California Department of Justice Office of the Attorney General		**Legal Alert**
Subject: **Jurisdictional Status of Fort Irwin National Training Center**	*No.* OAG-2024-03 *Date:* 05/30/2024	*Contact for information:* LegalAlerts@doj.ca.gov

The Office of the California Attorney General issues this legal alert to provide guidance regarding the jurisdictional status of Fort Irwin National Training Center in San Bernardino County.

The Attorney General and the United States have analyzed whether Fort Irwin is a federal enclave subject to the exclusive legislative jurisdiction of the United States and set forth their positions on that question in the attached amicus briefs filed in *Gillespie v. Peraton, Inc.*, No. 23-55089 (9th Cir. Oct. 13, 2023), *appeal voluntarily dismissed*.

Fort Irwin is not a federal enclave subject to the exclusive legislative jurisdiction of the United States.

Summary of Analysis: The State of California did not cede exclusive jurisdiction over Fort Irwin to the United States under California Statutes of 1897, Chapter 56, Section 1. Accordingly, Fort Irwin is not a federal enclave subject to the exclusive jurisdiction of the United States.

Legal Background: The United States may obtain exclusive jurisdiction over land in a State by a State's cession and the federal government's acceptance of jurisdiction over the land. *See Paul v. United States*, 371 U.S. 245, 264 (1963); 40 U.S.C. § 3112 (previously codified at 40 U.S.C. § 255 (1940)). If the federal government obtains exclusive jurisdiction over an area, only state laws that are in effect at the time of the transfer of jurisdiction and that do not conflict with federal policy can continue to operate in that area; subsequently enacted state laws are presumptively inapplicable. *See Paul*, 371 U.S. at 268-269; *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99-100 (1940).

The California Legislature has enacted statutes to govern how the State cedes jurisdiction over lands to the federal government. The relevant question here is whether California ceded exclusive jurisdiction over Fort Irwin to the United States under California Statutes of 1897, Chapter 56, Section 1, which provides:

> The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; *provided*, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated . . . .

Attorney General's Analysis: The 1897 cession statute has one affirmative requirement for memorializing a cession of jurisdiction over lands within the State: that "a sufficient description by metes and bounds and a map or plat" of those lands "be filed" in the proper county recorder's office. Under California law, that requirement must be strictly followed for a cession of jurisdiction to be recognized. There is no evidence that a metes-and-bounds description or a map or plat of Fort Irwin was filed in the Recorder's Office in San Bernardino County, where Fort Irwin is located. Because the terms of the cession statute have not been satisfied, California did not cede exclusive jurisdiction over Fort Irwin to the United States, and the United States does not have exclusive jurisdiction over Fort Irwin. This conclusion is consistent with the weight of

district court authority addressing the question and with how the federal government and California have treated Fort Irwin in recent decades.

The United States also filed an amicus brief, agreeing that Fort Irwin is not subject to exclusive federal jurisdiction. The federal government took the position that the filing requirement in the 1897 cession statute is a mandatory requirement that must be satisfied for a cession of jurisdiction under the statute to take effect. In the federal government's view, that requirement was not satisfied with respect to Fort Irwin, and, even assuming that the requirement could be waived, waiver was not established here. Accordingly, California did not cede exclusive jurisdiction over Fort Irwin to the United States under the 1897 cession statute. The federal government noted that this conclusion is consistent with its view that exclusive federal jurisdiction is generally disfavored.

Please refer to the attached amicus briefs for the full legal analysis of the Attorney General and the United States.

No. 23-55089

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELDONNA GILLESPIE,
Plaintiff-Appellee,

v.

PERATON, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California
No. 5:21-cv-02028-JGB-SHK
Hon. Jesus G. Bernal, Judge

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
DANIEL A. OLIVAS
Senior Assistant Attorney General

HELEN H. HONG
Deputy Solicitor General
ANDREW M. VOGEL
Supervising Deputy Attorney General
ALICE X. WANG
Associate Deputy Solicitor General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
(415) 510-3921
Alice.Wang@doj.ca.gov
Attorneys for the State of California

October 13, 2023

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INTRODUCTION AND STATEMENT OF INTEREST

The Attorney General of the State of California files this brief in response to the Court's order inviting California and the United States to submit amicus curiae briefs addressing whether Fort Irwin National Training Center is a federal enclave subject to the exclusive legislative jurisdiction of the United States. Specifically, the Court requested the views of California and the United States on whether California ceded exclusive jurisdiction over Fort Irwin to the United States under California Statutes of 1897, Chapter 56, Section 1.

In the Attorney General's view, the answer to the limited question presented in the Court's order is that Fort Irwin is not a federal enclave subject to exclusive federal jurisdiction.[1] California did not cede exclusive jurisdiction over Fort Irwin to the United States under California Statutes of 1897, Chapter 56, Section 1 (or its successor statute, which was codified in 1943). That statute has one affirmative requirement for memorializing a cession of jurisdiction over lands within the State: that "a sufficient description by metes and bounds and a map or plat" of those lands "be filed" in the proper county recorder's office. 1897 Cal. Stat. ch. 56, § 1. Indeed, that is the only mandatory obligation the statute provides to effect a cession of jurisdiction over those lands. Under California law, that requirement

[1] The Attorney General takes no position on the other questions presented in this case, including the merits of the underlying employment dispute.

must be strictly followed for a cession of jurisdiction to be recognized. There is no evidence that a metes-and-bounds description or a map or plat of Fort Irwin was filed in the Recorder's Office in San Bernardino County, where Fort Irwin is located. Because the terms of the cession statute have not been satisfied, California did not cede exclusive jurisdiction over Fort Irwin to the United States.

The Attorney General's view is consistent with the weight of district court authority addressing this question: all but one district court to consider the question have concluded that California did not cede exclusive jurisdiction over Fort Irwin to the United States.[2] The Attorney General's view is also consistent with how the federal government and California have treated Fort Irwin in recent decades. For example, since 1985, the federal government has repeatedly requested concurrent criminal jurisdiction over Fort Irwin from California—a request that would be unnecessary if California had ceded exclusive jurisdiction over Fort Irwin to the United States.

[2] *See* ER-27-29; *Hillman v. Leixcon Consulting, Inc.*, 2016 WL 10988766, at *3-7 (C.D. Cal. July 27, 2016); *Atiqi v. Acclaim Tech. Servs., Inc.*, 2014 WL 12965984, at *5-9 (C.D. Cal. July 3, 2014); *Graupner v. Lewis Ltd. Consultants, LLC.*, 2012 WL 12895714, at *2-4 (C.D. Cal. Oct. 26, 2012). *But see Jackson v. Mission Essential Pers., LLC*, 2012 WL 13015000, at *1-2 (C.D. Cal. Apr. 13, 2012).

