No. 19-35807(L), 19-35821

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES AND BANDS OF TH
E YAKAMA NATION,

Appellee,

v.

KLICKITAT COUNTY, et al.,

Appellant.

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

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS FUND AS *AMICUS CURIAE* IN SUPPORT OF CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT

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Date: July 3, 2020

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae National Congress of American Indians (NCAI) Fund is the non-profit public-education arm of NCAI, the oldest and largest organization addressing American Indian interests. The NCAI Fund's mission is to educate the general public and government officials about tribal self-governance, treaty rights, and legal and policy issues affecting Indian tribes.

ARGUMENT

I. THIS COURT MUST FOLLOW LONG STANDING CANONS OF TREATY CONSTRUCTION WHEN DETERMINING WHETHER TRACT D WAS LOCATED WITHIN THE BOUNDARIES OF THE YAKAMA RESERVATION.

Federal Indian law began with the formation of treaties. *Cohen's Handbook of Federal Indian Law* § 1.03[1] at 23 (2012 ed.). Treaty-making between the United States and Indian tribes served two primary goals. The United States sought to acquire Indian lands, paving the way for expansion of non-Indian settlements. Indian tribes wanted to preserve their way of life. The end result was a bargained-for exchange between sovereigns.

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[1] No counsel for either party authored this brief in whole or in part, and no person other the amicus curiae or their counsel made a monetary contribution intended to fund the preparation of submission of this brief. A motion for leave to file an amicus brief is being simultaneously filed with this brief.

Treaties are the "supreme law of the land," U.S. Const. art. VI, § 1, cl. 2, and the rights memorialized in them are recognized property interests protected by the Fifth Amendment. *United States v. Sioux Nation*, 448 U.S. 371 (1980). As a result, Indian treaties retain a significant "moral and legal force that . . . [is] not easily ignored." *Cohen's* at 23-24. Yet even though treaties between the United States and Indian tribes were agreements between sovereigns, the negotiations that gave rise to these contracts were not equal. *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974) ("*Washington I*"). Accordingly, for almost two hundred years, the Supreme Court has applied special canons of construction when interpreting these documents. *Worcester v. Georgia*, 31 U.S. 515, 582 (1832) (McLean, J., concurring); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019).

The District Court correctly applied these canons and concluded Tract D was within the Yakama Reservation as created by the 1855 Treaty. Its decision should be affirmed.

A. Treaties with Indian tribes must be interpreted in accord with the original Indian understanding, and any ambiguities must be resolved in their favor.

Indian treaties are not to be construed only by reading their text; they must be interpreted as the Indian negotiators would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Worcester*, 31 U.S. at 528 (McLean, J., concurring). Additionally, any ambiguities should be "resolved from

the standpoint of the Indians."[2] *Winters v. United States*, 207 U.S. 564, 576-77 (1908). These canons of construction were developed because the United States drafted Indian treaties, those treaties were drafted in English, and tribal negotiators could not read or write in that language. The federal government provided official interpreters during treaty negotiations, and thus, any differences between the text of a treaty and the tribal negotiator's understanding of its terms were likely the result of errors in drafting, interpreting, or explaining the provisions, all of which were the responsibility of the United States. *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899). Many difficulties arose as a result of this language barrier.

Translation of treaty concepts would be hard for trained translators, even today. Native languages are complex, and they are constructed very differently than English. The Ojibwe language, for example, has thousands of verb forms, and English words and concepts are not easily translated into Ojibwe words with identical meaning. Theresa M. Schenck, ed., *The Ojibwe Journals of Edmund F. Ely*,

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[2] This comports with the common law principle that ambiguities in a contract should be construed against the drafter. *Mastrobuono v. Hutton*, 514 U.S. 52, 62 (1995); *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 407 (9th Cir. 1992); Restatement (Second) of Contracts § 206. The Supreme Court has applied this rule of construction to contracts drafted by the United States, *United States v. Seckinger*, 397 U.S. 203, 210 (1970), and it therefore makes sense that the Court would have also applied this rule to Indian treaties drafted by the United States, since treaties are, in essence contracts between sovereigns. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

1833-1849, xxiii (2012); *see also* John D. Nichols, "The Translation of Key Phrases in Treaties of 1837 and 1855," at 514-15 *in* James M. McClurken, ed., *Fish in the Lakes, Wild Rice, and Game in Abundance: Testimony on Behalf of Mille Lacs Ojibwe Hunting and Fishing Rights* (2009) (noting that "English and Ojibwe are about as different as any two languages can be in the way that words and sentences are constructed," and "[a]ccurate translation between languages with such radically different grammars can be extremely difficult").

