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

14 CONFEDERATED TRIBES AND
15 BANDS OF THE YAKAMA
16 NATION,

17 Plaintiff,

18 v.

19 KLINKITAT COUNTY;
20 KLINKITAT COUNTY SHERIFF'S
21 OFFICE; BOB SONGER,
22 KLINKITAT COUNTY
23 DEPARTMENT OF THE
PROSECUTING ATTORNEY; and
DAVID QUESNEL

Defendants.

NO. 1:18-CV-03110-TOR

DEFENDANTS' RESPONSE TO
PLAINTIFF'S EX PARTE
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiff has moved for the issuance of an immediate temporary
restraining order and preliminary injunction enjoining Defendants, and all

1 persons acting on Defendants' behalf, from exercising jurisdiction over the
2 retail sale of fireworks by Yakama Members on Indian Trust lands.

3 Defendants ask the court not to grant the restraining order or injunction based
4 on the relevant law, and the serious risk to irreparable harm if such order is
5 granted. Most importantly the plaintiff is mistaken in believing the regulation
6 of prohibited fireworks in the State of Washington is purely civil in nature and
7 is not likely to succeed.
8

9 **II. LEGAL AUTHORITY**

10 A party seeking preliminary injunctive relief must demonstrate "that he
11 is likely to succeed on the merits, that he is likely to suffer irreparable harm in
12 the absence of preliminary relief, that the balance of equities tips in his favor,
13 and that an injunction is in the public interest." *Winter v. Natural Resources*
14 *Defense Council*, 555 U.S. 7, 20 (2008).
15

16 Irreparable harm is harm that the court could not remedy even if the
17 moving party ultimately prevailed on the merits of the action, such as
18 environmental harm or harm to intangible interests. *See Amoco Prod. Co. v.*
19 *Vill. of Gambell*, 480 U.S. 531, 545 (1987); *Nelson v. Nat'l Aeronautics &*
20 *Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008). "[E]conomic injury alone
21 does not support a finding of irreparable harm, because such injury can be
22 remedied by a damage award." *Rent-A-Center, Inc. v. Canyon Television &*
23

1 *Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (affirming grant of
 2 preliminary injunction). To show irreparable harm, the moving party must
 3 show more than inconvenience or speculative injury. *Younger v. Harris*, 401
 4 U.S. 37, 46 (1971); *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668,
 5 674-76 (9th Cir. 1988) (reversing grant of preliminary injunction). The
 6 moving party must present facts demonstrating immediate threatened injury.
 7 *Caribbean Marine Serv. Co.*, 844 F.2d at 674-76.

9 The Plaintiff's motion must fail because it cannot demonstrate a
 10 likelihood of prevailing on the merits. The Nation predicates claims of
 11 irreparable injury and harm on conclusory allegations and impermissible
 12 opinions and because the Plaintiff fails to address the significant financial and
 13 other harm it will face if the requested relief is not granted, the order should
 14 not be granted.

16 III. ARGUMENT

17 **1. PLAINTIFF IS UNLIKELY TO PREVAIL ON ITS CLAIM, 18 DEFENDANTS DO HAVE AUTHORITY TO EXERCISE 19 JURISDICTION AGAINST YAKAMA MEMBERS SELLING 20 FIREWORKS ON TRUST LAND IN KLINKITAT COUNTY.**

21 Plaintiff alleges they are likely to prevail on its claim that under
 22 Defendants do not have the authority to exercise civil regulatory jurisdiction
 23

1 against Yakama Members selling fireworks on Yakama Nation trust
2 allotments. This assertion is not supported by case law.

3
4 Plaintiff apparently does not dispute that the State has full criminal
5 jurisdiction over tribal members on off-reservation trust lands under Wash.
6 Rev. Code § 37.12.010. *See State v. Comenout*, 173 Wn.2d 235 (2011); *State*
7 *v. Cooper*, 130 Wn.2d 770 (1996). The exact issue presented here has been
8 litigated in Washington State courts. In *State v. Comenout*, No. 19355-8-II
9 (1997), rev. den. 85 Wn.2d 1012 (1997), cert. den. 523 U.S. 1005 (1998), the
10 defendant was selling fireworks without state or city licenses or permits on
11 Indian trust land, outside the formal boundaries of an established Indian
12 reservation with the court determining that the defendant did not have the
13 right to sell his goods absent the necessary licenses and permits.

