IN THE TRIBAL COURT
FOR THE CONFEDERATED TRIBES AND BANDS OF
THE YAKAMA NATION

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a federally-recognized Indian tribe, Plaintiff, v. ALAN HAIGHT, Director of the Washington State Department of Licensing; WASHINGTON STATE DEPARTMENT OF LICENSING; CHRISTINE GREGOIRE, Governor of the State of Washington; STATE OF WASHINGTON; Defendants.	NO. _____ CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION'S MOTION FOR TEMPORARY RESTRAINING ORDER

I. RELIEF REQUESTED

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation" or "Nation") respectfully requests a temporary restraining order ("TRO") enjoining and restraining Defendants from refusing to mediate in violation of a court-approved contract between the Yakama Nation and State of Washington. *See Teo v. Steffenson*, No. 04-3079, at 2 (E.D. Wash. Aug. 21, 2006), ECF No. 66 [hereinafter "Consent Decree"]. In short, a 2006 Consent Decree provides that mediation between the two sovereigns shall continue "until the dispute is resolved or until **the mediator** determines that the parties are not able to resolve the

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dispute." *Id.* at ¶ 4.7.d (emphasis added). The dispute has not resolved and the mediator has in no way determined that the parties were unable to resolve the dispute. *See generally* Declaration of Gabriel S. Galanda ("Galanda Decl."), Ex. A.

In fact, the Mediator has formally determined that "a deal might have been found" had Defendants not "froze[n] the [T]ribe's negotiating team and its ability to respond" by their failure to mediate in good faith as required by the Consent Decree. *Id.* As such, the Court should issue a TRO, preventing Defendants from attempting to imminently "terminate" the mediation process.

The Yakama Nation seeks this extraordinary remedy due to the grave threat of irreversible harm presented by Defendants and the lack of adequate remedy at law. Indeed, for the first time in recent history, and in violation WASH. REV. CODE § 43.376.020(1)'s mandate that "state agencies must . . . [m]ake reasonable efforts to collaborate with Indian tribes in the development of . . . agreements," Defendants have flouted the government-to-government relationship between the Nation and the State of Washington. Moreover, by disregarding the mutual promise and bargained-for agreement to mediate in good faith with the Nation, Defendants will irreparably destroy confidence in contracts made between the state and tribal governments. Only an injunction can ensure the uninterrupted operation of inter-governmental dispute resolution contemplated by the Consent Decree and the sovereigns who entered into that contract.

Defendants must be enjoined from breaking their promise and refusing to mediate, until the dispute is resolved or until the Mediator declares that the dispute cannot be resolved.[1]

[1] Defendants are subject to this Court's jurisdiction per R.Y.C. § 2.01.03(4) and applicable federal law. *See also e.g. Ramsey v. Gregoire*, No. R-08-33, at 2 (Yakama Nation Tribal Ct. Jan. 29, 2008); *Yakama v. Gregoire*, No. 08-3056 (E.D. Wash. 2010) (tribal jurisdiction over state in *Ramsey* unchallenged). *See generally* Complaint for

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I. FACTS

The Yakama Nation is a federally-recognized Indian tribal government, whose Reservation was established by the Treaty with the Yakama ("Treaty"), 12 Stat. 951 (1859). The Nation currently occupies, regulates, and self-governs over 1.2 million acres of lands within the Yakama Indian Reservation. In exchange for the rights guaranteed by the Treaty of 1855, the Yakama Nation ceded over 10 million acres of land to the United States. *U.S. v. Smiskin*, 487 F.3d 1260, 1265-66 (9th Cir. 2007). The United States promised that Yakamas could rely on "all [the Treaty's] provisions being carried out strictly." *Id.* "The Yakama Nation thus understandably assigned a special significance to each part of the Treaty at the time of signing and continues to view the Treaty as a sacred document today." *Id.* at 1266.

