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

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A. The Yakama Nation Has Demonstrated Likelihood Of Success.

There are no "serious questions" or degrees of likelihood of success at issue before the Court. *See* ECF No. 58 at 6 (*citing Winter v. Natural Res. Def. Council, Inc*. 555 U.S. 7, 20 (2008); *Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011)). Yakama will prevail on the merits – the Court need not address the *Winter* standard parsed by Plaintiffs since they have patently violated the mediation clause in the Consent Decree and, as discussed below, will irreparably harm the Nation.

Contrary to what Plaintiffs claim, if one thing is clear from the Consent Decree they drafted – and do not dispute having drafted – it is that they must mediate disputes, in good faith, until a mediator determines the dispute cannot be resolved. ECF No. 8, at 43. Frankly, despite Plaintiffs' obfuscation, ¶ 4.7(d) of the Consent Decree could not be clearer:

> 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.

Id (emphasis added). There is no mention of any other provision of the Consent Decree in this plainly worded mediation requirement. Plaintiffs raise the specter of "indefinite" mediation. ECF No. 58 at 7. But mediation might actually have been quite short had Plaintiffs negotiated in good faith as required by the Consent

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Decree.[1] Moreover, there *is* a clear, objective end to mediation: the Mediator's determination "that the parties are not able to resolve the dispute." ECF No. 58 at 7. Incredibly, Plaintiffs still fail to argue "that the parties are not able to resolve the dispute"; stating instead that negotiations were "fruitless." *Id*. But that is not the standard at bar – it is unresolvability, by determination of the Mediator.

Paragraph 4.7(d), read in its entirety, means the following: If the dispute is not resolved by mediation: (1) the parties may agree to have a neutral third party arbitrator make a final binding decision resolving the dispute, or (2) wait 180 days. If no party requests arbitration in those 180 days, either party may give notice of intent to terminate, according to the terms provided in ¶ 4.27. ECF No. 8, at 62. In either case, these contingencies only arise "[i]f the dispute is not resolved by mediation." *Id*. This is entirely consistent with the first sentence of ¶ 4.7(d), which, again, states succinctly that mediation can end only in one of two ways.

Plaintiffs argue that somehow the last sentence of ¶ 4.27 changes every other

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[1] The record makes clear that *Plaintiffs*, not Defendants, unnecessarily elongated mediation, at least before hastily terminating it on December 5, 2012. ECF No. 8, at 71 (email to Mary Tennyson and Mediator, et al.) (citing State's "delay in mediation for weeks at a time in June, July and now again in late August and early September."); ECF No. 7, at 68 (email from Mediator) ("The State's strategy, on more than one occasion, to put out a 'best' or "last and final' offer. . . . These offers tended to stall negotiations rather than elicit productive counter-proposals.").

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requirement for mediation. ECF No. 58, at 3. It does not. That provision provides:

> [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 either (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. 8, at 67. The provision does not delete ¶ 4.27 or the requirement that the clause be read against, again, the clear backdrop that:

> 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.

Id. at 43. Only "[i]f the dispute is not resolved by mediation . . . [and] is unresolved for more than 180 days, [may] either party may give notice of intent to terminate this agreement as **provided for *infra***." ECF No. 8, at 62 (emphasis added). Importantly, ¶ 4.27 does not say that either party may "terminate," only that they may provide "notice of intent to terminate as provided for *infra*." *Id.* And what does "*infra.*" refer to, per ¶ 4.7(d)? Of course, it refers to the "written notice" to terminate clause, per ¶ 4.27. Read together, ¶ 4.27 dovetails with ¶ 4.7(d). Before "termination": the parties must (1) mediate until the Mediator declares unresolvability, and (2) wait 180 days. That is all that is required.

The Nation's reading of the 2006 language is not only consistent with the plain meaning of its words, but it is required by canons of statutory construction. Plaintiffs, who, again, indisputably drafted the Consent Decree, are bound by the

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supplementary rule to the doctrine of the last antecedent. *See James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012); *Bingham, Ltd. v. U.S.*, 724 F.2d 921, 925-26 n. 3 (11th Cir. 1984). This guidance provides that, grammatically, the comma immediately following "[i]f the dispute is not resolved by mediation," separates the series ("the parties may agree" and "either party may give notice"), and clarifies that the modifying phrase is meant to apply to both elements in the series. *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 217 (2d Cir. 1999). Indeed, this comma can serve no other grammatical purpose. *Id*. If Plaintiffs' drafters had left out the comma following "mediation," perhaps it could be argued (without reading the rest of the Consent Decree) that, "[i]f the dispute is not resolved by mediation" modifies only "the parties may agree to have a neutral third party or arbitrator make a final binding decision resolving the dispute . . . ." ECF No. 8, at 62. However, with that comma included, such a reading is impossible.

