UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES AND BANDS OF TRIBES OF THE YAKAMA RESERVATION, a federally recognized Indian Tribe, Defendant-Appellant, vs. ALAN HAIGHT, et al., Plaintiffs-Appellees.	No. 13-35161 D.C. No. CV-12-3152-LRS Eastern Washington (Yakima)

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, appellant Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") states that it is a federally recognized Indian Tribe.

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I. INTRODUCTION

This Appeal arises from the State of Washington's ("State") breach of the mediation clause in a Consent Decree entered into between the State and the Yakama Nation ("Nation").

The Consent Decree requires the State to mediate with the Nation "in mutual good faith on a government to government basis . . . until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute." Excerpts of Record ("ER") 234. The parties' mediator has not "determine[d] that the parties are not able to resolve the dispute," nor have the parties resolved the dispute. *See* ER 157. Still, the State refuses to mediate.

II. JURISDICTION

The State alleges the basis for the district court's subject-matter jurisdiction is 28 U.S.C. § 1331. The Nation disputes this assertion. The Nation has not waived its sovereign immunity and does not do so through this appeal. The State cannot assert a right of action under a treaty to which it is not a beneficiary. *Cf.* ER 304. Nor can a court's authorization of continued jurisdiction create a federal question when that authorization has been subsequently revoked. *Cf.* ER 253.

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This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1).

The appeal is timely. The district court's Order Denying Cross-Motion For Preliminary Injunction was entered on February 11, 2013. ER 7. The Nation's timely motion for Stay Pending Appeal was denied in the district court's Order Denying Motion For Stay Pending Appeal on March 4, 2013. ER 1. A timely notice of appeal was filed on March 5, 2013. ER 17.

III. ISSUE ON APPEAL

The principal issue on appeal is whether the State violated the Consent Decree's mediation requirement in such a manner that the Yakama Nation is (1) likely to succeed on the merits and (2) likely to suffer irreparable harm in the absence of preliminary relief. The State has done so in the following ways:

- The State has *per se* violated the Consent Decree mediation requirement by refusing to mediate in good faith until a dispute is resolved or the mediator appointed by the Parties determines that the Parties cannot resolve their dispute.
- Breach of the Consent Decree mediation requirement constitutes irreparable harm in that the Yakama Nation, a

sovereign government, contracted with the State to prevent the very litigation the State has initiated.

- Breach of the Consent Decree mediation requirement permanently and irreparably violates the Yakama Nation's right to make and be ruled by its own laws since the law and process for resolving disputes was agreed upon in the Consent Decree.

IV. STATEMENT OF THE CASE

In the middle of mediation between the Parties – mediation initiated pursuant to the procedure mandated by the Consent Decree – the State unilaterally halted its participation. ER 214-17. The Nation sued the State in Yakama Nation Tribal Court and petitioned for an injunction requiring the State to mediate in good faith pursuant to the requirements of the Consent Decree. ER 101, 124. The Yakama Nation Tribal Court merely ordered the parties to mediate pursuant to the Consent Decree, finding that "Paragraph 4.7.d of th[e] Consent Decree requires the parties to mediate . . . 'until the dispute is resolved or until the mediator determines that the parties are not able to resolve the dispute,'" and holding that the Nation "will likely prevail on its claim that [the State] breached, *inter alia*, Paragraph 4.7.d of th[e]

Consent Decree" by refusing to mediate. ER 281.

The State then sued the Yakama Nation, the Yakama Nation Tribal Court, and Yakama Nation Tribal Court Chief Judge Ted Strong in the United States District Court for the Eastern District of Washington. ER 287. The district court enjoined the Tribal Court proceedings, finding that Tribal Court lacked jurisdiction and that the district court possessed jurisdiction over the State's claims.[1] ER 8.

Without waiver of its sovereign immunity or the defenses raised in its FED. R. CIV. PROC. 12 motion, defendant Yakama Nation petitioned the district court for an injunction requiring the State to mediate in good faith pursuant to the Consent Decree. ER 59.