STATEMENT

A. Legal Background

The United States may obtain jurisdiction over land in a State in several ways: (1) by purchasing or condemning the land with the State's consent for the purposes enumerated in the Enclave Clause of the Federal Constitution (*see* U.S. Const. art. I, § 8, cl. 17; *Paul v. United States*, 371 U.S. 245, 264 (1963)); (2) by reserving federal jurisdiction over the land upon admission of the State into the Union (*see Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 526-527 (1885)); or (3) by a State's cession and the federal government's acceptance of jurisdiction over the land (*see Paul*, 371 U.S. at 264; 40 U.S.C. § 3112 (previously codified at 40 U.S.C. § 255 (1940))). This case implicates only the third method of acquiring jurisdiction.

The scope of the United States' acquired jurisdiction depends on the terms of the State's cession. *See Paul*, 371 U.S. at 264-265. A State may cede *exclusive* jurisdiction over land to the federal government without any reservation of legislative authority. *See Standard Oil Co. v. California*, 291 U.S. 242, 244 (1934). In that case, the United States "acquire[s] exclusive legislative authority so as to debar the State from exercising any legislative authority including its taxing and police power in relation to the property and activities of individuals and corporations within the territory." *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186,

197 (1937). A cession of exclusive jurisdiction covers both criminal and civil jurisdiction. *See Standard Oil Co. v. California*, 291 U.S. at 244-245; *id.* at 245 (explaining that the United States had "exclusive jurisdiction . . . over crimes committed within a reservation lying within Nebraska," where "[j]urisdiction had been ceded by the state"). A State may also reserve certain powers when it cedes jurisdiction over land to the federal government, so long as that reservation of jurisdiction is consistent with federal use of the land. *See James v. Dravo Contracting Co.*, 302 U.S. 134, 147 (1937). For example, a State may reserve its jurisdiction to tax private property on that land. *See id.*

The California Legislature has enacted statutes to govern how the State cedes jurisdiction over lands to the United States. *See, e.g.*, 1891 Cal. Stat. ch. 181; 1939 Cal. Stat. ch. 710. The relevant question here is whether California ceded exclusive jurisdiction over Fort Irwin to the United States under a particular statute passed in 1897 and modified in 1943.[3] That statute, California Statutes of 1897,

[3] Two other cession statutes were in effect during the 1940s, when the defendant contends that California ceded jurisdiction over Fort Irwin to the United States: an 1891 statute and former California Political Code Section 34. Neither statute applies here. The 1891 statute governed the cession of jurisdiction over land that California owned and then "ceded or conveyed" to the United States. 1891 Cal. Stat. ch. 181, § 1; *see Coso Energy Devs. v. Cnty. of Inyo*, 122 Cal. App. 4th 1512, 1525-1528 (2004). That statute does not apply because Fort Irwin is not located on land that California ever owned and then ceded or conveyed to the federal government. *See Atiqi*, 2014 WL 12965984, at *7; SER-48-49. Former California

Chapter 56, Section 1, was enacted by the California Legislature to cede to the United States jurisdiction over lands used for military purposes. The Legislature provided:

> The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; *provided*, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; *and provided further*, that this State reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands.

ER-88-89. The cession question here turns on whether "a sufficient description by metes and bounds and a map or plat" of lands over which California ceded jurisdiction were "filed" with the county recorder's office, or whether that term of the statute was otherwise satisfied.

The Legislature amended and codified the 1897 statute in 1943, but that amendment did not materially alter the requirement for cession of jurisdiction. The amended statute, which was repealed in 1947, provided:

Political Code Section 34 is inapplicable for similar reasons. It governed the cession of jurisdiction over land that the federal government "purchase[d]" or "condemn[ed]." Cal. Pol. Code § 34, *as amended by* 1939 Cal. Stat. ch. 710, § 1 (repealed 1947). But the federal government did not purchase or condemn the land on which Fort Irwin is located. *See Graupner*, 2012 WL 12895714, at *2 n.3; SER-50.

> The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated.

1943 Cal. Stat. ch. 134, § 114 (codified at Cal. Gov't Code § 114 (1943)). The amendment explicitly reserved the State's power to tax on lands held by or ceded to the United States for military purposes. But the statutory requirement at issue in this appeal—whether a "sufficient description by metes and bounds and a map or plat" of those lands were "filed" in the proper county recorder's office—is identical in material respects in both versions of the statute.

B. Historical Background

Fort Irwin is a federal military base located in San Bernardino County, California. SER-47. It is a training center for the United States Army, consisting of approximately 753,537 acres in the Mojave Desert.[4] At present, the base houses around 21,390 people, including 4,401 active-duty soldiers.[5] It was first

[4] *See* Military OneSource, *Fort Irwin* (2023), https://installations.militaryonesource.mil/in-depth-overview/fort-irwin; Environmental Impact Statement for Training and Public Land Withdrawal Extension, Fort Irwin, California, 85 Fed. Reg. 48512 (Aug. 11, 2020).

[5] *See* Military OneSource, *Fort Irwin*, https://installations.militaryonesource.mil/in-depth-overview/fort-irwin.

established as a military base in 1940 and has always been within San Bernardino County lines. SER-48, SER-99, SER-109.

The United States acquired the land on which Fort Irwin is located—along with the lands that comprise present-day California and several other States—in 1848 from Mexico through the Treaty of Guadalupe Hidalgo. *See Atiqi*, 2014 WL 12965984, at *5; SER-48; Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922. From 1848 until 1850, when California was admitted into the Union as a State, the United States owned and had exclusive jurisdiction over the land on which Fort Irwin is located. *See Atiqi*, 2014 WL 12965984, at *5; *Fort Leavenworth R.R. Co.*, 114 U.S. at 526.

In 1850, California became the thirty-first State admitted into the Union. When the federal government admitted California as a State, it did not reserve exclusive jurisdiction over the land on which Fort Irwin is located. *See Atiqi*, 2014 WL 12965984, at *5; *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 527 (1938); An Act for the Admission of the State of California into the Union, 9 Stat. 452 (1850). As a result, California secured both civil and criminal jurisdiction over the land. *See Standard Oil Co. v. California*, 291 U.S. at 244-245.

But because the federal government maintained an ownership interest in the land, it became part of the public domain. In the 1940s, the public domain consisted of federal lands, mostly in the western United States, that were "available

for sale, entry, and settlement under the homestead laws" in effect at the time. *Hagen v. Utah*, 510 U.S. 399, 412 (1994). The President was also empowered to withdraw land from the public domain and reserve it for public uses, including for the settlement of Native Americans, bird preservation, and military installations. *See id.*

Exercising that authority, President Franklin D. Roosevelt signed an executive order in 1940, which withdrew the land on which Fort Irwin is located from the public domain and reserved it for use by the United States War Department. *See* Exec. Order No. 8507, 5 Fed. Reg. 2817 (Aug. 8, 1940). That order first established what is now Fort Irwin as a military base. *See Atiqi*, 2014 WL 12965984, at *6; SER-48. The base was originally established as the Mojave Desert Anti-Aircraft Firing Range (SER-48) and in 1942 was renamed Camp Irwin in honor of a World War I battle commander.[6]

In 1944, during World War II, the United States War Department sent California Governor Earl Warren two letters purporting to accept exclusive jurisdiction over Fort Irwin and other military reservations in California. *See* SER-96-103, SER-105-112. Those letters were sent in an effort to fulfill the requirements of a statute enacted by Congress in 1940, which required the federal

[6] *See* Military OneSource, *Fort Irwin*, https://installations.militaryonesource.mil/in-depth-overview/fort-irwin.

government to file a notice to accept any State's cession of jurisdiction; without such notice, it was "conclusively presumed that no such jurisdiction has been accepted." 40 U.S.C. § 255 (1940) (now codified at 40 U.S.C. § 3112); *see* SER-96, SER-105. Governor Warren acknowledged receipt of those letters by signing and returning copies of them to the federal government. *See* SER-96, SER-105.