14
15 Although not verbose, the opinion is directly on point. Specifically, the
16 court found that the “whether the state has jurisdiction under RCW 37.12.010
17 over particular Indian lands presents a question of state law.” As to the
18 jurisdiction over trust land, the court cited *State v. Sohapp*, 110 Wn.2d 907,
19 757 P.2d 509 (1988), finding that a reservation does not include all Indian
20 lands outside the formal boundaries of established reservations, and....
21 “reservation” does not include lands held in trust for Indians outside the
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1 formal boundaries of an established reservation. The court went on to find
 2 “[t]he state has jurisdiction over trust land outside the formal boundaries of
 3 the reservation” and therefore, the state court has jurisdiction to grant the
 4 declaratory and injunctive relief – criminal prosecution of the defendant for
 5 the sale of fireworks on trust lands.
 6

7 Where the defendant challenged the right of the state court to prosecute
 8 offenses, asserting protection under federal jurisdiction 18 U.S.C. sec. 1153,
 9 the court disagreed, finding that the offenses assigned to federal jurisdiction
 10 are specifically enumerated in 18 U.S.C. sec. 1153, and that the fireworks law
 11 was not within those offenses listed. Squarely on point, the court found
 12 “[b]ecause violation of a state’s fireworks law is not one of sec. 1153’s
 13 enumerated offenses, sec. 1153 does not operate here to preempt state
 14 jurisdiction.”¹
 15

16
 17 Multiple provisions of RCW 70.77 classify various activities related to
 18 fireworks as crimes punishable by incarceration. See RCW 70.77.485
 19

20 ¹ The issue in *Comenout* is not the only time the Washington Courts have
 21 been asked to consider criminal versus regulatory. In *State v. Yallup*, 160 Wn.
 22 App. 500, 248 P.3d 1095 (2011), the defendant argued that because driving is
 23 generally permitted, implied consent statute is part of a regularity scheme and
 not enforceable against Indians on tribal ground. The court concluded that
 implied consent state was part of a criminal prohibition against impaired
 driving under RCW 37.12.010, and that “Public Law No. 280 did not bar the
 criminal prosecution of” the defendant in the matter.

1 (classifying as misdemeanor or gross misdemeanor the possession of
2 prohibited fireworks depending on the amount of the fireworks in question);
3 70.77.488 (making a gross misdemeanor to use or discharge fireworks in a
4 reckless manner), RCW 70.77/515 (it is a gross misdemeanor to sell fireworks
5 with license and permit). In fact, violations of the fireworks statute are
6 generally to be treated as misdemeanors, see RCW 70.77.540. In fact, the
7 granting to the Washington State Patrol of police powers to enforce the
8 provisions of RCW 70.77 does not prevent local government agencies having
9 general law enforcement powers “from enforcing this chapter within the
10 jurisdiction of the agency and city, county, or local government.” RCW
11 70.77.250(5).
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14 The issues in *State v. Comenout* were also addressed prior to the court’s
15 ruling by the United States Department of Interior, with the Department
16 writing “we believe there is a good chance that a court would find that the
17 State of Washington could enforce at least some of its laws concerning
18 fireworks against activity conducted on the [trust property of Defendant
19 Comenout].” The memorandum, dated June 15, 1993, and titled
20 “Memorandum to the Assistant Area Director of Program Services” provides
21 a lengthy analysis of the states right to enforce its laws, consistent with that
22 done by the court several years later. Specifically, the Department cited that
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1 pursuant to Public Law 280, Washington has jurisdiction over off-reservation
2 Indian Country.² Next, the Department analyzed whether the sale of fireworks
3 contrary to Washington law is criminal/prohibitory or civil/regulatory,
4 understanding that a civil/regulatory finding would require further analysis to
5 determine jurisdiction under Public Law 280. Looking to federal case law, the
6 Department concluded that based on the precedent “it would be very difficult
7 to argue that the fireworks provisions were merely civil/regulatory in nature.”
8

