

Ethan Jones, WSBA No. 46911
Kathryn E. Marckworth, WSBA No. 46964
Yakama Nation Office of Legal Counsel
P.O. Box 150 / 401 Fort Road
Toppenish, WA 98948
(509) 865-7268
ethan@yakamanation-olc.org
kate@yakamanation-olc.org

Attorneys for the Confederated Tribes and
Bands of the Yakama Nation

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA
NATION, a sovereign federally
recognized Native Nation,

Plaintiff,

v.

Klickitat County, a political
subdivision of the State of
Washington; Klickitat County
Sheriff's Office, an agency of
Klickitat County; Bob Songer, in
his official capacity; Klickitat
County Department of the
Prosecuting Attorney, an
agency of Klickitat County; David
Quesnel, in his official capacity,

Defendants.

Case No.: 1:18-cv-03110

PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

Date: April 24, 2019
Without Oral Argument

Defendants do not have civil/regulatory jurisdiction to enforce the State of Washington's firework laws against enrolled Yakama Members on trust allotments outside the Yakama Reservation. Congress did not offer the State of Washington civil/regulatory jurisdiction over enrolled Yakama Members in Indian Country in

1 passing Pub. L. 83-280. The Washington State Legislature amended Washington's
 2 firework laws to expressly designate them as civil/regulatory in nature, making them
 3 inapplicable to Indian Country under Pub. L. 83-280. Given this straightforward
 4 analysis, Defendants' exercise of civil/regulatory jurisdiction over enrolled Yakama
 5 Members selling fireworks on off-Reservation Yakama trust allotments should be
 6 declared unlawful and enjoined.

7 Pursuant to Fed. R. Civ. P. 56(a), Plaintiff, Confederated Tribes and Bands of
 8 the Yakama Nation ("Yakama Nation"), respectfully moves this Court for an order
 9 granting summary judgment in Plaintiff's favor and as requested in the Complaint
 10 on the grounds that there is no defense to the action, there is no genuine dispute as
 11 to any material fact, and Plaintiff is entitled to judgment as a matter of law.

12 I. SUMMARY JUDGMENT STANDARD

13
 14 Summary judgment is appropriate where "the movant shows that there is no
 15 genuine dispute as to any material fact and the movant is entitled to judgment as a
 16 matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden to
 17 demonstrate an absence of a genuine issue of material fact. *Celotex Corp. v.*
 18 *Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party
 19 to identify specific facts showing there is a genuine issue of material fact.
 20 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). For summary
 21 judgment, a fact is "material" if it might affect the outcome of the suit under the
 22 governing law. *Id.* at 248. A dispute as to a material fact is "genuine" where the
 23 evidence is such that a reasonable jury could find for the non-moving party. *Id.*

24 In ruling on a motion for summary judgment, courts view the facts and all
 25 rational inferences therefrom in the light most favorable to the non-moving party.
 26 *Scott v. Harris*, 550 U.S. 372, 378 (2007). However, the non-moving party must

do more than show there is some “metaphysical doubt” as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986). The non-moving party cannot rely on conclusory allegations alone to create issues of fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). Further, “[a]rguments based on conjecture or speculation are insufficient to raise a genuine issue of material fact.” *R.W. Beck & Associates v. City & Borough of Sitka*, 27 F.3d 1475, 1480 n.4 (9th Cir. 1994). There is no issue for trial “unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.” *Anderson*, 477 U.S. at 249. A mere “scintilla of evidence” to support the non-moving party’s position about disputes as to material facts cannot defeat a motion for summary judgment, because “there must be sufficient evidence upon which a jury could reasonably find for the [non-movant].” *Id.* at 252.

II. ARGUMENT

A. Judgment As A Matter Of Law Is Appropriate Because There Is No Genuine Dispute Between The Parties As To Any Material Facts.

Please see Plaintiff’s Statement of Material Facts Not in Dispute, filed on the same day as this Motion, which is hereby incorporated by reference. Based upon the evidence cited therein, Defendants’ cannot reasonably dispute that on June 26, 2018, the Klickitat County Sheriff’s Department issued cease and desist notices under Wash. Rev. Code Chapter 70.77 to at least one enrolled Yakama Member operating a Yakama Nation-permitted firework stand on a Yakama allotment held in trust by the United States. As a result, there is no genuine dispute between the parties as to any material fact underlying this lawsuit.