The San Bernardino County Recorder's Office maintains official public records and historical materials relating to the County.[7] The parties do not dispute that the office has no record of a metes-and-bounds description or a map or plat of Fort Irwin reflecting a cession of jurisdiction over the land. *See* Opening Br. 5-6; Answering Br. 5; 1897 Cal. Stat. ch. 56, § 1. Nor is the Attorney General aware of any such record having been filed with the office. *Cf.* SER-49.

ARGUMENT

I. FORT IRWIN IS NOT A FEDERAL ENCLAVE SUBJECT TO EXCLUSIVE FEDERAL JURISDICTION

California did not cede exclusive jurisdiction over Fort Irwin to the United States under the 1897 statute (or the amended 1943 statute). California law requires strict compliance with the terms of a cession statute, which did not occur here. There is no evidence that a metes-and-bounds description or a map or plat of

[7] *See* San Bernardino County, *Official Public Records – Recorder's Index* (2023), https://arc.sbcounty.gov/official-records/; San Bernardino County, *Archives* (2023), https://arc.sbcounty.gov/archives/.

Fort Irwin reflecting a cession of jurisdiction was ever filed in the San Bernardino County Recorder's Office. In addition, the conduct of the United States and California after 1944 reflects that neither party believes that California ceded exclusive jurisdiction over Fort Irwin to the United States.

A. California Law Demands Strict Compliance with the Terms of a Cession Statute

Whether the United States has acquired exclusive jurisdiction over a certain area is a federal question. *See Paul v. United States*, 371 U.S. 245, 267 (1963). But California law governs the interpretation of its statutes. *See Midbrook Flowerbulbs Holland B.V. v. Holland America Bulb Farms, Inc.*, 874 F.3d 604, 614 (9th Cir. 2017). This Court "review[s] a district court's interpretation of state law de novo." *PSM Holding Corp. v. Nat'l Farm Fin. Corp.*, 884 F.3d 812, 820 (9th Cir. 2018). When interpreting California law, federal courts are bound by decisions of the California Supreme Court. *See id.* When such decisions are not available, federal courts should consult "intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements" to predict how the California Supreme Court would decide the issue. *Id.*

Under California law, the requirements of cession statutes must be strictly followed. According to the California Supreme Court, statutes "in derogation of sovereignty are construed strictly in favor of the state." *People v. Centr-O-Mart*, 34 Cal. 2d 702, 703 (1950). The Court has explained that "since self-preservation

is the first law of nations and states . . . it will not be presumed, in the absence of clearly expressed intent, that the state has relinquished its sovereignty." *Standard Oil Co. v. Johnson*, 10 Cal. 2d 758, 766-767 (1938). California courts have applied this principle to cession statutes, since they are laws "relinquishing the state's sovereignty." *Coso Energy Devs. v. Cnty. of Inyo*, 122 Cal. App. 4th 1512, 1533 (2004); *see Standard Oil Co. v. Johnson*, 10 Cal. 2d at 766-767.

As the district court here recognized, strictly construing a cession statute in favor of the State includes requiring strict compliance with the statute's terms. *See* ER-28-29; *cf. Ramirez v. Tulare Cnty. Dist. Attorney's Off.*, 9 Cal. App. 5th 911, 917 (2017) ("strictly construe[ing]" forfeiture statute in favor of person against whom forfeiture is sought includes requiring that statutory requirements be "fully satisfied" by agency pursuing forfeiture); *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006) ("strictly construe[ing]" statute waiving sovereign immunity in favor of sovereign includes requiring "strict adherence" to statutory requirements). "[S]trict compliance with a statute" is also warranted when the Legislature has provided "detailed and specific" statutory requirements, which reflects its intent that those requirements be "followed precisely." *Prang v. Los Angeles Cnty. Assessment Appeals Bd. No. 2*, 54 Cal. App. 5th 1, 19 (2020).

Applying those principles here, the 1897 statute (and the 1943 amendment) must be construed strictly in favor of the State, and strict compliance with the

statutes' terms is required.[8] The cession statute is a law "in derogation of sovereignty" because it expressly cedes jurisdiction over certain lands within California's borders to the United States, under particular conditions set out in the statute. *Centr-O-Mart*, 34 Cal. 2d at 703. As the district court concluded, the statute "should be strictly construed in favor of the state" (ER-29), and its requirements must be strictly satisfied to ensure that jurisdiction is not ceded where there is no "clear and unmistakable" intent on the part of the State to do so (*Coso Energy Devs.*, 122 Cal. App. 4th at 1533). *See* ER-28-29.

Strict adherence to the cession statute's terms is especially warranted given that the statute contains only one affirmative, detailed requirement to reflect California's cession of jurisdiction. The statute sets out that California cedes exclusive jurisdiction over certain lands "*provided*" that "a sufficient description by metes and bounds and a map or plat" of those lands "be filed" in the proper county recorder's office. 1897 Cal. Stat. ch. 56, § 1; *see* 1943 Cal. Stat. ch. 134, § 114. That was the *only* affirmative act required by the statute to cede exclusive

[8] Courts appear to have analyzed the question of Fort Irwin's jurisdiction under the 1897 version of the statute that was in effect when Fort Irwin was first established in 1940. *See, e.g.*, ER-28; *Graupner v. Lewis Ltd. Consultants, LLC.*, 2012 WL 12895714, at *2 (C.D. Cal. Oct. 26, 2012). But the amended 1943 statute may also be relevant to the analysis because the United States War Department sent letters purporting to accept jurisdiction over Fort Irwin in 1944 and Governor Warren acknowledged those letters the same year. *See* SER-96-103, SER-105-112. Regardless, there is no material difference between the two statutes in analyzing the question presented in this appeal. *See supra* pp. 5-6.

jurisdiction over lands within California's borders and the *only* method identified in the statute for memorializing an intent to cede jurisdiction. 1897 Cal. Stat. ch. 56, § 1; *see* 1943 Cal. Stat. ch. 134, § 114; *see also Harold L. James, Inc. v. Five Points Ranch, Inc.*, 158 Cal. App. 3d 1, 6 (1984) ("[W]here the Legislature has provided a detailed and specific mandate" in the statute, "any deviation from the statutory mandate will be viewed with extreme disfavor.").

