NO. 13-35161

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA RESERVATION, a federally recognized Indian Tribe,

Defendant-Appellant,

v.

STATE OF WASHINGTON, et al.,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT YAKIMA

No. CV-12-3152-LRS
The Honorable Lonny R. Suko
United States District Court Judge

BRIEF OF APPELLEES

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I. INTRODUCTION

This appeal involves the interpretation of a Consent Decree that the United States District Court for the Eastern District of Washington entered as a court order in 1994, and amended in 2006. The Consent Decree resolved claims concerning the collection of Washington State fuel taxes on fuel sold from on-reservation gas stations owned by members of the Yakama Nation ("Nation") and licensed by the Nation. A key element of the Consent Decree was its detailed record-keeping and audit requirements. Those requirements were the agreed mechanism by which tax-exempt sales to Yakama Nation members would be tracked and distinguished from taxable sales to non-members. The Consent Decree also contained dispute resolution procedures, which are the focus of this appeal.

Over a period of five years, a dispute persisted concerning the Nation's failure to keep the required records and arrange for the required audits. Finally, in December 2012, following years of effort and 20 months of unsuccessful dispute resolution, the State notified the Nation that it was terminating the Consent Decree. The Nation sued the State in Tribal Court. The State then filed an action in the district court that had entered the Consent Decree to confirm its termination, and to enjoin the Tribal Court. The Nation

moved for a preliminary injunction to compel the State to resume mediation, arguing that the Consent Decree required the state to continue mediation until the mediator formally declared an impasse. The district court denied the motion, and the Nation has appealed.

Because the district court properly denied the Nation's motion and committed no abuse of discretion, this Court should affirm.

II. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331, and under the doctrine of ancillary jurisdiction. Count I of the Complaint alleged that the Yakama Nation Tribal Court and its Chief Judge exceeded the lawful limits of the Tribal Court's jurisdiction.[1] Excerpts of Record (ER) 300. Whether a tribal court has exceeded the lawful limits of its jurisdiction is a federal question under 28 U.S.C. § 1331. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852–53 (1985); *Boozer v Wilder*, 381 F.3d 931, 934 (9th Cir. 2004). Count II of the Complaint sought prospective equitable relief confirming that the Consent Decree had been lawfully terminated, as well as damages for the Yakama Nation's breaches of the Consent Decree. ER 300-01.

[1] Neither the Yakama Nation Tribal Court nor its Chief Judge has appeared in this appeal. Count I is not part of this appeal.

The district court entered the Consent Decree as an order in 1994, and modified it by a subsequent order in 2006. ER 226-49; ER 251-60. Federal courts have ancillary jurisdiction to interpret and enforce their prior orders and judgments, such as the Consent Decree involved in this case. *Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846, 856, 860–61 (9th Cir. 2007); *see Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379-82 (1994).

The State agrees with the Nation's statement that this Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The Nation's appeal is timely under Fed. R. App. P. 4(a)(1)(A).

III. STATEMENT OF THE ISSUE

Did the district court abuse its discretion in denying the Yakama Nation's motion for a preliminary injunction compelling the State to mediate indefinitely, until a mediator formally declares impasse?

IV. STATEMENT OF THE CASE

In 1994, the United States District Court for the Eastern District of Washington entered a Consent Decree that resolved claims by the Yakama Nation concerning the collection of state fuel taxes within the Yakama Indian Reservation. *Teo v. Steffenson*, No. CY-93-3050-AAM (E.D. Wash. Nov. 2, 1994); ER 226-49; Supplemental Excerpts of Record (SER) 17-40. A

subsequent dispute in 2004 was resolved with narrative amendments to the Consent Decree, which the district court approved and adopted in 2006. *Teo v. Steffenson*, No. CV-04-3079-CI (E.D. Wash. Aug. 21, 2006); ER 251-60; SER 41-49. Thus, the Consent Decree at issue in this case consists of an "original" Consent Decree entered in 1994 together with narrative amendments that were entered in 2006. ER 226-60; SER 17-49.