B. Defendants Do Not Have Civil/Regulatory Jurisdiction Over Yakama Nation-Permitted And Yakama Member-Owned Businesses Selling

Fireworks On Off-Reservation Trust Allotments As A Matter Of Law.

As requested in our Complaint, the Yakama Nation seeks both declaratory relief under 28 U.S.C. 2201, and a permanent injunction to enforce the requested declaratory judgment under 28 U.S.C. 2202. Under Section 2201, the Court is empowered to “declare the rights and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. 2201(a). Where a declaratory judgment is entered, Section 2202 allows “[f]urther necessary and proper relief based on a declaratory judgment or decree . . .” including injunctive relief. 28 U.S.C. 2202; *Powell v. McCormack*, 395 U.S. 486, 499 (1969) (citing 28 U.S.C. 2202 for the rule that “[a] declaratory judgment can then be used as a predicate to further relief, including an injunction”).

Here, the Yakama Nation seeks a declaratory judgment that Defendants do not have civil/regulatory jurisdiction to enforce Wash. Rev. Code Chapter 70.77 against enrolled Yakama Members on trust allotments outside the Yakama Reservation, which are considered “Indian Country” under federal law. 18 U.S.C. 1151.

Based on that declaratory judgment, the Yakama Nation requests a permanent injunction enjoining Defendants from exercising civil/regulatory jurisdiction over enrolled Yakama Members selling fireworks on trust allotments outside the Yakama Reservation (i.e. in Indian Country). The Court should order this requested relief based on the rights reserved by the Yakama Nation in the Treaty with the Yakamas of June 9, 1855, the limited scope of civil jurisdiction offered to the State of Washington in Pub. L. 83-280, and the Washington State Legislature’s express designation of state firework laws as civil/regulatory in nature.

The Treaty with the Yakamas of June 9, 1855 is the supreme law of the land under the Supremacy Clause of the United States Constitution. Treaty with the

1 Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951 [hereinafter Treaty of
 2 1855]; U.S. Const. art. VI, cl. 2. The Yakama Nation exercises civil and criminal
 3 jurisdiction over Yakama trust allotments outside the Yakama Reservation under its
 4 inherent sovereign rights reserved in the Treaty of 1855. These off-reservation trust
 5 allotments are considered Indian Country as defined by 18 U.S.C. 1151 for federal
 6 jurisdictional purposes. 18 U.S.C. 1151 (defining Indian Country to include
 7 allotments, separate from the reference to lands within Indian Reservations); *see also*
 8 *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022 (8th Cir. 1999).

9 Historically, the power to legislate in both criminal and civil matters
 10 concerning Indians in Indian Country lay exclusively with Congress¹ and the
 11 relevant Native Nation. *Confederated Tribes of the Colville Reservation v.*

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 13 ¹ As a matter of policy, the Yakama Nation rejects the United States' assertion of
 14 plenary power to ignore the Treaty of 1855 and unilaterally modify jurisdiction
 15 within Yakama lands without the Yakama Nation's free, prior, and informed con-
 16 sent, as it did in passing Pub. L. 83-280. Congress's claim of such plenary author-
 17 ity is extra-Constitutional and founded in the morally and legally objectionable re-
 18 ligious doctrine of Christian discovery, which should be repudiated by modern
 19 courts. *See Johnson v. M'Intosh*, 21 U.S. 543 (1823) (adopting the religious doc-
 20 trine of discovery into federal law to deprive Native rights); *United States v.*
 21 *Kagama*, 188 U.S. 375 (1886) (finding no constitutional basis for plenary authority
 22 over Native Nations, the Court justified the plenary power doctrine using the doc-
 23 trine of discovery); United Nations Declaration on the Rights of Indigenous Peo-
 24 ples, Resolution 61/295 (Sept. 13, 2007) (requiring States to obtain Native Na-
 25 tions' free, prior, and informed consent before taking legislative actions that affect
 26 Native Nations).

1 *Washington*, 938 F.2d 146, 147 (9th Cir. 1991). However, in 1953 Congress enacted
2 Pub. L. 83-280 which allowed the states to impose certain measures of state criminal
3 and civil jurisdiction within Indian Country. 67 Stat. 588. In 1963, Washington
4 unilaterally assumed forms of civil and criminal jurisdiction throughout Yakama
5 Indian Country—including off-Reservation trust allotments—without the Yakama
6 Nation’s consent. *Washington v. Confederated Bands & Tribes of the Yakima Indian*
7 *Nation*, 439 U.S. 463, 465 (1979).

