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7 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

8  
9 CONFEDERATED TRIBES AND  
BANDS OF THE YAKAMA  
10 NATION, a federally-recognized  
Indian tribal government and as  
11 *parens patriae* on behalf of the  
enrolled members of the Confederated  
Tribes and Bands of the Yakama  
12 Nation,

13 Plaintiff,

14 vs.

15 ERIC H. HOLDER, JR., Attorney  
General of the United States; et al.,

16 Defendants.  
17

NO. CV-11-3028-RMP

**FEDERAL DEFENDANTS'  
OPPOSITION TO  
PLAINTIFF'S MOTION  
FOR TEMPORARY  
RESTRAINING  
ORDER AND  
PRELIMINARY  
INJUNCTION**

INTRODUCTION

18 The Confederated Tribes and Bands of the Yakama Nation ("Plaintiff" or  
19 "Tribe") request that the Court disrupt the status quo and require all defendants to  
20 obtain permission from the Tribe before entering onto the Yakama Reservation.  
21 While the Tribe's brief seeks to enjoin Yakima County, the Tribe's proposed order  
22 would apply to all defendants. ECF No. 227-1 at 2-3 ("Defendants are temporarily  
23 restrained from entering Yakama Reservation trust lands."). The granting of such  
24 overly broad emergency injunctive relief, where no emergency is present, will not  
25 only prevent Yakima County from entering the Reservation but also will  
26 negatively impact federal law enforcement efforts on the Yakama Reservation.  
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1 As discussed below, plaintiff cannot meet the extraordinarily high burden  
 2 necessary to obtain mandatory injunctive relief that would dictate how the federal  
 3 government conducts law enforcement operations. First, settled Ninth Circuit case  
 4 law establishes that plaintiff cannot prevent federal law enforcement from entering  
 5 the Reservation in performance of their official duties. Second, plaintiff has not  
 6 identified any imminent entry that is about to take place, plaintiff's request would  
 7 exempt exigent circumstances from the injunction and plaintiff's have delayed for  
 8 over a year before seeking injunctive relief. These facts taken together strongly  
 9 militate against a finding of the kind of exigent circumstances that would justify  
 10 imposition of emergency relief. Third, as discussed below, plaintiff demands a  
 11 mandatory injunction that could threaten public safety and impact federal law  
 12 enforcement efforts to the detriment of the public. Plaintiff has not demonstrated  
 13 that the equities weigh in favor of imposing mandatory requirements on federal  
 14 law enforcement efforts or on Yakima County officers when acting in concert with  
 15 federal law enforcement. Instead, the public interest favors not issuing emergency  
 16 injunctive relief. In short, there is no basis for the issuance of emergency relief  
 17 and the Court should deny plaintiff's motion.

18  
 19 **I. THE SUPREME COURT REQUIRES PLAINTIFF TO MEET ALL**  
 20 **FOUR PRONGS IN ORDER TO JUSTIFY THE EXTRAORDINARY**  
 21 **RELIEF OF A MANDATORY EMERGENCY INJUNCTION**

22 In order to obtain emergency injunctive relief, a plaintiff must establish that  
 23 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the  
 24 absence of preliminary relief, that the balance of equities tips in his favor, and that  
 25 an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555  
 26 U.S. 7, 21 (2008); *Arakaki v. Cayetano*, 198 F. Supp. 2d 1165, 1173 (D. Haw.  
 27 1999) (“The standard for granting a temporary restraining order ('TRO') is identical  
 28 to that for a preliminary injunction.”). An injunction is “a drastic and extraordinary

1 remedy, which should not be granted as a matter of course.” Monsanto Co. v.  
2 Geertson Seed Farms, 130 S. Ct. 2743, 2761 (2010).

