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Hon. Lonny R. Suko

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, WASHINGTON DEPARTMENT OF LICENSING, CHRISTINE GREGOIRE, Governor, and ALAN HAIGHT, Director of Washington State Department of Licensing;

Plaintiffs,

v.

THE TRIBAL COURT FOR THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, and its CHIEF TRIBAL COURT JUDGE TED STRONG, and the CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a Federally Recognized Indian Tribe,

Defendants.

NO. CV-12-3152-LRS

MEMORANDUM IN SUPPORT OF YAKAMA NATION'S CROSS-MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Defendant Confederated Tribes and Band of the Yakama Nation ("Yakama Nation") respectfully requests that, if the Court determines that remedies of the Yakama Nation Tribal Court need not be exhausted, *cf. City of Wolf Point v. Mail*, No. 10-0072, 2011 WL 2117270, at *2 (D. Mont. May 24, 2011), it enjoin Plaintiffs from refusing to mediate without first complying with the explicit terms of a U.S. District Court-approved contract.

To be clear, respectfully, this Court lacks jurisdiction over the Yakama Nation and this lawsuit. The Nation and its officers cannot be sued in any court without its consent. Moreover, an agreement between the parties requires all disputes to be mediated in good faith until released by a mediator, which also precludes litigation in this forum. Finally, Plaintiffs present no federal question upon which the Court can exercise jurisdiction.

However, without waiver of the foregoing, because the facts and law surrounding Plaintiffs' breach of contract are clear, the Nation requests that the Court issue a Preliminary Injunction enjoining Plaintiffs from further violating of the contract that brings the parties before this Court.

Plaintiffs are in breach of Consent Decree by refusing to mediate. The parties' Mediator has not "determine[d] that the parties are not able to resolve the dispute," as required by the Consent Decree. Yet, the Plaintiffs have refused to

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mediate. Plaintiffs take this stance, notwithstanding the Mediator's criticism of Plaintiffs' behavior in mediation. *See* ECF No. 7, p. 68[1] (Plaintiffs "wanted closure of the mediation process as fast as possible. . . The State's strategy was, on more than one occasion, to put out a 'best' or 'last and final' offer. If the tribe wouldn't meet several of its deal points than the State saw no value in further negotiations.").

The requested injunction simply requires Plaintiffs to mediate with the Yakama Nation "in mutual good faith on a government to government basis . . . until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute," as required by the court-approved contract to which Plaintiffs agreed to be bound.

[1] For the sake of judicial economy, Defendants cite to the Yakama Tribal Court record as offered by Plaintiffs in the Declarations of William G. Clark and Karla Laughlin. The page numbers will refer to the documents as filed in the ECF system, not those imprinted on the pages by Plaintiffs. Defendants refer to these documents while recognizing that there are some deficiencies in Plaintiffs' declarations and without waiving their objections thereto.

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II. FACTS[2]

The Yakama Nation is a federally recognized tribal government, whose Reservation was established by the Treaty With The Yakama, 12 Stat. 951 (1859).

A. 1994 Consent Decree

In May of 1993 the Yakama Nation filed suit against Plaintiffs. Complaint at 6, *Teo v. Steffenson*, No. 93-3050 (E.D. Wash. May 7, 1993). On August 23, 1993, the Court issued a TRO in favor of the Nation, reasoning, in part, that "serious questions are raised by the possibility that continued collection of the [state fuel] tax from plaintiffs' distributors would, as a practical matter, result in the routine collection of what may be an invalid tax, and by the possibility that the tax may impermissibly infringe on plaintiffs' treaty rights." *Teo v. Steffenson*, No. 93-3050, at 8-9 (E.D. Wash. Aug. 23, 1993) [hereinafter 1993 Order].

After the District Court entered an Order Setting Settlement Conference on September 8, 1993, the Nation and Plaintiffs "conferred and engaged in mediated negotiations." *Teo v. Steffenson*, No. 93-3050 (E.D. Wash. Nov. 2, 1994) [hereinafter "1994 Consent Decree"], *available at* ECF No. 6, Ex. B. Plaintiffs admitted that throughout 1994, both parties demonstrated "good faith effort to

[2] These facts are largely the same as those presented to the Yakama Tribal Court on December 6, 2012. *See* ECF No. 7, at 37-42. For the sake of judicial economy, The Yakama Nation incorporates that TRO briefing herein, where indicated.

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resolve" the dispute. *Id*. The parties exchanged several letters regarding a settlement agreement that would become a Consent Decree. *See* ECF No. 7, at pp. 71-102. The State prepared the 1994 Consent Decree.[3]

On November 2, 1994, after over a year of mediation negotiations, U.S. District Court Judge Alan A. MacDonald entered the Consent Decree, which became effective on January 1, 1995. 1994 Consent Decree, at 23. In it, both the Nation and state declared their "desire[] to work within the framework of a government-to-government relationship." *Id*. at 1. As explained in more detail below, through the Consent Decree, the parties consented to a process for resolving any disputes initially and primarily through mediation – a process they agreed must continue until **the Mediator** might declare impasse, in which case the parties could invoke the continuing jurisdiction of the U.S. District Court for traditional dispute resolution. 1994 Consent Decree, at ¶ 4.7.