V. STATEMENT OF FACTS

The Yakama Nation is a federally recognized Indian Tribe, whose inherent sovereignty was affirmed and whose Reservation was

[1] Although not directly at issue here, the district court also erred in holding that tribal remedies need not be exhausted. *See e.g. City of Wolf Point v. Mail*, No. 10-0072, 2011 WL 2117270 (D. Mont. May 24, 2011). The question of whether or not the exclusive remedy for breach of the Consent Decree – a Consent Decree with an explicit disclaimer of federal jurisdiction – remained a question of fact that should have been determined by the Tribal Court in the first instance. *See Bank of America, N.A. v. Swanson*, 400 Fed.Appx. 159, 161 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 2099 (2011) ("Generally, the rule of tribal exhaustion requires that federal courts give precedence to tribal courts to determine in the first instance the extent of their own jurisdiction to hear a particular case.").

established by the Treaty With The Yakama, 12 Stat. 951 (1859).

A. 1994 Consent Decree

In May of 1993 the Yakama Nation filed suit against the State. The Nation prevailed in that suit, and obtained an order enjoining the State from "requiring licensed distributors to pre-pay the state gas tax on sales of gas" to Yakamas.[2] ER 62.

After the district court entered an Order Setting Settlement Conference, the Nation and the State "conferred and engaged in mediated negotiations," ER 226, and on November 2, 1994 – after over a year of post-complaint mediation negotiations – U.S. District Court Judge Alan A. MacDonald entered the Consent Decree, which became effective on January 1, 1995. ER 248. 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 the parties unable to resolve their dispute, in which case the Parties could invoke the continuing jurisdiction of the district court. ER 233-34.

[2] The State argues that the Nation did not prevail in that litigation. Dkt. No. 6, at 2-3 n.2. The State is wrong. This Court has unequivocally held that "a plaintiff who obtains a preliminary injunction is a prevailing party." *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002).

B. 2006 Consent Decree

In July of 2004, the Nation invoked the now-deleted continuing jurisdiction of the district court, in order to be compensated for monies owed under the Consent Decree. ER 251. Based on the Nation's claims, the Parties agreed to conduct a 2006 retroactive audit and base any refund upon the results of that audit – which resulted in a $71,811.82-payment from the State to the Nation. ER 252.

To protect the baseline from being upset without Yakama Nation verification in 2006 and beyond, the State insisted that any future audits must be based exclusively on records kept pursuant to the Consent Decree. ER 257. If those records were not collected, the State protected itself from liability by insisting that the baseline percentages within the Consent Decree could not be upset. ER 257-58. The Consent Decree was revised accordingly. *Id*. After another year and a half of mediation, the then District Court Magistrate entered a revised Consent Decree reflecting these changes. ER 259.

After the 2004-2006 debacle, the Parties were intent on finding a less litigious solution to dispute resolution. The resulting Consent Decree thus (1) added a provision instructing the parties to "resolve further disputes on a government to government basis," ER 253; (2)

added a provision deleting the "continuing jurisdiction" of the district court to resolve any "issues of compliance," *id.*; (3) again reaffirmed the Parties' agreement to "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.*; and (4) added a provision that gave the Parties 180 days after any mediator-declared impasse to either request arbitration or to petition the district court to vacate the Consent Decree in its entirety:

> 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 258.

Critically, the clause found "*infra*" that allows a party to move for termination and/or modification of the Consent Decree also employs the constraint that no party may petition the Court the Consent Decree unless "the dispute resolution process in paragraph 4.7" is fulfilled.

In other words, the Consent Decree contemplated two categories of disputes: (1) those that "invoke the continuing jurisdiction of the court to enforce the terms of the Consent Decree, . .