There is good reason to require strict compliance with the filing requirement in particular. In property law, metes-and-bounds descriptions, maps, and plats are used to clearly define property boundaries and establish ownership. *See* Joyce Palomar, 1 Patton and Palomar on Land Titles §§ 111, 119, 126 (3d ed. 2022). Metes and bounds generally refer to a description of land by its boundaries, "as measured by distances and angles from designated landmarks and in relation to adjoining properties." *Metes and Bounds*, Black's Law Dictionary (11th ed. 2019). And plat refers to "a map describing a piece of land and its features, such as boundaries, lots, roads, and easements." *Plat*, Black's Law Dictionary (11th ed. 2019); *see also Plat Map*, Black's Law Dictionary (11th ed. 2019). These documents are usually filed in the county recorder's office as official records of property ownership and boundaries. *See* Palomar, *supra*, at §§ 2, 81, 119, 126; *see, e.g.*, *Mikels v. Rager*, 232 Cal. App. 3d 334, 343-344 (1991). Providing an accurate description of land is essential to the transfer of ownership and to the

designation of rights; the requirement is so important that "it is an elementary common law rule that a deed conveying real property can be voided if the property description is insufficiently definite to permit the property to be readily located." *Morehart v. Cnty. of Santa Barbara*, 7 Cal. 4th 725, 766 (1994) (Mosk, J., concurring).

B. California Did Not Cede Exclusive Jurisdiction over Fort Irwin Because the Terms of the Cession Statute Have Not Been Strictly Satisfied

Under those principles, the State of California did not cede exclusive jurisdiction over Fort Irwin to the United States under the 1897 statute (or the amended version from 1943) because the statute's terms have not been strictly satisfied. As the parties acknowledge, the filing requirement set out in the cession statute was not met here: there is no evidence that a "map or plat" of Fort Irwin reflecting a cession of jurisdiction was filed in the San Bernardino County Recorder's Office. *See* Opening Br. 5-6; Answering Br. 5; 1897 Cal. Stat. ch. 56, § 1. Nor have the parties provided any evidence that a "metes and bounds description" of Fort Irwin reflecting a cession of jurisdiction was ever filed in that office. *See* Opening Br. 5-6; Answering Br. 5; Reply Br. 6, 8-9; 1897 Cal. Stat. ch. 56, § 1. The Attorney General is also unaware of any recording in the San Bernardino County Recorder's Office that would satisfy the statute's requirement. *Cf.* SER-49.

All but one of the district courts to consider this issue have correctly held that California did not cede exclusive jurisdiction over Fort Irwin to the United States because there was no recording of such a cession at the San Bernardino County Recorder's Office. *See* ER-28-29; *Hillman v. Leixcon Consulting, Inc.*, 2016 WL 10988766, at *5-7 (C.D. Cal. July 27, 2016); *Atiqi v. Acclaim Tech. Servs., Inc.*, 2014 WL 12965984, at *8 (C.D. Cal. July 3, 2014); *Graupner v. Lewis Ltd. Consultants, LLC.*, 2012 WL 12895714, at *2-3 (C.D. Cal. Oct. 26, 2012). As those courts have observed, "the map or plat requirement must be strictly construed" (*Atiqi*, 2014 WL 12965984, at *8); "[i]t is undisputed that the United States never filed the map or plat of Fort Irwin's land in the proper office of record in the county in which Fort Irwin is situated" (*Graupner*, 2012 WL 12895714, at *2); and "[b]ecause this requirement was not followed and California did not expressly waive it . . . California did not cede exclusive jurisdiction over Fort Irwin" (ER-29).

The analysis in the only district court decision to conclude that California ceded exclusive jurisdiction over Fort Irwin is flawed. *See Jackson v. Mission Essential Pers., LLC*, 2012 WL 13015000, at *1-2 (C.D. Cal. Apr. 13, 2012) (Real, J.). The court in that case did not disagree that "no map or plat was ever formally filed with the San Bernardino county recorder's office." *Id.* at *2. But it concluded that California waived the map-or-plat requirement when Governor

Warren signed and acknowledged letters from the federal government purporting to accept exclusive jurisdiction over Fort Irwin. *See id.* The *Jackson* court did not give adequate weight to the filing requirement, which, as explained above, must be strictly followed under California law. *See supra* pp. 10-14. In addition, its analysis of the waiver issue was cursory and incorrect, as further discussed below. *See infra* pp. 18-20. The court did not provide a standard for waiving a requirement in a cession statute, nor did it explain why Governor Warren's actions were sufficient to constitute waiver under any applicable standard. *See Jackson*, 2012 WL 13015000, at *2.

The California State Lands Commission, which is responsible for maintaining records regarding the legislative jurisdictional status of federal lands in California, has also consistently concluded that Fort Irwin is not subject to exclusive federal jurisdiction. *See* SER-47-52; Cal. Gov't Code § 127. In declarations filed in other district court litigation, an attorney for the Commission explained that there is no evidence that a metes-and-bounds description or map or plat of Fort Irwin was ever filed with the San Bernardino County Recorder's Office and concluded that California had not ceded exclusive jurisdiction over Fort Irwin. *See* Decl. of James Frey, *Atiqi*, 2014 WL 12965984, ECF No. 20-2; Decl. of James Frey, *Jackson*, 2012 WL 13015000, ECF No. 50-1. An Administrative Opinion from the Commission published in 2016 reached the same conclusion. SER-47-52.

Defendant Peraton, Inc., nevertheless contends that California ceded exclusive jurisdiction over Fort Irwin because the State, through Governor Warren, waived the statutory filing requirement. According to Peraton, California ceded jurisdiction over Fort Irwin through a series of actions taken by the federal and state governments during World War II: at a time when California's cession statute authorized the cession of jurisdiction over federal land used for military purposes, President Roosevelt signed an executive order in 1940 establishing Fort Irwin; the United States War Department sent two letters to Governor Warren in 1944 purporting to accept exclusive jurisdiction over Fort Irwin; and Governor Warren signed and returned copies of those letters to the federal government. *See* Opening Br. 4-6; Reply Br. 3-5; ER-90-107.

In Peraton's view, President Roosevelt's executive order—which contained a metes-and-bounds description of Fort Irwin—satisfied that term of the cession statute's filing requirement. *See* Opening Br. 6; Reply Br. 8-9; ER-90-91. But the statute requires that "a sufficient description by metes and bounds . . . be *filed*" in the appropriate county recorder's office. 1897 Cal. Stat. ch. 56, § 1 (emphasis added); *see* 1943 Cal. Stat. ch. 134, § 114. And there is no evidence that the executive order or any other document containing a metes-and-bounds description of Fort Irwin was ever filed in the San Bernardino County Recorder's Office. *See* SER-49. Similarly, Peraton notes that Governor Warren filed the 1944 letters from

the War Department in California's "official records." Opening Br. 5; Reply Br. 3, 6, 8, 13. Even if they were filed in some "official records," however, the letters did not contain a metes-and-bounds description or a map or plat of Fort Irwin. That omission is crucial: the filing requirement in the 1897 statute (and the 1943 amended statute) is the only mechanism for memorializing the boundaries of the lands over which California cedes jurisdiction. *See supra* pp. 12-14.