Translation was also difficult because Native cultures were so different than European cultures during treaty times. "As linguistic anthropology has revealed, people who speak different languages may see the world differently" and "concepts may not translate perfectly between cultural groups." Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 Am. Indian L. Rev. 111, 115-16 (2008-09) (citing Harriet Joseph Ottenheimer, *The Anthropology of Language: An Introduction to Linguistic Anthropology* 29 (2008)). This was especially true for the technical legal language and concepts found in treaties with Indian tribes, particularly surrounding land ownership. *Id.* at 115 n.24.

Despite these complexities, the United States often employed interpreters who lacked the most basic language skills, sometimes in both languages. Alfred Brunson, *A Western Pioneer or Incidents of the Life and Times of Alfred Brunson* 83 (1879) (noting Patrick Quinn, one of the government interpreters for the 1837 Treaty of St.

Peters, was "a thick-mouthed, stammering Irishman not being able to speak intelligibly in either language[: English or Ojibwe]"); *United States v. Bouchard*, 464 F. Supp. 1316, 1323 (W.D. Wis. 1978), *rev'd on other grounds*, 700 F.2d 341 (7th Cir. 1983) (noting federal commissioner admitted one of the translations was "of course . . nonsense but [the translation] is given literally as rendered by the Interpreters [sic] who are unfit to act in that capacity"). Some individuals may have been appointed to interpret as political patronage, despite lack of any knowledge of the language. *See* Martin Case, *The Relentless Business of Indian Treaties* 108 (Kindle ed. 2018) (stating Gabriel and Rene Paul and their sons signed 25 treaties as interpreters, and noting "it is unclear how, from St. Domingo," they had learned the languages of 12 different tribes). Other interpreters were sufficiently familiar with both English and the Native language they were translating into, but they did not faithfully interpret the treaty negotiations because they were acting in their own self-interest, because they were illiterate, or because they did not want to offend the federal negotiators. *E.g.*, Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* 214 (1994) (noting "a considerable number [of interpreters] who witnessed treaties were illiterate and signed their names on the treaty documents with a mark").

Not infrequently, the federal government negotiated with several tribes at once, and it did not have an interpreter that could translate from English into the

language of each tribe. In those cases, negotiations were translated from English into another language or jargon before being translated into the tribe's language. For example, during negotiations for the Treaty of Medicine Lodge, seven different languages were spoken by the treaty signatories. Since not all of the interpreters could speak English, most of the statements were translated from English into Comanche, and then from Comanche into Kiowa, Cheyenne, Arapaho, Plains Apache, and a rough sign language for those that spoke a different language. Douglas C. Jones, *The Treaty of Medicine Lodge: The Story of the Great Treaty Council as Told by Eyewitnesses* 101-02, 104, 108 (1966). In the Pacific Northwest, throughout negotiations that culminated in a dozen treaties between 1854 and 1855, government interpreters translated the statements of federal negotiators from English into the Chinook jargon, and then into the specific Native languages of Indian tribes that were present. *Washington I*, 384 F. Supp. at 355-56. The Chinook jargon was a trade language with a very limited vocabulary (around 300 words) and simple grammar. *Id.* at 356. This was "hardly an effective tool for sensitive negotiations," as "a single word might be used to translate a number of different English words." Prucha at 214-15; *see also United States v. Washington,* 520 F.2d 676, 683 (9th Cir. 1975) (concluding that "the jargon was inadequate to express more than the general nature of the treaty provisions"). Given all of the above, it should not be surprising one of the leading historians of Native American

history concluded that "[p]roblems of accurate translation occurred at nearly all the treaty councils." Prucha at 214.