[3] *See* ECF No. 7, at 71 ("Enclosed is our latest version of draft Consent Decree prepared after conferring with DOL and DOT. . . . We have made several other changes, as well . . . ."); *id*., at 74 ("Before we can put the Consent Decree into final form, the blanks in paragraphs 4.9 and 4.10 will need to be filled in."); *id*., at 77 ("attached is the proposed Consent Decree in *Teo*" and outlining the State's latest changes).

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B. 2006 Consent Decree

In July of 2004, the Nation filed a Petition with the U.S. District Court to enforce the terms of the 1994 Consent Decree against Plaintiffs, explaining that the parties had attempted to mediate issues that had arisen under the original Decree but had "reached an impasse" after having "engaged in a mediation on May 20, 2003." *Teo v. Steffenson*, No. 04-3079, at 2 (E.D. Wash. Aug. 21, 2006), ECF No. 66 [hereinafter "2006 Consent Decree"], *available at* ECF No. 6, Ex. F.

Thereafter, the parties again "engaged in negotiations," pursuant to Local Rule 16.2, which, after a year and a half of mediation, resulted in a new Consent Decree entered by District Court Magistrate Judge Cynthia Imbrogno on August 21, 2006. *Id.* at 1. The resulting Consent Decree terminated any continuing jurisdiction of the U.S. District Court,[4] but retained the 1994 Consent Decree's mediation mandate – to wit, that the pursue mediation "in good faith until the dispute is resolved or until **the mediator** determines that the parties are not able to

[4] Specifically, Consent Decree deleted the provisions of the 1994 Consent Decree "for maintaining that continuing jurisdiction" of this Court. Consent Decree, at 3. The Consent Decree did not contain any waiver of the regulatory or adjudicatory authority of the Yakama Nation. *See Merrion v. Jicarilla Apache*, 455 U.S. 130, 147 (1982) (holding that a tribal government does not "abandon[] its sovereign powers simply because it has not expressly reserved them through contract").

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resolve the dispute." *Id.* at ¶ 4.7.d (emphasis added). The Consent Decree, now in force, contains the following contractual language to mandate that the parties mediate and arbitrate in "good faith" on a "government to government basis"[5]:

> The parties agree that provisions . . . for maintaining the continuing jurisdiction of the court should be deleted. The parties agree to resolve further disputes exercising mutual good faith on a government to government basis and, to the extent they are unable to resolve such disputes, **the dispute resolution process in ¶ 4.7 [of the 1994 Consent Decree] shall apply**.

Consent Decree, at ¶ H (emphasis added). The provision referred to in the 1994 Consent Decree reads as follows:

> 4.7 Should a dispute arise between the Yakama Indian Nation and the State of Washington upon an issue of compliance with the Consent Decree by either government, or by their officers, employees or agents, the Tribe and the State shall attempt to resolve the dispute through the following dispute resolution process:
>
> a. Either party may invoke the dispute resolution process by notifying the other, in writing, of its intent to do so. The notice shall set out the issue(s) in dispute and the position of the party giving notice as to each such issue.
>
> b. The first stage of the process shall include a face-to-face meeting between representatives of the two governments to attempt to resolve the dispute by negotiation. The meeting shall be convened within thirty (30) days of the written notice described in ¶ 4.7.a. The representatives of each government

[5] This mandate comports with Plaintiffs' more general instruction to "[m]ake reasonable efforts to collaborate with Indian tribes in the development of . . . agreements." WASH. REV. CODE. § 43.376.020(1).

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shall come to the meeting with the authority to settle the dispute.

c. If the parties are unable to resolve the dispute within sixty (60) days of the date of the written notice described in ¶ 4.7.a, the parties **shall engage the services of a mutually-agreed-upon qualified mediator to assist them in attempting to negotiate the dispute.** If the parties cannot agree who the mediator should be, the mediator shall be a person or persons selected by the Court pursuant to Local Rule 39.1(d)(1). Cost for the mediator shall be borne equally between the two governments.

d. **Both parties shall pursue the mediation process in good faith until the dispute is resolved or until *the mediator* determines that the parties are not able to resolve the dispute.** If the parties cannot agree on a format for the mediation process, the format shall that directed by the mediator. If the dispute is resolved, the resolution shall be memorialized by the mediator and shall bind the parties.

e. Except as provided in ¶ 4.15.3, if either party terminates the process before completion, or if the mediator determines that the dispute cannot be resolved in the mediation process, or if the dispute is not resolved within thirty (30) days of the date the mediator is selected, the other party may petition the Court for enforcement of the Consent Decree as to the disputed and unresolved issue or issues.

1994 Consent Decree, at ¶ 4.7 (emphasis added).

As modified by ¶¶ H-K of the 2006 Consent Decree, the alternative dispute resolution ("ADR") clause and related provisions that now bind the parties reads as follows:[6]

[6] The excluded 1994 text has been stricken out and the additional 2006 text has been bolded.