A. 1994 Consent Decree

In May of 1993 the Yakama Nation filed a lawsuit against the State of Washington in the U.S. District Court for the Eastern District of Washington, seeking a declaration that state "may not lawfully require the collection or payment of all state petroleum taxes by [the Nation] nor require distributors with whom [the Nation] do[es] business to prepay state taxes on entire deliveries in advance." Complaint at 6, Teo v. Steffenson, No. 93-3050 (E.D. Wash. May 7, 1993) [hereinafter "Teo Complaint"]. The Nation also sought a declaration that the state may not "impermissibly infringe upon [the Nation's] rights to use of, and access to, public highways . . . without payment of fee or charge." *Id.* The complaint alleged that the state's acts to the contrary violated the Treaty of 1855 by infringing upon the Nation and its members' "right to

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Declaratory Judgment And Injunctive Relief, at 3 ("The civil obligations incurred were to be performed [on land held in trust for the use and benefit of the Yakama Nation and within the exterior boundaries of the Yakama Reservation (see 12 Stat. 951, Art. II); sustained interaction between the Yakama Nation and Defendants occurred thereon; the subject matter of the civil obligations incurred is located thereon; and the economic, spiritual, social, cultural, and political impacts of the violations of those civil obligations occurred thereon.").

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free use and access of public highways"[2] and the Nation's right "to make [its] own laws and be governed by them." *Id.* at 5.

On August 23, 1993, the District 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). The referenced "treaty rights" are those rights reserved by and guaranteed to the Yakama in Article III of the Treaty of 1855, specifically the right of Yakamas to travel free of state restriction or taxation. *Smiskin*, 487 F.3d 1260; *Salton Sea*, 2011 WL 4945072.

After the District Court entered an Order Setting Settlement Conference on September 8, 1993, the Nation and state "conferred and engaged in mediated negotiations." *Teo v. Steffenson*, No. 93-3050, at 1 (E.D. Wash. Nov. 2, 1994) [hereinafter "1994 Consent Decree"]. The state admitted that throughout 1994, both parties demonstrated "good faith effort to resolve" the dispute. *Id.* The parties exchanged several letters regarding a settlement agreement that would become a Consent Decree. Galanda Decl., Exs. B-D. The State prepared the Consent Decree.[3]

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[2] Article III of the Treaty of 1855 "guarantees [Yakamas] the 'right to transport goods to market over public highways without payment of fees for that use,'" including any state taxes imposed on the fuel needed for Yakamas' travel. *Smiskin*, 487 F.3d at 1265 (quoting *Cree v. Flores (Cree II)*, 157 F.3d 762, 769 (9th Cir. 1998)); *see also Salton Sea Venture, Inc. v. Ramsey*, No. 11-1968, 2011 WL 4945072 (S.D. Cal. Oct. 18, 2011) (same). The Treaty otherwise guarantees Yakamas the right to travel over public highways "for many reasons, including trade, subsistence, and maintenance of religious and cultural practices," yet "without payment of fees for that use.'" *Smiskin*, 487 F.3d at 1265 (quoting *Yakama Indian Nation v. Flores*, 955 F.Supp. 1229, 1239 (E.D. Wash. 1997), *aff'd*, *Cree II*, 157 F.3d 762).

[3] *See* Galanda Decl., Ex. B ("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 Ex. C ("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 Ex. D ("attached is the proposed Consent Decree in *Teo*" and outlining the State's latest changes). The Consent Decree was executed by the Yakama Nation Office of Legal Counsel, at the Yakama Nation Main Agency Offices, 401

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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.

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, 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 in Portland, Oregon." Consent Decree, at 2. The State answered, admitting those specific averments. Answer of Defendant State Of Washington Department Of Licensing And Fred Stephens, at 1-2, *Teo v. Steffenson*, No. 04-3079 (E.D. Wash. Sept. 1, 2004). While the State maintained that the Nation prematurely terminated mediation "before its completion," curiously claiming that only "the State, but not the Nation, [could] petition the Court for enforcement of the Consent Decree," *id.* at 4, the State expressly

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Fort Road, Toppenish, WA 98948, on Yakama Nation trust land within the exterior boundaries of the Yakama Reservation. Indeed, a large of majority of the 1994 Consent Decree's negotiations occurred on Yakama Nation trust land. Declaration of Harry Smiskin ("Smiskin Decl."), at ¶ 30. The place of performance, too, was only to be on Yakama Nation trust land – the subject matter of the Consent Decree being Yakama Nation members and transactions taking place on Yakama Nation trust land only. *Id.*

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"waived any defense as to whether conditions have been met to invoke the jurisdiction retained by this Court." *Teo v. Steffenson*, No. 04-3079, at 1 (E.D. Wash. Feb. 2, 2005), ECF. No. 12.