The Supreme Court has long recognized how the differences in language and culture between Indian tribes and federal negotiators impacted treaty negotiations. In an 1899 opinion, the Court stated:

> In construing any treaty between the United States and an Indian tribe, it must always be borne in mind that the negotiations for the treaty are conducted, on the part of the United States . . . by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves . . that the Indians, on the other hand . . . have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States . . .

Jones, 175 U.S. at 10-11. It is for these reasons Indian treaties "must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Id.* at 11; *see also Washington State Dep't of Licensing v. Cougar Den*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring) (noting the court is "charged with adopting the interpretation most consistent with the treaty's original meaning" and it must "give effect to the terms as the Indians themselves would have understood them"). Courts must look "beyond the written words to the larger context that frames the [t]reaty, including the history of the treaty, the negotiations, and the practical

construction adopted by the parties." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

Unlike in ordinary statutory interpretation, there need not be an ambiguity in the treaty language before this canon is employed. Treaty language must always be considered in conjunction with the Indians' understanding and the historic circumstances of the adoption of a treaty. *See, e.g.*, *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) (interpreting agreement "according to its unambiguous language" only where there is no finding that "the two tribes intended to agree on something different from that appearing on the face of [the] agreement"); *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 772 (1985) (noting "[t]he historical record of the lengthy negotiations between the Tribe and the United States provides no reason to reject" the conclusion that the text "fairly describes the entire understanding between the parties").

For example, in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983) (*LCO*), the court interpreted a provision in the 1837 Treaty of St. Peters, which provided off-reservation hunting and fishing rights were "guarantied [sic] to the Indians during the pleasure of the President." Treaty with the Chippewas, art. V, 7 Stat. 536 (July 29, 1837). While the plain language of this clause might be read to "confer unbridled discretion on

the Government to extinguish the usufructuary rights," federal courts rejected this interpretation. *LCO*, 700 F.2d at 356. The Seventh Circuit emphasized that the Ojibwe believed, because of representations made during treaty negotiations, that their usufructuary rights would remain "for an unlimited time unless they misbehaved by harassing white settlers." *Id*. Wisconsin had argued that the federal government intended to reserve complete discretion in the President to terminate the usufructuary rights since the treaty was "made pursuant to the removal policy which contemplated placing the Indians on lands farther west." *Id.* But the Seventh Circuit noted that "[t]he difficulty with the defendants' argument is that it does not really address what the *Indians* believe the treaty to mean," but rather focused on the "motive of the Government in seeking the treaty." *Id.* at 356, 357 (emphasis in original).

B. The Yakamas understood Tract D to be within Yakama Reservation boundaries when they negotiated the 1855 Treaty.

The negotiations that culminated in the 1855 Treaty, were plagued with many of the difficulties described above. First, there were Indians present from many different tribes at the negotiations, including the Walla Walla, Cayuse, Umatilla, Nez Perce, Palouse, and the fourteen tribes and bands later confederated as the Yakama Nation. ER1917. Governor Isaac Stevens of the Washington Territory, and Oregon's Superintendent of Indian Affairs, Joel Palmer, negotiated

three treaties with these tribes in the same council, even though they spoke several different languages. There were six different official interpreters that attempted to translate treaty terms from English into Nez Perce, Cayuse, Sahaptin, and other Native languages. ER655-56, 1917. The interpreters were primarily local non-Indian settlers, and their level of fluency in the Native languages is unknown. ER659. None of the Yakama leaders could speak English, let alone read and write in the language. ER655-56. At the outset, one chief remarked that "they [sic] may be some words hard for them to make us understand." ER1917.

The treaty gathering was large. Some sources indicate that there were 5,000 Indians present. ER660, 1917. Because of the size of the gathering, interpreters relayed their translation to criers, who attempted to shout it loudly to the audience. ER660. It was hard to hear the translations at times, ER2010, not all speeches were translated verbatim, ER1951, and communicating complex topics was obviously difficult given the circumstances. ER1949 ("our languages are different. If you would speak straight then I would think you spoke well").

