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

CONFEDERATED TRIBES AND
BANDS OF THE YAKAMA
NATION,

Plaintiff,

v.

KLICKITAT COUNTY, *et al.*,

Defendants.

Case No.: 1:18-cv-03110

PLAINTIFF'S REPLY FOR
SUMMARY JUDGMENT

Defendants violated the Yakama Nation's inherent sovereign and Treaty-reserved rights by attempting to enforce the State's civil/regulatory firework laws against Yakama Member retailers selling fireworks in Indian Country. Defendants have no such civil/regulatory authority unless expressly delegated by Congress, and Defendants have identified no such congressional grant. Rather, Defendants ignore the plain language and legislative history of RCW Ch. 70.77 to characterize the state firework laws as criminal/prohibitory under Pub. L. 83-280, and in the alternative, ask that this Court assume federal legislative powers and unilaterally ab-

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1 rogate the Yakama Nation's Treaty-reserved rights by carving out an exception to
 2 the Yakama Nation's exclusive civil/regulatory jurisdiction. They argue without
 3 relevant supporting precedent that fire danger justifies such an exception, while at
 4 the same time allowing non-Indians to sell fireworks within their jurisdiction in a
 5 manner that is substantially similar to the Yakama Nation's own regulation of its
 6 Members' retail firework sales.

7 Defendants do not have congressionally delegated authority to enforce State
 8 fireworks laws in Yakama Indian Country, and they have not demonstrated any ex-
 9 ceptional circumstances that would justify a violation of Yakama Nation's sover-
 10 eign and Treaty-reserved rights to govern its lands and its Members free from state
 11 interference. For these reasons, Plaintiff's motion for summary judgement should
 12 be granted, and Defendants' apparent cross-motion for summary judgment should
 13 be denied.

14 I. ARGUMENT

15 A. Defendants do not have congressionally delegated authority to enforce 16 Washington's fireworks laws on Yakama Members in Yakama Indian 17 Country under Public Law 83-280.

18 Washington's current fireworks laws expressly state and substantively mani-
 19 fest the Washington State legislature's intent to permit, but regulate fireworks.
 20 RCW 70.77.111 is a clear expression of legislative intent that State fireworks laws
 21 be legally understood as regulatory and not prohibitory. And this intent is reflected
 22 in other procedural and substantive amendments made by the State legislature in
 23 the mid 1990's and early 2000's to the State fireworks law. Because Washington's
 24 fireworks laws are civil/regulatory, they cannot be enforced by Defendants against
 25
 26

1 Yakama Members selling fireworks in Yakama Indian Country pursuant to the
2 State's delegated authority under Public Law 83-280.

3 **1. Washington's current fireworks laws are regulatory, not prohibito-**
4 **ry, by their express terms.**

5
6 Under federal law, "if [a] state law generally permits the conduct at issue,
7 subject to regulation, it must be classified as civil/regulatory and Pub. L. 83-280
8 does not authorize its enforcement" in Indian Country. *Quechan Indian Tribe v.*
9 *McMullen*, 984 F.2d 304, 306 (9th Cir. 1993) (quoting *California v. Cabazon Band*
10 *of Mission Indians*, 480 U.S. 202 (1987)). "A law is not criminal/prohibitory simp-
11 ly because the law is enforceable by criminal as well as civil means." *Id.* (citing
12 *Cabazon*, 480 U.S. at 211). In analyzing whether a law is criminal/prohibitory vs.
13 civil/regulatory, a court may rely "on the intent of the statute and the State's public
14 policy" and "must examine more than the label itself to determine the intent of the
15 State and the nature of the statute." *Id.* at 306-07 (internal citations omitted).

16 For example, in *Quechan*, the court found it unpersuasive that California's
17 fireworks law was codified in the California Health and Safety code as a civil en-
18 actment – this was a mere label, not an expression of legislative intent. And in
19 *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977), the court analyzed
20 Washington State's then-current fireworks laws and found them to be crimi-
21 nal/prohibitory because they evidenced the legislature's general intent to prohibit
22 and criminally penalize the possession and sale of fireworks. Unlike the California
23 fireworks laws at issue in *Quechan*, or the historical Washington fireworks laws at
24 issue in *Marcy*, Washington State's current fireworks laws evidence the Wash-
25 ington legislature's policy to permit but regulate fireworks, and its intent that they
26 be legally understood as regulatory and not prohibitory.

