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Honorable Rosanna Malouf Peterson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Plaintiffs;

v.

ERIC H. HOLDER JR.; et al.,

Defendants.

NO. CV-11-3028-RMP

REPLY IN SUPPORT OF CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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1 The Yakama Nation seeks a narrow injunction to prevent Yakima County
2 from particular imminent conduct that will violate the Nation's Treaty and
3 sovereignty. The County mischaracterizes the Nation's Motion as one "seek[ing]
4 generally to prevent the Yakima County Sheriff's Office from entering the
5 reservation absent prior approval from plaintiffs." ECF No. 239 at 3. Likewise,
6 Federal Defendants argue that the Nation is seeking to "require all defendants to
7 obtain permission from the Tribe before entering onto the Yakama Reservation."
8 ECF No. 244 at 1. The Motion at bar seeks neither. The Nation asks only that the
9 Court prohibit the ***County*** from further entering Yakama Reservation ***trust lands*** to
10 assert ***state criminal processes over enrolled Yakamas*** without complying with
11 codified Treaty-based Yakama law and procedure. *See* ECF No. 237. Federal law
12 requires as much. Only a TRO will make the County honor federal law.

13 **A. IMMINENT AND IRREPARABLE INJURY WILL RESULT IF THE NATION'S REQUESTED RELIEF IS NOT GRANTED.**

14 If the Court does not enjoin the County, the County will continually enter
15 Reservation trust land and assert state criminal jurisdiction and process over
16 Yakamas. The County will continually violate codified Yakama law and
17 procedure, as well as Article II to the Yakama Treaty of 1855, 12 Stat. 951 (1855),
18 and will permanently harm the Nation and its members.

19 The County first argues that "heightened criteria" should apply here because
the Nation is seeking a "mandatory" rather than "prohibitory" injunction. ECF No.

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1 248 at 8. This is not true. The Nation simply seeks to prohibit the County from
2 impinging upon those sovereign rights (1) exercised through the Nation's own
3 codified tribal law and procedure, and (2) guaranteed in the Treaty with the
4 Yakama. *Muscogee Nation v. Oklahoma Tax Com'n*, 611 F.3d 1222 (10th Cir.
5 2010). The Nation is not, for instance, seeking "mandatory injunctive relief"
6 directing the return of Yakamas in state custody. *Id.*

7 The County also argues that because its "law enforcement procedures have
8 remained essentially unchanged for more than 30 years," no imminent and
9 irreparable "significant threat" to the Nation's sovereignty exists. ECF No. 248 at
10 10. The County is mistaken. A "threatened violation of the [tribal] sovereignty, as
11 guaranteed by federal law" constitutes an irreparable and "significant threat" to the
12 Nation. *Miccosukee Tribe of Indians of Fla. v. U.S.*, No. 00-3453, 2000 WL
13 35623105, at *10 (S.D. Fla. Dec. 15, 2000). The same standard applies to Treaty
14 rights. *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1516 (W.D. Wash.
15 1988). Although it is now apparent that the County has been violating federal law
16 for over thirty years, ECF No. 248 at 10, the County's historical disregard for its
17 legal obligations has no bearing today. The sovereignty of the Yakama Nation has
18 been blatantly violated twice in the last few weeks. ECF Nos. 233 at 4; 235 at 5-13.

19 The two unprecedented invasions of Wanity Park Elders Housing Project in
late February 2012; the September 2011 attempt to take a Yakama Child from a

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1 Yakama home on Reservation trust land, ECF No. 236; the timing of the County's
2 most recent incursions after meeting with Mr. Ormsby "to discuss tribal issues" on
3 February 2, ECF No. 234 at 35, and after County Sheriff Ken Irwin telling the
4 Yakama Nation police Chief on February 14, that "it was U.S. Attorney Ormsby
5 who had told him that Yakima County could execute warrants on enrolled Yakamas
6 on Reservation trust land, ECF No. 254 – all show that the sovereignty of the
7 Yakama Nation and the rights of enrolled Yakamas are imminently at risk. The
8 County's own proof unequivocally shows that unless this Court issues a TRO, it
9 will enter Reservation trust lands and asserting state criminal process over Yakamas
10 without complying with codified Yakama law and procedure or the Treaty of 1855.
11 *See* e.g. ECF Nos. 246-2 at 15; 246 at 5 (injunction would have "immediate and
12 significant implications for law enforcement").