Since the Yakama could not read the treaty for themselves, their understanding of the Yakama Reservation's boundaries was derived from the negotiations with federal officials that spanned several days. ER657-58. At first, the United States described the location of the Yakama Reservation in only brief and vague terms. ER1962. But later in negotiations, federal officials added more

clarity by referring to a large map (the "Treaty Map") that could communicate the location of the reservation. ER660-62, 2229-30. Pointing to the Treaty Map he drew himself, ER663, Governor Stevens stated:

> Here is the Yakama Reservation, commencing with the mouth of the Attanum river, along the Attanum river to the Cascade mountains, thence down the main chain of the Cascade mountains south of Mount Adams, thence along the Highlands separating the Pisco and the Sattass river from the rivers flowing into the Columbia, thence to the crossing of the Yakama below the main fisheries, then up the main Yakama to the Attanum where we began.

ER1971. Natural features were used to denote reservation boundaries because the tribal negotiators were not familiar with longitude or latitude lines. ER654. On the Treaty Map, the Yakama Reservation is identified by a dotted and dashed line that follows rivers, mountains and other natural features. ER664.

The Treaty Map is the best evidence of Indian understanding. Both the Treaty Map and the verbal description given of the reservation boundaries during negotiations are consistent with one another. ER660. The Yakama Reservation extends west of Mount Adams (which is located entirely within reservation boundaries) and runs south from that point, along the Cascade Mountains, before turning east. ER664-65. The southwestern portion of the Reservation boundary on the Treaty Map is shown between the White Salmon and Klickitat Rivers. This is the location of Tract D, known as Camas Prairie. ER660, 664-65, 2229, 2230. As Dr. Andrew Fisher opined in the proceedings below, the Yakama would have

understood the reservation created by the 1855 Treaty to include Tract D. ER648. Its inclusion makes perfect sense, because the Camas Prairie was an important location for roots that the Indians relied on as a valuable food source. ER634, 647, 665-66.

The County claims the District Court erred concluding that Tract D is within the Yakama Reservation. While at first articulating the canons of treaty construction, the County then abandons them, by focusing on what it claims were the intentions of Governor Stevens, the lead federal negotiator. According to the County, when Stevens used the word "spur" he was referring to "large finger-like ridges, running east from the Cascade Mountains," that did not need to be continuous. Dkt.27 at 41-42. The County also points to Railroad Survey Reports to claim Stevens understood Camas Prairie was located on the 46th parallel, which was outside of the Yakama Reservation on the Treaty Map. *Id.* at 44-45.

But the canons of treaty construction require that this court focus on the *Indian* understanding. While the County claims Governor Stevens had a specific, atypical meaning for the word "spur," this word was not even used to describe the Yakama's Reservation boundaries during negotiations, and there is no evidence that federal negotiators explained the County's newly advanced definition to the Indians. Likewise, the Yakama negotiators did not have access to the Railroad Survey Reports the County now relies on, they did not understand latitude and

longitude lines, and there is no evidence these concepts were explained to them. ER13. What the Indians would have understood, is apparent to anyone looking at the Treaty Map. Mount Adams is located firmly within the Reservation's boundaries, as is a large area directly south of that mountain, Tract D. The District Court did not err in finding that the Indians understood this area to be included within their Reservation.

C. Indian treaties must be liberally construed in favor of preserving Indian rights to fulfill the federal government's trust responsibility to Indian tribes.

The canons of treaty construction were not only created because of differences in language and culture. There was an imbalance of power between the United States and Indian tribes, and in many cases, federal officials used coercion to exact vast cessions of tribal land. *Choctaw Nation*, 397 U.S. at 630 (acknowledging "Indian Nations did not seek out the United States and agree upon an exchange of land in an arms-length transaction," but rather, "treaties were imposed upon [Indian tribes] and they had no choice but to consent"); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973) (same). This alone would be enough to liberally construe treaties in favor of preserving Indian rights. After all, a contract entered into between two parties on unequal footing, written by the more advantaged bargainer to meet his own needs, and offered on a "take it or leave it" basis, is considered a contract of adhesion. Such contracts are

liberally construed in an attempt to fulfill the reasonable expectations of the weaker party. *Gray v. Zurich Insurance Co.*, 419 P.2d 168,171-72 (Cal. 1966); Kessler, *Contracts of Adhesion*, 43 Colum. L. Rev. 629 (1943).