1 RCW § 70.77.111 is no mere label – it is an express declaration of legisla-
 2 tive intent that in Washington State, “fireworks . . . are legal” and Washington’s
 3 fireworks laws are “regulatory only, and not prohibitory.” This express statement
 4 of policy and intent leaves little room to argue that the Washington legislature still
 5 intends its fireworks laws to “generally prohibit” fireworks within the meaning of
 6 the rule established by the Supreme Court in *Cabazon* and followed by the Ninth
 7 Circuit in *Quechan* and *Marcy*. Further, an analysis of other changes to Wash-
 8 ington’s fireworks laws since the time of *Marcy* supports an understanding that
 9 Washington’s current policy is to generally permit but regulate fireworks.

10 Amendments made by the Washington legislature to Washington’s fire-
 11 works laws in 1994, 1995, and 2002 evidence the State’s policy shift away from
 12 treating fireworks primarily under a criminal/prohibitory scheme and toward per-
 13 mitting them under a civil/regulatory scheme. These included: removing fire pro-
 14 tection districts from oversight of fireworks use, 1994 Wash. Sess. Laws p. 659 –
 15 660, ch. 133, §§ 3, 5 – 7, 9; adding a new section distinguishing the state fireworks
 16 law from the state criminal firearms and dangerous weapons chapter, codified as
 17 RCW § 9.41.330; creating hearings under the state Administrative Procedures Act
 18 to contest the seizure of fireworks, 1994 Wash. Sess. Laws p. 661 – 662, ch. 133,
 19 §§ 11 – 12; and authorizing the seizing agency to resell confiscated common fire-
 20 works and special fireworks to manufacturers, 1994 Wash. Sess. Laws p. 662, ch.
 21 133, § 12(2). Signaling an important change away from past criminal/prohibitory
 22 approaches, the legislature codified a new policy that, “inclusion in [Chapter
 23 70.77] of criminal penalties does not preclude enforcement of this chapter through
 24 civil means.” 1994 Wash. Sess. Laws p. 663, ch. 133, § 5 (codified at Wash. Rev.
 25 Code 70.77.548). Testimony in support of these 1994 amendments captured a de-
 26

1 creased public appetite for criminal prosecution and desire to move towards pri-
 2 marily civil enforcement:

3 Most of the provisions in this bill were requested by the
 4 Attorney General's Office. Prosecutors are reluctant to
 5 bring criminal charges because courts find the penalties
 6 too onerous. Therefore, it is important that the
 7 department have the authority to enforce the code civilly.

8 Aff. of Ethan Jones in Support of Pl.'s Reply for Summ. J. Ex. A (Apr. 8,
 9 2019).

10 The 1995 amendments implemented civil licensing and revenue generating
 11 provisions that reflected a permissive State policy approach to "[e]stablish[] a fund
 12 for a public education campaign emphasizing safe and responsible use of legal
 13 fireworks." Jones Aff. Ex. B. And pursuant to new authority granted to it under
 14 the 2002 amendments, the Washington State Patrol promulgated a civil regulatory
 15 scheme to "establish civil penalty criteria for violations of [Chapter 70.77] and
 16 [Chapter 212-17]" including a "violation/penalty matrix" with forty-eight (48) spe-
 17 cific violations related to the manufacture, transportation, licensing, sale and use of
 18 fireworks each designated with prescribed *civil* penalties. WAC § 212-17-515.
 19 The nature of these amendments supports an understanding of Washington State's
 20 current fireworks laws as "regulatory only, and not prohibitory" as expressly stated
 21 by the Washington legislature in RCW § 70.77.111.

22 Defendants' Response entirely ignores this legislative history. Instead, De-
 23 fendants attempt to draw parallels to cases that are irrelevant to the issues here:
 24 furnishing liquor to minors on a military base; sale of cigarettes to a minor under
 25 Iowa law; practicing law without a license before a military tribunal; and a 19th
 26 century case on the unconstitutional search and seizure of self-incriminating per-

1 sonal documents. ECF No. 23 at 5-7. Defendants’ only citations addressing the
 2 sale of fireworks within the State of Washington pre-date all of the relevant subse-
 3 quent legislative amendments. ECF No. 23 at 5, 7. Defendants offer no argument
 4 for why such tenuous precedent supports asking this Court to ignore the plain leg-
 5 islative intent of Chapter 70.77.

