HON. LONNY R. SUKO

Rob Costello
Deputy Attorney General
Mary Tennyson
William G. Clark
Assistant Attorneys General
Attorney General of Washington
PO Box 40110
Olympia, WA 98504-0110
Telephone: (360) 753-0225
Fax: (360) 664-0174
E-Mail: RobC@atg.wa.gov
E-Mail: BillC2@atg.wa.gov
E-Mail: MaryT@atg.wa.gov

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, WASHINGTON DEPARTMENT OF LICENSING, CHRISTINE GREGOIRE, Governor, and ALAN HAIGHT, Director of 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 (in his official capacity) and the CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a Federally-Recognized Indian Tribe,

Defendants.

NO. CV-12-3152-LRS

PLAINTIFFS' OPPOSITION TO DEFENDANT YAKAMA NATION'S MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs brought this lawsuit to enforce the termination provisions of a consent decree that this Court entered in 1994 and amended in 2006. Plaintiffs have moved for a preliminary injunction to dissolve orders, and to enjoin proceedings, that defendants improperly brought in Yakama Tribal Court.

Defendant Yakama Nation has cross-moved for a preliminary injunction ordering the State to resume unfruitful mediation, contending that the decree requires the parties to mediate all disputes to a successful conclusion or until a mediator declares an impasse. The Nation contends that formal declaration of impasse is required before either party may terminate the consent decree. The Nation has not served a counter claim or other pleading in this case and supports its motion only with pleadings it filed in tribal court.

The Court should deny the Nation's Motion because: 1) the Nation must bring formal claims in this Court to obtain the requested relief and, in doing so, must waive objections to the jurisdiction of this Court; 2) the Nation cannot show a likelihood of success on the merits of a claim that the consent decree requires the State to engage in unsuccessful mediation indefinitely or that the mediator must formally declare an impasse before the State can terminate the consent decree; 3) the Nation's claims of irreparable injury are based entirely on disputed, conclusory allegations and inadmissible opinions from the Nation's tribal court pleadings; and 4) the Nation offers no security or bond to

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800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

safeguard the State from harm caused by the preliminary injunction, including the loss of $300,000 each month in uncollected motor vehicle fuel taxes.

II. STATEMENT OF FACTS

The history of the parties' negotiations and of the consent decrees entered by this Court regarding the State's collection of motor vehicle fuel taxes on wholesale purchases of fuel destined for retail sale on the Yakama Reservation is set forth in plaintiffs' pending Motion for Preliminary Injunction (ECF No. 10) and in the declaration of Karla Laughlin (ECF No. 6), and is not repeated here. However, there are material inaccuracies in the Nation's alleged facts in its preliminary injunction motion that warrant specific rebuttal.

First, neither the 1994 consent decree nor its amended version in 2006 required the parties to engage in mediation until it was successfully concluded or until the mediator declared that the parties were at an impasse. The 1994 decree's dispute resolution language of ¶ 4.7(d) was qualified by ¶ 4.7(e) in that either party could terminate mediation and resort to this federal court to resolve any dispute left unresolved 30 days after a mediator was selected. ECF No. 6, Ex. B at 57-58. In the amended 2006 consent decree, the enforcement option contained in ¶ 4.7(e) was deleted and replaced with a right to terminate clause added at the end of ¶ 4.7(d): "[I]f a dispute is unresolved for more than 180 days, either party may give notice of intent to terminate this agreement as provided for *infra*." The process for exercising the right to terminate under

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¶ 4.7(d) was included in new ¶ 4.27 of the 2006 amended consent decree, which the Nation neither references nor discusses in its motion:

> [I]f a party objects to continued participation in the processes and framework provided for in this decree and desires to withdraw and terminate the agreement, it may do so only upon not less than one hundred-eighty (180) days written notice to the other party and a government to government meeting or consultation between them occurs to discuss their proposed reasons for doing so.

ECF No. 6, Ex. C at 8. Paragraph 4.27 contradicts the Nation's position that the State could not terminate the consent decree unless and until the mediator determined that the parties were at an impasse.

Next, the Laughlin Declaration, submitted in support of plaintiffs' preliminary injunction motion, contradicts the Nation's claim that the State failed to negotiate or mediate in good faith. Since 2008, the State has tried to obtain compliance with the consent decree provisions that imposed record-keeping requirements on the Nation and its members regarding purchases and sales of motor vehicle fuel on the Yakama Reservation. Record-keeping is essential so that third-party annual audits could occur to verify the taxable or tax-exempt status of each retail sale made on the reservation. ECF No. 6, ¶¶ 22 – 37. The Nation undisputedly has never complied with these requirements.

Nor does the Nation dispute that the State invoked the alternative dispute provisions of ¶ 4.7(d) on March 16, 2011. ECF No. 6, ¶¶ 37 – 39, Ex. I; ECF No. 45 at 11. The State sought without success to resolve the Nation's non-compliance with the consent decree, prompting written notice of the State's

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(206) 464-7352

intent to terminate the consent decree, effective 180 days later, on September 19, 2011. ECF No. 6, ¶¶ 40 – 47, Ex. M. The State offered to continue to negotiate during the 180-day notice period, yet the Nation waited five months, until February 27, 2012, to request formal mediation. ECF No. 6, ¶ 48. The State agreed to mediate, but insisted that mediation occur during March 2012. ECF No. 6, ¶ 48.