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. Consent Decree, at 1. As described in more detail below, the resultant Consent Decree terminated any continuing jurisdiction of the U.S. District Court, 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 resolve the dispute."[4] *Id.*, at ¶ 4.7.d (emphasis added). Here, the State has prematurely terminated mediation and the Yakama Nation has not otherwise waived the condition of a Mediator-declared impasse, which must be met – yet has not been met – for the State to legally discontinue its good-faith involvement in mediation.

C. Dispute Resolution & Mediation

In late 2011, the state contended 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." Galanda Decl., Ex. E. Therefore, on March 16, 2011, DOL Director Elizabeth Luce unilaterally invoked "the dispute resolution process per section 4.7 of the Consent Decree." *Id.* at Ex. F. The State outlined five substantive "issues in dispute," for resolution. *Id.*

[4] Like the 1994 Consent Decree, a large of majority of the negotiations pertaining to the 2006 Consent Decree occurred on Yakama Nation trust land. Smiskin Decl., at ¶ 11-21. Again, also like the 1994 Consent Decree, the place of performance was only to be on Yakama Nation trust land – the subject matter of the Consent Decree being Yakama Nation members and transactions taking place on Yakama Nation trust land only. *Id.* at ¶¶ 27-35.

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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 Ex. G. After a June 27, 2011 teleconference and September 14, 2011 meeting between the parties, the State 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 Ex. H. The State expressed its "willing[ness] to continue negotiations with the Yakama Nation during the 180 day termination period," meaning through March 2012. *Id.*

On February 28, 2012, the Yakama Nation requested mediation of the retrospective and prospective issues previously framed by the State for dispute resolution. *Id.* at ¶ 4. After initially declining mediation, the State "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." *Id.* at Ex. I. 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. Most notably, on July 9 and September 28, the Mediator convened two calls with the parties' counsel, which the Office of Legal Counsel participated in from the Yakama Nation Main Agency. *Id.* at ¶ 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

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conduct, before the State informed the Yakama Nation that it would no longer be participating in mediation just seven months later, on December 5, 2012. Galanda Decl., at ¶ 14.

On December 5, 2012, Defendants 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 would inform the Nation of the same via letter, to be emailed on the afternoon of December 5, 2012. *Id.* Defendants 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 ¶ 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 ¶ 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.*

II. AUTHORITY

Plaintiff offers the following recitation of pertinent federal common law pursuant to RYC § 7.01.01:

"A plaintiff 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"

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under which "the required degree 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 plaintiffs "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) (citing *Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 565 (9th Cir. 2000) (the stronger the probability of success on the merits, the less burden is placed on the plaintiffs to demonstrate irreparable harm)). Conversely, the less the likelihood of success on the merits, the more plaintiffs must show that "the balance of hardships tips decidedly in their favor." *Id.*

Here, Defendants have *per se* violated at least one section of the Consent Decree, ¶ 4.7, as discussed below. Based on that violation alone, the Yakama Nation will succeed on the merits. Thus, the showing of harm immediately below is more than adequate to justify a TRO.

A. The Consent Decree Is An Enforceable Contract.

As a threshold question, the Court must first determine under what standard to analyze the requested TRO. As discussed below, because the cause of action is properly based in the common law of contracts, the requested TRO must be evaluated under that standard.