. including an action to recover monies alleged to be owed either party," ER 251, 231; and (2) "[d]isputes regarding requests for amendment of th[e] Consent Decree," which, in accordance with federal law, includes "withdraw[al] and terminat[ion] the agreement." ER 258. The first of these, the ability to "invoke the continuing jurisdiction of the court . . . to recover monies alleged to be owed either party," was deleted in 2006. ER 253. The ability to "withdraw and terminate the agreement" remained a viable option, provided the moving party first complete "the dispute resolution process in paragraph 4.7 of th[e] Consent Decree." ER 258.

As modified by ¶¶ H-K of the 2006 Consent Decree, the dispute resolution clause and related provisions that now bind the parties reads as follows:[3]

> 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~~

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

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

* * * *

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

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

a. Either party may invoke the dispute resolution process by notifying the other, in writing, of its intent to do so. The notice shall set out the issue(s) in dispute and the position of the party giving notice as to each such issue.

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

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

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

e. ~~Except as provided in ¶ 4.15.3, if wither party terminates the process before completion, or if the mediator determines that the dispute cannot be resolved in the mediation process, or if the dispute is not resolved within thirty (30) days of the date the~~

> ~~mediator is selected, the other party may petition the Court for enforcement of the Consent Decree as to the disputed and unresolved issue or issues.~~
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> * * * *
>
> 4.27 **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 230-34, 253-54, 258.

C. Dispute Resolution & Mediation

In late 2011, the State announced that "[n]either the State nor the Yakama Nation is in compliance with [the] Consent Decree," confessing that its "requirements for audit and record keeping are difficult to administer for both parties." ER 194. On March 16, 2011, the State invoked "the dispute resolution process per section 4.7 of the Consent Decree," outlining five substantive "issues in dispute," for resolution. ER 197.

On June 13, 2011, the Parties commenced dispute resolution, but not yet mediation, with the State framing the "issues to resolve," including a modification of the current Consent Decree and well as several retrospective issues dating back to 2007. ER 202. After a June 27, 2011, teleconference and a September 14, 2011, meeting between the Parties, the State attempted to "terminate" the Consent decree because "DOL fe[lt] there [wa]s not enough agreement to warrant an extension . . . ." ER 206. The State did, however, express their "willing[ness] to continue negotiations with the Yakama Nation" for an additional 180 days. *Id*.

On February 28, 2012, the Yakama Nation requested mediation of the issues previously framed by the State. 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. ER 209. Yakama Nation 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. ER 214. Thereafter, from May through October of 2012, the Parties' counsel engaged in a number of conference calls with the Mediator.

ER 151-52.

Despite two prior Yakama-State mediations under the Consent Decree – each lasting over a year – the March 23, 2012, mediation session would prove to be the only in-person negotiation that the Mediator would be allowed to conduct. On December 5, 2012 – just seven months into the mediation process and only three months after mediation became "meaningful" according to the Mediator, ER 157 – the State informed the Nation that it intended to terminate the Consent Decree without fulfilling the mediation requirement. ER 153.

On December 5, 2012, the State participated in a conference call with attorneys for the Nation. *Id*. The State informed the Nation's attorneys that it was "terminating mediation and the consent decree," and would inform the Nation of the same via letter later that day. *Id.* The State also informed the Nation that it would notify all fuel distributors 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. ER 154-55. Regardless of any attempted "termination," the district court had not

yet vacated the Consent Decree.[4]

The Yakama Nation's express position in the face of this improper attempt at "termination" was that the parties remain able to resolve this matter through good faith governmental negotiation. ER 154. Specifically, the Nation expressed its position that "continued mediation and trying to work through the differences" to "get a deal