The parties and mediator met on March 23, 2012. ECF No. 6, ¶ 49. According to the mediator face to face negotiation was unproductive and set the process back. ECF No. 45 at 13-14. Though the Nation tries to blame the State for the unsuccessful mediation, the mediator faulted the Nation for expecting a "negotiation dance where there would be more give and take", for never communicating what it needed from the State and for not making a best and final offer. *Id*. The mediator never suggested that the State acted in bad faith; on the contrary, the mediator took responsibility for the failed mediation and noted that, as of November 26, 2012: "It seems obvious to me that we are reaching the end of the negotiations …. Recogniz[ing] that the parties are more likely to be moving beyond the mediation phase in the near future." ECF No. 7, Ex. 2 at 68 – 69. The State formally notified the Nation of the termination of the consent decree a week later on December 5, 2012.

The State complied with all provision of the consent decree. From May 2008 to the present the State has been unable to obtain the Nation's compliance

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with the record-keeping and annual audit provisions of the consent decree. ECF No. 6, ¶¶ 22 – 37. On March 6, 2011 the State invoked the dispute resolution provisions of ¶ 4.7 of the consent decree and, when efforts to resolve their disputes proved unsuccessful, the State notified the Nation on September 19, 2011 of its intent to terminate the consent decree, effective 180 days later, under ¶ 4.27. ECF No. 6, Exs. I & M. When the Nation invoked formal mediation on February 27, 2012, the State cooperated and negotiated in good faith for an additional eight months without resolution before finally terminating the decree on December 5, 2012. ECF No. 6, ¶ 49.

III. LEGAL AUTHORITY

At the outset, this Court should decline to entertain the Nation's Motion because the Nation has provided no pleadings or declarations in this case to support the award of such extraordinary relief. No answer and counter-claim has been filed and the Nation's improper attempt to substitute its pleadings in the Tribal Court for formal pleadings in this case must be rejected. *See Credit Bureau Connection, Inc. v. Pardini*, 726 F.Supp.2d 1107, 1137-38 (E.D. Cal. 2010) (Without a counterclaim, court cannot assess defendant's likelihood of success, irreparable injury or the alleged impact on the public interest). The references to "the Court" in the consent decree mean this Court, not tribal or state court. ECF No. 6, Ex. B at 5:20-21 & ¶¶ 1.1, 4.6, 4.7(c); Ex. C at 1:21.

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Even if supported by an appropriate record, however, the Nation's motion must fail because it cannot demonstrate a likelihood of prevailing on the merits. The Nation predicates claims of irreparable injury and harm on conclusory allegations and impermissible opinions and because the Nation fails to address the significant financial and other harm to the State if the Court orders the parties back into a stalemated mediation. .

A. The Nation Cannot Demonstrate the Likelihood of Prevailing on the Merits of its Breach of Contract Claim.

To obtain a preliminary injunction the Nation must demonstrate that it is likely to succeed on the merits, likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor and that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Though it quotes the *Winter* standards, the Nation incorrectly cites pre-*Winter* "sliding scale" cases allowing a preliminary injunction to issue if there is a weak case on the merits but a strong showing of irreparable injury or vice versa. ECF No. 45 at 14 – 15. After the Supreme Court in *Winter* criticized the sliding scale approach, the Ninth Circuit revisited and substantially modified its pre-*Winter* test in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011):

> We had held that the 'possibility' of irreparable harm is sufficient in some circumstances to justify a preliminary injunction. *Winter* explicitly rejected that approach . . . under *Winter*, plaintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction.

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After *Winter* the Ninth Circuit requires the Nation demonstrate "serious questions going to the merits" as well as "a hardship balance that tips sharply toward the [Nation] to support issuance of an injunction. *Id*. at 1132. Indeed as one Ninth Circuit district court ruled recently in applying *Alliance for Wild Rockies*:

> The *sine qua non* of a preliminary injunction inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.

United Capital Fin. Advisors, Inc. v. Capital Inside Partners, LLC, 2012 WL 1079329 at *2 (D. Nev. 2012), citing *New Comm. Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). Under this test, the relative strength of a showing of irreparable injury will not excuse the weakness of a case on the merits.

The Nation has no case on the merits. The alternative dispute resolution provisions in the original and amended consent decree do not require indefinite mediation, particularly where, as here, months of effort yielded no progress. Nor did the consent decree change the nature of mediation as a voluntary form of alternative dispute resolution that leaves parties free to reject each other's positions and to decline to participate in fruitless meetings. Moreover, the amended consent decree provided three outcomes for the parties' attempts at dispute resolution: 1) unsuccessful face to face discussions and/or mediation under ¶ 4.7; 2) the mediator declares an impasse as provided in ¶ 4.7; or 3) a

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Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

party elects to terminate the consent decree in an unresolved dispute subject to the advance notice provisions in ¶¶ 4.7(d) and 4.27. The State followed those procedures in terminating the consent decree on December 5, 2012.