"Consent decrees have elements of both contracts and judicial decrees," *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 438 (2004), in that they "embod[y] an agreement of the parties" and are also "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992). Thus, while a "court generally lacks authority to rewrite the terms of a consent decree, it has broad discretion to fashion equitable remedies to enforce a consent decree in response to a

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party's noncompliance." *Chisolm ex rel. CC v. Greenstein*, No. 97-3274, 2012 WL 2449902, at *8 n. 15 (E.D. La. June 27, 2012) (citing *EEOC v. Local 580, Int'l Assoc. of Bridge, Structural & Ornamental Ironworkers*, 925 F.2d 588, 593 (2d Cir. 1991)). **A consent decree is always specifically enforceable as written.** *U. S. v. ITT Continental Baking Co.*, 420 U.S. 223 (1975). The duty of the court to ensure that the terms of the decree are effectuated arises where the performance of one party threatens to frustrate the purpose of the decree. *E.E.O.C. v. Local Union No. 38*, No. 73-0645, 1981 WL 104 (N.D. Cal. 1981); *Bolden v. Pennsylvania State Police*, 73 F.R.D. 370 (E.D. Pa. 1976).

Circumstances where these contracts may be enforced by issuing a TRO, as opposed to a contempt proceeding, *see e.g. Reynolds v. Roberts*, 207 F.3d 1288, 1297 (11th Cir. 2000), arise where, in effect, the consent decree has become a run-of-the-mill contract byway of the parties' consent, *see Beaver v. Kingman*, 785 P.2d 998, 1003 (Kan. 1990) (finding that "the language of the consent judgment terminate[d] the district court's jurisdiction"); Christina Crimi, et al., *Consent Judgment: Interpretation and Effect of Judgment*, 46 AM. JUR. 2d JUDGMENTS § 200 (2012) (same), or where the consent decree specifically calls for injunctive relief. *See e.g. Access for the Disabled, Inc. v. Hialeah Fee Commons, Ltd.*, No. 08-21890, 2011 WL 484307 (S.D. Fla. Feb. 7, 2011); *Keith v. Volpe*, 965 F.Supp. 1337 (C.D. Cal. 1996), *overruled on other grounds*, 18 F.3d 1386 (9th Cir. 1997).

Here, as noted above, **the Consent Decree explicitly disclaims the U.S. District Court for the Eastern District of Washington's jurisdiction over this suit.** *See* Consent Decree, at ¶ H ("The parties agree that provisions . . . for maintaining the continuing jurisdiction of the

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court should be deleted.").[5] Thus, the Consent Decree has become a run-of-the-mill contract (albeit between sovereigns) by way of the parties' consent. Injunctive relief to prevent a breach of the Consent Decree will therefore be triggered where, as here, the Consent Decree has been violated; and the common law of contracts will control that analysis. *See e.g. Western Industries-North, LLP v. Lessard*, No. 12-0177, 2012 WL 859459 (E.D. Va. Mar. 13, 2012) (granting preliminary injunction to prevent a breach of contract); *Beaver*, 785 P.2d 998 (same).

If the standards for granting injunctive relief can be met, injunctive relief *must* issue.[6] *See e.g. Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63 (2nd Cir. 1999); *Teamsters Local Unions Nos. 75 and 200 v. Barry Trucking, Inc.*, 176 F.3d 1004 (7th Cir. 1999); *United Capital Financial Advisers, Inc. v. Capital Insight Partners, LLC*, No. 12-0300, 2012 WL 1079329 (D. Nev. Mar. 30, 2012); *Western Industries-North*, 2012 WL 859459; *see also* Richard A. Lord, *Specific Performance of Negative Promises by Injunction*, 25 WILLISTON ON CONTRACTS § 67:53 (4th ed. 2012) ("[A]n injunction will always be granted, regardless of an adequate legal remedy, to enforce a unilateral negative contract.").

B. Defendants Must Be Enjoined From Violating The Consent Decree.

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[5] Although a U.S. District Court could assert pendent jurisdiction over the Nation's breach of contract claim, the Nation hopes to hereby avoid any need for full-fledged litigation against Defendants in any court. Instead, the Nation simply desires an order compelling the state to mediate in good faith such that protracted litigation between Yakama and the state might be altogether avoided, precisely as both governments envisioned when they entered into the Consent Decree and promised each other to mediate in "mutual good faith on a government to government basis." Consent Decree, at ¶ H.