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4.1 Plaintiff shall voluntarily dismiss their complaint in this action, with prejudice, contemporaneously with their entry of this Consent Decree. ~~The Court shall, however, retain jurisdiction over this case for a period of one year for the limited purpose of ensuring compliance with this Consent Decree.~~

4.2 ~~Subject to ¶¶ 4.6 and 4.7, either the Yakama Indian Nation or the State of Washington may initiate an action in this Court at any time for the limited purpose of requesting the court to enforce the terms of this Consent Decree. If the action is initiated within one year of the date of entry of this Consent Decree, with party may file a petition seeking enforcement of the terms of this Consent Decree under the cause number assigned to this case without paying an additional filing fee. Any action brought under this Consent Decree after that one-year period expires must be filed as a new and separate action requesting the Court to enforce the Consent Decree. The parties consent to such an action being brought for the limited purpose of enforcing this Consent Decree, including an action to recover monies alleged to be owed to either party . . . . .~~ **The parties agree to resolve further disputes exercising mutual good faith on a government to government basis and, to the extent they are unable to resolve such disputes, the dispute resolution process in ¶ 4.7 shall apply.**

* * * *

4.6 Neither the Yakama Indian Nation, nor the State of Washington, nor officers acting on either government's behalf, may petition the Court to enforce this Consent Decree unless (a) the dispute resolution process described in ¶ 4.7 has been followed in good faith to completion without successful resolution, or unless (b) the party fails to enter into the dispute resolution process or terminates the process before its completion.

4.7 Should a dispute arise between the Yakama Indian Nation and the State of Washington upon an issue of compliance with the Consent Decree by either government, or by their officers, employees or agents, the Tribe and the State shall attempt to resolve the dispute through the following dispute resolution process:

a. Either party may invoke the dispute resolution process by notifying the other, in writing, of its intent to do so. The notice

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shall set out the issue(s) in dispute and the position of the party giving notice as to each such issue.

b. The first stage of the process shall include a face-to-face meeting between representatives of the two governments to attempt to resolve the dispute by negotiation. The meeting shall be convened within thirty (30) days of the written notice described in ¶ 4.7.a. The representatives of each government shall come to the meeting with the authority to settle the dispute.

c. If the parties are unable to resolve the dispute within sixty (60) days of the date of the written notice described in ¶ 4.7.a, the parties shall engage the services of a mutually-agreed-upon qualified mediator to assist them in attempting to negotiate the dispute. If the parties cannot agree who the mediator should be, the mediator shall be a person or persons selected by the Court pursuant to Local Rule 39.1(d)(1). Cost for the mediator shall be borne equally between the two governments.

d. Both parties shall pursue the mediation process in good faith until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute. If the parties cannot agree on a format for the mediation process, the format shall that directed by the mediator. If the dispute is resolved, the resolution shall be memorialized by the mediator and shall bind the parties. **If the dispute is not resolved by mediation, the parties may agree to have a neutral third party arbitrator make a final binding decision resolving the dispute, or if a dispute is unresolved for more than 180 days, either party may give notice of intent to terminate this agreement as provided for *infra*.**

~~e. Except as provided in ¶ 4.15.3, if wither party terminates the process before completion, or if the mediator determines that the dispute cannot be resolved in the mediation process, or if the dispute is not resolved within thirty (30) days of the date the mediator is selected, the other party may petition the Court for enforcement of the Consent Decree as to the disputed and unresolved issue or issues.~~

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C. Dispute Resolution & Mediation

In late 2011, the state announced that "[n]either the State nor the Yakama Nation is in compliance with [the] Consent Decree," confessing that its "requirements for audit and record keeping are difficult to administer for both parties." ECF No. 8, at 3. Thereafter, on March 16, 2011, DOL Director Elizabeth Luce unilaterally sought to invoke "the dispute resolution process per section 4.7 of the Consent Decree." *Id.* at 6. The State outlined five substantive "issues in dispute," for resolution. *Id*.

The parties commenced dispute resolution from the Yakama Nation Main Agency on June 13, 2011, with the State framing the "issues to resolve," including the negotiation of a "future fuel tax agreement," i.e. modifying the current Consent Decree, as well as several retrospective issues dating back to 2007. *Id.* at 10-13. After a June 27, 2011, teleconference and a September 14, 2011, meeting between the parties, Plaintiffs unilaterally declared: "DOL feels there is not enough agreement to warrant an extension [of the Consent Decree] and will proceed with terminating the Consent Decree. . . . Therefore, the Department of Licensing hereby notifies the Yakama Nation that it is exercising the termination clause in the agreement." *Id.* at 15-16. Plaintiffs did, however, express their "willing[ness] to continue negotiations with the Yakama Nation" for an additional 180 days. *Id*.

On February 28, 2012, the Yakama Nation requested mediation of the retrospective and prospective issues previously framed by the State for dispute

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resolution. ECF No. 7, at 63, ¶ 4. After initially declining mediation, Plaintiffs "reconsidered" and agreed to "mediate the issues of the consent decree under dispute as articulated in the letter sent by Director Luce to the Yakama Nation on March 16, 2011." ECF No. 8, at 18. Yakama and State officials entered into a Mediation Agreement, with John Bickerman, a mediator from Washington, DC, and engaged in an initial mediation session on March 23, 2012. Thereafter, the parties' staff counsel did engage in a number of conference calls with the Mediator from May through October 2012, in which the Office of Legal Counsel participated in from the Yakama Nation Main Agency. ECF No. 7, at 63, ¶3.

Despite two prior Yakama-State mediations under the Consent Decree – which each lasted over a year – the March 23, 2012, mediation session would prove to be the only in-person negotiation between Yakama and State officials that the Mediator would be allowed to conduct. On December 5, 2012 – just seven months into the mediation process and only three months after mediation became "meaningful" according to the Mediator (ECF No. 7, at 68) – Plaintiffs informed the Yakama Nation that they were terminating mediation. *Id*. at 64, ¶ 14.