13 It is ironic that the County and Federal Defendants are fighting the inter-local
14 law enforcement coordination that underlies Title 2011 simply because the Nation
15 has legislated a tribal process for the same. Any threat to public safety in Indian
16 Country results from the very lack of coordination that County and Federal
17 Defendants seek to prolong. As noted by Congress in its findings to the Tribal Law
18 and Order Act of 2010 ("TLOA"):

19
> [T]he complicated jurisdictional scheme that exists in Indian country . . . has a significant negative impact on the ability to provide public safety to Indian communities; . . . has been increasingly exploited by criminals; and . . . requires a high degree of commitment and cooperation among

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tribal, Federal, and State law enforcement officials . . .

Pub. L. No. 111-211, § 202, 124 Stat. 2262 (2010); *see also* DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF THE INTERIOR, TRIBAL LAW AND ORDER ACT: LONG TERM PLAN TO BUILD AND ENHANCE TRIBAL JUSTICE SYSTEMS 32 (2011) ("Broad-based partnerships involving key federal, tribal, state and local partners can build stronger, more sustainable programs. These collaborations can address challenges related to jurisdiction over tribal members . . . ."). Due to the imminent harm faced by enrolled Yakama members and Federal and County Defendants' refusal to entertain broad-based partnerships with Yakama, the Nation has been forced to implement its own codified procedures to ensure Reservation safety.

If there has been any delay in filing this Motion it was not at the Nation's hands. Since the enactment Title 2011, the Nation has reached out to the County on *multiple* occasions, to resolve jurisdictional differences. *See* ECF No. 234, Exs. A, B, C; ECF No. 246-3. Last week, it became clear that the County will not work with the Nation to resolve this dispute. ECF No. 233, Ex. I; *see also id.*, Ex. G (it was revealed to the Nation early last week that "Sheriff Irwin has directed that as a courtesy we will notify Yakama Nation when we are going to trust land to work but . . . their presence or blessing is not necessary for us to do what we need to do.").

Therefore, by mid-last week, the Nation determined that its only choice to prevent the County from continuing to "do what it needed to do" on Reservation trust lands and in defiance of codified Yakama procedures, the Treaty and other

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federal law, was to seek a TRO. On March 8, Plaintiffs requested a hearing before for the following day; the soonest available hearing date was today. With the County having rebuffed all of the Nation's diplomatic efforts to resolve the governments' legal differences out of court, most recently after Yakama's March 5 entreaty, the Nation had no choice but to finally file this Motion on March 9.

It would be imprudent to sanction the County's intractable behavior – especially its refusal to even acknowledge the Nation's settlement overtures, which has served only to prolong the matter and foment this dispute – by weighing such antics in favor of the County. *See Volkswagen AG v. Dorling Kindersley Pub.*, 614 F.Supp.2d 793, 812 (E.D. Mich. 2009) (delay in filing TRO "was not unreasonable because during the delay, [plaintiff] engaged in efforts . . . to resolve the dispute."); *Liquid Glass Enterprises, Inc. v. Dr. Ing. Porsche AG*, 8 F.Supp.2d 398, 405 (D.N.J. 1998) (where "delay was the result of [the plaintiff's] efforts toward settlement, [a]ny delay . . . in filing suit was completely excusable.").

At any rate, "[i]t is generally held that delay, by itself, is insufficient to block relief under Rule 65. . . . Rather, in order for such delay to be determinative, it must prejudice the defendant is some way." *Synagro-WWT, Inc. v. Louisa County, VA*, No. 01-0060, 2001 WL 868638, at *5 (W.D. Va. 2001). Here, because any alleged delay in bringing this Motion does not prejudice the County, to deny the Nation the

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relief that is now clearly needed to protect enrolled Yakama members, inherent Yakama sovereignty, and the Yakama Treaty of 1855, would be improper.