Courts also liberally construe international treaties, even when there is no imbalance of power between the contracting nations. And when construing private contracts and international treaties, courts imply a duty of good faith and fair dealing in both their negotiation and performance. *See, e.g.*, Restatement (Second) of Contracts § 201; *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902).

Indian tribes are not private contractual parties; nor are they foreign nations to whom the United States owed no prior duty; they are sovereign nations that were induced to relinquish nearly all of their land through treaties, in reliance on the United States' promises to fulfill its side of the bargain and protect tribal property and sovereignty in perpetuity. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). The United States has long acknowledged the "undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). And the Supreme Court has held that "[i]n carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party . . . Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be

judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).

The canons of treaty construction then, are not simply based on differences in language and culture, or on analogies to private contracts or international treaties. They are "rooted in the unique trust relationship" between two sovereigns. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Choate v. Trapp*, 224 U.S. 665, 675 (1912). Given the special fiduciary relationship that exists, as well as the on-going government-to-government relationship between the United States and Indian tribes, these principles of liberal construction must be given extra force.

D. The treaty parties' collective, long-standing view that Tract D is located within the Yakama Reservation is entitled to great deference.

In 1855, representatives of the tribes and bands that would become the Confederated Tribes and Bands of the Yakama Nation did not approach the United States seeking to enter into a treaty. Rather, it was the United States that chose a calculated and economically efficient approach to acquiring tribal lands after hearing about the conflicts between the tribes and white settlers in the Pacific Northwest. *Washington I*, 384 F. Supp. at 330. Negotiating treaties with the tribes as sovereigns, rather than attempting conquest, saved the United States monetary

and human resources that would be expended in any Indian war, and these savings were necessary given the impending American Civil War.

The Yakama were extremely reluctant to cede their land and confine themselves to reservations. ER1984-86, 2001-02. The United States, however, insisted that the only way it could protect the Indians from "bad white men" who would seek to steal their property and cause them harm, would be by confining the Yakama on a reservation, and ensuring that white men did not cross the boundary. ER1924, 1927, 1940-41, 1945, 1947, 1963. The Indians said they needed more time, and they asked federal officials to stop white settlers from entering their territory until the parties could convene for additional negotiations at a later date. ER1983-84. But Palmer noted that gold had been found in the area, and:

> When our people hear this they will come here by hundreds . . . [and] bad people will steal your horses and cattle. There are but few of you, you cannot prevent it . . . but if you are living in these reservations we can protect you and your property. Then why should you refuse to receive our talk and refuse to allow us to protect you?

ER1988. Faced with the threat that white men would flood their homelands and "leav[e] the Indians with no food in his lodges," ER1938, the Yakama had little choice but to cede millions of acres for the promise of protection. Discussing the 1855 Yakama Treaty, Justice Gorsuch recently stated that "like many such treaties, this one was by all accounts more nearly imposed on the Tribe than a product of its

free choice." *Cougar Den*, 139 S. Ct. at 1016 (Gorsuch, J., concurring). This, then, is why treaties must be read liberally to preserve Indian rights.

The Yakama relied on the United States' promise to protect them from anyone who would intrude onto their reservation. Yet the United States failed to survey the reservation for several decades, even though this was the obvious first step in safeguarding it from intruding settlers. When surveys were conducted, federal officials repeatedly erred in locating the Yakama Reservation's boundaries, including by excluding Tract D.

The United States had not performed its duties under the Treaty in good faith. But when the Treaty Map was rediscovered in 1930, federal officials sought to rectify past errors. Assistant Secretary Dixon conceded the Treaty Map established the Tract D was within the Reservation. ER722-24, 2031-36. In 1932, a resurvey by Elmer Calvin also placed Tract D within the Reservation. ER734-37. In 1966, the Indian Claims Commission held that the parties to the 1855 Treaty intended for Tract D to be within Reservation. ER2166-2182. In 1972, the Attorney General opined that the 21,000 acres of Tract D within Gifford Pinchot National Forest were actually Reservation lands and should be returned to the Tribe. ER1867-73. President Nixon agreed, and issued an Executive Order returning this land to the Yakama, " as a portion of the reservation created by the

Treaty of 1855, 12 Stat. 951." ER1874-76. And since 1982, the federally approved survey of the Reservation includes Tract D.