The primary object of the Consent Decree was to create a mechanism to identify, distinguish, and verify sales of fuel to the Nation and its members, which would not be taxed, from sales of fuel to non-members, which would be fully taxed. *See* ER 227-28; SER 18-19. Thus, the Consent Decree contained specific record-keeping and audit provisions requiring that the Nation and its licensed tribal fuel retailers keep records of all sales, distinguishing purchases by tribal members from purchases by non-members, and requiring the annual audit of such records to verify the accuracy of percentage estimates of such sales.

Between 2007 and 2011, state officials repeatedly sought without success to obtain the Nation's compliance with the auditing requirements of the Consent Decree. SER at 8-12. In March 2011, the State invoked the dispute resolution clause of the Consent Decree. SER at 12, 50. After a year of

unsuccessful negotiation, followed by eight months of fruitless mediation, the State terminated the Consent Decree on December 5, 2012. SER at 13-15; ER 268-69.

Within hours, the Yakama Nation Tribal Court tried to order the State of Washington, its Governor, and other state officials to resume mediation and to appear for a preliminary injunction hearing. ER 277-86. The State then filed an action in the United States District Court for the Eastern District of Washington. ER 287–305. The district court preliminarily enjoined the Tribal Court proceedings because the Tribal Court lacked jurisdiction. *See* ER 8; ER 312 (ECF No. 75). The Nation has not appealed that order.

The Nation filed a series of motions in the district court, including a motion to dismiss and a cross-motion for preliminary injunction. In the latter, the Nation asked the district court to order the State to resume mediation. The district court denied both motions, concluding that it had jurisdiction over the State's claims, and rejecting the Nation's argument that the Consent Decree required the State to engage in mediation until a mediator formally declared an impasse. ER 7-16; *see* ER 315 (ECF No. 98).

The Nation takes this appeal from the order denying its motion for preliminary injunction. ER 17-21. The district court and this Court have denied the Nation's motions for a stay pending appeal. ER 1-6; Docket No. 9.

V. STATEMENT OF FACTS

A. The 1994 Fuel Tax Consent Decree and the 2006 Agreed Changes

Washington levies an excise tax on motor vehicle fuel (gasoline) and special fuel (diesel fuel). Wash. Rev. Code §§ 82.36.020, 82.38.030; *see* SER 2. The Washington Department of Licensing (DOL) administers both fuel taxes.

In 1993, the Yakama Nation and others filed an action against DOL officials in the Eastern District of Washington concerning the imposition and collection of state fuel taxes on fuel sold by tribally-licensed gas stations owned by Yakama tribal members within the Yakama Reservation. *Teo v. Steffenson*, No. CY-93-3050-AAM (E.D. Wash.). Applying a legal test no longer used in this Circuit, the district court granted the Nation's motion for a preliminary injunction, but it cautioned that "the likelihood that plaintiffs will succeed on the merits is, at this time, simply not ascertainable." SER 69; *Teo*

v. Steffenson, 20 Ind. L. Rep. 3210, 3213 (E.D. Wash. 1993).[2] Because of that uncertainty, the district court required the Nation to post a bond. SER 72; 20 Ind. L. Rep. at 3213. The court also required the Nation to keep an accounting of fuel sales on which state taxes were not collected, so that the court could audit that accounting. SER 71; 20 Ind. L. Rep. at 3213.

The *Teo* case was ultimately resolved, without any ruling on the merits, when the court entered a 24-page Consent Decree in 1994. ER 226-49; SER 17-40. Under Paragraphs 4.21 and 4.1 of the Consent Decree, the Nation's injunction bond was exonerated, and the complaint was dismissed with prejudice. ER 247, 230; SER 38, 21. Paragraph 4.7 of the Consent Decree laid out a process for resolving disputes that might arise in the future, requiring at least one face-to-face meeting, followed by mediation if the dispute remained unresolved, along with a provision in Paragraph 4.7.e that permitted either party to seek resolution by the court if mediation had not

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[2] The Yakama Nation says it "prevailed" in the *Teo v. Steffenson* lawsuit, citing *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002). Yakama Br. at 10. In *Watson*, the Court held that a plaintiff who obtains a preliminary injunction is a "prevailing party" for the purpose of obtaining attorney fees under 42 U.S.C. § 1988, even if the plaintiff does not ultimately prevail on the merits. The *Teo* litigation did not involve 42 U.S.C. § 1988 or any award of attorney's fees, however. *See* ER 247 ¶ 4.20.

resolved the dispute within 30 days from the date the mediator was selected. ER 233-34; SER 24-25.