3 Contrary to plaintiff's reliance on older case law setting forth the emergency  
4 relief standard, ECF No. 237 at 8-9, in Winter, the Supreme Court struck down the  
5 standard previously applied by the Ninth Circuit that a preliminary injunction may  
6 be entered where there is only a "possibility" of irreparable harm if plaintiff has  
7 demonstrated a "strong likelihood" of prevailing on the merits. 555 U.S. at 21.  
8 Although the Ninth Circuit has determined that its alternative "sliding scale" test  
9 applies after Winter, a plaintiff must show both "'serious questions going to the  
10 merits' and a balance of hardships that *tips sharply* towards the plaintiff can support  
11 issuance of a preliminary injunction." Alliance for the Wild Rockies v. Cottrell, 632  
12 F.3d 1127, 1135 (9th Cir. 2011) (emphasis added). These factors support issuance  
13 of an injunction only if "the plaintiff also shows that there is a *likelihood* of  
14 irreparable injury *and* that the injunction is in the public interest." Id. Moreover, a  
15 heightened showing is further necessary to justify a mandatory injunction that alters  
16 rather than preserves the status quo (such as requested by plaintiff here). See, e.g.,  
17 Heckler v. Lopez, 463 U.S. 1328, 1333-34 (1983).

18  
19 **II. PLAINTIFF HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON**  
**THE MERITS**

20 In order to meet the first prong of the emergency injunctive relief test, the  
21 Ninth Circuit requires that a plaintiff show that there are “serious questions going  
22 to the merits.” This standard requires more than showing that “success is more  
23 likely than not”; it requires a plaintiff to demonstrate a “substantial case for relief on  
24 the merits.” Leiva-Perez v. Holder, 640 F.3d 962, 968 (9th Cir. 2011). Here, to the  
25 extent the Tribe's emergency motion would enjoin the federal defendants, the Tribe's  
26  
27

1 Treaty right does not preclude the federal defendants, nor cross-deputized federal  
2 officers from entering the Yakama Reservation.

3 The federal defendants do not dispute that the Treaty gives the Yakama  
4 Nation a general right to exclude non-Indians from their reservation land. See  
5 Treaty with the Yakama, 1855, 12 Stat. 951, Art. II ("[N]or shall any white man,  
6 excepting those in the employment of the Indian Department, be permitted to reside  
7 upon the said reservation without permission of the tribe and the superintendent and  
8 agent."); U.S. Dep't of Labor v. Occupational Safety & Health Comm'n, Warm  
9 Springs Forest Prods., 935 F.2d 182, 185 (9th Cir. 1991). This right is consistent  
10 with the Ninth Circuit's acknowledgment that "a hallmark of Indian sovereignty is  
11 the power to exclude non-Indians from Indian lands" independent of a treaty.  
12 Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1117 (9th Cir. 1985)  
13 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982)). But it is also  
14 clear that this general right is not absolute.

15 It is settled law that tribes do not possess a right to prevent the United States  
16 from enforcing those laws of general applicability (including federal criminal  
17 statutes) that apply with equal force on Indian reservations. See California v.  
18 Cabazon Band of Mission Indians, 480 U.S. 202, 214 n.16 (1987) ("Federal law  
19 enforcement officers have the capability to respond to violations of [federal law] on  
20 Indian reservations"); Solis v. Matheson, 563 F.3d 425, 437 (9th Cir. 2009) (holding  
21 a general right of exclusion in an Indian treaty was not sufficient to bar the  
22 application of Fair Labor Standards Act to the tribe); Confederated Tribes of Warm  
23 Springs v. Kurtz, 691 F.2d 878, 882 (9th Cir. 1982) (holding a general right of  
24 exclusion in an Indian treaty was not sufficient to bar the application of federal tax  
25 laws to the tribe); United States v. Farris, 624 F.2d 890, 894 (9th Cir. 1980) (holding  
26 a general right of exclusion in an Indian treaty was not sufficient to bar the  
27 application of the Organized Crime Control Act to the tribe).

1 Plaintiff also cannot prevent Yakima County law enforcement, when acting as  
 2 deputized federal officers, from entering the Reservation. See United States v.  
 3 Diamond, 53 F.3d 249, 251-52 (collecting cases and holding that cross-deputized  
 4 county sheriff deputy is a federal officer "either as a special deputy U.S. marshal or  
 5 as someone assisting a federal officer"); United States v. Okie, 12 F.3d 1436, 1439-  
 6 40 (8th Cir. 1993) (cross-deputized tribal law enforcement is a federal officer). The  
 7 Tribe's enactment of an ordinance purporting to prevent federal agencies or federal  
 8 deputies from entering the reservation does not change this analysis; the Tribe's  
 9 unilateral action cannot provide rights greater than the Treaty.

