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HON. LONNY R. SUKO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, WASHINGTON DEPARTMENT OF LICENSING, et al.,

Plaintiffs,

v.

THE TRIBAL COURT FOR THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, et al.,

Defendants.

NO. CV-12-3152-LRS

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

On December 6, 2012, a judge of the Yakama Nation Tribal Court ordered Washington state officials not to take actions that a Consent Decree of this Court entitles them to take. Because the Tribal Court lacked jurisdiction to enter the order, which interferes with state functions and with the jurisdiction of this Court, this Court should enter a preliminary injunction requiring the Yakama

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Nation Tribal Court and its Chief Judge, Ted Strong, to dissolve the December 6 order and to dismiss the tribal court action.

FACTS

Nearly twenty years ago, the Yakama Indian Nation filed a lawsuit in this Court, alleging that Washington lacked authority to collect state gasoline taxes on certain fuel sales by tribal retailers within the Yakama Reservation. The case was settled with a Consent Decree that this Court approved in 1994, and the Yakama Nation dismissed its complaint with prejudice. *Teo v. Steffenson*, Civil No. 93-3050-AAM, Doc. No. 71 (E. D. Wash., Nov. 3, 1994). In 2006, this Court approved amendments to the Consent Decree, after the Yakama Nation once again invoked the jurisdiction of this Court to enforce the 1994 Consent Decree. *Teo v. Steffenson*, Civil No. 04-3079-CI (E.D. Wash.), ECF No. 66.

The Consent Decree established a framework for the quantification and collection of state fuel taxes on sales within the Yakama Reservation. Laughlin Decl. ¶¶ 4, 13-18, & Exs. A-C. The state agreed to refrain from collecting state taxes on reservation fuel sales to tribal members and for tribal governmental purposes. Laughlin Decl. Ex. B ¶¶ 2.3, 4.9. Because the exact quantity of such sales was not known, the parties started with an estimate, and agreed that a percentage (initially 70% then 75%) of the fuel tax would not be collected on fuel delivered to tribal licensees on the Yakama Reservation. Laughlin Decl. Ex. A ¶ 4.9, Ex. C at 4.

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The State and the Yakama Nation intended that the exemption from fuel taxes would apply only to sales actually proven to be to the Tribe or its members. The Consent Decree contained specific provisions requiring tribal fuel retailers to keep records of all sales, distinguishing and identifying tribal and member sales from nonmember sales, on which the full amount of the state tax was applicable. Based on these records, annual audits were to be conducted in order to adjust the percentage of ex-tax deliveries to reflect actual sales. The Yakama Nation, however, never complied with the record-keeping requirements, nor were any annual audits ever completed. Laughlin Decl. ¶ 22 & Exs A-C.

In 2008, the DOL made repeated attempts to initiate the audit of fuel purchases for the year 2007, but the Yakama Nation did not respond. Laughlin Decl. ¶ 24. In 2009, the DOL requested the Yakama Nation audit fuel purchases for the year 2008 and suggested the 2007 and 2008 audits be combined. *Id*. ¶ 27. The parties agreed to combine the audits, with a due date of September 30, 2009, (later extended to October 30 at the Nation's request). *Id*. ¶¶ 28-30 & Ex. D. When the Nation later sought to postpone the audit indefinitely, DOL requested that the audit report be completed by January 15, 2010. Laughlin Decl. ¶ 31. No audit report was ever forthcoming, nor has any audit been completed for any of the years 2007, 2008, 2009, 2010 or 2011. Laughlin Dec. ¶32.

In August 2010, the parties met in Toppenish to discuss the Consent Decree. Laughlin Decl. ¶ 35. With that meeting, DOL initiated more than two

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years of effort to cure the breaches, resolve disputes and restore a fair and functioning consent decree. *Id*. ¶¶ 35-49.