[6] As the court noted in the seminal case of *National Marketing Mach. Co. v. Triumph Mfg. Co.*, 13 F.2d 6 (8th Cir. 1926):

> An injunction against the breach or the continuance of a breach of a contract is a negative decree of specific performance, and the power and duty of a court of equity to grant such an injunction is even greater, under the rules, principles, and practices in equity, than its power and duty to grant decrees of specific performance. A court of equity may issue its injunction to prevent a violation, or the continuance of a violation, of a contract in cases in which it would not decree specific performance thereof.

Id. at *9.

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As noted above, where appropriate under the common law of contracts, courts must grant preliminary injunctions to prevent a breach of a consent decree. Here, the Consent Decree contains the following contractual language to mandate that the parties mediate and arbitrate in "good faith" on a "government to government basis"[7]:

> 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 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.

[7] This mandate comports with Defendants' 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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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:[8]

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.**

* * * *

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

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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 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~~

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~~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.~~

The Court must now enjoin Defendants from unilaterally terminating the Consent Decree without complying with the terms of that binding contract. The Consent Decree clearly contemplates that mediation be fulfilled "in good faith" by both parties, and that mediation continues "until the dispute is resolved or 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 the state "fails to enter into the dispute resolution process or **terminates the process before its completion**." Consent Decree, at ¶ 4.6 (emphasis added).

Certainly, by refusing to mediate Defendants have "terminate[ed] the [ADR] process before its completion" and thus triggered the jurisdiction of this Court. Consent Decree, at ¶ 4.7; *see also* Galanda Decl., at ¶ 14 (on December 5, 2012, Defendants expressly stated that they were, as of that date, "terminating mediation"). There is no question that Defendants have

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refused to mediate in "good faith."[9] Consent Decree, at ¶ 4.6. There is no question that the **mediator** has yet to "determine[] that the parties are not able to resolve the dispute." *Id.*, at ¶4.7(d). There is, thus, no question that this Court must issue a TRO enjoining and restraining Defendants from prematurely "terminating" mediation in violation of the contract between the parties.

A plaintiff seeking to force a party to mediate a dispute may also request that a court issue an injunction in aid of that request, and that the court "maintain the *status quo* pending [ADR]." *Shainin II, LLC v. Allen*, No. 06-0420, 2006 WL 2473495, at *8 (W.D. Wash. Aug. 28, 2006) (citing *PMS Distrib. Co. v. Huber & Suhner*, A.G., 863 F.2d 639, 641-42 (9th Cir.1988)). The Nation respectfully does so here.[10]

1. Defendants Have Irreparably Harmed The Yakama Nation.

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. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1376-77 (11th Cir. 2005). 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 [defendants] are not restrained."); *Qwest Communications Intern. Inc. v. National Union Fire Ins. Co. of*

[9] As discussed in further detail below, this is not mediation in "good faith" as demanded by the Consent Decree nor is it a "reasonable effort[]" to resolve the dispute as demanded by Defendants' own WASH. REV. CODE. § 43.376.020(1).

[10] Notably, the Nation has not sought in its Complaint full relief for all potential claims against Defendant. Instead, the Nation seeks only to force Defendants to mediate, in good faith and on a government-to-government basis, under the terms of the 1994 and 2006 Consent Decrees, and that Defendants otherwise properly carry out their duty to consult with Plaintiff. *See* Complaint, at § VII.