A subsequent dispute in 2004 was resolved with agreed, narrative changes to the Consent Decree (Settlement Agreement, Agreed Changes To Consent Decree, And Order (hereinafter "agreed changes")) that the court entered in 2006. *Teo v. Steffenson*, No. CV-04-3079 (E.D. Wash. Aug. 21, 2006); ER 251-60; SER 41-49.[3]

The 2006 agreed changes included a new termination mechanism that either party could use to terminate the agreement without a petition to the court. Paragraph 4.7.e was deleted, and the following sentence was added to Paragraph 4.7.d of the Consent Decree:

> If the dispute is not resolved by mediation, the parties may agree to have a neutral third party or 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***.

ER 253 (emphasis added). The "*infra*" refers to Paragraph 4.27, which was also added in 2006. It provides:

[3] On pages 13-14 of its Brief, the Nation asserts that the 2006 amendments deleted all of the 1994 text from Paragraph 4.2 of the Consent Decree and replaced it with new text. The Nation's assertion is misleading, and is not supported by the language of the 2006 Settlement Agreement. *See* ER 253 ¶ H; SER 43 ¶ H.

> Amendments to the Consent Decree shall be considered upon the written request of either party. Disputes regarding requests for amendment of this Consent Decree shall be subject to the dispute resolution process in paragraph 4.7 of this Consent Decree. The agreement and processes embodied in this Consent Decree shall remain in effect unless and until such time as: (a) the parties mutually agree in writing that the decree should be vacated or terminated and superseded by a new agreement between the parties; or **(b) if 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.**

ER 258 (emphasis added).

B. The Yakama Nation's Failure to Comply With the Audit Requirements of the Consent Decree

The Consent Decree established a framework to implement the parties' agreement regarding the imposition and collection of state fuel taxes. ER 227; SER 18. The State agreed to refrain from collecting state fuel taxes on 70 percent, later 75 percent, of the fuel sold to the Tribe or tribally-licensed retailers within the Yakama Reservation. ER 235-36, 254-55; SER 26-27, 44-45. The Consent Decree described those percentages as "the parties' best current estimate" of the amount of fuel that would ultimately be purchased at the pump and used by the Yakama Nation and its members—as opposed to the amount of fuel estimated to be purchased by non-members. *Id.* The parties

agreed that all other fuel, e.g., fuel purchased by non-members, would be subject to the State's taxes. ER 227-28, 236, 238-39, 255; SER 18-19, 27, 29-30, 45. Under this arrangement, fuel distributors paid 100 percent of the state fuel tax when they withdrew fuel from the wholesale supply facility (commonly referred to as the "terminal rack"), but then sold the fuel to tribal retailers at a price that included only 30 percent, later 25 percent, of the state fuel tax. SER 6; *see* ER 236, 255. The State refunded to the distributors the remaining fuel taxes they had paid when they acquired the fuel. SER 6-7.

Central to the Consent Decree was the parties' agreement to identify, track, and verify on-reservation fuel sales to the Nation and its members, as distinct from other sales, such as sales to non-members. ER 227-28, 231-32, 234-39, 254-57; SER 18-19, 22-23, 25-30, 44-47. The Consent Decree required the Nation to keep, and to require its licensees to keep, detailed records distinguishing tax-exempt from non-exempt sales, provide those records to the State, and submit those records to the annual examination of a certified public accounting firm. ER 232, 236-46, 255-57; SER 23, 27-37, 45-47. If the records and audits demonstrated that the amount of fuel actually used by the Nation and its members and businesses deviated from the 70 or 75

percent figure, either the State or the Tribe would owe the other an adjustment. ER 236-39; SER 27-30.