10 Moreover, the general exclusion provision of the Tribe's Treaty, which as  
 11 discussed above does not prevent federal law enforcement from entering the  
 12 Reservation, must also be read in conjunction with Article III of the Tribe's Treaty,  
 13 which provides for "free access" in common with citizens of the United States to  
 14 travel upon public highways crossing the Reservation. See 12 Stat. 951, Art. III.  
 15 With respect to the Yakama Reservation, this is important given the non-Indian  
 16 towns within the boundaries of the Reservation. For example, the towns of Wapato,  
 17 Toppenish, and Harrah are primarily deeded land, as opposed to reservation land,  
 18 but to reach them you have to enter the Reservation. See Ex. A ¶ 11.<sup>1/</sup> Thus,  
 19 plaintiff has not shown a likelihood of success on the merits and the motion should  
 20 be denied.

21 \_\_\_\_\_  
 22 <sup>1/</sup> Plaintiff's claims of the United States Attorney's "instigation" and "legal  
 23 advice" to the County do not advance their arguments. ECF No. 237 at 7-8.  
 24 Plaintiff's submitted documents show that Mr. Ormsby did not provide legal  
 25 advice to the County, but instead, evidence concerns for the difficult position both  
 26 federal and county law enforcement face with respect to enforcement on the  
 27 Yakama Reservation. See ECF No. 234 at 41 and 46.

1 **III. PLAINTIFF'S FAIL TO PROVIDE EVIDENCE OF IMMINENT**  
 2 **IRREPARABLE HARM IF THE DEFENDANTS CONTINUE TO**  
 3 **ENTER THE RESERVATION**

4 Plaintiff's allegations of "imminent irreparable injury" do not meet the  
 5 standards of proof required for the issuance of emergency injunctive relief. "It is not  
 6 enough for a court considering a request for injunctive relief to ask whether there is  
 7 a good reason why an injunction should not issue; rather, a court must determine  
 8 that an injunction should issue." Monsanto, 130 S. Ct. at 2757; id. at 2760 (An  
 9 injunction should only issue if it is "needed to guard against any present or  
 10 imminent risk of likely irreparable harm."). An injunction should issue only where a  
 11 plaintiff makes a "clear showing" and presents "substantial proof" that an injunction  
 12 is warranted, Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam), and  
 13 does "more than merely allege imminent harm sufficient to establish standing,"  
 14 Associated Gen. Contractors v. Coal. for Econ. Equity, 950 F.2d 1401, 1410 (9th  
 15 Cir. 1991); Ctr. for Food Safety v. Vilsack, 636 F.3d 1166, 1171 n. 6 (9th Cir.). The  
 16 plaintiff is under the obligation to show that "irreparable injury is *likely* in the  
 17 absence of an injunction." Winter, 555 U.S. at 22 (emphasis in original).

18 First and foremost, plaintiff's own requested injunction disclaims its  
 19 application to exigent circumstances, ECF No. 237 at 3, which means there is no  
 20 imminent injury requiring emergency relief here. Second, plaintiff does not set forth  
 21 imminent irreparable injury but instead relies on past behavior. Id. at 9-11. One  
 22 situation relied upon by plaintiff concerns the entry of Yakima County in concert  
 23 with Bureau of Indian Affairs officers.<sup>2/</sup> Id. at 5. Bureau of Indian Affairs officers

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24 <sup>2/</sup> Of note, plaintiff does not provide the complete factual situation as the FBI  
 25 was not on the Reservation at the time of that law enforcement activity. See Ex.  
 26 C. Instead, that action was carried out by the BIA and a cross-deputized officer of  
 27 the Violent Crimes Task Force. Id.

1 are expressly not covered by the Tribe's ordinance. See ECF No. 234 (Sexton Decl.  
2 at 9, Ex. A) ("The prohibition . . . shall not apply to officers, employees and agents  
3 of the United States Department Bureau of Indian Affairs"). Additionally, in all of  
4 the tribal police reports, the tribal law enforcement officers uniformly describe the  
5 Sheriff's office as "requesting assistance" from tribal law enforcement with the  
6 February 2012 law enforcement activities. See ECF No. 235, Ex. A ("[T]he  
7 Sheriff's Office was requesting assistance in locating a suspect with a felony  
8 warrant"); id. Ex. B ("to assist Yakima County Sheriff[']s Office with a warrant  
9 arrest"); id. ("Yakima County Sheriff's Office requesting a Tribal officer to assist  
10 with an warrant arrest."). In other words, plaintiff's own documentation of those  
11 February 2012 entries show that the County followed the protocol established by the  
12 plaintiff and defeats plaintiff's allegations of injury.