In March 2011, DOL formally invoked the Consent Decree dispute resolution process. Laughlin Decl. ¶ 39, Ex. I. Throughout 2011 and 2012, the DOL and Yakama Nation engaged in negotiations, retaining a professional mediator in March 2012. Eight months of mediation produced no agreement or resolution. Laughlin Dec ¶49, Clark Decl. Ex. 1. On December 5, 2012 the DOL gave written notice terminating the Consent Decree in accordance with ¶ 4.27. Clark Decl. Ex. 1; *see* Laughlin Decl. Ex. M.

On December 5, 2012, the Yakama Nation filed a lawsuit with the Yakama Tribal Court against the State of Washington, its Department of Licensing, Governor Gregoire and Director Haight. Clark Decl. ¶ 8. The following day, the Honorable Ted Strong, Chief Judge of the Yakama Tribal Court, issued an order temporarily enjoining the State, its agencies and officials from taking any further steps to implement the termination of the Consent Decrees, and ordered the state to appear in Tribal Court on January 17, 2013. Clark Decl. Exs. 3 & Ex. 4.

ARGUMENT

A. Standards for Preliminary Injunctions

A party seeking preliminary injunctive relief must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the

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absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Those factors are met here.

B. The State is Likely to Succeed on the Merits.

1. The Yakama Nation Tribal Court Lacks Jurisdiction.

The Yakama Nation Tribal Court does not have jurisdiction to interfere with the activities of state officials or with the implementation of a Consent Decree of this Court. Three recent Supreme Court cases guide the analysis. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). All three reaffirm the rule that a tribe's adjudicative jurisdiction cannot exceed its regulatory authority, and that in the absence of express federal law to the contrary, such authority does not ordinarily extend to the regulation of nonmembers of the tribe, such as state officials. *Plains Commerce Bank*, 554 U.S. at 330; *Hicks*, 533 U.S. at 357-38; *Strate*, 520 U.S. at 445, 453; *see Montana v. United States*, 450 U.S. 544, 565 (1981).[1]

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[1] The Yakama Nation may contend that Tribal Court jurisdiction existed because DOL representatives visited the Yakama Reservation. The Nation erroneously conflates this "minimum contacts" analysis for personal jurisdiction with the question of whether the Tribal Court had subject matter jurisdiction

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The general rule has two limited exceptions. Often referred to as the *Montana* exceptions, they provide that (1) a tribe may regulate the activities of nonmembers who enter into *consensual relationships* with the tribe or its members through commercial dealings, contracts, leases or other arrangements, *Montana*, 450 U.S. at 565, and (2) a tribe may regulate nonmember activities that directly affect the tribe's political integrity, economic security, health or welfare. *Id*. at 565-66. These exceptions are narrowly construed, and must not be allowed to "swallow the rule or severely shrink it." *Plains Commerce Bank*, 554 U.S. at 330.

Neither exception applies in this case, nor does any federal law empower the Yakama Nation or its Tribal Court to regulate the State of Washington in the manner in which the December 6 Tribal Court order purports to do.

a. No Consensual Relationship is Present.

Under the first *Montana* exception, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. This exception applies to voluntary, commercial relationships between the tribe or tribal members and private actors, not public agencies or officials. *Hicks*, 533

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under federal law. *See* Nell Jessup Newton, et al., Cohen's Handbook of Federal Indian Law § 7.02[2] (2012 ed.).

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U.S. at 372. *Accord MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1073-74 (10th Cir 2007); *Cnty. of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (en banc) ("*Montana*'s exception for suits arising out of consensual relationships has never been extended to contractual agreements between two governmental entities"). Nor is the Consent Decree at issue in this case voluntary in the sense envisioned by *Montana*. The state entered into the Consent Decree only as a result of litigation brought by the Yakama Indian Nation.

b. No Threat to the Tribal Community is Present.