Despite the clear requirements in the Consent Decree, the Yakama Nation has been unwilling or unable to enforce or comply with the record-keeping requirements, and no audits have ever been completed since the Consent Decree was revised in 2006. SER 8. Indeed, the Nation has conceded that no records exist that would allow audits to be completed. SER 90.

C. The State Spent Four and One-Half Years Seeking to Obtain Audits and to Resolve the Dispute

Over a period of three years, beginning in 2008, DOL repeatedly attempted without success to engage the Yakama Nation in efforts to conduct the audits required by the Consent Decree. SER 8-12; *see* SER 50-54. On March 16, 2011, DOL sent a written notice to the Yakama Nation invoking the dispute resolution provision of the Consent Decree. SER 12, 50; *see* ER 197-99. The parties met twice face to face but were unable to resolve the dispute. SER 13-14. On September 19, 2011, DOL notified the Yakama Nation in writing that it intended to terminate the agreement after 180 days, while expressing a willingness to continue negotiations during that period. SER 14, 55-56; *see* ER 206-07.

The parties convened a government-to-government meeting on February 27, 2012. SER 14; *see* ER 209. Mediation began on March 23, 2012, and the parties continued discussions with the mediator for eight months, but those discussions failed to resolve the dispute. SER 15; ER 91. DOL terminated the agreement by written notice dated December 5, 2012. ER 96-97.

Later that same day, the Yakama Nation filed a lawsuit in the Yakama Tribal Court against the State. The next morning, on December 6, the Yakama Nation Tribal Court enjoined DOL, the Governor, and the sovereign State from terminating the Consent Decree, and ordered them to resume mediation. ER 276-86.

D. Proceedings in the District Court

The State filed a Complaint in the United States District Court for the Eastern District of Washington on December 17, 2012. ER 287-305. On January 10, 2013, the district court entered an order preliminarily enjoining the Tribal Court proceedings and orders. *See* ER 8; 312 (ECF No. 75). That order has not been appealed and is not before this Court.

The Nation filed a series of motions in the district court, including a motion to dismiss and a cross-motion for preliminary injunction. The court

denied both of those motions. ER 7-16; *see* ER 315 (ECF No. 98). The district court ruled that it had "exclusive express inherent jurisdiction over its Consent Decree," ER 8, and concluded that the Yakama Nation is not likely to succeed on the merits of its argument that the Consent Decree required the State to continue in mediation until the mediator formally declared impasse. ER 7-16. The Nation moved unsuccessfully for a stay pending appeal of the Order Denying Cross-Motion for Preliminary Injunction. ER 1-6. The Nation timely appealed. ER 17.

The Nation filed a new motion in this Court for a stay pending appeal, which this Court has denied. Docket No. 9.

VI. SUMMARY OF ARGUMENT

The district court applied the correct legal standard in denying the Yakama Nation's Cross-Motion for Preliminary Injunction. It applied the test of *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), as supplemented by this Court's decision in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). ER 3, 8.

The district court correctly construed the language of the Consent Decree and properly rejected the Yakama Nation's strained argument that it

required the parties to remain engaged in fruitless mediation unless and until a mediator formally declared the parties at impasse.

The Yakama Nation had the burden to establish a likelihood of irreparable harm. *See Winter*, 555 U.S. at 20. The district court correctly concluded that the Nation failed to meet that burden by offering only the argument that its expected success on the merits established irreparable injury per se, rather than providing evidence of any actual harm. ER 4, 14-15.

The district court properly concluded that the balance of equities did not tip in favor of the Nation. In reaching that conclusion, the district court found that the Nation has not complied with the audit requirements of the Consent Decree, a critical part of the State's benefit of the bargain, and the mechanism by which the State was to determine and collect the taxes to which it is entitled. ER 15.