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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[,] as [plaintiff] will lose an important contract right affecting a high stakes insurance coverage dispute."); *Reliance Nat., Ins. Co. v. Seismic Risk Ins. Service, Inc.*, 962 F. Supp. 385, 391 (S.D.N.Y. 1997) (same); *see also 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 [ADR] constitutes irreparable harm."); *Olde Discount Corp. v. Tupman*, 805 F. Supp. 1130, 1135 (D. Del. 1992), *aff'd*, 1 F.3d 202 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1065 (1994) ("loss of [plaintiff's] federal substantive right to [ADR], should injunctive relief be denied, constitutes irreparable harm clearly distinguishable from purely economic loss"); *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 482 F. Supp. 788, 792 (D. Fla. 1980), *rev'd on other grounds*, 677 F.2d 391 (4th Cir. 1982) (risk of engaging in discovery and going to trial "over a controversy for which this court ordered [ADR]" constitutes irreparable harm).

Moreover, the injury to the 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. Teo Complaint, at 5-6. This type of harm is irreparable in that it cannot not be adequately compensated for in the form of monetary damages or other remedy. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001). Not only is harm via physical invasion of tribal territory – and the resultant psychological harm to a sovereign Native American People – 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

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employment for specific Tribal members. *See* Teo Complaint, at 3-4. Thus, courts have found that "irreparable harm to the future economic well-being" of an entire demographic is grounds for the issuance of 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. Even such basic services as law enforcement and fire protection may be endangered by this loss of revenue. Furthermore, the Tribes argue that if 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 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 to tribe could hinder the productivity of a tribal enterprise and result in irreparable harm to the tribe). Moreover, based on Defendants' past 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 counsels in favor of equitable rather than legal relief." *LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985).

As discussed below, mediation is mandated by the Consent Decree and, thus, binding federal law. The fact that the Nation will be denied this negotiated and legally mandated benefit if this Court does not issue the requested relief therefore constitutes irreparable harm. Again, to validate the premise that a public agency could wrongfully terminate agreements without fear of any consequence – exhibiting flagrant disregard of that the bargained for

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agreement – is to countenance the destruction of confidence in contracts made between the state and any other government or enterprise. Any resultant breach of the Treaty will also create irreparable harm. Only an injunction can ensure the uninterrupted operation of ADR contemplated by the consent decree.

2. The Yakama Nation Is Likely To Prevail On The Merits.

"If mediation has been contractually agreed to be an ADR step precedent to litigation, arbitration, or some regulatory or administrative proceeding, then a court may compel parties to mediation." Thomas H. Oehmke & Joan M. Brovins, *Cause of Action for Enforcing Mediation Contracts*, 50 CAUSES OF ACTION 2d 609, § 11 (2011). As discussed above, "ordinary contract principles" will dictate whether mediation is required. *Gate Precast Co. v. Kenwood Towne Place, LLC*, No. 09-0113, 2009 WL 3614931, at *5 (S.D. Ohio Oct. 28, 2009); *see also Ervin v. Nashville Peace and Justice Center*, 673 F. Supp. 2d 592 (M.D. Tenn. 2009) (same). Thus, a determination of the likelihood of success on the merits of the Nation's breach of contract claim requires analysis of the Consent Decree itself.

"[A]s to the elements of a breach of contract claim under federal law, 'a party must allege and establish: (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by the breach.'" *Red Lake Band of Chippewa Indians v. U.S. Dept. of Interior*, 624 F.Supp.2d 1 (D.D.C. 2009) (quoting *Pryor v. U.S.*, 85 Fed.Cl. 97, 104 (Fed. Cl. 2008)).

a. Validity And Duty Arising Out Of The Consent Decree

Here, the Consent Decree contains a clear and unambiguous alternative dispute provision to mandate mediation:

> 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

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> such disputes, . . . the parties **shall** engage the services of a mutually-agreed-upon qualified mediator to assist them in attempting to negotiate the dispute. . . . **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.**

Consent Decree, at ¶¶ 4.2, 4.7.c-d (emphasis added). Neither party has disputed the existence or validity of this contractual ADR provision. The Court must therefore find that the Nation has succeeded in establishing that a legal duty arises out of this mediation provision. *See Global Tel*Link Corp. v. Scott*, 652 F.Supp.2d 1240, 1246 (M.D. Fla. 2009); *see also U.S. v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir. 2001) (citing *In re Complaint of Hornbeck Offshore Corp.*, 981 F.2d 752, 754 (5th Cir. 1993)) (holding that if any of the issues being disputed are arguably within the contemplation of an ADR clause, ADR "is mandatory, and there is no discretion vested in the district court to deny" compelling that they submit to the ADR as contemplated by the contract).