On December 5, 2012, Plaintiffs participated in a conference call with attorneys for the Nation. *Id*. At approximately 1:30 p.m., Washington State's Senior Assistant Attorney General, Mary Tennyson, informed the Nation's attorneys that the state was "terminating mediation and the consent decree," and

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would inform the Nation of the same via letter, to be emailed on the afternoon of December 5, 2012. *Id.* Plaintiffs also informed the Nation that immediately upon sending its so-called notice of "termination" it would notify all fuel distributers who service the Yakama Reservation, by letter and by telephone, that any future delivery to the Nation "needs to have the full amount of the state's tax included" in the sale price and that the state would "no longer be offering refunds" to these distributors. *Id.* at 65-66, ¶ 15. The Nation's express position in the face of this unilateral attempt at "termination" that the parties remain able to resolve this matter through good faith government-to-government negotiation. *Id*. at 66, ¶ 15. Specifically, the Nation expressed its position that "continued mediation and trying to work through the differences" to "get a deal done" was still entirely "on the table." *Id.*

The State has refused to mediate with the defendants, despite the fact that the Mediator had not declared the parties unable to resolve their differences, as contemplated by ¶ 4.7 of the Consent Decree, ¶ 4.7. ECF No. 7, at pp. 64-65. Not only had the Mediator not by then declared, i.e., impasse, but a week before the State's attempt at "termination" he advised the parties:

> This has been one of the more frustrating mediations for which I have served as a neutral. Like many disputes that I am asked to mediate, there has been a long history between the parties that I can't hope to reconcile in a mediation. Indeed, the State claimed that it had been in negotiations with Yakama for a very long time before the mediation process began and wanted closure of the mediation process as fast as possible. However, in my experience concerning tribal negotiations, the actual period of negotiation was extremely brief. Real

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> meaningful negotiations did not take place until late August at the earliest. The initial phase of the mediation prior to August was counter-productive. The joint session was unhelpful and set the process back. **From that point forward the negotiations were extremely asymmetrical. The State's strategy was, on more than one occasion, to put out a 'best' or 'last and final' offer.** If the tribe wouldn't meet several of its deal points than the State saw no value in further negotiations. Several times this approach froze the tribe's negotiating team and its ability to respond. **These offers tended to stall negotiations rather than elicit productive counter-proposals.** In turn, the tribe expected there to be more of the 'negotiation dance' where there would be give and take. Therefore, Yakama never put out its best offer because of a lack of reciprocal concessions by the State. It never communicated effectively what the State would need to do to get a deal with Yakama. Please don't misunderstand my point — I do believe that there was movement but not enough. **We never got to the critical point where both sides had their best proposals on the table and strategies for compromise emerged.** It's when both sides have put their last proposal on the table that the real work often begins. **We never got to that point in these negotiations**.

ECF No. 7, at 68. From November 26, 2012, until it unilaterally attempted to "terminate" mediation on December 5, 2012, the State halted communication with the Mediator.

III. AUTHORITY

A. Plaintiffs Should Be Enjoined.

"A [party] seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 129 S.Ct. 365, 374 (2008). Courts in the Ninth Circuit use a "sliding scale" under which "the required degree

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of irreparable harm increases as the probability of success decreases." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005). Thus, where parties "demonstrate[] a strong likelihood of success on the merits, then plaintiffs . . . need[] only to make a minimal showing of harm to justify [a] preliminary injunction." *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1124 (9th Cir. 2002). Conversely, the more a movant shows that "the balance of hardships tips decidedly in their favor," the less a "likelihood of success on the merits" must be demonstrated. *Id.*

Plaintiffs have *per se* violated the Consent Decree, ¶ 4.7. Based upon these violations alone, the Yakama Nation will succeed on the merits. Thus, the showing of harm immediately below is more than adequate to justify a TRO.

But even were the Court to find some imperfection in the Yakama Nation's preliminary arguments on the merits, Plaintiffs cannot show that the granting of an injunction would cause any harm at all. Plaintiffs do not have a governmental or organizational interest in refusing to negotiate in good faith on a government-to-government basis with the Yakama Nation. Plaintiffs' proper interest is in carrying out their duties in full compliance with the law. The minimally intrusive injunction that the Nation seeks – one to compel inter-governmental mediation in good faith – will only help Plaintiffs satisfy this important interest.

1. Plaintiffs Have Irreparably Harmed The Yakama Nation.

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Plaintiffs have irreparably harmed the Yakama Nation in at least three ways. First, the Yakama Nation has been irreparably harmed, and will continue to be irreparably harmed, by Plaintiffs' breach of contract. Mediation, fulfilled "in mutual good faith on a government to government basis" until the mediator "determines that the parties are not able to resolve the dispute," was a bargained-for aspect of the Consent Decree; to benefit, bind, and be enforceable by each party. A breach of the terms of the Consent Decree itself, particularly the mediation clause, therefore constitutes irreparable harm. *See International Ass'n of Machinists & Aerospace Workers, AFL-CIO (IAM) v. Northwest Airlines, Inc.*, 674 F.Supp. 1387, 1391 (D. Minn. 1987) ("since it appears that mediation was properly invoked, [plaintiff] faces irreparable harm if the [Plaintiffs] are not restrained."); *Qwest Communications Intern. Inc. v. National Union Fire Ins. Co. of Pittsburgh*, 821 A.2d 323, 329 (Del. Ch. 2002) ("[A] loss of the right to designate mediation as the method of ADR threatens [a plaintiff] with irreparable harm . . . ."); *Reliance Nat., Ins. Co. v. Seismic Risk Ins. Service, Inc.*, 962 F. Supp. 385, 391 (S.D.N.Y. 1997) (same); *Paramedics Electromedicina Comercial Ltda. v. GE Medical Systems Information*, No. 02-9369, 2003 WL 23641529, at *12 (S.D.N.Y. June 4, 2003) ("The deprivation of [a movant's] contractual right to [alternative dispute resolution] constitutes irreparable harm.").