Even under their tortured reading – indeed, Plaintiffs doth protest too much against good faith mediation – Plaintiffs cannot seriously contend that option A does not require mediation. By virtue of the lack of a comma after "or," they are similarly bound to a correct reading of option B.

Further, considering the "federal policy in favor of alternative dispute resolution," even were there merit to Plaintiffs' reading, mediation must carry the

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benefit of any doubt. *Centaur Corp. v. ON Semiconductor Components Industries, LLC*, No. 09-2041, 2010 WL 444715, at *3 (S.D. Cal. Feb. 10, 2010).

Through the plain meaning of the Parties' agreement, the force of grammar, and the Parties' intent to resolve disputes as governments instead of in any court, it is clear that mediation is required – to a mediator's determination of unresolvability – and that Plaintiffs have clearly breached their promise.

B. The Nation Will Be Irreparably Harmed Absent An Injunction.

Plaintiffs have failed to respond to Yakama's offered authority regarding the irreparable harm caused by Plaintiffs' breach. ECF No. 45 at 16-18. When a party fails to make an argument in response to a motion, he waives it. *County of McHenry v. Ins. Co. of the W.*, 438 F.3d 813, 817 (7th Cir. 2006); *Frodge v. City of Newport*, No. 11-5458, 2012 WL 4773558 (6th Cir. 2012). Instead of contesting the Nation's proof of irreparable harm, Plaintiffs focus vaguely on whether the Yakama Chairman's Declaration (ECF No. 8, at 19-29; ECF No. 55 at 2) is supported by personal knowledge or foundation. The Nation's evidence is admissible; or at least should be weighed for purpose of preventing irreparable harm before trial. *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).

In summary of that to which Plaintiffs have utterly failed to respond:

(1) Depriving the Yakama Nation of its contractual right to mediate Consent

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Decree disputes to a mediator's determination of unresolvability is irreparable harm. *Int'l Ass'n of Machinists & Aerospace Workers v. Northwest Airlines, Inc.*, 674 F.Supp. 1387, 1391 (D. Minn. 1987); *Reliance Nat., Ins. Co. v. Seismic Risk Ins. Service, Inc.,* 962 F. Supp. 385, 391 (S.D.N.Y. 1997).

(2) Plaintiffs are interfering with the Nation's right "to make [its] own laws and be governed by them." Complaint at 5, *Teo v. Steffenson*, No. 93-3050 (E.D. Wash. May 7, 1993). Such sovereignty violations are irreparable; they cannot not be adequately recompensed at law or equity. *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1516 (W.D. Wash. 1988).

(3) There is a "high likelihood that the violations will recur absent issuance of an injunction [which] counsels in favor of equitable rather than legal relief." *LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985). Plaintiffs' recidivism and future intent is apparent throughout their filings in this case – not to mention the initial TRO the Nation obtained against Plaintiffs in 1994 and the Nation's suit against Plaintiffs for breach of the Consent Decree in 2004. Absent an injunction, they will continue to break their promises and violate the Consent Decree.

C. Plaintiffs Concede That Public Interest Favors An Injunction.

By completely failing to respond to the Yakama Nation's arguments regarding the public interest, Plaintiffs have waived their arguments in opposition. *County of McHenry*, 438 F.3d at 817.

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D. Plaintiffs Misstate Facts.

Plaintiffs continue to cite to an imaginary $300,000 per month tax loss. If this is a "loss," it is a "loss" that Plaintiffs suffer pursuant to agreements Plaintiffs have with 18 other tribes. ECF No. 6, at 2-3. These agreements are contemplated by the state's own tribal fuel tax scheme. WASH. REV. CODE § 82.36.450. The agreement with the Nation was authorized by Plaintiffs and blessed by this Court *twice*. ECF No. 8, at 35-69. Indeed Plaintiffs do not argue, and have never argued, that they have not received the requisite 25% of all taxes associated with all fuel delivered to the Yakama Reservation. They cannot do so. According to Plaintiffs' own evidence, the state has seen every penny of every tax dollar due under the Consent Decree since 2007. ECF No. 6, at 104.