The Consent Decree makes clear that the ADR clause is meant to cover all "issue[s] of compliance with the Consent Decree." Consent Decree, at ¶ 4.7. Of course, as the dispute at hand revolves around the state's failure to comply with the Consent Decree – particularly the mediation clause thereof and an utter failure to mediate "in good faith" the issues framed by Alan Haight's letter of September 19, 2011. Thus, the dispute falls within the terms of the Consent Decree; a duty to mediate has clearly been triggered.

b. Breach of Duty to Mediate

DOL has breached the Consent Decree in at least two ways: First by failing to mediate in good faith and second by refusing to mediate "until the mediator determines that the parties are not able to resolve the dispute."

i. Defendants Mediated in Bad Faith.

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Good faith generally requires that negotiating parties refrain from "behavior which is in effect a refusal to bargain, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement." *N.L.R.B. v. Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, 747 (1962).

In the state-tribal contractual context, good faith requires that the party rejecting a claim or demand must be willing to make a counter-suggestion or proposal. *See Flandreau Santee Sioux Tribe v. S. Dakota*, No. 07-4040, 2011 WL 2551379, at *4 (D.S.D. June 27, 2011) (*citing NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 37 (3d Cir. 1941)). "[W]here that is expressly invited but is refused, in such circumstances the refusal may go to support a want of good faith, and, hence, a refusal to bargain."[11] *Id.*; *see also Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1031 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 3055 (2011) (non-negotiable demand for share of tribal revenue – as is the case here – is evidence of bad faith).

Likewise, "[a]s a matter of Yakama custom and law, good faith, government-to-government mediation involves dialogue and negotiation in a manner sensitive to the rights, concerns, and needs of the Yakama Nation and enrolled Yakama members, particularly those rights guaranteed to us in the Yakama Treaty of 1855 and otherwise as part of our inherent sovereignty." Smiskin Decl., at ¶ 21.

Here, without revealing the confidential substantive content of mediation, the Defendants' participation in these negotiations, however brief, was carried out in bad faith.

[11] Likewise, in the labor context "bad faith" stems from making "unreasonable bargaining demands that are consistently and predictably unpalatable to the other party; unilateral changes in mandatory subjects of bargaining;" and interjecting new proposals after months of bargaining. *Universal Fuel, Inc. & Int'l Ass'n of Machinists & Aerospace Workers, Afl-Cio, Dist. Lodge 4*, 358 NLRB 1, 19 (2012); *see also Fort Independence Indian Cmty. v. California*, 679 F. Supp. 2d 1159, 1171 (E.D. Cal. 2009) (cases interpreting the NLRA provide guidance in interpreting IGRA's requirement that states negotiate in good faith with Indian Tribes).

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The starkest proof of the state's bad faith was its repeated "final offers." The state first threatened to unilaterally terminate the mediation process on August 10, 2012. Smiskin Decl., at ¶ 19. Then the state imposed a "72-hour" mediation termination deadline of August 15, 2012. *Id.* The state again threatened to unilaterally "terminate" mediation on August 31, 2012, and then again on September 21, 2012. *Id.* at ¶ 20. From April 23, 2012, to November 13, 2012, the Yakama Nation made several written settlement offers to the state. At least three times during about that same time span, the state made "take-or-leave" offers to the Yakama Nation, constituting essentially the exact same offer that it had previously made -- as admitted by the state itself. *Id.* at ¶ 21.

Taken with the Defendants' refusal to communicate with either the mediator or the Nation for long stretches of time – repeatedly submitting nearly identical "offers" – these final offers were "behavior which is in effect a refusal to bargain, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement." *Katz*, 369 U.S. at 747. The proverbial gun to the head embodies the kind of "unreasonable bargaining demands that are consistently and predictably unpalatable to the other party." *Universal Fuel*, 358 NLRB at 19.