The federal government's decades-long construction of the 1855 Treaty provides that Tract D is within the Yakama Reservation. This is consistent with the Indian understanding of the treaty. This court should not displace the interpretation of both treaty parties here. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (noting great deference is required "[w]hen the parties to a treaty both agree as to the meaning of a treaty provision").

II. THE 1904 ACT DID NOT SEVER TRACT D FROM THE YAKAMA RESERVATION.

Klickitat County argues that even if Tract D was originally within the Yakama Reservation, a 1904 Act, which allotted the Reservation, permanently severed Tract D from it. Act of December 21, 1904, ch. 22, 33 Stat. 595. This is not the case.

Federal courts have long described Indian tribes as "domestic dependent nations" possessing "inherent sovereign authority." *Michigan v. Bay Mills Indian Comty.,* 134 S. Ct. 2024, 2030 (2014). Congress, however, has broad authority to govern relations with tribal governments, including by diminishing their sovereign and property rights. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56-57 (1978). Still, this power has always been tempered by the requirement that Congress

"clearly" and "unequivocally" make its intent to diminish tribal rights known. *E.g., Id*. at 60; *Ex Parte Crow Dog,* 109 U.S. 556, 572 (1883); *Cohen's* § 2.02[1] at 114.

Congress did not express a clear and unequivocal intent to diminish the Yakama Reservation in the 1904 Act. A straightforward application of the well-established test applied by the Supreme Court to turn-of-the-century allotment acts demonstrates that when Congress opened portions of the Yakama Reservation to white settlement, it acted as a mere sales agent, and did not alter Reservation boundaries. While the County would like this court to ignore the *Solem* test and instead imply that Congress somehow diminished the Reservation by *expanding* the Tribe's then-existing land base, treaty rights cannot be abrogated by implication. There is no indication that Congress considered whether Tract D was within the Yakama Reservation when it enacted the 1904 Act, and therefore, the statute has no impact on the Reservation boundaries at issue in this case.

A. The Supreme Court's longstanding test for determining whether an allotment act diminishes a reservation is controlling here.

The test for determining whether an Indian reservation has been diminished by a statute opening lands for non-Indian settlement has been the subject of at least eight Supreme Court decisions since 1962. These cases provide that "some statutes that opened Indian lands for settlement diminished reservations [while] others did

not." *Hagen v. Utah*, 510 U.S. 399, 410 (1994). For diminishment to be found, there must be "clear and plain" evidence that Congress intended this result. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, (1998); *DeCoteau v. Dist. Cty. Ct. for the Tenth Judicial Cir.*, 420 U.S. 425, 444 (1975); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973).

To determine congressional intent, the Supreme Court has developed a "fairly clean analytical structure." *Hagen*, 510 U.S. at 410-11. The first prong and most probative evidence is the statutory language itself. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). While no precise language is required for diminishment, language of cession coupled with payment of a certain sum for the land are typically viewed as establishing a strong presumption in favor of diminishment, as is operative language which specifically restores opened land to the public domain. *Yankton*, 522 U.S. at 792; *Solem*, 465 U.S. at 470-71; *Hagen*, 510 U.S. at 414; *Seymour v. Superintendent*, 368 U.S. 351, 354-55 (1962). The second prong of the Court's analysis involves examination of the events surrounding passage of the act for evidence of a "widely-held contemporaneous understanding" that Congress intended reservation boundaries to be altered. *Solem*, 465 U.S. at 471. This requires review of the legislative history of the act, reports on negotiations of the land sale, executive and presidential declarations, reports of executive agencies overseeing Indian matters, and similar documentation. *Id*.; *Rosebud Sioux Tribe v. Kneip*, 430

U.S. 584, 602 (1977); *Seymour*, 368 U.S. at 354- 57. In the absence of a clear expression in statutory language relating to the intent of Congress, only unequivocal evidence contained in the surrounding circumstances will allow a finding of diminishment. *Yankton*, 522 U.S. at 351. The third and least compelling prong of the Court's analysis involves examination of subsequent jurisdictional and demographic history of the region opened for settlement. *Solem*, 465 U.S. at 471-72. Standing alone, modern demographics cannot be the basis of reservation diminishment. *Parker*, 136 S. Ct. at 1801.