Plaintiffs claim that they are owed an alleged "$300,000 in lost revenues every month" because of the Nation's failure to provide audits. ECF No. 58, at 9. This assertion requires an impossible leap of logic. The audits allegedly owed under the Consent Decree are not worth $300,000 a month. Were it not for the Consent Decree, Plaintiffs would be receiving nothing. *See* ECF No 56, at 15-37 (1993 TRO). As it is they are receiving, based on their calculations, $100,000 a month – 25% of $400,000 – all they claim to be owed per that contract. ECF No. 6, at 4, 15. Plaintiffs attempt to portray the 75% that they are not owed under that contract as a "loss" is ridiculous.

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Years ago, the State admitted that "[n]either the State nor the Yakama Nation is in compliance with [the] Consent Decree," and that "requirements for audit and record keeping are difficult to administer for both parties." ECF No. 8, at 6-8; *see also* ECF No. 56-3, at 80 ("[C]urrent requirements of the Consent Decree related to fuel tax and audit requirements are not working administratively for either the Yakama Nation or the Department."). While Plaintiffs continue to argue that the Nation is out of compliance with the Consent Decree, its admissions tell a different story. Plaintiffs choose to air this laundry before the Court – despite the Parties' clear agreement to behave like governments in mediation, even when mediation is difficult – as one would expect given perennial clashes between Indian Treaty rights and sovereignty, and state taxation and revenue-raising. That these historical "deadliest enemies" agreed to collaborate through mediation should be complimented, not undermined. *U.S. v. Kagama*, 118 U.S. 375, 384 (1886).

E. Plaintiffs' Additional Relief Requested Is Unwarranted.

Plaintiffs ask that the Nation be required to post a bond or provide unspecified records related to fuel sales. Respectfully, again, the Court lacks jurisdiction to make any orders regarding the Nation or the Consent Decree dispute. Plaintiffs have failed to mediate; have not exhausted Tribal Court remedies; the Nation has not waived sovereign immunity; and Plaintiffs have not presented a valid federal question. The Complaint fails to provide subject matter or personal

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jurisdiction or to state a claim upon which relief can be granted. Plaintiffs have not sufficiently served process on some Defendants.

Without waiver of the foregoing, no bond should be required. There is no monetary risk to Plaintiffs by being required to mediate as promised. Further, because requiring a bond has a chilling effect on public interest-litigants seeking to protect the rights secured by contract, 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 itself from a breach of a contract that ensured it should never need to proceed to court. Any bond would come directly from the scarce Tribal resources needed to provide governmental services to Yakama members.[2] *See e.g. Yakama Nation v. U.S. Dept. of Agriculture*, No. 10-3050, 2010 WL 3434091, at *6 (E.D. Wash. Aug. 30, 2010).

F. This Court Can Provide The Yakama Nation Relief.

Plaintiffs argue that because the Nation has not answered and counter-claimed, it cannot seek an injunction. ECF No. 58 at 5. There is no authority for

[2] It is quite ironic that while Plaintiffs argue that no bond is required of them, *see* ECF No. 16 at 2, the Nation has already had to post a bond. *See* ECF No. 8, at 93.

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this proposition, since it would deprive the Court of its inherent power to preserve the *status quo*. Moreover, it would be inappropriate for the Nation to answer and counter-claim when, respectfully, the Court lacks jurisdiction.

The Court cannot hear the underlying dispute set before it. *See* ECF Nos. 44-45, 57. Still, if the Court does anything besides dismiss this matter, an injunction against Plaintiffs is appropriate. Even while jurisdiction is disputed, the Court has inherent authority to preserve the *status quo* until jurisdictional questions are resolved – here, by the Tribal Court and/or mediation. *See U.S. v. United Mine Workers*, 330 U.S. 258, 290 (1947) ("the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction"); *Fernandez–Roque v. Smith*, 671 F.2d 426, 431 (11th Cir.1982) (same).

To be clear, the Yakama Nation will not file an answer or counter-claim before it petitions the Court for dismissal under FED. R. CIV. PROC. 12(b)(1), (2), (4), (5), and/or (6). The Nation intends to seek dismissal as soon as is practically possible. A responsive pleading to the Complaint, ECF No. 1, is not even due until January 9, 2013, per FED. R. CIV. PROC. 4(d) and 12(b).

As Plaintiffs recognize, the Yakama Nation has not and will not "waive objections to the jurisdiction of this Court." ECF No. 58 at 1. Indeed, this Court should be dubious of Plaintiffs' obviously manufactured federal questions,

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desperately designed to establish jurisdiction when it is lacking. *See* ECF No. 1, at 5. Still, nothing deprives the Court of its inherent authority to enjoin Plaintiffs from violating the clear terms of their promise to mediate.

DATED this 4th day of January, 2013.

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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 January 4, 2013, 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 4th day of January, 2013.

s/Gabriel S. Galanda

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