If Defendants had *ever* intended to mediate in good faith, they changed their minds in late 2012. While mediation is only as successful as its participants wish it, when parties bargain for "good faith" each must keep its promise. Defendants have repeatedly and wholly failed to do so.

ii. Defendants Halted Mediation Before The Mediator Declared That The Parties Are Not Able To Resolve The Dispute.

As discussed in more detail above, there is no question that **the mediator** has yet to "determine[] that the parties are not able to resolve the dispute." Consent Decree, at ¶4.7(d).

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There is no question that Defendants agreed to mediate until **the mediator** determines that the parties are not able to resolve the dispute. Therefore, Defendants are clearly in breach of the agreement they drafted and executed to mediate until a particular instant.

c. Damages

Damages that may be sought for breaching a contractual duty to mediate – which are required to state a claim under the applicable common law – 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 judgment." 50 CAUSES OF ACTION 2d at § 11.

Here, the 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.[12] Unless and until Defendants 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 Court must therefore find that the Nation has succeeded in establishing a substantial likelihood of success on the merits as to the request for specific performance of this mediation and arbitration clause. *See e.g. Global Tel*Link Corp.*, 652 F.Supp.2d, at 1246; *The O.N. Equity Sales Co. v. Thiers*, 590 F.Supp.2d 1208 (D. Ariz. 2008).

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

a. The Public Interest Requires A Preliminary Injunction.

The public interest weighs heavily in favor of preventing irreparable harm. Numerous courts have found that the public interest in promoting and enforcing valid ADR clauses

[12] Although the Nation has suffered damages, it is not seeking to recover money damages against Defendants 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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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); *Chester County Hosp. v. Independence Blue Cross*, No. 02-2746, 2003 WL 25905471, at *4 (E.D. Pa. Nov. 10, 2003). ("With the increase in the amount of litigation, the federal courts necessarily suffer from a backlog of cases. Mediation alleviates some of the congestion by allowing speedy resolution of many of these matters.").

Here, a similar finding is warranted. Defendants have unilaterally breached the Consent Decree's ADR clause. The public has been harmed by the Defendants' breach, and will continue to be harmed until Defendants are enjoined from further ignoring their duties under the Consent Decree.

b. <u>The Balance Of Hardships Requires A Preliminary Injunction.</u>

Defendants 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 Defendants. *See Global Tel*Link Corp.*, 652 F.Supp.2d at 1247 ("[B]eing denied the

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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."). Again, this action seeks neither damages nor retrospective relief.

Further, it appears that pending mediation, the state has received, and will continue to receive, 100% of its fuel taxes, which militates against any finding of detriment to the State or its citizenry. Consent Decree, at ¶ 2.3; Smiskin Decl., at ¶ 4. The Nation wishes only to preserve the *status quo* and otherwise comply with the letter of the agreement between the parties.

Moreover, Defendants do not have an organizational interest in violating the law by failing to comply with the Consent Decree and the Treaty rights that that Consent Decree protects. Defendants' 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 mediation – will only help Defendants meet this important interest.

4. No Bond Should Be Required Of The Nation.

The Nation should not be required to post a bond to obtain a TRO. Because requiring a bond has a chilling effect on public interest litigants seeking to protect the rights secured in the Consent Decree, any applicable bond requirement should be waived, or only a nominal bond should be required. *People ex rel. Van de Kamp v. Tahoe Regional Plan*, 766 F.2d 1319 (9th Cir. 1985). "The court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review." *Id.* at 1325. Here, the Nation is attempting to protect the Treaty rights guaranteed to its members in the Consent Decree. Any bond would come directly from the Tribal resources

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needed to continue to provide governmental services to those members – including stewardship over Treaty rights secured in the Consent Decree.

No bond should be required. But if a bond is required, the Nation proposes to post a $100.00 bond.

III. CONCLUSION

The Yakama Nation requests that relief set forth in the proposed order filed with its Motion for Temporary Restraining Order.

DATED this 5th day of December, 2012.

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