The 1904 Act fits neatly within *Solem*'s description of surplus land acts: statutes enacted "at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." 465 U.S. at 467. Indeed, the 1904 Act was titled, "An Act To authorize the sale and disposition of surplus or unallotted lands of the Yakima [sic] Indian Reservation, in the State of Washington." 33 Stat. 595. The "Crow-Flathead Commission" negotiated with the Yakama from 1896 to 1901 to pressure the tribe to agree to allotment, but the Tribe never consented. H.R. Rep. No. 58-2346, at 5 (2nd Sess. 1904). In its 1903 decision in *Lone Wolf v. Hitchcock,* however, the Supreme Court held that tribal consent was not necessary; Congress could allot a treaty-created reservation unilaterally. 187 U.S. 553, 566

(1903). Congress took that step in the 1904 Act. The question then, is whether in doing so, Congress diminished the Yakama Reservation.

Nothing in the text of the 1904 Act supports diminishment. There is no language of cession or restoration of land to the public domain. Instead, the Act states that the Secretary of the Interior is authorized to allot land to any Yakama tribal members. § 2, 33 Stat. at 596. The remaining unallotted land shall be appraised and "disposed of under the general provisions of the homestead laws of the United States" and the land "shall be opened to settlement and entry . . . by proclamation of the President." § 3, *Id*. The Act guarantees no lump sum payment to the Yakamas, but rather provides that "the proceeds arising from the sale and disposition of the lands . . . shall, after deducting the expenses incurred from time to time in connection with the appraisements and sales, be deposited in the Treasury of the United States to the credit of the tribe." §4, *Id.* at 597. Indeed, the Act goes so far as to state, "it being the purpose of this Act merely to have the United States to act as trustee for said Indians in the disposition and sales of said lands and to expend or pay-over to them the proceeds derived from the sales as herein provided." §7, *Id.* at 598. Thus, the language in the 1882 Act is nearly identical to language that the Supreme Court has found *not* to result in diminishment in *Parker*, 136 S. Ct. at 1077, *Solem,* 465 U.S. at 473, and *Seymour*, 368 U.S. at 356.

Only Congress can diminish a reservation's boundaries, and there must be clear evidence of its intent to do so. This rule follows over a century of precedent requiring clear evidence of congressional intent to diminish tribal sovereign or property rights. In this case, because the 1904 Act provides no evidence of such clear intent, diminishment cannot be found.

B. The 1904 Act does not meet the "actual consideration" test found in *United States v. Dion*.

The County argues that *Solem* should not be applied, because it admits that the Reservation was not diminished as a result of allotment and the subsequent surplus land sales. Dkt 27 at 65. Rather, it claims that Congress chose to "settle" ongoing disputes regarding Yakama Reservation boundaries in the 1904 Act, and the boundaries created by that Act do not include Tract D. *Id*. But *Solem* cannot be circumvented so easily, and even if it could, it would not lead the County to a more favorable legal standard or result.

The title of the 1904 Act announces that its purpose is "[t]o authorize the sale and disposition of surplus or unallotted lands of the Yakima [sic] Indian Reservation." 33 Stat. 595. It makes no mention of altering Reservation boundaries. The Act is comprised of eight sections, and all of them are devoted to discussions of the allotment, appraisal, and sale of Reservation lands. The entire Act only contains one proviso regarding Reservation boundaries, which acknowledges an "erroneous boundary survey" excluded 293,837 acres of land

from the Reservation. It notes that this tract of land "shall be regarded as a part of the Yakima [sic] Indian Reservation *for the purposes of this Act*," which was the issuance of allotments and the sale of surplus land. *Id.* at 596 (emphasis added). The 1904 Act is an allotment statute, plain and simple, and *Solem* is the appropriate test.