B. THE NATION IS LIKELY TO SUCCEED ON THE MERITS.

1. The County Is Barred From Circumventing or Contravening Governing Tribal Procedure.

The County asserts that the Nation's claims "amount to a rash collateral attack on Public Law 280." ECF No. 248 at 12. In fact, Public Law 280 has nothing to do with the Nation's argument.

Pursuant to P.L. 280, "Washington State extended full criminal and civil concurrent jurisdiction to all **fee** lands in every Indian reservation . . . ." *Young v. Duenas*, 262 P.3d 527, 532 (Wash. Ct. App. 2011) (emphasis added). State law makes express that this assumption of jurisdiction did "**not** apply to Indians when on their **tribal** lands or **allotted** lands within an established Indian reservation . . . ." WASH. REV. CODE § 37.12.010. In other words, regardless of P.L. 280, only the Yakama Nation and the U.S. have criminal jurisdiction over Yakamas on Yakama Reservation trust land. *State v. Ambro*, 123 P.3d 710, 716 (Idaho Ct. App. 2005).

The Nation does, however, seek to halt the County's increasing propensity to import state processes onto Yakama Reservation trust land, relative to enrolled Yakama members. Contrary to the County's argument that "cases that do not involve Public Law 280 . . . are largely beside the point," ECF No. 248 at 13, the cases that the Nation cites are precisely on point **for the relief that it *is* seeking**:

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1 When a state officer seeks to exert state process upon Yakamas on Yakama
2 Reservation trust land, that "state officer's . . . authority . . . necessarily [may] not
3 infringe on tribal sovereignty by circumventing or contravening a governing tribal
4 procedure." *State v. Harrison*, 238 P.3d 869, 876, 880 (N.M. 2010); *see also Tracy*
5 *v. Superior Court of Maricopa County*, 810 P.2d 1030, 1043 (Ariz. 1991); *see also*
6 *generally Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 686 (9th Cir. 1969), *cert.*
7 *denied*, 396 U.S. 1003 (1970); *Miccosukee Tribe*, 2000 WL 35623105, at *6. Such
8 is the case even where the underlying crime was committed off-Reservation.
9 *Turtle*, 413 F.2d 683; *Benally v. Marcum*, 553 P.2d 1270 (1976).

10 **2. The Treaty With The Yakama Provides This Court An Independent Basis To Enjoin Yakima County.**

11 Federal Defendants concede that Yakima County agents, when not acting as
12 deputized federal officers, lack authority to enter Reservation trust lands absent
13 Yakama's permission. ECF No. 245 at 5. Yakima County's silence on the topic of
14 Article II to the Yakama Treaty is deafening. The County quite literally offers no
15 defense to the Nation's Treaty argument.[1]

16 [1] At least one court has noted that the exertion of state process on Indian reservation
17 trust lands would be independently preempted where it interferes with "the United
18 States' government's treaties with" Indian tribes – here, Article II of the Treaty of
19 1855. *Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, No. 05-10296, 2011 WL 1884196, at *3 (E.D. Mich. May 18, 2011).

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1 Title 2011 was enacted pursuant to the sovereign powers reserved to the
2 Nation in its Treaty. The Treaty guarantees that the Yakama Reservation be set
3 apart for the Nation's ***exclusive*** use and benefit, and requires that the County
4 request and obtain permission from the Yakama Nation so that in the instance of
5 Title 2011, "the presence and assistance of a Yakama Nation Police Officer" can be
6 afforded the County. ECF No. 246-3. The Yakama Nation has enacted a procedure
7 that reflects this protocol; yet nowhere in the County's response papers does the
8 County indicate it has ever even attempted to comply with Title 2011.
9 Instead, the County outright rejects the application of Title 2011 and instead
10 simply chooses to violate codified Yakama procedures, and thus the common law,
11 claiming that such procedures are not consistent with the way the County has
12 engaged in law enforcement activities on the Yakama Reservation for decades.
13 Surely the County has "since at least the 1970s" had to comply with "recently-
14 adopted" state and federal law. ECF No. 248, at 1. The only difference here is that
15 the laws governing the County's behavior on Reservation trust lands are Indian in
16 nature: (1) Title 2011, and (2) Article II of the Treaty of 1855. The County
17 blatantly refuses to honor the rights expressed in and flowing from an Indian Treaty
18 recognized by the Federal Constitution as "the supreme Law of the Land." Art. VI,
19 cl. 2. An injunction must therefore issue.

