILD LLP
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154
(206) 624-3600
mmitchell@foxrothschild.com

TABLE OF CONTENTS

STATEMENT OF INTEREST.....1

INTRODUCTION AND SUMMARY OF
ARGUMENT1

ARGUMENT3

 I. The Question Presented Is of Great
 National Importance..... 3

 II. The Ninth Circuit Incorrectly Rejected
 Congress’s 1904 Act Establishing the
 Southwestern Boundary of the Yakama
 Reservation. 4

 III. The Ninth Circuit Erred by Failing to
 Acknowledge the Precedent of this
 Court..... 6

 IV. The Court Should Consider the
 Practical Consequences of the Ninth
 Circuit’s Revision of Reservation
 Boundaries. 7

CONCLUSION.....11

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Brown v. Huger</i> , 62 U.S. (21 How.) 305 (1858).....	7
<i>Indian Country, U.S.A., Inc. v. State of Okl.</i> <i>Ex rel. Oklahoma Tax Com'n</i> , 829 F.2d 967 (10th Cir. 1987)	3
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	8
<i>Newsom v. Pryor's Lessee</i> , 20 U.S. (7 Wheat.) 7 (1822)	7
<i>Northern Pac. Ry. Co. v. United States</i> , 227 U.S. 355 (1913)	3, 6, 7
<i>United States v. Lara</i> , 541 U.S. 193 (2004)	5
<i>Wash. State Dep't of Licensing v. Cougar</i> <i>Den, Inc.</i> , — U.S. —, 139 S. Ct. 1000, 203 L.Ed.2d 301 (2019)	7
Statutes	
12 Stat. 951	3

STATEMENT OF INTEREST

Amicus curiae is the Washington Farm Bureau.¹ Washington Farm Bureau is a non-profit corporation and voluntary grassroots advocacy organization representing the social and economic interests of farm and ranch families in Washington State. The Washington Farm Bureau maintains an office in Lacey, Washington. Washington Farm Bureau has over 46,000 members who farm and ranch in every county of Washington State, including Klickitat County and in Tract D, the 190 square mile area of land at issue in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The questions presented by the petition before the Court are:

1. Whether, or in what circumstances, a court may override an Act of Congress adopting a boundary for an Indian reservation, and set its own boundary.

2. Whether the Ninth Circuit erred by holding in conflict with the decisions of this Court, including a decision involving the very boundary at issue, that the Reservation encompasses the area at issue.

¹ No counsel for any party authored this brief in whole or in part and no person other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties received notice and have provided consent to this filing.

The Ninth Circuit's decision presents a major disruption to the status of fee land owners and other stakeholders that now find themselves within the boundaries of an Indian reservation and may be subjected to a new and confusing jurisdictional landscape. The Washington Farm Bureau files this amicus brief in support of Petitioners to highlight the practical implications of the Ninth Circuit's decision to its members in Klickitat County. The Washington Farm Bureau is concerned not only with the immediate impacts on the ranchers and farmers now located within the expanded territory of the Yakama Nation, but also with the potential for future shifts in reservation boundaries based upon the Ninth Circuit's misapplication of the Indian canons and its mis-interpretations of Congressional intent.

First, the Ninth Circuit improperly disregarded an act of Congress specifically intended to resolve uncertainty regarding the southwestern boundary of the Yakama Indian Reservation in Washington. *See* Act of Dec. 21, 1904, ch. 22, 33 Stat. 595 ("1904 Act"). In setting a new Reservation boundary between the White Salmon River and Klickitat River, the Ninth Circuit effectively nullified the 1904 Act.

Second, in significantly expanding the Yakama reservation boundaries to a point well beyond the area previously recognized as the treaty-defined boundaries, the Ninth Circuit has incorrectly applied this Court's and its own precedents regarding treaty interpretation. Specifically, this Court recognized that the

boundary of the Yakama Reservation excludes Glenwood Valley in *Northern Pac. Ry. Co. v. United States*, 227 U.S. 355, 365-66 (1913).

While the precise terms and language of the Treaty with the Yakamas, U.S.-Yakama Nation, June 9, 1855, *ratified* Mar. 8, 1859, 12 Stat. 951, and proclaimed by the President April 18, 1859 (“1855 Treaty”), are unique to that document, the principles in question, i.e. correct interpretation of the treaty, subsequent legislation intended to address ambiguities and errors, and the history of land grants, present issues of national importance. *See generally* Petition for a Writ of Certiorari, *Penobscot Nation v. Frey*, No. 21-838 (December 3, 2021). Washington Farm Bureau writes as amicus to urge this Court to recognize the legal effect of the 1904 Act and its precedent in *Northern Pac. Ry. Co.*, *supra*.