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[4] Federal law requires that a Court find one of the following before terminating a consent decree: "changed factual conditions [that] make compliance with the decree substantially more onerous;" "a decree proves to be unworkable because of unforeseen obstacles;" or "enforcement of the decree without modification would be detrimental to the public interest." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). It is not up to the parties to unilaterally determine when these events have transpired. *See Gonzales v. Galvin*, 151 F.3d 526, 532 (6th Cir. 1998) ("[B]efore a district court dissolves a consent decree, it must consider and resolve all objections to such dissolution. When the district court terminates its supervision and jurisdiction before making findings concerning compliance with all terms of a decree, the court abuses its discretion.") (citation omitted); *Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland*, 669 F.3d 737 (6th Cir. 2012) (courts must determine that "termination was lawful given not only the decree's terms, but also the broader legal rules that govern consent decrees."). Only the Court can terminate the Consent Decree, and it can do so only after "making specific findings of fact to support the exercise of its inherent equitable power." *N.A.A.C.P. v. Town of Kearny*, 34 Fed.Appx. 46, 49 (3rd Cir. 2002). But even if the State had had the authority to "terminate" the Consent Decree at its own will, the return to *status quo ante* would completely bar the State from collecting any fuel tax at all on the Reservation, per the district court's 1993 injunction. *See Fairfax Countywide Citizens Ass'n v. Fairfax Cnty.*, 571 F.2d 1299, 1305-06 (4th Cir. 1978) (vacation of a Consent Decree "restores the litigants to the *status quo ante*").

done" was still entirely "on the table." *Id.*

In sum, the State has refused to mediate with the Nation, despite the fact that the Mediator has never declared the parties unable to resolve their differences, as contemplated by ¶ 4.7 of the Consent Decree. ER 157. Indeed, a week before the State's attempt at "termination" he advised the parties in part:

> [T]he State claimed that it had been in negotiations with Yakama for a very long time before the mediation process began and wanted closure of the mediation process as fast as possible. However, in my experience concerning tribal negotiations, the actual period of negotiation was extremely brief. Real meaningful negotiations did not take place until late August at the earliest. . . . We never got to the critical point where both sides had their best proposals on the table and strategies for compromise emerged. It's when both sides have put their last proposal on the table that the real work often begins. We never got to that point in these negotiations.

Id. At some time prior to November 26, 2012, the State simply stopped communicating with the Mediator. ER 92. On February 26, 2013, the Mediator wrote further to the Parties:

> I did not believe that there was an impasse, rather I believed that the State did not want to negotiate any more and therefore it was pointless to have further meetings. . . . [I]t is fair to say that external pressures on the State influenced its negotiation posture.

Dkt. No. 4-7, at 16. On March 5, 2013, the district court denied the Nation's motions for stay pending appeal, ER 1, and to dismiss, Dkt.

No. 4-9. The district court stayed proceedings pending resolution of the Yakama Nation's pending Motion to Stay in this Court. ER 6.

VI. STANDARD OF REVIEW

The Court reviews "the grant or denial of a preliminary injunction for abuse of discretion." *Am. Trucking Ass'ns. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Although the standard is deferential, "a district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id*. (quotation omitted).

Issues of law underlying the district court's preliminary injunction – including "[t]he district court's interpretation of the contract language" – are subject to *de novo* review. *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 474 (9th Cir. 1991); *see also Howard Elec. and Mechanical Co., Inc. v. Frank Briscoe Co.*, 754 F.2d 847, 849 (9th Cir. 1985) (holding that a district court's interpretation of an alternative dispute resolution provision, "like the interpretation of any contractual provision, is subject to *de novo* review") (citing *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1462-63 (9th Cir. 1983)).

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VII. SUMMARY OF ARGUMENT

The principal issue on appeal is whether the State was required to mediate pursuant to its promise to do so in 1994, as reaffirmed and reflected in the 2006 Consent Decree. The district court abused its discretion by applying the wrong test for preliminary injunction and by failing to take into account the Nation's irreparable harm. The district court's legal interpretation of the State's obligations under the Consent Decree is subject to *de novo* review and should be reversed. The district court made the clearly erroneous findings of fact that the State had "complied with all of the provisions of Paragraph 4.7 relating to the dispute resolution process and complied with Paragraph 4.27 relating to termination of the Consent Decree." ER 13.