Peraton's principal argument relies on a theory that Governor Warren waived the map-or-plat requirement when he signed and acknowledged the letters from the federal government purporting to accept exclusive jurisdiction over Fort Irwin. *See* Opening Br. 5 n.1, 6; Reply Br. 3-5, 10-17. In support of this waiver argument, Peraton relies on caselaw addressing the standard for waiving an individual person's or corporation's rights. *See* Opening Br. 5 n.1; Reply Br. 12-13, 15-17; *see, e.g.*, *Brookview Condo. Owners' Ass'n v. Heltzer Enterprises-Brookview*, 218 Cal. App. 3d 502, 512 (1990) (waiver of corporation's right to seek dismissal of action); *Outboard Marine Corp. v. Superior Ct.*, 52 Cal. App. 3d 30, 41 (1975) (waiver of corporation's right to notice); *People v. Murphy*, 207 Cal. App. 2d 885, 888-889 (1962) (waiver of criminal defendant's right to new trial). Not one of the cases addresses the standard for waiving requirements of statutes in derogation of sovereignty, and Peraton has not identified any basis for applying its proposed standard in that context.

In any event, even under the standard cited by Peraton, Governor Warren's actions would not constitute waiver of the filing requirement. To find waiver under that standard, there must be "knowledge, actual or constructive, of [the waived right's] existence" and "an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that it has been relinquished." *Trujillo v. City of Los Angeles*, 276 Cal. App. 2d 333, 343 (1969) (emphasis omitted). The party claiming a waiver must prove it by "clear and convincing evidence that does not leave the matter to speculation," and "doubtful cases will be decided against a waiver." *Id.* at 343-344.

Peraton has not met that standard. According to Peraton, Governor Warren's acknowledgment and filing of the 1944 letters from the War Department constitutes knowing and intentional waiver of the map-or-plat requirement. *See* Opening Br. 5 n.1; Reply Br. 12-17. It notes that Governor Warren received an Opinion from the California Attorney General in 1943 on his duties with respect to the federal government's acceptance of exclusive jurisdiction. *See* Opening Br. 6 n.2; Reply Br. 13; ER-108-109. It contends that the Governor thus knew about the legal requirements for cession when he acknowledged the letters but did not demand compliance with the filing requirement. *See* Reply Br. 13, 17.

But neither the letters nor the opinion references the map-or-plat filing requirement in the 1897 cession statute (or the amended 1943 statute). ER-108-109; SER-96-103, SER-105-112. The documents therefore cannot provide "clear and convincing evidence" that Governor Warren had knowledge of or intent to waive the map-or-plat requirement, which is required to establish waiver under Peraton's proffered standard. *Trujillo*, 276 Cal. App. 2d at 343. Peraton also argues that Governor Warren should have known about the map-or-plat requirement given his training as a lawyer and position as the governor. Reply Br. 14-15, 17. But that sort of conjecture is not the type of "clear and convincing evidence" necessary to constitute waiver. *Trujillo*, 276 Cal. App. 2d at 343.

C. The Subsequent Conduct of the United States and California Reflects that Fort Irwin Is Not a Federal Enclave Subject to Exclusive Federal Jurisdiction

The actions of the United States and California in the decades after 1944 show that neither party believed California had ceded exclusive jurisdiction over Fort Irwin to the United States. *Cf. In re Imperial Credit Indus., Inc.*, 527 F.3d 959, 966 (9th Cir. 2008) (explaining that "subsequent conduct of the parties" can illuminate "mutual intent of the parties"). For example, in 1948, the United States War Department published a list of military reservations in California. SER-49-50, SER-71. The document stated that, with respect to Fort Irwin, "[e]xclusive jurisdiction over the lands withdrawn from the public domain has not been ceded."

SER-71. Later, in 1962, the United States General Services Administration published an inventory report on the jurisdictional status of federal properties. SER-49-50, SER-66-68. The report indicated that the federal government had "proprietorial interest only" in Fort Irwin, meaning that the United States owned the land but had "not obtained any measure of the State's authority over the area." SER-67-68. Although the report labeled other properties as being subject to the "exclusive legislative jurisdiction" of the United States, it did not apply that label to Fort Irwin. SER-67-68.

Since 1985, the federal government has also repeatedly requested cession of concurrent criminal jurisdiction over Fort Irwin from California. California Government Code Section 126, which is now the principal statute governing cessions of jurisdiction, authorizes the California State Lands Commission to cede concurrent criminal legislative jurisdiction over federal lands to the United States for limited periods of time. Cal. Gov't Code § 126; *see* SER-50. The federal government requested concurrent criminal jurisdiction over Fort Irwin in 1985, 1991, 1996, 2001, 2007, 2012, and 2017, and the California State Lands Commission granted each request.[9]

[9] *See* SER-50; California State Lands Commission, *Voting Record* (Apr. 20, 2017), https://www.slc.ca.gov/Meeting_Summaries/2017_Documents/04-20-17/Voting_Record.htm.

There would be no need for the federal government to request cession of *concurrent* criminal jurisdiction if it had already acquired *exclusive* legislative jurisdiction over Fort Irwin in 1944. Under the express terms of the 1897 statute, California would have ceded "exclusive jurisdiction" over Fort Irwin to the United States if the filing requirement had been satisfied, reserving only the right to serve and execute process. 1897 Cal. Stat. ch. 56, § 1. Under the amended 1943 statute, California would also have ceded "exclusive jurisdiction," while "reserving the authority to serve and execute process, and the State's entire power of taxation." 1943 Cal. Stat. ch. 134, § 114. Under either cession statute, the federal government would have acquired both criminal and civil jurisdiction had California ceded exclusive jurisdiction. *See supra* pp. 3-4; *Standard Oil Co. v. California*, 291 U.S. 242, 244-245 (1934). The federal government's request—on seven separate occasions—and California's agreement to grant concurrent criminal jurisdiction over Fort Irwin offer powerful evidence that California never ceded exclusive jurisdiction. Fort Irwin is not a federal enclave subject to exclusive federal jurisdiction.

CONCLUSION

In the Attorney General's view, California did not cede exclusive jurisdiction over Fort Irwin National Training Center to the United States, and Fort Irwin is not a federal enclave subject to the exclusive legislative jurisdiction of the United States.

Dated: October 13, 2023

Respectfully submitted,

s/ Alice X. Wang

ROB BONTA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
DANIEL A. OLIVAS
Senior Assistant Attorney General
HELEN H. HONG
Deputy Solicitor General
ANDREW M. VOGEL
Supervising Deputy Attorney General
ALICE X. WANG
Associate Deputy Solicitor General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
(415) 510-3921
Alice.Wang@doj.ca.gov
Attorneys for the State of California

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 23-55089

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELDONNA GILLESPIE,

Plaintiff-Appellee,

v.

PERATON, INC.,

Defendant-Appellant, and

CENTERRA SERVICES INTERNATIONAL, INC., et al.,

Defendants.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

E. MARTIN ESTRADA
United States Attorney

MICHAEL S. RAAB
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 305-8849

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INTEREST OF THE UNITED STATES

The United States submits this brief in response to the Court's request for its views as to "whether the State of California ceded exclusive jurisdiction over Fort Irwin to the United States pursuant to Cal. Stats. 1897, c.56, § 1."