C. AN INJUNCTION IS IN THE PUBLIC INTEREST.

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1 The County argues that the public interest will not be served by an injunction
2 because it "will be compelled to comply with the 2011 ordinance" and therefore
3 "will no longer be able to respond to non-emergent calls from reservation residents
4 until it has received permission to do so from the Yakama Tribal Council or its
5 chair." ECF No. 248 at 18. The County is mistaken. Again, the Nation is not
6 seeking to prevent the County from entering the Reservation. Indeed, Title 2011 is,
7 on its face, an "ACCESS" law. ECF No. 234, Ex. A.

8 The County also asserts that because Title 2011 does not include an appeal
9 procedure or similar constraints, it is somehow illegitimate or need not be to
10 complied with. ECF No. 248 at 5. The Navajo Nation's procedure, however,
11 which has been endorsed by numerous non-tribal courts, *see e.g. Turtle*, 413 F.2d
12 683; *Benally*, 553 P.2d 1270, is much more onerous and, similarly, does not include
13 appeal procedures or the constraints requested by the County. *See id.*

14 In short, the County has offered no proof that its compliance with codified
15 Yakama law and procedure will hinder its law enforcement efforts. Instead of
16 pretending that codified tribal procedures and reserved Treaty rights do not exist,
17 recent congressional findings urge "cooperation among tribal, Federal, and State
18 law enforcement officials" regarding on-Reservation public safety. Further, case
19 law holding that evidence is not admissible where a tribal defendant is arrested on
reservation trust land without utilizing the tribe's codified process indicates that

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complying with tribal process would be *beneficial* to the County. *See State v. Yazzie*, 777 P.2d 916 (N.M. Ct. App. 1989). An injunction, therefore, is in the County's best interest, as well as the Reservation and neighboring public's.

III. NO BOND SHOULD BE REQUIRED.

No bond should be required, let alone a bond of $10 million. The County essentially asks the Court to require security because complying with its obligations under federal law could be difficult. First, the Nation rejects the County's premise for a bond, since on-Reservation law enforcement will actually be more efficient if the County elects to enter an MOU with the Nation. Second, many federal laws other than the Yakama Treaty or codified Yakama law and procedure, already slow down but do not outright impede law enforcement. The Fourth Amendment to the U.S. Constitution, for instance, in most circumstances likely affects the County's ability to "respond in a timely manner to calls for assistance arising from the reservation." ECF No. 248 at 19. This risk of delay simply does not allow the County to flout the Fourth Amendment or require a bond for its trouble.

DATED this 14th day of March 2012.

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1
CERTIFICATE OF SERVICE

2 I, Gabriel S. Galanda, declare as follows:

3 1. I am now and at all times herein mentioned a legal and permanent
4 resident of the United States and the State of Washington, over the age of eighteen
5 years, not a party to the above-entitled action, and competent to testify as a
witness.

6 2. I am employed with the law firm of Galanda Broadman PLLC, 11320
7 Roosevelt Way NE, Seattle, WA 98125.

8 3. On March 14th, 2012, I filed the foregoing document, which will
provide service to the following via ECF:

9 George Fearing
10 Gregory C Hesler
11 Kenneth W Harper
12 Lisa Beaton
Maureen Elizabeth Rudolph
13 Meriwether D Williams
14 Michael John Kapaun
Pamela Jean DeRusha
15 Quinn N Plant
16 Stephen John Hallstrom
17 William John Schroeder
William M Symmes

18 The foregoing statement is made under penalty of perjury and under the laws
19 of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 14th day of March 2012.

s/Gabriel S. Galanda

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