6 **2. Washington’s current fireworks laws are regulatory under key civ-
 7 il/regulatory vs. criminal/prohibitory factors used by the *Marcy*es
 8 and *Quechan* courts.**

9 This Court may rely on the Washington legislature’s express declaration of
 10 intent in RCW § 70.77.111. *Quechan*, 948 F.2d at 306; *Cabazon*, 480 U.S. at 211.
 11 To the extent the Court looks beyond these clear statements, an examination of
 12 Washington’s current fireworks laws using factors applied by the *Marcy*es and
 13 *Quechan* courts also supports a finding that they are regulatory in nature.

14 Critically, where a statute’s purpose is to regulate the described conduct and
 15 to generate revenues it is properly understood as civil/regulatory. *Quechan*, 948
 16 F.2d at 307; *Marcy*es, 557 F.2d at 1364. In finding Washington and California’s
 17 fireworks laws to be criminal/prohibitory, the *Marcy*es and *Quechan* courts found
 18 it persuasive that “the purpose of the fireworks laws is not to generate income, but
 19 rather to prohibit [the] general use and possession [of fireworks]” *Id.* (both
 20 courts used identical language).

21 Washington’s current fireworks laws include a variety of licensing and civil
 22 penalty schemes intended to generate state and local revenues. For example, fire-
 23 works licenses issued by the Washington State Patrol generate revenues of between
 24 \$5 and \$1,500 per license for the fire services trust fund under RCW § 70.77.343;
 25 cities and counties are authorized to collect permit fees in the “amount sufficient to
 26

cover all legitimate costs” up to \$100 per retail sales permit per year and up to \$5,000 per display permit under RCW § 70.77.555; civil penalties are deposited to the fire services trust fund under RCW § 70.77.252; and profits from the proceeds of sales of seized fireworks resold at public auction are likewise deposited with the fire services trust fund under RCW § 70.77.440. The Washington Governor’s proposed 2017-19 State budget projected \$146,000 in revenue to the fire service trust account, with an unreserved balance of \$427,000 at the end of this biennium.

Jones Aff. Ex. D.

Defendants have urged this Court to blindly apply the *Marcy* holding that Washington’s fireworks laws are criminal/prohibitory and thus enforceable by Defendants under Pub. L. 83-280. But the intent and policy of the Washington legislature towards the sale of fireworks has changed significantly since the *Marcy* court issued its decision in 1977, and so have the State’s fireworks laws. Although they still include criminal penalties, this is not dispositive. *Cabazon*, 480 U.S. at 211. Washington’s current fireworks laws are rightly understood as “regulatory only, and not prohibitory” by their express terms and under applicable federal law, and may not be enforced by Defendants against Yakama Members in Yakama Indian Country under Pub. L. 83-280.

B. Defendants have no inherent authority to regulate the sale of fireworks by Yakama Members in Yakama Indian Country.

It is settled federal law that states do not ordinarily have authority to regulate the property or conduct of Native Nations or their Members in Indian Country. *Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520, 527 n.1 (1998). Recent Ninth Circuit decisions have affirmed this foundational principle. *See e.g., Gobin v. Snohomish Cty.*, 304 F.3d 909, 914 (9th Cir. 2002) (“In

determining the extent of State jurisdiction over Indians, State laws are not applicable to tribal Indians on an Indian reservation except where Congress has expressly intended that State laws shall apply.”) (internal citations omitted);

Only “exceptional circumstances” may justify state jurisdiction over the activities of Indians in Indian Country absent Congress’s express consent.¹ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987) (state’s interest in preventing the infiltration of tribal bingo enterprises by organized crime did not justify state regulation of tribal enterprises; state regulation would impermissibly infringe on tribal government); *Sonoma County Fire Chief v. Dry Creek Rancheria Band*, 228 Fed. Appx. 671, 2007 U.S. App. LEXIS 8118 (9th Cir. 2007) (fire danger did not create an exceptional circumstance justifying an enforcement of state fire code). Moreover, any “asserted exceptional circumstances are weighed against traditional notions of Indian sovereignty and the congressional goal of encouraging tribal self-determination, self-sufficiency, and economic development.” *Gobin*, 304 F.3d at 917 (citing *Cabazon*, 480 U.S. at 216).