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Second, the injury to the Yakama Nation concerns a breach of the Yakama Treaty of 1855 and interference with the Nation' right "to make [its] own laws and be governed by them," which will permanently harm the Nation and its members. This type of harm is irreparable because it cannot not be adequately compensated for by monetary damages or other remedy. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001). Not only is the resultant psychological harm to a sovereign Indian Nation not easily subject to valuation, but also, and perhaps more important, the loss of the Nation's ability to produce tax revenue on fuel will result in decreased services and programs to tribal members and the loss of employment for specific Tribal members. *See* ECF No. 8, at 26, ¶27 ("When the state pulled out of mediation and ceased complying with the Consent Decree . . . it had an immediate and profound effect on the Yakama Nation and Yakamas living on the Reservation."). Thus, Federal Courts have found "irreparable harm to the future economic well-being" of an entire demographic as grounds to issue a TRO. *State of Del. v. Bender*, 370 F.Supp. 1193, 1201 (D.C. Del. 1974). As the court noted in *Sac and Fox Nation of Missouri v. LaFaver*, 905 F.Supp. 904 (D. Kan.1995):

> [S]uch devastating losses of revenue may well mean the complete elimination of social service, medical, and education payments to tribal members. . . . [I]f the Department is not enjoined from collecting the taxes and the Tribes win on the merits, the loss of revenue in the interim may so devastate the Tribes that the ability to sustain themselves may be irretrievably lost. . . . [T]he court considers

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> the consequences of such losses as extremely serious and potentially devastating to the Tribes. Such loss would indeed meet the irreparable harm test.

Id. at 907; *see also Elrod v. Burns*, 427 U.S. 347, 359 (1976) (government interference with fundamental rights is presumed to constitute irreparable harm); *Baker Electric Cooperative v. Chaske et al.*, 28 F.3d 1466, 1473 (8th Cir. 1994) (granting preliminary injunction to tribe because threatened disruption of electric services could hinder the productivity of a tribal enterprise).

Finally, based on Plaintiffs' imposition of the state motor fuels tax before the Consent Decree became effective, "the high likelihood that the violations will recur absent issuance of an injunction [also] counsels in favor of equitable rather than legal relief." *LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985).

In sum, mediation is mandated by the Consent Decree. Plaintiffs' have failed to mediate until the Mediator declares that the dispute cannot be resolved. The fact that the Nation has been denied this negotiated and legally mandated benefit of mediation constitutes irreparable harm. Additionally, any resultant breach of the Treaty will also created irreparable harm. Thus, the high likelihood that Plaintiffs will continue to harm the Nation absent issuance of an injunction also counsels in further favor of equitable relief. Only an injunction can ensure the uninterrupted operation of mediation as contemplated by the Consent Decree.

2. <u>The Yakama Nation Is Likely To Prevail On The Merits.</u>

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That Plaintiffs have acted, and are acting, in violation of the Consent Decree has been briefed, argued, and decided in the Yakama Tribal Court. For the sake of judicial economy, The Yakama Nation incorporates that briefing herein, and offers the following short recapitulation:

a. The Consent Decree Is An Enforceable Contract

The Consent Decree is an enforceable contract between the parties. *See* Consent Decree, at ¶ H; *Beaver v. Kingman*, 785 P.2d 998, 1003 (Kan. 1990). Because the cause of action is properly based in the common law of contracts, the requested preliminary injunction must be evaluated under that standard. *See* Consent Decree, at ¶ H ("The parties agree that provisions . . . for maintaining the continuing jurisdiction of the court should be deleted."); *Beaver*, 785 P.2d at 1003. If the standards for granting injunctive relief can be met, injunctive relief must issue to compel Plaintiffs to act in compliance with the Consent Decree's dispute resolution procedures. *See e.g. United Capital Financial Advisers, Inc. v. Capital Insight Partners, LLC*, No. 12-0300, 2012 WL 1079329 (D. Nev. Mar. 30, 2012) (TRO to enforce contract); *Global Tel*Link Corp. v. Scott*, 652 F.Supp.2d 1240, 1246 (M.D. Fla. 2009 (TRO to enforce mediation and arbitration).

b. The Consent Decree Created A Duty To Mediate In Good Faith Until The Mediator Declares Impasse – Plaintiffs Have Breached That Duty.

The Consent Decree clearly contemplates that mediation be fulfilled "in good faith" by both parties, and that mediation continue "until the dispute is resolved or

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until **the mediator** determines that the parties are not able to resolve the dispute." Consent Decree, at ¶ 4.7.d (emphasis added). In the case that the Mediator determines that the parties are not able to resolve the dispute, the consent decree envisions that the parties either arbitrate the dispute or, if 180 days has passed since the Mediator has determined that the dispute cannot be resolved, that the Consent Decree be terminated upon the request of one of the parties. *Id.* Nowhere does the Consent Decree allow for a party to unilaterally opt-out of the terms of the Consent Decree without first fulfilling these requirements. In fact, just the opposite is true – the Consent Decree contemplates that the Nation may petition "to enforce this Consent Decree" where one of the parties "fails to enter into the dispute resolution process or **terminates the process before its completion**." Consent Decree, at ¶ 4.6 (emphasis added). The Yakama Nation has done just that by petitioning the Tribal Court.