ARGUMENT

I. The Question Presented Is of Great National Importance.

Determining what constitutes Indian Country has been described as the “benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands.” *Indian Country, U.S.A., Inc. v. State of Okl. Ex rel. Oklahoma Tax Com’n*, 829 F.2d 967 (10th Cir. 1987), citing Handbook of Federal Indian Law 27-46 (R.Strickland ed. 1982). For this reason, a court of appeals decision that erro-

neously unsettles a long-established Indian reservation boundary represents a case of great national importance.

Disputes between the Yakama Nation and the United States emerged in the late 1800's. Pet. App. at 8. In response, the United States commissioned two federal surveys. *Id.* The first occurred in 1890. The Schwartz survey omitted much of the western half of the Reservation. *See* Pet. App. at 87a (map). After receiving a petition from the Yakama Nation, the United States sent a second surveyor, E.C. Barnard, to investigate the Yakama's boundary claim in 1898. Pet. App. at 8. Barnard found that the treaty boundary ran out to the Cascades, southward along the mountains' main ridge, swing around the eastern slope of Mount Adams to Goat Butte, and then straight to Grayback. *Id.* Barnard's survey extended further west and south than Schwartz's survey, but Glenwood Valley remained outside Reservation boundaries. *See* Pet. App. 87a (map).

Facts regarding the area in question – Glenwood Valley (also known as Tract D) – and the non-Native American population are stated in the Petitioner's Opening Brief and will not be repeated here.

II. The Ninth Circuit Incorrectly Rejected Congress's 1904 Act Establishing the Southwestern Boundary of the Yakama Reservation.

The Washington Farm Bureau urges this Court to give effect to the act of Congress dated December 21, 1904. Pet. App. 67a. It is well-established that Con-

gress is authorized to exercise plenary power over Indian tribes, including with respect to the establishment of reservation boundaries. *United States v. Lara*, 541 U.S. 193, 200 (2004). In the 1904 Act, Congress expressly recognized the Reservation boundaries to include certain lands, including approximately 293,837 acres of land that were erroneously excluded from the prior Schwartz survey, and adopted and recognized the Barnard survey, approved by the Secretary of the Interior on April 7, 1900, as the correct Reservation survey. Barnard found that the treaty boundary ran out to the Cascades, southward along the mountains' main ridge, swing around the eastern slope of Mount Adams to Goat Butte, and then strait to Grayback. Pet. at 8.

The Ninth Circuit recognized that the Barnard survey did not include Tract D. Pet. App. 20a. But the Ninth Circuit proceeded to limit the 1904 Act's legal effect by referencing language that the Barnard report was recognized "for the purposes of this act" and that the Act was for the purpose of having the United States act as "trustee" for the Yakama Indians in the disposition of surplus lands within the Reservation. *Id.* Contrary to the Ninth Circuit's conclusions, the 1904 Act was not so limited.

The legal effect of the 1904 Act establishing reservation boundaries for the Yakama Nation is no different than the effect of the Maine Implementing Act ("MIA") and the Maine Indian Claims Settlement Act ("MICSA"), known collectively as the Settlement Acts, involving the claims of the Penobscot Nation. The local government and the State have continuously

treated Tract D as lying outside the Yakama Reservation boundary. Pet. at 12-13. And the Yakama tribal council expressed “thanks and appreciation of the Act” that recognized the Yakamas’ right and title to the disputed tracts on the western border of the Reservation. Pet. at 10.

III. The Ninth Circuit Erred by Failing to Acknowledge the Precedent of this Court.

For decades, state and local governments have relied upon well-established precedent, i.e. this Court’s decision in *Northern Pacific Railway Co. v. United States*, 227 U.S. 355 (1913), which indisputably settled the western boundary of the Yakama Reservation. The Ninth Circuit’s opinion incorrectly concluded that this Court “did not hold that the Act conclusively settled the Reservation’s boundary.” The Washington Farm Bureau is gravely concerned about the jurisdictional disarray that will result from the Ninth Circuit’s decision.

Adjudication of the location of the Yakama Reservation boundaries occurred in the *Northern Pacific Railway* decision, and was the direct result of Congress resolving the disputed Reservation boundaries in the 1904 Act. *Northern Pac. Ry. Co.*, 227 U.S. at 358. After thoroughly analyzing the textual language of the 1855 Treaty, the calls cited therein, and contemporaneous evidence of the understanding of the Reservation boundaries held by the surveyors, government officials, and Tribal leaders, this Court was convinced of the “correctness of the Barnard survey.” *Id.* at 366.