VIII. ARGUMENT

A. The Court Abused Its Discretion By Applying The Incorrect Legal Standard To The Nation's Motion.

A court abuses its discretion if it fails to identify and apply the correct legal rule. *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). Here, the correct legal rule required the district court to examine whether the Yakama Nation had demonstrated that "serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor."

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011) (citation omitted). "'[S]erious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir.) *cert. denied*, 132 S. Ct. 1656 (2012). If a plaintiff can only show that there are "serious questions going to the merits" – a lesser showing than likelihood of success on the merits – then a preliminary injunction may still issue if the "balance of hardships tips sharply in the plaintiff's favor," and the other two *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), factors are satisfied. *Shell Offshore v. Greenpeace*, 12-35332, 2013 WL 936586, at *7 (9th Cir. Mar. 12, 2013) (citation ommitted).

The district court asked but a single question in ruling on the Yakama Nation's motion: whether the Yakama Nation was "likely to succeed on the merits." ER 10. The district court stopped its inquiry there, holding that any other factors "are of no significant consequence," and effectively ignored them. ER 14-15. Meanwhile, the district court devoted seven pages to what must certainly be

"serious questions," as argued below. ER 8-14. This failure to apply the correct legal test was an abuse of discretion, and exposes the rest of the district court's order to *de novo* review. If the district court believed the Yakama Nation was less than likely to succeed on the merits, it was required to examine whether there were serious questions going to the merits. But it failed to do so, as conceded in a later order. *See* ER 3, n.1 (acknowledging that "the court's 'Order Denying Cross-Motion For Preliminary Injunction'" did not address whether there were "'serious questions going to the merits'").

This error constitutes an abuse of discretion and warrants reversal of the district court's Order Denying Defendants' Cross-Motion for Preliminary Injunction.

B. The State Breached Its Obligation To Mediate.

The district court's interpretation of the Consent Decree is subject to *de novo* review. *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986). "Failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to filing a lawsuit warrants dismissal." *Brosnan v. Dry Cleaning Station Inc.*, No. 08-2028, 2008 WL 2388392, at *1 (N.D. Cal. June 6, 2008). To determine whether a contract makes mediation a condition

precedent to filing a lawsuit, a court applies standard principles of contract construction. *HIM Portland v. De Vito Builders*, 317 F.3d 41, 43 (1st Cir. 2003). Further, as recently noted by the Southern District of California in *Centaur v. ON Semiconductor Components*, No. 09-2041, 2010 WL 444715 (S.D. Cal. Feb. 10, 2010):

> The Federal Arbitration Act, although it does not explicitly govern the mediation clause in the parties' contract, creates a federal policy in favor of alternative dispute resolution. Therefore, just as any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, the court resolves any doubts about the parties' mediation clause in favor of mediation.

Id. at *3 (quotation and citation omitted).

The district court's interpretation of the Consent Decree was legally incorrect and should be reversed. Section 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.

ER 234 (emphasis added). There is no mention of any other provision of the Consent Decree in this plainly worded mediation requirement. There is a clear, objective end to mediation: the Mediator's determination "that the parties are not able to resolve the dispute." *Id.* The State has never argued that "that the parties are not able to resolve

the dispute." *Id*.

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. ER 253. In either case, these contingencies only arise "[i]f the dispute is not resolved by mediation." ER 253. 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: resolution or impasse.

The State argues that somehow the last sentence of ¶ 4.27 changes every other requirement for mediation. It does not. The provision does not delete ¶ 4.7(d) or the requirement that the clause be read against, again, the clear backdrop that mediation continues "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 th[e] agreement." ER 258.

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Read together, ¶ 4.27 dovetails logically 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, but it is required by canons of statutory construction. The State is bound by the supplementary rule to the doctrine of the last antecedent. *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012). 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 v. Lark*, 186 F.3d 210, 217 (2d Cir. 1999). Indeed, this comma can serve no other grammatical purpose. *Id*. If the State had left out the comma following "mediation," perhaps it could be argued (while ignoring 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." ER 253. However, with that comma included, that reading is impossible.