The Court should answer that question in the negative. The 1897 statute conditioned California's cession of jurisdiction on the recordation of "a sufficient description of metes and bounds and a map or plat of" the lands in question. That undisputedly never happened for Fort Irwin. Peraton argues that the Governor of California waived the recordation requirement by acknowledging the receipt of letters from the federal Secretary of War that listed Fort Irwin among lands over which the United States was "accept[ing] exclusive jurisdiction." SER-96–112. But even assuming the Governor had the power to waive a statutory condition precedent to the cession of legislative jurisdiction, the rule of narrow construction for statutes derogating sovereignty, *Coso Energy Developers v. County of Inyo*, 122 Cal. App. 4th 1512, 1533 (2004), implies that such a condition could not be waived except in the clearest possible manner. And the circumstances here do not establish a waiver with anything like that degree of clarity.

The conclusion that California has not ceded jurisdiction over Fort Irwin accords with the federal government's longstanding view that exclusive federal jurisdiction is generally disfavored. In an age of cooperative federal-state relations, exclusive federal jurisdiction is typically unnecessary to protect the federal government's interest in the use of military bases and other federal properties. And the inoperability of state law in

enclaves of exclusive federal jurisdiction creates numerous practical complications, as this case illustrates.

ARGUMENT

I. Exclusive Federal Jurisdiction Is Generally Disfavored

1. Article I, Section 8, Clause 17 of the Federal Constitution, known as the Enclave Clause, authorizes Congress

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District … as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

The Constitutional Convention adopted the Clause in response to the concern that the nascent federal government needed to possess exclusive authority over lands housing certain federal functions so as not to have to rely on state authorities for protection.

In 1783, for example, a meeting of the Continental Congress in Philadelphia had been besieged by soldiers hoping "'to obtain a settlement of accounts,'" who "'wantonly point[ed] their muskets to the windows of the hall.'" *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within The States*, pt. II, at 15-16 (June 1957) (*Report Part II*), https://perma.cc/HN6M-GD5T. The Congress called on Pennsylvania authorities for protection but was informed that the militia would not act "'unless some actual outrage were offered to persons or property,'" and maybe not even then. *Id.* at 16.

James Madison presumably had that episode in mind when he wrote in the Federalist Papers of "[t]he indispensable necessity of complete authority at the seat of government," to avoid "a dependence of the members of the general government on the state comprehending the seat of the government, for protection in the exercise of their duty." The Federalist No. 43 (Madison), at 222-223 (Carey & McClellan eds., 2001). He found "[t]he necessity of a like authority over forts, magazines," and other military properties to be no "less evident," including on the view that it would not "be proper for the places on which the security of the entire union may depend[] to be in any degree dependent on a particular member of it." *Id.* at 223.

Although the Enclave Clause specifies only one method by which the federal government can acquire exclusive jurisdiction over federal properties—namely, purchase with the State's consent—the Supreme Court recognized two others in *Fort Leavenworth Railroad Co. v. Lowe*, 114 U.S. 525 (1885). First, States can cede legislative jurisdiction over land within their borders. *Id.* at 540-542. That pathway has now come to account for most instances of exclusive federal jurisdiction. *Report Part II* at 43. Second, Congress can specify the cession of jurisdiction over certain lands as a condition of admitting new States to the Union. *Fort Leavenworth*, 114 U.S. at 526-527.

2. Notwithstanding the Framers' perception of the advantages of exclusive federal jurisdiction over federal lands, the drawbacks of eliminating state legislative jurisdiction quickly became evident.

In two state ratifying conventions, for example, the Enclave Clause "was subjected to severe criticism" by some delegates on the ground "that it was destructive of the civil rights of the residents of the areas subject to its provisions," who would lack benefits ordinarily afforded by state laws. *Report Part II* at 23. Others, including George Mason, "suggested that the seat of government might become a sanctuary for criminals" seeking to escape the reach of state law. *Id.* at 25.

When Congress passed legislation in 1828 to "authoriz[e] the President to procure the assent of the legislature of any State" for exclusive federal jurisdiction over lands purchased by the federal government for military purposes, some Members of Congress objected "as to the efficacy of the exercise by the United States of legislative jurisdiction over widely scattered areas throughout the" country. *Id.* at 30. At least one Member also raised George Mason's concern that, absent state jurisdiction for the enforcement of criminal laws, "'public fortresses'" could "'become places of refuge from State authority'" and could "'themselves be made the theatres where the most foul and dark deeds may be committed.'" *Id.* at 31.

And thirty years later, after the Ohio Supreme Court held that the federal government's exclusive jurisdiction over a soldier's home precluded its residents from voting in state elections, *Sinks v. Reese*, 19 Ohio St. 306 (1869)—an outcome later rejected by the Supreme Court in *Evans v. Cornman*, 398 U.S. 419 (1970)—Congress retroceded jurisdiction over the home. *Report Part II* at 33 (citing Act of Jan. 21, 1871, 16 Stat. 399). In the debates preceding the enactment of the retrocession law, a Senator opined that

exclusive federal jurisdiction over military facilities "has always been an inconvenience" and "unnecessary" to military discipline:

> Congress, of course, would require the jurisdiction necessary to punish a soldier for drunkenness, … or to punish any violation of military law or discipline; but is it necessary that this Government should have jurisdiction to punish a man who happens to stroll upon the ground and commit a larceny, or that it shall have jurisdiction if two of the hands engaged in plowing or gardening should get into a fight? Such cases do not come within the reasoning of the rule at all.

Id. at 34.

Congress ameliorated some of the concerns about potential lawlessness in federal enclaves by enacting the first Assimilative Crimes Act in 1825, adopting as federal law the criminal laws of the relevant State that were in effect at the time of the Act's enactment. *Id.* at 36 & n.41 (citing 4 Stat. 115 (1825)). But Congress did not undertake similar measures to protect the state-law civil rights and benefits of the residents of federal enclaves. *Id.*

3. Notwithstanding concerns like these, the federal government for decades acquired exclusive jurisdiction over numerous federal lands used for military purposes. It did so because of an 1841 statute "requiring consent by a State to Federal acquisition of land (and therefore a cession of jurisdiction by the State by operation of [the Enclave Clause])[] as a condition precedent to the expenditure of money by the Federal Government for the erection of structures on the land." *Report Part II* at 32; *see id.* at 9.

In 1940, however, Congress amended this statute "to make Federal acquisition of legislative jurisdiction optional rather than mandatory." *Report Part II* at 9. The amended statute provided as follows:

> Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

Act of Feb. 1, 1940, 54 Stat. 19. That provision remains in effect, with stylistic modifications, as 40 U.S.C. § 3112.

4. The 1940 amendment marked a broader trend toward disfavoring the acquisition of exclusive federal jurisdiction. In 1954, President Eisenhower formed an Interdepartmental Committee, with representatives from numerous agencies, to undertake "a study … with a view toward resolving problems arising out of the jurisdictional status of federally owned areas within the several States." *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within The States*, pt. I, at vii (Apr.