No reading of the 1855 Treaty supports the inclusion of the Glenwood Valley, which places the Reservation boundary between the White Salmon and Klickitat Rivers. Pet. at 5. In so reading the 1855 Treaty, the Ninth Circuit’s decision has adopted an interpretation of the 1855 Treaty that cannot be reconciled with the plain and unambiguous text referencing the divide between the Klickitat and Pisco Rivers. Rather than adhere to the canon that natural objects in land grants have “absolute control,” the Ninth Circuit has re-written the Reservation boundaries by judicial fiat. *Brown v. Huger*, 62 U.S. (21 How.) 305, 318 (1858); see *Newsom v. Pryor’s Lessee*, 20 U.S. (7 Wheat.) 7, 10 (1822) (Marshall, C.J.). It is true that canons of construction require courts to construe ambiguities according to the tribe’s understanding at the time the treaty was signed. *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, — U.S. —, 139 S. Ct. 1000, 1011, 203 L.Ed.2d 301 (2019). However, there is no ambiguity in the 1855 Treaty that would support wholesale relocation of the Reservation boundary to a place adjacent to the White Salmon River, which was never mentioned in the calls setting Reservation boundaries.

IV. The Court Should Consider the Practical Consequences of the Ninth Circuit’s Revision of Reservation Boundaries.

There are very real, practical consequences to the Ninth Circuit’s misreading of the 1855 Treaty. If the re-location of boundaries that have been recognized and relied upon for over a century is allowed to stand, property owners, businesses, farmers, and ranchers

will be forced to navigate the complex jurisdictional puzzle that applies to lands located within Indian Country. Although the 190 square mile area that includes Glenwood Valley is mostly rural and located close to the Yakama Reservation, it has never been considered within the scope of tribal jurisdiction. Washington Farm Bureau members include ranchers who run cattle in Glenwood Valley. There will inevitably be a deluge of questions of state and local regulatory authority, including application of tax codes, zoning and land use regulations, filing and perfection of legal instruments pertaining to real and personal property, applicability of tribal ordinances and regulations, the scope of tribal jurisdiction over non-member property owners and businesses in the affected territory, and countless other legal questions encountered on a daily basis in Indian Country. *See generally Montana v. United States*, 450 U.S. 544 (1981) (establishing rule that Indian tribes retain inherent authority to exercise civil jurisdiction over non-Indians within reservation boundaries based upon (1) a consensual relationship or (2) when the conduct at issue threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe).

Virtually overnight the state's role in environmental regulation has been dismissed entirely. Farmers and ranchers in Glenwood Valley now face the prospect of a combination of U.S. Environmental Protection Agency and tribal regulations over environmental matters and those regulatory agencies may have a drastically different approach, necessitating a new

slate of environmental measures to implement new regulatory requirements. For example, state law currently makes stream buffers and other setbacks voluntary. There is a very real risk that tribal or federal regulators could impose more restrictive rules regarding the types of activity that can take place in the setback and buffer areas. The U.S. Environmental Protection Agency's authority could potentially be augmented by the Yakama Nation itself, if it applies for "Treatment as a State" status for purposes of implementing certain provisions of the Clean Water Act, Clean Air Act, and other environmental statutes.

Ranchers and farmers in Tract D could also face loss of federal funding for environmental programs. The U.S. Department of Agriculture runs a Natural Resources Conservation Service program that provides financial and technical assistance to help manage natural resources in a sustainable manner. Such federal funding is not available for environmental projects that are required by law or rule. Hence, farmers could be subject to expensive environmental projects as a result of new requirements and their costs would be directly imposed on the agricultural producers, where grants and program support were previously available.

In the area of criminal jurisdiction, local law enforcement will need to completely overhaul its approach to investigating and prosecuting crimes in Glenwood Valley. While state, local and tribal law enforcement agencies are not strangers to the concept of overlapping jurisdiction, the occupants of Glenwood

Valley will now need to navigate the complex jurisdictional quagmire that plagues and often frustrates criminal justice in Indian Country. The Yakama Reservation has seen a spike in violent crime since Governor Inslee approved partial retrocession of PL 280 in 2016.² Local and state jurisdiction over such crimes will be transferred to federal authorities. Spreading scarce federal law enforcement resources even thinner with expansion of Reservation boundaries causes grave concern to the Washington Farm Bureau and its members.

Amicus curiae Washington Farm Bureau urges this Court to grant Petitioner's writ to correct the Ninth Circuit's re-writing of the Reservation boundary. In addition to creating the immediate impacts to Glenwood Valley, the Ninth Circuit's approach to addressing reservation boundary disputes poses a very real risk of upending territorial expectations at countless other reservations throughout the western United States. The Ninth Circuit spans a vast geographic area with more federally-recognized tribes than any other circuit. Where important questions of geographic scope of reservations have arisen and been settled through Congressional action, those legislative acts need to be respected. The Ninth Circuit's decision sets a problematic precedent that warrants review by this Court.

² [Deadly ground: Yakama Reservation shaken by disturbing homicide rate | Local | yakimaherald.com](#) (published 12/19/2021) (last visited 2/7/2022).

CONCLUSION

This Court should grant certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,



Maureen L. Mitchell
FOX ROTHSCHILD LLP
1001 Fourth Avenue
Suite 4500
Seattle, WA 98154
(206) 624-3600
mmitchell@foxrothschild.com

*Counsel for Amicus Curiae
Washington Farm Bureau*

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