Washington citizens have a strong public interest in the collection of fuel taxes to build and maintain the highways on which we all depend. The Consent Decree was designed to facilitate that objective. *See* ER 226-28, 231-32 (¶¶ 1.3, 2.2, 2.3, 4.3). That objective has not been realized because the Nation has failed to fulfill its record-keeping and audit requirements. The

district court properly recognized that the public interest does not favor a preliminary injunction in favor of the Nation. ER 15.

The district court did not abuse its discretion in denying the Yakama Nation's Cross-Motion for Preliminary Injunction. The district court correctly applied the law, and its findings of fact are supported by the record and are not clearly erroneous. The Order Denying Cross-Motion for Preliminary Injunction should be affirmed.

VII. STANDARD OF REVIEW

A district court's decision regarding preliminary injunctive relief is subject to limited and deferential review. *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 993-94 (9th Cir. 2011) (per curiam). The district court will be reversed only if it abused its discretion by basing its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc); *see Winter*, 555 U.S. at 33. This Court reviews conclusions of law de novo and findings of fact for clear error. *Lands Council*, 537 F.3d at 986-87; *see* Fed. R. Civ. P. 52(a).

VIII. ARGUMENT

A. The District Court Applied the Correct Legal Standard

According to the Yakama Nation, the district court applied the wrong legal standard in ruling on the Nation's motion for preliminary injunction. Yakama Br. at 22-24. As the district court's orders demonstrate, however, the court applied the correct standard, and there is no basis for concluding otherwise.

The legal standards governing preliminary injunctions are found in *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008), and in subsequent decisions of this Court. Under *Winter*, 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." *Id*. at 20. In this Circuit, as the Nation points out, serious questions going to the merits and a hardship balance that tips sharply toward the moving party can support issuance of an injunction, if the other two elements of the *Winter* test are also met. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132, 1135 (9th Cir. 2011); *see* Yakama Br. at 23. The district court applied those standards in this case.

In its Order Denying Cross-Motion for Preliminary Injunction, the court took note of the four *Winter* elements and ruled that the Nation had established none of them. ER 8, 14-15. The Nation faults the district court for not using the phrase "serious questions" in that order, and says that shows the district court overlooked the *Alliance for the Wild Rockies* test used in this Circuit. Yakama Br. at 23-24. The Nation, however, ignores the district court's clarification in the Order Denying Motion for Stay Pending Appeal:

> In case it is not apparent from the court's "Order Denying Cross-Motion for Preliminary Injunction," there are not "serious questions going [to] the merits" of the Nation's assertions. Furthermore, the balance of hardships does not tip sharply in favor of the Nation, there is not a likelihood the Nation will suffer irreparable injury, and an injunction is not in the public interest.

ER 3. As that clarification demonstrates, the district court did apply the legal standard used in this Circuit. This Court should reject the Nation's argument that it did not.

B. The District Court Correctly Construed the Consent Decree in Ruling That the Yakama Nation Is Not Likely to Succeed on the Merits

According to the Yakama Nation, the district court's interpretation of the Consent Decree "was legally incorrect." Yakama Br. at 25. The Nation acknowledges, however, that courts construe consent decrees with reference to contract principles. Yakama Br. at 24-25; *see Nehmer*, 494 F.3d at 861. Under

those principles, a written contract must be read as a whole, and every part interpreted with reference to the whole, with preference given to reasonable interpretations. *E.g.*, *Wapato Heritage, LLC v. United States*, 637 F.3d 1033, 1039 (9th Cir. 2011).

Instead of reading the Consent Decree as a whole, the Yakama Nation focuses narrowly on two sentences in Paragraph 4.7.d. According to the Nation, those two sentences mean a party must mediate indefinitely until a mediator declares impasse, and then wait an additional 180 days before providing notice of intent to terminate. Yakama Br. at 12, 24-28. The Nation relies on obscure grammatical rules and a solitary and inapplicable "canon of construction" to support its argument.[4] Yakama Br. at 27-28. Unlike the Nation, however, the district court read the Consent Decree as a whole, and looked for the most reasonable interpretation. ER 3; *see* ER 10. As described below, the district court's reading, not the Nation's, is correct.