1956) (*Report Part I*), https://perma.cc/3ES6-9ZFK. The Committee's report summarized the extensive complications associated with exclusive federal jurisdiction, ranging from the provision of services ordinarily performed by state and local governments (like firefighting or garbage collection) to the availability of state-law rights and benefits (like voting and public education) to matters of law enforcement. *Id.* at 49-57. For example, the study was motivated by "the denial to a group of children of Federal employees residing on the grounds of a Veterans' Administration hospital of the opportunity of attending public schools in the town in which the hospital was located." *Id.* at 1.

The Committee concluded that "[i]n the usual case there is an increasing preponderance of disadvantages over advantages as there increases the degree of legislative jurisdiction vested in the United States," and that "[w]ith respect to the large bulk of federally owned or operated real property … it is desirable that the Federal Government not receive, or retain, any measure whatever of legislative jurisdiction, but that it hold the installations and areas in a proprietorial interest status only, with legislature jurisdiction remaining in the several States." *Report Part I* at 70. President Eisenhower found that recommendation "sound[]." *Id.* at iii.

A decade and a half later, the Public Land Law Review Commission—a body created by statute and comprised of Members of Congress and presidential appointees—reached a similar conclusion. Public Land Law Review Comm'n, *One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review*

Commission, at ix, 278-279 (June 1970), https://perma.cc/6PS8-RKUJ. After summarizing the "[j]umbled condition of rights, privileges and obligations created by the confusion of jurisdiction over federally owned properties," the Commission recommended that "[e]xclusive Federal legislative jurisdiction should be obtained, or retained, only in those uncommon instances where it is absolutely necessary to the Federal Government." *Id.* at 278-279.

Consistent with the recommendations of the Commission and the Interdepartmental Committee, the Army has since the 1970s adopted a policy of "acquir[ing] only a proprietorial interest in land and not … any degree of legislative jurisdiction except under exceptional circumstances," and of "retroced[ing] unnecessary Federal legislative jurisdiction to the State concerned." U.S. Dep't of the Army, Regulation 405-20, *Federal Legislative Jurisdiction* 2 (Feb. 21, 1974), https://perma.cc/F6R6-W9GK.

II. The Federal Government Does Not Possess Exclusive Jurisdiction Over Fort Irwin

1. This case involves the Army's Fort Irwin, in Barstow, California. The United States acquired the land on which Fort Irwin sits—along with the rest of California—from Mexico, through the 1848 Treaty of Guadalupe Hidalgo. SER-48; *see, e.g.*, *Coso Energy Developers v. County of Inyo*, 122 Cal. App. 4th 1512, 1523 (2004). "[T]he United States reserved title to" the land when California became a State two years later, SER-48, but it "did not reserve to itself exclusive jurisdiction over its lands within the new state," *Coso Energy Developers*, 122 Cal. App. 4th at 1523.

In 1940, President Roosevelt issued an executive order withdrawing land within what is now Fort Irwin from public use so that the land could be used by "the War Department as an anti-aircraft firing range." Exec. Order No. 8507, 5 Fed. Reg. 2817 (Aug. 8, 1940); *see* SER-48. "The land was established as the Mojave Anti-Aircraft Gunnery Range and later named Camp Irwin in memory of Major General George Irwin, a World War I battle commander." Dep't of Defense, *Military Installations: Fort Irwin*, https://perma.cc/5KGP-B8EW. After World War II, "the post became the home of the United States Army Armor and Desert Training Center"; it was later "designated Fort Irwin." *Id.* In 1981, it "was re-designated as the National Training Center," and it continues today to operate "as the premier training site of the U.S. Army." *Id.* "[T]he United States has acquired additional lands and added them to" Fort Irwin since its initial creation, though "[t]hese lands are located within the original perimeter land description in the Executive Order." SER-48.

The Army appears to have believed initially that it possessed exclusive jurisdiction over Fort Irwin. In January 1944, the Secretary of War sent then-Governor Earl Warren a letter accepting exclusive jurisdiction (pursuant to the 1940 statute discussed above) "over all lands acquired by" the United States "for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained." SER-96. The Governor signed the letter to acknowledge receipt. *Id.* Two months later, the Secretary of War followed up with another letter listing the facilities in question, including Camp

Irwin. SER-97; SER-99. Subsequent letters sent later in 1944 served apparently the same function.[1] SER-105; SER-106; SER-109.

Since at least 1962, however, the Army has taken the view that it does *not* possess any form of legislative jurisdiction over Fort Irwin. In that year, the General Services Administration conducted an inventory of federal lands and their jurisdictional status as determined by the agency in question. *See* SER-27 (inventory); *see also Report Part I* at iii (directive to undertake the inventory). That inventory lists Fort Irwin as a property over which the Army possessed only proprietary jurisdiction—that is, a property that it owned but over which it held no legislative jurisdiction. *See* SER-44 (listing Fort Irwin with jurisdictional code 4); SER-41 (description of codes).

Beginning in 1985, moreover, the Army has repeatedly asked the California State Lands Commission to cede to the United States concurrent legislative jurisdiction over criminal offenses at Fort Irwin, and the Commission has granted those requests. SER-50 (discussing requests in 1985, 1991, 1996, 2001, 2007, and 2012); *Resolution of Cession of Concurrent Criminal Legislative Jurisdiction* (May 24, 2017) (ceding concurrent criminal jurisdiction for ten years), https://perma.cc/6QJ4-QDSA. Those requests plainly assume that California, not the United States, would otherwise possess exclusive legislative

[1] The practice of sending multiple similar letters appears not to have been unique to California. *See United States v. Silvers*, 2023 WL 2714003, at *7 (W.D. Ky. Mar. 30, 2023) ("Why two similar letters mere months apart? The records and testimony indicate this was a belt-and-suspenders approach by the War Department: similar letters accepting exclusive jurisdiction were sent by Stimson to [the Governor of Kentucky] and his predecessor in March 1943, January 1944, and May 1944.").

jurisdiction over Fort Irwin. And the Commission has reached that conclusion in an administrative opinion. SER-47–52.

2. This history makes clear that the United States does not possess exclusive legislative jurisdiction over Fort Irwin.

a. Two California statutes are potentially relevant to the jurisdictional status of Fort Irwin. The first, an 1891 statute, provided that "'California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this State and the service of civil process therein.'" *Coso Energy Developers*, 122 Cal. App. 4th at 1523. But the California Court of Appeal has interpreted that statute "as referring to land ceded or conveyed *by the State of California* rather than *by all who cede or convey land to the United States*." *Id.* at 1525. The 1891 statute is thus inapposite here, because the land on which Fort Irwin sits was ceded to the United States by Mexico, not by California. *Supra p.* 8; *see Oregon Clinic, PC v. Fireman's Fund Ins. Co.*, 75 F.4th 1064, 1069 (9th Cir. 2023) ("'We will ordinarily accept the decision of an intermediate appellate court as the controlling interpretation of state law, unless we find convincing evidence that the state's supreme court likely would not follow it.'").

The other relevant statute, adopted in 1897, provided that "California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for

military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; *provided*, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated." Act of Mar. 2, 1897, ch. 56, § 1, 1897 Cal. Stat. 51, 51-52.