13 Moreover, delay by the plaintiff in seeking injunctive relief cuts against a  
14 finding of irreparable injury. RoDa Drilling Co. v. Siegel, 552 F.3d 1203, 1211  
15 (10th Cir. 2009). Like all such motions, plaintiff's motion for emergency relief "is  
16 sought upon the theory that there is an urgent need for speedy action to protect the  
17 plaintiffs' rights." Lydo Enterprises, Inc. v. City of Las Vegas, 745 F.2d 1211, 1213  
18 (9th Cir. 1984). "A delay in seeking a preliminary injunction is a factor to be  
19 considered in weighing the propriety of relief . . . . By sleeping on its rights a  
20 plaintiff demonstrates the lack of need for speedy action." Id.; see also Citibank,  
21 N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir. 1985) (delay in seeking an injunction  
22 suggests "the absence of the kind of irreparable harm required to support a  
23 preliminary injunction").

24 Here, while plaintiff claims to have "only in recent days" learned of the extent  
25 of law enforcement entries onto the Reservation, ECF No. 237 at 10, plaintiff filed  
26 this lawsuit over thirteen months ago. See also ECF No. 234 at 7 (letter from Aug.  
27 12, 2011). Indeed, an entry in February 2011 prompted the filing of the Complaint,

1 meaning plaintiff has been well aware of past entries for at least over a year.  
2 Plaintiff's motion relies upon that entry along with additional entries spanning the  
3 past thirteen months. ECF No. 237 at 3-6. In fact, the most recent entry plaintiff  
4 complains about occurred over two weeks ago. See id. at 5-6. Plaintiff also  
5 codified an ordinance purporting to deny access to law enforcement in May of 2011,  
6 over nine months ago. Plaintiff decided not to seek injunctive relief for over a year  
7 and now claims that the situation is an emergency; this substantial delay in seeking  
8 injunctive relief makes clear that plaintiff's injury is not irreparable and justifies the  
9 denial of emergency relief.

10  
11 **IV. THE BALANCE OF EQUITIES TIPS DECIDEDLY IN FAVOR OF**  
12 **DEFENDANTS; ISSUANCE OF AN INJUNCTION WOULD HARM**  
13 **THE PUBLIC INTEREST**

14 The public interest and balancing of the equities prongs are separate and in  
15 addition to the other prongs. Mazurek, 520 U.S. at 972 (stating that plaintiffs must  
16 carry the burden or persuasion as to each element "by a clear showing."). The  
17 public interest and equities inquiries address whether, if the emergency injunctive  
18 relief were granted, would the injunction be adverse to the public interest. While  
19 plaintiff's arguments relating to balancing of the equities and public interest focus on  
20 potential impacts to Yakima County, plaintiff disregards the impacts to federal law  
21 enforcement operations if all defendants are broadly enjoined from entering the  
22 Reservation for the duration of this litigation. ECF No. 237 at 17-19. The negative  
23 impacts to federal law enforcement remain even if Yakima County is singularly  
24 enjoined because, as discussed below, federal law enforcement agencies regularly  
25 partner with Yakima County.

26 Here, there is no question that the public has an interest in effective law  
27 enforcement or that the United States Marshal Service, the Bureau of Alcohol  
28 Tobacco Firearms Explosives ("ATF"), the Federal Bureau of Investigation, the



1 Bureau of Indian Affairs ("BIA") or other federal agencies that enter the Reservation  
2 for law enforcement purposes are acting in the public interest. Enjoining either all  
3 defendants or just Yakima County will have impacts beyond efforts by Yakima  
4 County to enforce federal laws within the boundaries of the Yakama Reservation.