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[4] The Nation invokes the doctrine of last antecedent to make the phrase "if the dispute is not resolved by mediation" qualify the clause regarding notice of termination in Paragraph 4.7.d. The problem with this interpretation is that it leaves out entirely the phrase "if a dispute is unresolved for more than 180 days" that is the immediate "antecedent" to Paragraph 4.7.d's termination clause. Moreover, the Nation's interpretation would import an "impasse" requirement into Paragraph 4.27's termination clause that simply is not there. Principles of contract construction cannot add to or eliminate unambiguous contract language. *Pepper v. Evanson*, 70 Wash. 2d 309, 422 P.2d 817 (1967); *Lamar Outdoor Adver. v. Harwood*, 162 Wash. App. 385, 254 P.3d 208 (2011).

Paragraph 4.7 of the Consent Decree provided for a dispute resolution process that required at least one face-to-face meeting, followed by mediation if the dispute remained unresolved. ER 233-34; SER 24-25. The first sentence of Paragraph 4.7.d provided: "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." ER 234; SER 25. According to the Yakama Nation, that means the parties must stay in mediation indefinitely, until the mediator declares impasse.

The language of the Consent Decree as originally entered in 1994 demonstrates that the parties never intended the meaning the Nation now urges for Paragraph 4.7.d. As originally entered, the Consent Decree contained a Paragraph 4.7.e. Paragraph 4.7.e allowed either party to "opt out" of the mediation and petition the court for resolution of any dispute left unresolved 30 days after a mediator was selected, regardless of whether the mediator had "determine[d] that the parties are not able to resolve the dispute" under Paragraph 4.7.d. ER 234; SER 25.

The 2006 amendments to the Consent Decree deleted Paragraph 4.7.e, but replaced it with a different "opt-out" provision that did not require a petition to the court. This new provision was a unilateral right-to-terminate

clause added to Paragraph 4.7.d, which provided: "[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*." ER 253; SER 43. The process for exercising the right to terminate under Paragraph 4.7.d was described "*infra*" in new Paragraph 4.27 of the amended Consent Decree:

> [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.

ER 258; SER 48.

According to the Nation, Paragraph 4.27 "dovetails" with its reading of Paragraph 4.7.d and requires a party to mediate indefinitely until a mediator declares impasse, and then wait 180 days before providing notice of intent to terminate. Yakama Br. at 27. As the district court observed, however, that interpretation "does not make sense" in light of the other provisions in the Consent Decree. ER 11. The time limits for the other steps in the dispute resolution process, in Paragraphs 4.7.b and c, establish that the conduct and conclusion of dispute resolution, including mediation, can occur within a period that is much shorter than 180 days. ER 233; SER 24; *see* ER 11-13. Thus, there is no need for waiting an additional 180 days before exercising the

option to give notice of termination. Moreover, as the district court recognized, the Nation's reading of Paragraph 4.7.d would make the termination process in Paragraph 4.27 "mere surplusage." ER 11. Paragraph 4.27 would be completely unnecessary if all it did was duplicate Paragraph 4.7.d. Indeed, the latter's reference to a process "*infra*" would also be surplusage.

Read as a whole, the Consent Decree supports the district court's interpretation, not the Yakama Nation's. This Court should affirm the district court's interpretation.

C. The District Court Correctly Concluded That the Yakama Nation Failed to Establish That it Was Likely to Suffer Irreparable Harm

As it urged in the district court, the Yakama Nation says it suffers irreparable harm by being deprived of a right to mediate, and by being haled into a federal court to answer the State's claim that it has properly terminated the Consent Decree. Yakama Br. at 29-30; ER 74-76. Those assertions merely restate the Nation's position on the merits. The district court properly concluded that they did not establish a likelihood of irreparable harm without a preliminary injunction. ER 14-15.