Had the recordation requirement of that provision been satisfied, the statute would have ceded exclusive jurisdiction over Fort Irwin to the United States. But it is undisputed that the requirement was never satisfied. The analysis here thus turns on two questions: Was the recordation requirement of the 1897 statute mandatory, and if so, was it waived?

b. As Peraton appears to recognize, the recordation requirement of the 1897 statute should be regarded as mandatory.

Courts have differed in their treatment of recordation requirements in cession statutes like this one. *Report Part II* at 79-80. Some have treated them as "conditions precedent to a transfer of jurisdiction," with mandatory effect, while others have regarded them as "pertaining to matters of form noncompliance with which will not defeat an otherwise proper transfer." *Id.* at 79-80; *see id.* at 80 n.61 (collecting cases).

There are at least two reasons to consider the recordation requirement here to be mandatory as a matter of state law. *First*, California courts have held that "statutes restricting or derogating the state's sovereignty should be strictly construed in favor of the state." *Coso Energy Developers*, 122 Cal. App. 4th at 1533 (citing two decisions of the

state supreme court). That is consistent with principles of federal statutory interpretation. *See, e.g.*, *Sossamon v. Texas*, 563 U.S. 277, 292 (2011). It would violate California's rule of statutory construction to treat the recordation requirement here—which can easily be read as a mandatory condition precedent to the cession of sovereignty—as articulating an optional rule of procedure.

Second, the California Attorney General has treated the recordation requirement of the 1897 statute as mandatory, including in two opinions issued around the time of the events in question. A 1941 opinion issued by then-Attorney General Earl Warren explained that "the State's taxing jurisdiction over the Federal area … in question remain[ed] unimpaired" because the recordation requirement—which it described as "the condition precedent to a grant of exclusive jurisdiction under the 1897 statute"—"was not complied with until after" an "offer to cede exclusive jurisdiction" over the property in question "had been withdrawn." SER-127. And a 1954 opinion explained that if the cession of the land in question was to have been effected by the 1897 statute, then noncompliance with the recordation requirement would have rendered the cession "ineffective." SER-119. Opinions of a state attorney general are not binding, but they "'are … generally regarded as highly persuasive.'" *Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 625 (9th Cir. 1993) (quoting *Harris Cty. Comm'rs Court v. Moore*, 420 U.S. 77, 87 n.10 (1975) (some quotation marks omitted)).

Consistent with these authorities, none of the five district courts to have considered the jurisdictional status of Fort Irwin has doubted that the recordation requirement

of the 1897 statute was a condition precedent to the cession of jurisdiction; they have disagreed only about whether the requirement was waived. *Compare Jackson v. Mission Essential Pers., LLC*, 2012 WL 13015000, at *2 (C.D. Cal. Apr. 13, 2012) (concluding that the requirement was waived), *with Hillman v. Lexicon Consulting, Inc.*, 2016 WL 10988766, at *6 (C.D. Cal. July 27, 2016) (concluding "that the map or plat requirement must be strictly construed and that the actions of Governor Warren were not sufficient to constitute waiver"), *Atiqi v. Acclaim Tech. Servs., Inc.*, 2014 WL 12965984, at *8-9 (C.D. Cal. July 3, 2014) (similar), *Graupner v. Lewis Ltd. Consultants, LLC*, 2012 WL 12895714, at *3 (C.D. Cal. Oct. 26, 2012) (similar), *and* ER-28–29 (similar). Other courts have similarly interpreted the recordation requirement in addressing other federal properties. *See Allen v. 3M Co.*, 2021 WL 1118026, at *4 (D. Minn. Mar. 24, 2021) (concluding that the federal government lacks exclusive jurisdiction over the Marine Corps facility at Twentynine Palms because the recordation requirement was not satisfied), *vacated on other grounds sub nom. Ahrens v. 3M Co.*, 2021 WL 9145905 (D. Minn. Dec. 29, 2021); *Swift v. Tatitlek Support Servs., Inc.*, 2016 WL 11604973, at *14 (C.D. Cal. Oct. 26, 2016) (same); *see also United States v. Watkins*, 22 F.2d 437, 439-440 (N.D. Cal. 1927) (Presidio of San Francisco is within exclusive federal jurisdiction because recordation requirement was satisfied).

c. That leaves Peraton's argument that Governor Warren "waiv[ed]" the recordation requirement through his "acknowledgment, in writing, of the United States' acceptance of exclusive jurisdiction." Br. 6; *see* Br. 5 n.1. The only decision supporting Peraton's view rests on the same reasoning. *Jackson*, 2012 WL 13015000, at *2. But the

four other courts to have addressed the issue have properly regarded the waiver theory as unsound.

As an initial matter, the California Attorney General rejected a nearly identical theory in the 1954 opinion discussed above. There, the Attorney General wrote that the 1944 letter from the Secretary of War to Governor Warren, "purporting to accept exclusive jurisdiction over certain lands acquired by the United States for military purposes, … was ineffective" if the State's cession of jurisdiction was pursuant to the 1897 statute. SER-118. That opinion is persuasive (though not binding), as noted above.

Even aside from that opinion, moreover, it is far from clear as a matter of state law that the Governor possesses the unilateral authority to waive a condition prescribed by the Legislature for the cession of legislative jurisdiction. *See* SER-51 (administrative opinion of the California State Lands Commission concluding that the Governor lacks such a power). And even if the Governor had the power to waive the recordation requirement, the rule of narrow construction for statutes derogating sovereignty, *Coso Energy Developers*, 122 Cal. App. 4th at 1533, would suggest that a condition precedent to a cession of sovereignty cannot be waived except in the clearest possible manner.

The circumstances here do not come close to establishing a waiver with that degree of clarity. The letters to which Governor Warren was responding made no reference to the 1897 statute.[2] Much less did they disclose that the statute's recordation requirement had not been satisfied as to Fort Irwin. And the Governor did not expressly agree that the federal government possessed exclusive jurisdiction over the lands in question; he simply signed the letters, acknowledging receipt, and filed them appropriately in the State's records. Peraton's waiver theory thus more closely resembles a theory of adverse possession than any express relinquishment of sovereignty.

[2] The letters instead referred to Sections 33 and 34 of the California Political Code. SER-96; SER-105. But neither provision was a ground on which California could have ceded jurisdiction over Fort Irwin. Section 33 simply stated that California's "sovereignty and jurisdiction … extends to all places within its boundaries" but that "the extent of such jurisdiction over places that have been or may be ceded to, purchased or condemned by the United States, is qualified by the terms of such cession, or the laws under which such purchase or condemnation has been or may be made." SER-62. And although Section 34 stated that California "consents to the purchase or condemnation by the United States of any tract of land within the state for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings," reserving jurisdiction for the service of civil and criminal process, *id.*, the land on which Fort Irwin sits was not acquired by "purchase or condemnation" from California.

CONCLUSION

The district court's ruling should be affirmed.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

E. MARTIN ESTRADA
United States Attorney

MICHAEL S. RAAB

/s/ Daniel Winik
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8849
daniel.l.winik@usdoj.gov

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) No. 23-55089

I am the attorney or self-represented party.

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