Regardless, outside the context of surplus land acts, Congress still cannot abrogate Indian treaty rights unless it does so clearly. *United States v. Santa Fe Pac. R.R. Co*., 314 U.S. 339, 346, 353-54 (1941) (Congress must be "plain and unambiguous" or "clear and plain" when abrogating tribal property rights). Absent explicit language, federal courts are "extremely reluctant" to find abrogation. *Passenger Fishing Vessel*, 443 U.S. at 690. At a minimum, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 740 (1986).

For example, the Supreme Court has held that a statute terminating the government-to-government relationship with the Menominee Tribe that disestablished its reservation, disposed of its property, and provided that the Tribe and its members would be subject to state laws in the same manner as other citizens, did *not* terminate the Indians' hunting and fishing rights secured by an 1854 treaty. *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

The Court "decline[d] to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians." *Id.* at 412. Even though two termination bills introduced in Congress would have explicitly preserved Menominee hunting and fishing rights, and even though the final bill passed by Congress contained no such savings clause for Menominee treaty rights, the Court noted that "the intention to abrogate or modify a treaty is not to be lightly imputed." *Id.* at 413.

The tract of land mentioned in the 1904 Act's proviso is a different parcel than Tract D. Nevertheless, the 1904 Act acknowledges that land on the western boundary of the Reservation was previously "excluded by *erroneous* boundary survey," 33 Stat. at 596 (emphasis added), as Schwartz's 1890 survey had been discredited by a more recent survey conducted by Barnard. ER2613-2628. In passing the 1904 Act, Congress acknowledged the Schwartz survey had mistakenly excluded a large tract of land from the Reservation, that the almost 300,000 acres of land claimed by the Yakama was part of the treaty-created Reservation all along, and that this land should be subject to allotment and surplus land sales as provided in the Act. Nothing indicates Congress intentionally altered the boundaries of the Reservation as established by treaty, let alone diminished them.

The legislative history for the Act confirms this. During congressional debate, Representative Jones of Washington confirmed the dissatisfaction of the

Yakama and explained that the intent of the bill was "to help provide for the better disposition of the Indian" and "to be fully protecting the Indians in all their rights," calling it "one of the fairest bills for the Indians that has ever been presented." ER1819. Mr. Jones explained that the bill itself recognized the Yakama's claim of title to the land, stating: "the bill now being considered recognizes the very thing that the Indians claim – it recognizes their title to that land. There is no doubt they are entitled to it under the terms of the treaty." *Id*. Through this language it is apparent that Congress considered the 1904 Act as fulfilling the Yakama's understanding of the treaty, rather than diminishing the Reservation's boundaries.

The House and Senate Reports are similar. They note that Congress sought to "guard[] "well the rights and interests of the Indians." ER2631. Congress admitted that "[t]he reservation is a treaty reservation, and this bill recognizes not only the right of the Indians to the use and occupancy of the lands, but in effect recognizes the title of the Indians to the lands and secures to them the entire proceeds arising from the sales made." ER2632. This language once again reveals a Congressional intent to act in good faith towards the Yakama and to reaffirm, not compromise or abrogate, their treaty-based claims to the land.

There is no indication that when Congress passed the 1904 Act it knew there was a dispute over whether Tract D was within the boundaries of the treaty-created Reservation. The Treaty Map would not be rediscovered in the federal

government's files for another 26 years. ER15. When it was, Congress actually appropriated funds for the "completion of a survey of the disputed boundary of the Yakima [sic] Reservation," 53 Stat. 685, 696 (1939), thus acknowledging that this issue had not been settled by the prior act. The "actual consideration" test established by *Dion*, requires that Congress not only knew of the dispute regarding Tract D, but that it chose to exclude this land from the boundaries of the Reservation when it passed the 1904 Act. Tract D is not mentioned in the text or legislative history of the 1904 Act. This court cannot construe the Act in a "backhanded way" to abrogate treaty rights.

CONCLUSION

The District Court's decision should be affirmed.

Date: July 3, 2020

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CERTIFICATE OF COMPLIANCE

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

This Brief of *Amicus Curiae* National Congress of American Indians Fund in Support of the Confederated Tribes and Bands of the Yakama Nation complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,493 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016, the word processing system used to prepare the brief, in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS FUND AS *AMICUS CURIAE* IN SUPPORT OF CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 3, 2010. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 3, 2020

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