Under the second *Montana* exception, a tribe may regulate the conduct of non-Indians within its reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. 450 U.S. at 566. The Court has interpreted this exception narrowly. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Court rejected the argument that unsafe driving on the reservation satisfied the exception, noting that reckless driving endangers everyone, and "if the exception requires no more, the exception would severely shrink the rule." 520 U.S. at 458. Instead, the Court stated that purpose of the second *Montana* exception is to safeguard tribes' ability to order internal relationships within the tribal community. *Id*. at 459. Indeed, the nonmember conduct that a tribe seeks to regulate "must do more than injure the tribe, it must 'imperil the subsistence' of

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the tribal community." *Plains Commerce Bank*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566).

Here, the parties to the Consent Decree agreed that the state would refrain from collecting fuel tax in an amount based on actual sales to the Yakama Nation and its members. The State relied on the Yakama Nation's promise to keep records of actual sales and make them available to an auditor as the basis for adjusting the percentage of ex-tax fuel. The Yakama Nation failed to keep its promise, prompting the state to terminate the Consent Decree.

With one exception, the retail outlets that have benefited from the state's tax forbearance are owned and operated by a few individual tribal members, not the Yakama Nation. *See* Laughlin Decl. ¶ 17. The individuals who own these retail outlets, not the tribal community, profit from the State's agreement to forbear tax collection. The termination of the Consent Decree may affect their individual economic interests, but it will not "imperil the subsistence of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341.

The second *Montana* exception does not support tribal court jurisdiction.

c. No Federal Law Authorizes Tribal Court Jurisdiction.

Tribal courts are not courts of general jurisdiction and lack authority to interpret federal law unless Congress expressly authorizes it. *Hicks*, 553 U.S. at 367-68. Congress has not authorized it in this case. The Yakama tribal court is not a court of competent jurisdiction to enforce a federal court consent decree.

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2. This Court May Enjoin Tribal Officials under the Tribal Equivalent of *Ex parte Young*.

Whether a tribal court has adjudicative authority over nonmembers is a matter of federal law. *Plains Commerce Bank*, 554 U.S. at 324. Tribal officials, including tribal judges, may be sued for prospective injunctive relief for violations of federal law under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *E.g.*, *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176 (9th Cir. 2012); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154-56 (10th Cir. 2011). Regardless of whether the Yakama Nation has sovereign immunity, the *Ex parte Young* doctrine permits this Court to enjoin Judge Strong from exercising jurisdiction over the state officials in this case.

3. Exhaustion of Tribal Court Remedies is not Required.

The tribal court order purports to restrain state officials from performing their official duties. The Supreme Court has made clear that exhaustion of tribal court remedies is not required in such circumstances:

> Since it is clear, as we have discussed, that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties, adherence to the tribal exhaustion requirement in such cases "would serve no purpose other than delay" and is therefore unnecessary.

Hicks, 533 U.S. at 369 (quoting *Strate*, 520 U.S. at 459-60 & n. 14).

C. Plaintiffs Will Suffer Irreparable Harm Unless the Tribal Court is Enjoined.

If it is required to litigate in tribal court, the state will expend significant resources that it will not be able to recover from the Yakama Nation. The Tenth

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Circuit has held that financial injury from being forced to litigate in a tribal court that likely has no jurisdiction is irreparable harm sufficient to support the issuance of a preliminary injunction. *Crowe & Dunlevy*, 640 F.3d at 1157-58. The same principle applies here.

D. The Balance of Equities Favors Plaintiffs, and an Injunction is in the Public Interest.

The State is losing money every day because it has complied with the Consent Decree while the Yakama Nation has not. *See* Laughlin Decl. ¶¶50-51. This situation is unfair to state citizens and to the Indian Tribes who faithfully carry out other fuel tax agreements with the state. *See id*. ¶ 4,6. It undermines public confidence in the integrity of these agreements.

Maintaining the integrity of federal court orders without interference from the courts of other sovereigns is in the public interest. *See* 28 U.S.C. § 2283 (federal court may stay state court proceedings to protect its judgments).

CONCLUSION

The state's motion for preliminary injunction should be granted.

DATED this _____ day of December, 2012.

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