Defendants have failed to establish that any exceptional circumstances exist here which might justify an exception to the general rule that state laws are not

¹ Defendants quote *Nevada v. Hicks*, 533 U.S. 353, 362 (2001) to try to claim a general principle that where “state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land.” However, this principle has only been narrowly applied by the U.S. Supreme Court in ‘exceptional circumstances’ concerning the collection of state cigarette taxes from non-members by tribal retailers on Indian reservations. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

1 applicable to Indians in Indian Country. Defendants have questioned whether
 2 “public safety will be protected without enforcement of state fireworks laws”, ECF
 3 23 at 13, and argued that variations between State and Yakama law may put their
 4 citizens at risk. *See generally*, ECF 23-3. However, in both the State of
 5 Washington and Yakama Indian Country, fireworks are permitted but regulated.
 6 RCW 70.77; RYC 50.53. Further, differences in fireworks regulations are
 7 common in county and local jurisdictions throughout the State. Jones Aff. Ex. C.

8 Under RCW 70.77.395, cities and counties may adopt their own fireworks
 9 ordinances to limit the sale and use of consumer fireworks in their jurisdictions;
 10 and thus, fireworks sales and use standards vary across the State. Jones Aff. Exs.
 11 C, E, F. For example, Klickitat County allows the sale and limited use of
 12 fireworks within the county, while Yakima County has implemented a
 13 comprehensive ban except for public displays. *Id.* at Ex. F. Permitting such local
 14 variation is consistent with the State’s general policy that fireworks are permitted
 15 except where specifically prohibited. Thus Yakima County’s ban does not force
 16 Klickitat County to enact a similar ban. *Id.* at Ex. E. Similarly, the mere fact that
 17 the State’s fireworks laws differ from Yakama Nation’s fireworks laws cannot
 18 justify Defendants regulation of Yakama Members in Yakama Indian Country. *Id.*
 19 at Ex. C.

20 The Yakama Nation regulates and permits the sale of fireworks under
 21 Yakama Nation Revised Law and Order Code (“RYC”) § 50.53 *et seq.* and annual
 22 fireworks regulations passed by the Yakama Tribal Council Law and Order
 23 Committee under their authority under RYC § 50.53.04. Aff. of Laurene Contreras
 24 in Support of Pl.’s Reply for Summ. J. Ex. D (Apr. 8, 2019). All Yakama
 25 fireworks retailers must complete safety training before receiving their permits.
 26

1 RYC § 50.53.02. These trainings have historically been administered with Yakima
2 County Fire District 5. Contreras Aff. at 2, ll. 16 – 17. Yakama fireworks retailers
3 must comply with federal fireworks law, and may not sell illegal explosive devices
4 banned by federal consumer protection laws. *Id.* at Ex. A. Yakama law prohibits
5 fireworks sales and use at all Yakama Treaty-fishing sites, including those on the
6 Columbia River. *Id.* at Ex. A § 8; *see also*, 25 C.F.R. § 247.19(b) (prohibiting
7 commercial fireworks sales at Columbia River Treaty Fishing Access sites). Like
8 the State, Yakama Nation only permits fireworks sales within a limited window of
9 days and hours surrounding the 4th of July holiday and New Year’s holiday. *Id.* at
10 §§ 9, G, and M. Sales of fireworks by Yakama Members on Yakama trust
11 properties are conducted in the context of Yakama law and regulation, and
12 applicable federal law, not in a legal vacuum.

13 Defendants want this Court to allow them to enforce State fireworks laws
14 against Yakama Members selling fireworks on Yakama trust properties. However,
15 Defendants have no civil/regulatory authority under PL-280. Nor have Defendants
16 demonstrated any exceptional public safety issues that would justify this Court’s
17 departure from the general rule that states have no jurisdiction to regulate the
18 property or conduct of Yakama Members in Indian Country absent Congress’s
19 express consent. Defendants may prefer the State’s fireworks regulations and their
20 own enforcement authorities to those of the Yakama Nation, but that is no legal
21 basis to permit them to enforce State fireworks law against Yakama Members in
22 Yakama Indian Country. To allow Defendants to do so would violate the Yakama
23 Nation’s sovereign and Treaty-reserved rights to govern its lands and its Members,
24 and conflict with established federal law as well as federal policies favoring Indian
25 self-governance and self-determination.

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2 **II. REQUEST FOR RELIEF**

3 Plaintiff respectfully requests that the Court grant its Motion for Summary
4 Judgment, and deny Defendants' apparent cross-Motion for Summary Judgment.
5

6 DATED this 8th Day of April, 2019.
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