5 Yakima County works with federal law enforcement in various ways. For  
6 example, Yakima County comprises half of the United States Marshal Service's  
7 Pacific Northwest Violent Offender Task Force ("Violent Offender Task Force").  
8 See Ex. A ¶ 5. The office of the United States Marshal has been described as that  
9 of "a national peace-officer." In re Neagle, 39 F.833, 854-55 (C.C.N.D. Cal. 1889),  
10 aff'd, 135 U.S. 1 (1889). The purpose of the Violent Offender Task Force is to  
11 apprehend individuals who are wanted for violent offenses, and to arrest individuals  
12 with outstanding warrants that have a history of violence. Ex. A ¶ 4. Further, this  
13 Task Force has received specialized training for the apprehension of violent  
14 offenders and its members work together on a daily basis; it would be extremely  
15 difficult, given resources, to replace half the team and would increase the risk of  
16 injury while serving warrants on the Yakima Reservation. Id. ¶ 6-7.

17 Similarly, ATF requests and relies upon the assistance of the Yakima County  
18 Sheriff's Office to help ATF effectively and safely carry out its law enforcement  
19 operations. See Ex. B ¶ 8. Any temporary restraining order or preliminary  
20 injunction which hinders the ability of the Yakima County Sheriff's Office to  
21 cooperate with and assist the ATF in its law enforcement operations will ultimately  
22 hinder ATF's ability to effectively and safely carry out its mission. Id. ¶ 9; see, e.g.,  
23 USAO Press Release Wapato Gang Member Sentenced As Armed Career Criminal  
24 for Firearm Possession (August 15, 2011), available at  
25 [http://www.justice.gov/usao/wae/news/2011/2011\\_08\\_15\\_Navarro\\_Sentence.html](http://www.justice.gov/usao/wae/news/2011/2011_08_15_Navarro_Sentence.html)  
26 (discussing ATF's partnering with Yakima County); USAO Press Release Wapato  
27 Man Sentenced to 150 Months Imprisonment For Burglary and Possession of Stolen

1 Firearms (March 1, 2012), available at [http://www.justice.gov/usao/wae/news/\\_2011](http://www.justice.gov/usao/wae/news/_2011)  
2 /2011\_03\_01\_Cloud\_Sentence.html (same).

3 Considering all of the benefits from law enforcement operations, the public  
4 interest and balancing of the equities clearly weigh in favor of the Court not issuing  
5 an injunction.

6 **V. THE COURT SHOULD NARROWLY TAILOR ANY INJUNCTION**  
7 **TO AVOID IMPACTS TO FEDERAL LAW ENFORCEMENT**

8 If this Court were to find an injunction warranted, it should narrowly tailor  
9 that injunction in the public interest. Even when injunctive relief is found  
10 appropriate, courts should narrowly craft relief to address only the claimed violation  
11 and take into account the respective harms to the parties, the measures that can be  
12 taken to mitigate those harms, and the public interest. Weinberger v. Romero-  
13 Barcelo, 456 U.S. 305, 312 (1982); Orantes Hernandez v. Thornburgh, 919 F.2d  
14 549, 558 (9th Cir. 1990) (requiring injunctions to "be narrowly tailored to give only  
15 the relief to which plaintiffs are entitled."). Courts favor "[n]arrow, curative  
16 remedies that do not prohibit the agency from acting." Sierra Forest Legacy v. Rey,  
17 670 F.Supp.2d 1106, 1110 (E.D. Cal. 2009); accord Yakus v. United States, 321  
18 U.S. 414, 440 (1944). The granting of emergency relief is a drastic remedy. If the  
19 Court enjoins Yakima County, any injunction should be tailored to avoid any  
20 unintentional impacts to federal law enforcement operations. As such, the federal  
21 defendants respectfully request that any injunction expressly exempt federal law  
22 enforcement operations and Yakima County officers when acting in concert with  
23 federal law enforcement.

24 **CONCLUSION**

25 Plaintiff has not made the showings necessary to justify the imposition of  
26 emergency relief.

1 RESPECTFULLY SUBMITTED this 13th day of March, 2012.

2  
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28 FED. DEFS.' OPPOSITION  
TO PLAINTIFF'S TRO/PI MOTION

**CERTIFICATE OF SERVICE**

I hereby certify that on March 13, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: N/A

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