Further, considering the "federal policy in favor of alternative dispute resolution," even were there merit to the State's reading, mediation must carry the benefit of any doubt. *Centaur*, 2010 WL 444715, at *3; *see also 3-J Hospitality v. Big Time Design*, No. 09-61077, 2009 WL 3586830, at *2 (S.D. Fla. Oct. 27, 2009) ("When the Court faces a broad clause . . . it should resolve doubts in favor of mediation.") (citing *Solvay Pharmaceuticals v. Duramed Pharmaceuticals*, 442 F.3d 471, 482 n. 10 (6th Cir. 2006)); *see generally Granite Rock Co. v. International Broth. of Teamsters*, 130 S.Ct. 2847 (2010). This canon of construction was not even mentioned by the district court.[5] The district court erred in omitting this clearly applicable canon of construction.

Through the plain meaning of the parties' agreement, the force of grammar, the canon favoring mediation, and the parties' intent to resolve disputes as governments instead of in any court, it is clear that mediation is required – to the Mediator's determination of unresolvability – and that the State has clearly breached its promise.

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[5] The Code of Judicial Conduct for United States Judges also specifically mentions encouragement of mediation and settlement as an adjudicative responsibility. *See* Commentary to Canon 3A(5) ("A judge should encourage and seek to facilitate settlement . . . .").

C. The Nation Has Been Irreparably Harmed Because Of The Court's Failure To Enjoin The State.

The State failed to respond to the Yakama Nation's argument regarding the irreparable harm caused by the State's breach in the district court proceeding.[6] ER 74-76. When a party fails to make an argument in response to a motion, it is waived. *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. Oct. 5, 2012).

To summarize those arguments the State did not respond to:

(1) Depriving the Yakama Nation of its contractual right to mediate Consent Decree disputes to a mediator's determination of unresolvability is *per se* irreparable harm. *See International Ass'n of Machinists & Aerospace Workers v. Northwest Airlines*, 674 F.Supp. 1387, 1391 (D. Minn. 1987) (where "mediation was properly invoked, [a plaintiff] faces irreparable harm if the [defendants] are not restrained"); *Reliance Nat., Ins. v. Seismic Risk Ins. Service*, 962 F. Supp. 385, 391 (S.D.N.Y. 1997) (same). Requiring a party to litigate,

[6] Elsewhere, the State argues that it has indeed "contest[ed] each such argument listed in the Nation's Motion." Dkt. No. 6-1, at 16 n.8. The State then cites to *the Nation's* Motion for Stay Pending Appeal – specifically, the signature block thereof – as evidence that it has so responded. *Id.* Despite the State's best efforts, its response to the Nation's showing of irreparable harm is simply not found in the record.

when the dispute is subject to mandatory mediation, is harm that cannot be remedied.

(2) The State is interfering with the Nation's right to make its own laws and be governed by them. 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). The State is depriving the Nation of the benefit of their bargain: to prevent foreign courts from interfering in inter-governmental disputes.

(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). The State's recidivism and future intent is apparent throughout its filings in the case below – not to mention the initial injunction that the Yakama Nation obtained against the State in 1993 and the Nation's suit against the State for breach of the Consent Decree in 2004. Absent an injunction, the State will continue to break its promises and violate the Consent Decree.

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D. The State Would Not Be Harmed By Mediating.

The State cannot identify any harm resulting from mediating. The State is seeking "[d]amages in an amount to be proven at trial" and that the Court "confirm the [State's] ability to assess and collect the full amount of motor vehicle fuel and special fuel taxes." ER 301. But these remedies are not available in the district court.[7]

The State's alleged "loss" of roughly $300,000 each month is based upon its inaccurate assumption that the Consent Decree is now terminated. That misunderstanding aside, even if the district court terminated the Consent Decree, the State would *still* not be entitled to the full amount of state tax on each on-Reservation fuel sale.