The Mediator has yet to "determine[] that the parties are not able to resolve the dispute." Consent Decree, at ¶4.7(d). Plaintiffs have nonetheless refused to mediate at this early stage of dispute resolution. Plaintiffs have breached their duty to mediate, in good faith, until the Mediator declares impasse.

c. The Yakama Nation Has Been Damaged.

Damages that may be claimed for breaching a contractual duty to mediate include "one's own attorneys' fees and costs for having to compel mediation, stay arbitration or litigation, vacate a resulting arbitral award, or seek relief from a

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judgment." Thomas H. Oehmke & Joan M. Brovins, *Cause of Action for Enforcing Mediation Contracts*, 50 CAUSES OF ACTION 2d 609, § 11 (2011) (citing *McEntyre v. Edwards*, 583 S.E.2d 889 (Ga. Ct. App. 2003)).

Here the Yakama Nation has thus far already spent tens of thousands of dollars in its efforts to coerce the state into fulfilling its obligation to mediate under the Consent Decree, and has therefore been damaged by Plaintiffs' breach of contract.[7] Unless and until Plaintiffs are enjoined from further refusing to mediate, in further violation of the Consent Decree, these costs and fees for having to compel mediation will continue to accrue.

The Yakama Nation will succeed on its breach of Consent Decree claim. *See e.g. Global Tel*Link Corp.*, 652 F.Supp.2d 1240; *U.S. v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001) (citing *In re Complaint of Hornbeck Offshore Corp.*, 981 F.2d 752 (5th Cir. 1993)). There exists a valid, enforceable contract between the parties;

[7] Although the Nation has suffered damages, it is not seeking to recover money damages against Plaintiffs, nor is it claiming that those damages constitute "irreparable harm" for the purpose of the requested TRO. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (drawing a distinction between "monetary relief" and "money damages" for a contract claim where nonmonetary relief is being requested); *Fedex Trade Networks, Inc. v. U.S.*, No. 11-890, 2011 WL 4715217, at *8 (D. Md. Oct. 6, 2011) (same).

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that contract creates a duty that Plaintiffs mediate in good faith until the Mediator declares that the dispute cannot be resolved; Plaintiffs have breached that duty; and the Yakama Nation has been damaged by Plaintiffs' breach. *See* 50 CAUSES OF ACTION 2d at § 11 ("If mediation has been contractually agreed to be an ADR step precedent to litigation . . . then a court may compel parties to mediation.").

Moreover, as the Yakama Tribal Court has already determined, the Nation is likely to prevail on this claim. *See Prescott v. Little Six, Inc.*, 897 F.Supp. 1217, 1223 (D. Minn. 1995) (litigation in tribal courts "provide other courts with the benefit of their expertise in such matters in the event of further judicial review"). The Nation is likely to succeed on the merits of this breach-of-contract claim.

3. The Balance Of Hardships And The Public Interest Favor The Nation.

a. The Balance Of Hardships Requires A Preliminary Injunction.

Plaintiffs will suffer no harm if they are enjoined from unilaterally pulling out of mediation without complying with the terms of the Consent Decree. Such action is neither authorized nor contemplated by the parties' agreement – in fact, just the opposite is mandated of Plaintiffs. *See Global Tel*Link Corp.*, 652 F.Supp.2d at 1247 ("[B]eing denied the opportunity to engage in alternative dispute resolution, as set forth in the Agreement, clearly outweighs any potential harm . . . arising from being forced to engage in alternative dispute resolution.").

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Plaintiffs do not have any governmental or organizational interest in violating the law by failing to comply with the Consent Decree and the Treaty rights that that Consent Decree protects. Plaintiffs' proper interest is in carrying out their duties in full compliance with the law. The minimally intrusive injunction that the Nation seeks – one only to compel mediation – will only help Plaintiffs meet this important interest. *See* WASH. REV. CODE. § 43.376.020 ("In establishing a government-to-government relationship with Indian tribes, state agencies must . . . [m]ake reasonable efforts to collaborate with Indian tribes in the development of . . . agreements . . . ."); WASH. REV. CODE. § 43.376.040 (mandating "[e]ffective communication and collaboration between state agencies and Indian tribes"). Further, while Plaintiffs continue to mediate they will continue to receive 100% of their fuel taxes, which further militates against any finding of detriment to Plaintiffs. Consent Decree, at ¶ 2.3; ECF No. 8, at 20, ¶4. Plaintiffs will be in the identical situation they have been in for almost a decade. Indeed, Plaintiffs will be in the same situation they are in with almost every other Tribe in Washington. The Nation wishes only to preserve the *status quo* and otherwise comply with the letter of the agreement between the parties.

The harm to the Yakama Nation that will result as a consequence of this Court's failing to issue the requested relief, however, is overwhelming – especially considering the disparity in size and revenue sources between the Yakama Nation

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and Plaintiffs. *See White Mountain Apache Tribe v. Arizona Dep't of Game & Fish*, 649 F.2d 1274, 1285 (9th Cir. 1981)) (in considering the balance of hardships, District Courts are to take into account "the disparity in size and revenue sources between the tribe and the state.").