9 While numerous cases supported this position, none is more telling that
10 the case of *United States v. Marcyse*, 557 F.2d 1361, 1364 (9th Cir. 1977),
11 where the defendant was prosecuted for violation of Washington State
12 firework laws, and the argument that the statute was not meant to be punitive
13 or that the penal provisions of the state regulatory system did not apply was
14 rejected. In its ruling, the court determined “*Washington’s fireworks law is*
15 *prohibitory rather than a regulatory law*” and that the “intent is to prohibit the
16 general possession and/or sale of dangerous fireworks and is not primarily a
17 licensing law.” *Id.* at 1364.
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22 ² Defendants recognize that some state criminal and civil jurisdiction under
23 Public Law 280 has been retroceded via Governor’s Proclamation 14-01
(January 17, 2014), but such retrocession does not impact the issue presented
herein because retrocession applies only within the boundaries of the Yakama
Reservation. *See State v. Zack*, 2 Wn. App. 65 (2018).

1 Plaintiff has not met its burden of showing that it is likely to prevail on
2 its claim. Rather, for over thirty years there has been a position taken by the
3 courts that the sale of fireworks on trust property off the reservation is
4 prohibitory and can be prosecuted in state courts. Defendant is likely to
5 prevail in this matter.
6

7 **2. PLAINTIFF HAS NOT PRESENTED EVIDENCE OF**
8 **IRREPREABLE HARM.**

9 Plaintiff asserts that it is requesting this immediate relief based on the
10 irreparable harm it will face. First, the actions of the Defendants have in no
11 way threatened Plaintiff, the Yakama Nation, with irreparable harm. Rather,
12 the actions of Defendants, to enforce a law against individuals who have been
13 granted permits by the tribe, is limited to the potential impact of these few
14 individuals who continue to sell fireworks contrary to the state law while on
15 trust land. No threat exist to the Yakama Nation itself.
16

17 The law is clear that “economic injury alone does not support a finding
18 of irreparable harm, because such injury can be remedied by a damage
19 award.” *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*,
20 944 F.2d 597, 603 (9th Cir. 1991). In this case the Plaintiff has not shown
21 more than a limited financial impact that will result if the Defendants enforce
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1 the law. The restraining order and injunction should be denied on this basis
2 alone, with the matter being timely litigated properly before the court.

3 **3. DEFENDANTS ARE LIKELY TO SUFFER IRREPREABLE HARM**
4 **IF THE REQUESTED RELIEF IS GRANTED.**

5 Plaintiff asserts there will be irreparable harm if the requested relief is
6 not granted. The risk of harm to Klickitat County and the general public
7 outweighs the harm alleged by Plaintiff. While Plaintiff's potential harm is
8 limited to economic impact to a few individuals, the threat posed by allowing
9 the sale of fireworks in Klickitat County, including fireworks that are illegal
10 in the State of Washington, is very real. See Declaration of Bob Songer. In
11 2017 a single firework destroyed over 75 square miles of the Columbia River
12 Gorge, devastating the natural habitat and severally impacting the livelihoods
13 of the thousands who call the region home, including Yakama tribal members.
14 Recovery is ongoing, and just this month the fire reignited, setting off ongoing
15 concerns about further devastation. While Plaintiff are concerned about
16 financial impact which would be limited in scope, the repercussions from
17 granting the requested relief could impact tens of thousands of lives. With
18 dozens of fires already causing devastation in the pacific states and the low
19 rainfall this past year, the potential threat imposed by these fireworks is not an
20 abstract concept, but a reality.
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1 **IV. CONCLUSION**

2 For the reasons set forth above Defendants ask the court not to granted
3 the temporary restraining order and injunction requested by Plaintiffs.

4 Respectfully submitted this 28th day of June, 2018.
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6
7 /s/ David R. Quesnel

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