The Yakama Nation contends that the State "failed to respond" to certain legal arguments the Nation made in the district court regarding irreparable

harm, and thus "waived" them. Yakama Br. at 29-30. To the contrary, the State has steadfastly opposed the Nation's claim that its expected success on the merits of its contract interpretation also demonstrates irreparable injury. The State's position on this issue was reflected in the district court's Order Denying the Nation's Cross-Motion for Preliminary Injunction. ER 12-13. As the Nation equates its ability to prevail on the merits with its ability to show irreparable injury—whether presented as injury due to the loss of its bargain or injury to its sovereign interest in mediating—the failure of its case on the merits automatically disposed of its ability to show irreparable injury. *Id.*

Moreover, the Nation fails to explain any connection between the alleged waivers and the district court ruling. The Yakama Nation had the burden to establish a likelihood of irreparable harm. *See Winter*, 555 U.S. at 20. The district court concluded that the Nation failed to meet that burden. ER 4, 14-15. The issue before this Court is whether the district court relied on an erroneous legal standard or clearly erroneous findings of fact in reaching that conclusion. *Lands Council*, 537 F.3d at 986. The Yakama Nation does not address that issue, and has identified no error in the district court's conclusion that the Nation failed to establish a likelihood of irreparable harm.

D. The District Court Correctly Concluded That the Yakama Nation Failed to Establish That the Balance of Equities Tips in Its Favor

The district court concluded that the balance of equities did not tip in favor of the Nation and that, at most, the equities were equal between the parties. ER 15. In reaching that conclusion, the district court found:

> [F]or at least several years now, the Nation has not complied with the audit requirements of the Consent Decree which would enable the State to determine if it has collected all of the taxes to which it is entitled.

ER 15. The Nation has not challenged that finding of fact. The district court's finding is supported by the record and is not clearly erroneous. SER 8-12. The Nation does not contend otherwise.

The district court's finding recognizes that the Nation's failure to honor the Consent Decree leaves the State with no way of knowing what happens to the untaxed fuel that is delivered to the Yakama Reservation, or who gains from the taxes that are not collected. The State is not getting the benefit of the bargain it struck under the Consent Decree, at an ongoing cost to the State of $300,000 in lost revenues each month. SER 15. The Nation disputes the claim that the State is losing revenues, asserting that it "is based upon [the State's] inaccurate assumption that the Consent Decree is now terminated." Yakama Br. at 31. That is not correct. The unrebutted evidence in the record

demonstrates that the State loses $300,000 per month by continuing to *honor* the Consent Decree while the Yakama Nation does not. SER 15. Forcing the State to resume mediation for some indefinite period while the Nation continues to ignore the record-keeping and audit requirements of the Consent Decree would cause great financial harm in derogation of the State's sovereign right to collect fuel taxes and would be decidedly inequitable to the State and its taxpayers. *See* ER 15.

Finally, the Yakama Nation says the State gains nothing from terminating the Consent Decree instead of returning to mediation because termination revives the 1993 preliminary injunction. Yakama Br. at 19 n.4, 31-32. The cases the Nation cites do not support that proposition, however. Rather, vacating[5] the Consent Decree would simply return the parties to where

[5] Though vacating the Consent Decree is not an issue in this appeal, the Nation erroneously contends that the termination provisions of the Consent Decree somehow implicate Fed. R. Civ. P. 60 and require a motion to vacate the decree. Yakama Br. at 20 n.4. The Nation also contends erroneously that Rule 60 precludes "enforcement" of the decree in the form of claims for damages for past breaches of the decree. *Id*. Nothing in the Consent Decree says anything about vacating it, however; instead, the Consent Decree entitles the State to terminate the agreement, which the State has done. ER 258; SER 13-15. If Rule 60 applies at all, Rule 60(b)(5) specifically allows a consent decree to be modified when "applying it prospectively is no longer equitable." Under that rule, a consent decree's continued application and prospective requirements may be vacated, leaving intact claims for breaches of past, accrued obligations as well as preserving the res judicata effects of the consent decree. *See Safe Flight Instrument Corp. v. United Control Corp.*, 576 F.2d

they were before the 1993 case began, allowing the Nation to resume the pursuit of its underlying claims, to prove its case and, if so, to obtain appropriate relief. *Fairfax Countywide Citizens Ass'n v. Fairfax Cnty.*, 571 F.2d 1299, 1305 (4th Cir. 1978). No language in the Consent Decree supports revival of a 20-year-old preliminary injunction. Instead, the Consent Decree exonerated the Nation's security bond, signifying that the injunction was dissolved and of no further effect. ER 247; SER 38 (¶ 4.21).