Pursuant to the Revised Yakama Law and Order Code ("R.Y.C.") § 30.11.02 the Yakama Nation charges a tax of $0.055 per gallon of fuel sold to Yakamas.[8] ECF No. 8 at 20, ¶6 (Plaintiffs' numbering 121). Recognizing the high poverty and unemployment rates on the Reservation, the Yakama tax collected is used to fund valuable services provided by the Nation to its citizens, including opportunities for employment and transportation thereto.[9] *See* R.Y.C. § 30.11.08 (Yakama-licensed

[8] "An enrolled Yakama petroleum products retailer may sell to another enrolled Yakama without assessing or collecting state fuel tax and/or excise tax" if they instead collect the Yakama tax. R.Y.C. § 30.11.02. Where the Yakama tax is not collected – i.e. sales to non-Yakamas – the seller "must assess state fuel tax and/or excise taxes." *Id.* Any Yakama who violates the statute is subject to 90 days in jail, a fine of $350, and/or the revocation of their license to sell fuel. R.Y.C. § 30.11.03.

[9] In contrast, Washington State's motor vehicle taxes are used *exclusively* to fund state highway and county arterial construction and maintenance. *Washington Off-Highway Vehicle Alliance v. State*, 260 P.3d 956, 959 (Wash. Ct. App. 2011) (citing Wash. Const. art. II, § 40); WASH. REV. CODE. § 46.68.090. Although not directly

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petroleum products retailers must "give Yakamas employment preference"); R.Y.C. § 30.11.12 (fuel tax revenues "shall be a benefit to the health, safety and general welfare of all residents of the Yakama Reservation"); R.Y.C. § 71.01.03 (Yakama preference in employment statute); YAKAMA NATION TRIBAL TRANSIT SERVICE OPERATION PLAN 10 (2007) (discussing the Yakama Nation Tribal Transit Program; a program funded by the Yakama Nation to provide transportation services to disadvantaged Yakamas using a fleet of ADA accessible vehicles). It is thus vital to Reservation community and economics that these taxes are collected. *See* ECF No. 8 at 20, ¶6 (Plaintiffs' numbering 121); R.Y.C. § 30.11.10.

Were Plaintiffs to import their surcharge *in toto*[10] to the Yakama Reservation, however, Yakamas pay $.28125 more for each gallon of gas. ECF No. 8, at 26-27,

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at issue in the instant motion, the Treaty of 1855 guarantees that the state cannot charge Yakamas for highway and county arterial construction and maintenance. *Salton Sea Venture, Inc. v. Ramsey*, No. 11-1968, 2011 WL 4945072, at *7 (S.D. Cal. Oct. 18, 2011) (holding that California's "state tax constitutes a restriction on the Yakama's transportation of fuel into California" and therefore "violates the Yakama's rights under the Treaty of 1855").

[10] The cost of gas on the Yakama Reservation included a $.09375 per gallon state-required surcharge before the state terminated the Consent Decree (25% of $.375). ECF No. 8 at 26-27, ¶29 (Plaintiffs' numbering 127-128).

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¶29. This is a 200% increase in state-initiated per-mile charges on Yakamas. *Id.* "For those Yakamas who live paycheck-to-paycheck or without employment, which is too many Yakamas, these [additional state] surcharges are significant" as they "prevent certain Yakamas from travelling at all," thereby "ultimately prevent[ing] Yakamas from their way of Indian life." *Id.* at ¶ 33. Other contributions to the disparity in size and revenue sources between the parties that further warrant a tipping of the scales in favor of the Yakama Nation include the following:

- The Yakama Reservation is located in a rural, isolated, and economically distressed area of South Central Washington, 200 miles from the urban centers of Seattle and Spokane. While the Reservation is home to a variety of businesses and commerce, ranging from farming to tobacco manufacturing, to casino and cultural centers, at roughly 39.4 percent, the Reservation has one of the highest below-poverty level rates in the state. U.S. Environmental Protection Agency, Environmental Justice Indicators: Confederated Tribes and Bands of the Yakama Nation, http://www.epa.gov/region10/pdf/ej/yakama_bpov_map.pdf (last visited Dec. 26, 2012).

- At the same time, the Yakama Nation has the largest number of enrolled tribal population in the state. Roughly 50% of those enrolled members are unemployed. Multiple studies have found that this is high unemployment rate is caused by the high costs of travel. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, YAKIMA VALLEY REGION COORDINATED PUBLIC TRANSIT-HUMAN SERVICES TRANSPORTATION PLAN 9 (2010) [hereinafter "WSDOT TRANSPORTATION PLAN"].

- According to Plaintiffs themselves, although roughly 70% of Yakamas have reliable transportation, their inability to utilize that transportation has caused "difficulty [in] obtaining employment." YAKAMA NATION TRIBAL TRANSIT SERVICE OPERATION PLAN 8, 10 (2007).

- "The Wapato DSHS office, located on the Yakama Nation, conducted a survey in October 2005 with TANF clients and over 70% of the respondents indicated that transportation was a barrier to seeking, obtaining, and retaining employment." *Id.* at 8.