8 Congress’s offer of Indian Country jurisdiction to the states differed in scope
9 between criminal jurisdiction and civil jurisdiction. Pub. L. 83-280 allowed states
10 to assume broad criminal/prohibitory jurisdiction in Indian Country. *Colville*, 938
11 F.2d at 147. However, Congress’s offer of civil jurisdiction over Indians in Indian
12 Country under Pub. L. 83-280 was limited to state-court adjudicatory jurisdiction
13 over private civil actions, and did not include general state civil/regulatory
14 jurisdiction. *See e.g. Bryan v. Itasca County*, 426 U.S. 373, 390-92 (1976). As a
15 result, when courts consider the applicability of state laws to Indians in Indian
16 Country under Pub. L. 83-280, they generally consider whether the law should be
17 characterized as criminal/prohibitory and therefore permissible, or civil/regulatory
18 and impermissible. *Colville*, 938 F.2d at 147.

19 For example, in *Confederated Tribes of the Colville Reservation v.*
20 *Washington*, the Ninth Circuit considered whether the State’s speed limit laws
21 applied to enrolled Colville Members within the Colville Reservation. *Id.* at 146.
22 After reviewing the relevant statutory language stating that “a traffic infraction may
23 not be classified as a criminal offense,” accounting for the backdrop of Native
24 sovereignty “against which the applicable . . . federal [and state] statutes must be
25 read,” and keeping in mind that “the policy of leaving Indians free from state
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1 jurisdiction and control is deeply rooted in the Nation's history," the Ninth Circuit
2 held that the State's speeding law was civil/regulatory in nature and therefore
3 inapplicable to Indians in Indian Country. *Id.* at 148.

4 Specific to fireworks, the Ninth Circuit considered the applicability of the
5 State's firework laws in Indian Country in *United States v. Marcyes*, 557 F.2d 1361,
6 1364 (9th Cir. 1977). While the case implicated federal jurisdiction to prosecute
7 state laws under the Assimilative Crimes Act rather than state jurisdiction under
8 Pub. L. 83-280, the Ninth Circuit characterized the State's firework laws as
9 criminal/prohibitory. *Marcy*, 557 F.2d at 1363. Applying the civil/regulatory
10 versus criminal/prohibitory framework for analyzing state jurisdiction under Pub.
11 L. 83-280, *Marcy* would suggest that the state's firework laws are
12 criminal/prohibitory and therefore permissible. However, the Washington
13 legislature subsequently changed its fireworks laws in 1995, adding a new section
14 stating its legislative intent that Washington's fireworks laws be considered
15 civil/regulatory. Wash. Rev. Code 70.77.111.

16 This new section was codified as Wash. Rev. Code 70.77.111, and sets forth
17 an express presumption that fireworks are legal (i.e., not prohibited), and affirms
18 the exclusively regulatory nature of Washington State's fireworks laws:

19 . . . fireworks, when purchased and used in compliance
20 with the laws of Washington, are legal . . . [and] [t]he leg-
21 islature intends [Washington State's fireworks regulations
22 to be] regulatory only, and not prohibitory.

23 In other words, the Washington Legislature explicitly declared that the State's
24 fireworks laws are only regulatory in nature, not prohibitory.

25 While Wash. Rev. Code Chapter 70.77 includes some criminal sanctions, that
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1 does not automatically make the State's firework laws criminal/prohibitory within
2 the meaning of Pub. L. 83-280. *See e.g. California v. Cabazon Band of Mission*
3 *Indians*, 480 U.S. 202, 211 (1987) (the fact that an otherwise regulatory law is
4 enforceable by criminal as well as civil means does not convert it into a criminal law
5 within the meaning of Pub. L. 83-280). Consistent with this Court's determination
6 on Plaintiff's Motion for Temporary Restraining Order, Defendants lack federal
7 authorization to impose State firework laws on Yakama Members operating firework
8 stands on off-Reservation trust allotments because the State's firework laws are
9 civil/regulatory in nature.