The Yakama Nation has demonstrated no abuse of discretion or error in the district court's conclusion that the balance of equities did not tip in favor of the Yakama Nation.

E. The District Court Correctly Concluded That the Yakama Nation Failed to Establish That an Injunction Is in the Public Interest

The district court concluded that a preliminary injunction in favor of the Yakama Nation is not in the public interest, because the Nation has not complied with the audit requirements of the Consent Decree which would enable the State to determine if it has collected all of the taxes to which it is entitled. ER 15. The Yakama Nation does not challenge that conclusion, arguing only that the public interest is served by enforcing the mediation

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1340, 1343-44 (9th Cir. 1978). Alternatively, such claims can be asserted, as in this case, in a new lawsuit rather than under the former one. *See United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372 (11th Cir. 1981).

provision of the Consent Decree. That argument merely restates the Nation's position on the merits, which the district court properly rejected.

Washington citizens have a strong public interest in the collection of fuel taxes. The Consent Decree was designed to achieve that objective. *See* ER 226-28, 231-32; SER 17-19, 22-23 (¶¶ 1.3, 2.2, 2.3, 4.3). To date that objective is completely unrealized because the Nation has failed to fulfill its record-keeping and audit requirements. The district court properly recognized that the public interest does not favor a preliminary injunction in favor of the Nation. ER 15. Nor is the public interest served by further delay in bringing this case to final judgment.

F. The Yakama Nation Is Not Entitled to an Order Requiring the District Court to Dismiss the State's Suit

In the Conclusion section of its Brief, the Yakama Nation asks this Court to "remand this matter to the district court with an order to dismiss the State's suit." Yakama Br. at 33-34. Even if there were a basis for this Court to reverse the Order Denying Cross-Motion for Preliminary Injunction, the Nation would not be entitled to the relief it requests. This appeal is about the denial of a preliminary injunction related to Count II of the Complaint. It is not about the entire case.

After moving for a preliminary injunction, the Nation filed a separate motion to dismiss the entire case under Fed. R. Civ. P. 12(b). *See* ER 311 (ECF No. 67). The district court denied that motion in a separate interlocutory order entered March 4, 2013. *See* ER 315 (ECF No. 98). That order is not a final judgment. *See* Fed. R. Civ. P. 54(b). Nor has the Nation sought to appeal from that order. The Nation's appeal from the February 11, 2013, Order Denying Cross-Motion for Preliminary Injunction does not mention the Order Denying Motion to Dismiss. ER 17-18. Only the Order Denying Cross-Motion for Preliminary Injunction is before this Court, and the most that the Nation could be entitled to in this appeal would be an order remanding for further proceedings consistent with this Court's opinion. *See M.R. v. Dreyfus*, 697 F.3d 706, 739 (9th Cir. 2012).

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IX. CONCLUSION

The district court did not abuse its discretion in denying the Yakama Nation's Cross-Motion for Preliminary Injunction. The district court correctly applied the law, and its findings of fact are supported by the record and are not clearly erroneous. The Order Denying Cross-Motion for Preliminary Injunction should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of April, 2013.

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X. STATEMENT OF RELATED CASES PURSUANT TO NINTH CIRCUIT RULE 28-2.6

The undersigned counsel are unaware of any case that may be deemed related to this case under Ninth Circuit Rule 28-2.6.

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XI. CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1 FOR CASE NUMBER 13-35161

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[X] this brief contains 5716 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman 14 Point Font.

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Attorney for Appellees

Dated: April 30, 2013

Ninth Circuit Case Number 13-35161

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 30, 2013.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not a registered CM/ECF user. I have caused the foregoing document to be hand-delivered to the following non-CM/ECF participant:

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Dated this 30th day of April, 2013

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