There is no merit to the Nation's claim that the consent decree obligated the State to mediate indefinitely and without success. Nor is there any basis to conclude that the State negotiated in bad faith over the lengthy course of dispute resolution pursued by the parties since it was invoked by the State in March of 2011. The Nation's Motion must be denied because it cannot show a likelihood of success on the merits of its claim.

B. The Nation's Claim of Irreparable Injury and Hardship is Predicated Upon Speculation and Conclusory Allegations That Are Contradicted by the State's Evidence.

Before the Supreme Court decided *Winter*, the Ninth Circuit had held that the "possibility" of irreparable harm was sufficient to justify a preliminary injunction. As noted in *Alliance for the Wild Rockies*, 632 F.3d at 1131, a movant must establish that irreparable harm is likely, not just possible. That is because a preliminary injunction is an extraordinary remedy that is never awarded as of right. *Winter*, 555 U.S. at 24. The record offered by the Nation simply does not demonstrate a likelihood of irreparable injury or hardship without an injunction.

The Nations' contentions of injury and harm subsist in the conclusory and speculative allegations in pleadings that the Nation filed in the Tribal Court,

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Seattle, WA 98104-3188
(206) 464-7352

expressed in generalized opinions of the Nation's Chairman who opines concerning the State's motives, the mediator's observations, and vague harm to the members of the Yakama Nation for which he has no foundation or demonstrated personal knowledge. *See* ECF No. 45 at 24-28. Moreover, though he has no demonstrable interest or involvement with retail gas stations on the reservation, he opines that imposition of the state's gasoline taxes will cause dramatic price increases at the pumps. *Id*. Similar foundation and hearsay issues exist regarding the unauthenticated, hearsay reports and websites the Nation cites in ECF No. 45 at 26 and 27 in an effort to support the claim that the balance of hardships tips toward the Nation in this case. The Nation's showing of harm and irreparable injury is insufficient as a matter of law.

C. If the Nation's Motion is Granted, This Court Should Preserve the Status Quo by Ordering an Appropriate Bond, Strict Compliance with the Decree's Record Requirements and an Early Trial Date.

The Nation says the State would not be harmed if this Court issues an injunction, claiming that the current practice of charging only 25 percent of State fuel taxes on gasoline destined for sale by Yakama retailers fully compensates the State for all the taxes it would be entitled to. The State has demonstrated in its Motion (ECF Nos. 6 and 10) that the failure to honor the record-keeping and audit requirements of the consent decree continues to cost the State $300,000 in lost revenues every month. ECF No. 6 at 15, ¶ 51. Assuming that trial on the merits could be a year away, the injunction requested

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800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

by the Nation would deprive the State of 3.6 million dollars. Even an earlier trial six months from now will cost the State 1.8 million dollars.

Should this Court issue the Nation's requested preliminary injunction, even without a showing of success on the merits or irreparable injury, the Court should require the Nation to provide an appropriate bond or other security. Fed. R. Civ. P. 65(c). The Court should also order the Nation to supply the sales and other records the Consent Decree requires it to maintain and make available, just as the Court required the Nation to maintain an accounting of fuel sales as a condition of the preliminary injunction that preceded the 1994 consent decree. *Teo v. Steffenson*, No. CY-93-3050-AAM, Order Granting Prelim. Inj. at 13 (E.D. Wash. Aug. 23, 1993) (Ct. Rec. 57). Finally, the Court should order an early trial date so that mediation is swiftly concluded.

IV. CONCLUSION

The Court should deny the Nation's motion for preliminary injunction.

DATED this 3rd day of January, 2013.

ROBERT M. MCKENNA
Attorney General

s/William G. Clark
ROB COSTELLO, WSBA #12920
Deputy Attorney General
MARY TENNYSON, WSBA #11197
WILLIAM G. CLARK, WSBA #9234
Assistant Attorneys General
Attorneys for Plaintiffs

ATTORNEY GENERAL OF WASHINGTON
Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7352

PROOF OF SERVICE

I hereby certify that on the 3rd day of January, 2013, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will provide service of the same on counsel for defendants as follows:

Anthony S. Broadman
Galanda Broadman PLLC
anthony@galandabroadman.com

Ryan D. Dreveskracht
Galanda Broadman PLLC
ryan@ galandabroadman.com

Gabriel S. Galanda
Galanda Broadman PLLC
gabe@galandabroadman.com

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of January, 2013 at Seattle, Washington.

ROBERT M. McKenna
Attorney General

By: s/William G. Clark
ROB COSTELLO, WSBA #12920
Deputy Attorney General
MARY TENNYSON, WSBA #11197
WILLIAM G. CLARK, WSBA #9234
Assistant Attorneys General
Attorneys for Plaintiffs