First, the 1993 injunction "requiring licensed distributors to pre-pay the state gas tax on sales of gas" to Yakamas would be revived

[7] The Nation as at a loss as to what "damages" the state refers. At any rate, as discussed above, the ability to "invoke the continuing jurisdiction of the court . . . to recover monies alleged to be owed either party" was deleted in 2006. ER 251, 231. To the extent that the state seeks to litigate this claim, it may do so "in a new and independent suit." *United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372, 1377 (11th Cir. 1981). It is unlikely, though, that any federal forum would have jurisdiction to hear the state's claim. *Cook v. AVI Casino Enterprises*, 548 F.3d 718, 725 (9th Cir. 2008); *O'Connor v. Colvin*, 70 F.3d 530, 532 (9th Cir. 1995). Given this procedural posture, the Nation is perplexed by the State's refusal to mediate and/or arbitrate.

were the Consent Decree vacated. ER 62. *See Ross v. Alaska*, 58 Fed.Appx. 285, 287 (9th Cir. 2003) ("[P]ost-judgment developments in the law by themselves rarely constitute the extraordinary circumstances required for relief") (quotation omitted); *Mack v. Kuckenmeister*, No. 08-0370, 2011 WL 1377146, at *5 (D. Nev. Apr. 12, 2011) ("Under federal law, a preliminary injunction remains in effect until a final judgment is rendered or the complaint is dismissed, unless it expires earlier by its own terms, or is modified, stayed or reversed."). The 1994 Consent Decree said nothing about dissolving the injunction. While the Nation is aware that the injunction is currently not in effect, due to the Consent Decree's dismissal of that underlying lawsuit, if the Consent Decree is terminated "it is as if the order never existed" thereby "return[ing] the parties to their original positions, before the [Consent Decree] was issued." *Bryan v. BellSouth Commc'n.*, 492 F.3d 231, 241 (4th Cir. 2007).

But even were the 1993 injunction dissolved, there is no guarantee that the State will be allowed to tax sales to Yakamas without the Consent Decree being in place. As far as the Nation is concerned, the State is currently receiving a windfall – were it not for the Consent Decree, the State would be entitled to nothing, pursuant

to clearly established federal law not at issue in this appeal. *See generally U.S. v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007).

E. Mediation Will Serve The Public Interest.

The Yakama Public and Washington Public have a profound interest in the honoring and enforcement of intergovernmental mediation promises. The public interest in promoting and enforcing valid mediation and arbitration clauses militates enjoining a party's unilateral and unlawful departure therefrom. *See e.g. International Ass'n of Machinists v. National Mediation Bd.,* 374 F.Supp.2d 135, 143 (D.D.C. 2005); *see also Global Tel*Link Corp. v. Scott*, 652 F.Supp.2d 1240, 1247 (M.D. Fla. 2009) ("[E]njoining the parties to engage in alternative dispute resolution [furthers] public interest.").

The State has unilaterally breached the Consent Decree's mediation and arbitration clause. The Public has been and will continue to be harmed by the State's breach of contract until the State is enjoined from further ignoring its obligations.

IX. CONCLUSION

The Nation respectfully requests that this Court reverse the district court's Order Denying Defendants' Cross-Motion for Preliminary Injunction and remand this matter to the district court

with an order to dismiss the State's suit.

X. STATEMENT OF RELATED CASES

The Yakama Nation is not aware of any related cases pending in this Court, pursuant to Ninth Circuit Rule 28-2.6.

XI. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. PROC. 32(A)(7)(C) AND CIRCUIT RULE 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points, and contains 6,403 words.

Dated: April 2, 2013.

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9th Circuit Case Number(s) 13-35161

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Rob Costello
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Attorney General of Washington
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Signature (use "s/" format) s/Gabriel S. Galanda