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- Also due to this lack of mobility, "[l]ow-income individuals have difficulty accessing education and social services that will assist individuals to become self-sufficient citizens." *Id.*

- An increase in the Reservation's homeless population has also been correlated to a lack of "transportation to social service appointments and medical services." WSDOT TRANSPORTATION PLAN, at 4.

- For those Yakamas who live paycheck-to-paycheck or without employment – which is a large number of Yakamas – the additional state surcharges are significant enough to "prevent certain Yakamas from travelling at all." ECF No. 8 at 28, ¶33 (Plaintiffs' numbering 129. And because traveling is a very important spiritual and cultural aspect of Yakamas, one they explicitly reserved in the Treaty with the Yakama, these "surcharges ultimately prevent Yakamas from their way of Indian life." *Id.*

In fact, this Court has already found that, based upon similar facts existing in 1993, allowing Plaintiffs to have "the full amount of the state's tax included in the sale price" of fuel to Yakamas requires that a TRO be issued. *See* 1993 Order at 12-13.[11] This weighs in favor of granting the requested TRO.

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[11] The "law of the case doctrine" also weighs in favor of The Yakama Nation. *See Protect Lake Pleasant, LLC v. Connor*, No. 07-0454, 2010 WL 5638735, at *8 (D. Ariz. July 30, 2010) ("the law of the case doctrine ordinarily precludes a court from reexamining an issue previously decided" in the same dispute) (quotation omitted); *Mayweathers v. Terhune*, 136 F.Supp.2d 1152 (E.D. Cal. 2001) (holding that the doctrine applies to the issuance of preliminary injunctions just the same as it does all other previously issued orders and rulings, particularly where "the Plaintiffs' contentions were previously argued and rejected when the court issued the first . . . preliminary injunction.").

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b. The Public Interest Requires A Preliminary Injunction.

The public interest weighs heavily in favor of preventing irreparable harm to the Yakama Nation. Numerous courts have found that the public interest in promoting and enforcing valid mediation and arbitration clauses militates in favor enjoining a party's unilateral and unlawful departure therefrom. *See e.g. Antonelli v. Finish Line, Inc.*, No. 11-3874, 2012 WL 2499930, at *3 (N.D. Cal. June 27, 2012) (arbitration); *S & T Oil Equipment & Machinery, Ltd. v. Juridica Investments Ltd.*, No. 11-0542, 2011 WL 864837, at *6 (S.D. Tex. Mar. 10, 2011) (arbitration); *Siag v. King & Spalding LLP*, No. 10-0367, 2010 WL 2671580, at *2 (S.D. Tex. June 30, 2010) (arbitration); *International Ass'n of Machinists and Aerospace Workers v. National Mediation Bd.*, 374 F.Supp.2d 135, 143 (D.D.C. 2005) (mediation); *see also Global Tel*Link Corp*, 652 F.Supp.2d at 1247 ("[E]njoining the parties to engage in alternative dispute resolution, as contractually agreed by the parties in the Agreement, is in furtherance of the public interest."); *Charles Schwab & Co., Inc. v. McMurry*, No. 08-0534, 2008 WL 5381922, at *10 (M.D. Fla. 2008) (public interest in upholding contracts).

Plaintiffs have unilaterally breached the Consent Decree's mediation and arbitration clause. The public – both Yakamas and the Washington State citizenry – has been harmed by the Plaintiffs' breach of contract, and will continue to be harmed until Plaintiffs are enjoined from further ignoring their duties pursuant thereto. *See* ECF No. 8, at 91, ¶3 (Plaintiffs' numbering 192) ("Abandoning

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mediation for the more exhausting and expensive litigation would be detrimental to . . . both sovereign governments . . . at a time when economies are struggling to rebound from recession and citizens are experiencing historic high rates of unemployment.").

IV. CONCLUSION

The words of the Standing Rock Sioux Tribal Court ring true here: "Every sovereign owes a solemn duty to its citizens not to subject them to judicial train wrecks that will happen if they do not resolve to cooperate with competing sovereigns to their mutual benefit." *In re Montclair*, No. CC-C-2008-037, 2008 WL 7903915, at *8 (Stand. R. Sioux Trib. Ct. June 9, 2008).

Here, Plaintiffs have resolved not to cooperate with the Yakama Nation. In order to avoid a "judicial train wreck," the Nation has petitioned the Yakama Tribal Court, and now this Federal Court, so that Plaintiffs might reconsider their position. The Yakama Nation is simply requesting that Plaintiffs not break their promises of 1994 and 2006, so that exhausting and expensive litigation, detrimental to all constituents, not to mention the equally important government-to-government relationship between the parties, can be avoided.

Based upon the above and foregoing initial factual exposition and law, the Yakama Nation prays that its Cross-Motion for Preliminary Injunction be **GRANTED**, and that this Court enjoin Plaintiffs from refusing to mediate with The

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Yakama Nation without first complying with the explicit terms of that contract, i.e. mediate in good faith until the mediator declares the dispute unresolvable.

DATED this 26th day of December, 2012.

s/Gabriel S. Galanda
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CERTIFICATE OF SERVICE

I, Gabriel S. Galanda, declare as follows:

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

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Ave. NE, Suite L1, Seattle, WA 98115.

3. On December 26, 2012, I filed the foregoing document, which will provide service to the following via ECF:

Mary Tennyson

Rob Costello

Bill Clark

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

Signed at Seattle, Washington, this 26th day of December, 2012.

s/Gabriel S. Galanda

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