10 Defendants' argument that the Washington State Court of Appeals'
11 unreported decision in *State v. Comenout*, 1997 Wash. App. LEXIS 730 (Div. II
12 1997), controls here is unpersuasive. ECF 8 at 4. As an unreported decision issued
13 before March 1, 2013, the decision has "no precedential value and [is] not binding
14 on any court." Washington State Court General Rule 14.1; *cf.* 9th Circuit Rule 36-
15 3 (generally disallowing citation to unpublished opinions issued before January 1,
16 2007). Beyond this procedural bar, the *Comenout* decision is irrelevant because the
17 court assumed without analysis that the State's firework laws were applicable to
18 Indian Country under Pub. L. 83-280. In reaching its decision, the *Comenout* court
19 failed to conduct the foundational civil/regulatory versus criminal/prohibitory
20 analysis, failed to discuss the *Marcy* case, and failed to identify the relevant 1995
21 statutory change to Washington's firework laws expressly characterizing those laws
22 as civil/regulatory. *Comenout* is not precedential, and without these fundamental
23 analyses it should not be afforded persuasive value.

24 Defendants also argue there is a meaningful distinction between the treatment
25 of State jurisdiction on Reservation lands, versus State jurisdiction on off-
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1 Reservation trust lands. ECF No. 8 at 4-5. This is a parsing of the language of Wash.
 2 Rev. Code 37.12.010, which is the State statute that assumed Pub. L. 83-280
 3 jurisdiction. Defendants argument fails because Wash. Rev. Code 37.12.010 only
 4 applies to jurisdiction offered by the United States and assumed by the State under
 5 Pub. L. 83-280. Civil/regulatory jurisdiction simply was not offered to the State
 6 through Pub. L. 83-280, and is therefore not within the scope of Wash. Rev. Code
 7 37.12.010. Defendants' supposed jurisdictional distinction between Reservation and
 8 off-Reservation lands under State law cannot be used to assert jurisdiction they do
 9 not have under federal law.

10 In sum, neither the Yakama Nation nor Congress have authorized Defendants
 11 to exercise civil/regulatory authority over Indians in Indian Country, including off-
 12 Reservation trust allotments. Washington's firework laws are expressly
 13 civil/regulatory, and therefore cannot be applied by Defendants to Indians in Indian
 14 Country. Defendants violated the Yakama Nation's inherent sovereign and Treaty-
 15 reserved rights by enforcing civil/regulatory State laws against enrolled Yakama
 16 Members within Yakama Indian Country.

17 **III. REQUEST FOR RELIEF**

18
 19 Plaintiff respectfully requests that the Court grant its Motion for Summary
 20 Judgment, and order the relief sought in Plaintiff's Complaint as follows:

21 A. A declaratory judgment under 28 U.S.C. 2201 declaring that:

22 (1) Washington's Fireworks Regulations, as set forth in Wash. Rev.
 23 Code 70.11 *et seq.*, are properly understood as "regulatory only, and not
 24 prohibitory."

25 (2) Defendants do not have civil regulatory jurisdiction over
 26 enrolled Yakama Members selling fireworks in Indian Country, including Yakama

1 trust allotments.

2 (3) Defendants violated the Yakama Nation's inherent sovereign
3 and Treaty-reserved rights by threatening to unlawfully exercise civil regulatory
4 jurisdiction over enrolled Yakama Members in Indian Country.

5 B. Both a preliminary and permanent injunction pursuant to 28 U.S.C.
6 2202 enjoining Defendants from exercising civil regulatory jurisdiction over
7 enrolled Yakama Members selling fireworks in Indian Country on Yakama Trust
8 Allotments.

9 C. Award the Yakama Nation such other relief as the Court deems just
10 and appropriate.

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12 DATED this 4th day of March, 2019.

13
14 s/Ethan Jones
15 Ethan Jones, WSBA No. 46911
16 Kathryn E. Marckworth, WSBA No. 46964
17 YAKAMA NATION OFFICE OF LEGAL COUNSEL
18 P.O. Box 151, 401 Fort Road
19 Toppenish, WA 98948
20 Telephone: (509) 865-7268
21 Facsimile: (509) 865-4713
22 ethan@yakamanation-olc.org
23 kate@yakamanation-olc.org

24 *Attorneys for the Confederated Tribes and*
25 *Bands of the Yakama Nation*
26