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

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

v Plaintiff,

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 EX PARTE MOTION
FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT

Expedited Treatment Requested: Relief
Needed Immediately

Date: 6/27/18

Time: TBD

Court Room: TBD

Judge: Chief Judge Thomas O. Rice

Pursuant to Fed. R. Civ. P. 65, Plaintiff, Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”), respectfully moves the Court to immediately issue a temporary restraining order and a preliminary injunction enjoining Defendants, and all persons acting on Defendants’ behalf, from

PLAINTIFF'S EX PARTE MOTION FOR
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION; MEMORANDUM OF
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1 exercising civil regulatory jurisdiction over the retail sale of fireworks by Yakama
 2 Members in Indian Country.

3 As detailed below and in the accompanying Declaration of Ethan Jones, a
 4 temporary restraining order is necessary to ensure Yakama Nation will not suffer
 5 certain irreparable harm if injunctive relief is not granted, including trespasses
 6 against its civil regulatory jurisdiction over Yakama Members' actions in Indian
 7 Country exclusive of Defendants; impairment of Yakama Members rights under
 8 Yakama law to sell fireworks pursuant to a Yakama Nation-issued fireworks
 9 permit; and interference with Yakama Nation's right to make its own laws and
 10 live by them.

11 As further detailed below, preliminary injunctive relief is also appropriate
 12 because Yakama Nation is likely to prevail on its claim that Defendants do not
 13 have authority to exercise civil regulatory jurisdiction to apply or enforce Wash.
 14 Rev. Code 70.77 against Yakama Members selling fireworks in accordance with
 15 Yakama law in Indian Country. This is because the subject properties are trust
 16 allotments and therefore Yakama Member's actions upon them fall within the
 17 Yakama Nation's civil regulatory jurisdiction.

18 Accordingly, Yakama Nation requests expedited treatment of this Motion
 19 without written or oral notice to the adverse party and a decision by the Court
 20 prior to June 28, 2018 in order to preserve the status quo and avoid irreparable
 21 harm pending adjudication of this case. A proposed order is attached.

22 INTRODUCTION

23 As alleged in the Complaint filed in this matter on June 27, 2018 (Docket
 24 No. 1), this action concerns Defendants' threat that within twenty-four hours of
 25 June 26, 2018, Defendants intend to take ultra vires enforcement action under
 26

1 Wash. Rev. Code 70.77 et seq. against Yakama Members selling fireworks in
 2 Indian Country in accordance with Yakama Nation-issued firework permits,
 3 which violates the Yakama Nation's inherent sovereign and Treaty-reserved
 4 rights. Declaration of Ethan Jones, ¶¶ 4-5.

5 Specifically, Yakama Nation challenges Defendants' intent to:

6 "commence vigorous enforcement actions against [Yakama
 7 Members]. You will be arrested and charged with crimes. We
 8 will seize your inventory and will pursue forfeiture of all seized
 9 items. Accordingly, you must cease and desist immediately
 from fireworks transactions in violation of state law."

10 *Id.* at ¶ 7.

12 FACTUAL BACKGROUND

13 By executing the Treaty with the Yakamas of June 9, 1855, 12 Stat. 951
 14 (1859) (hereafter the "Treaty of 1855"), the Yakama Nation reserved its inherent
 15 sovereign jurisdiction over its enrolled Members and its lands both within and
 16 beyond the exterior boundaries of the Yakama Reservation, including off-
 17 Reservation trust allotments ("Yakama Trust Allotments") held by the United
 18 States on behalf of Yakama Nation and Yakama Members.

19 Yakama Nation exercises its civil regulatory jurisdiction by maintaining
 20 and enforcing Yakama fireworks laws, regulations, and a permitting regime that
 21 regulate Yakama Members' retail sale of fireworks at specified locations both
 22 within the Yakama Reservation and on Yakama Trust Allotments. *Id.* at ¶ 2.
 23 Consistent with such regulatory jurisdiction, and in accordance with Yakama law,
 24 the Yakama Nation issued permits to Yakama Members authorizing the retail sale
 25 of fireworks at specified locations both within the Yakama Reservation and on
 26 Yakama Trust Allotments, which are valid from June 11, 2018 through July 5,

1 2018. *Id.* at ¶ 3.

2 The United States has not authorized Defendants to exercise civil
 3 regulatory jurisdiction over Yakama Members on Yakama Trust Allotments.
 4 However, despite lacking such authorization, on June 26, 2018, Defendant Sheriff
 5 Bob Songer issued cease and desist notices to Yakama Members selling fireworks
 6 on Yakama Trust Allotments, which cited Wash. Rev. Code 70.77 et seq. as the
 7 basis for authority, and threatened criminal arrest and the seizure of fireworks. *Id.*
 8 at ¶¶ 4, 7.

9 On the morning of June 27, 2018, Yakama Nation's legal counsel
 10 unsuccessfully attempted to contact Defendant Songer by phone call to the
 11 Klickitat County Sheriff's Office to request that Defendant Songer not take ultra
 12 vires enforcement action against Yakama Members on Yakama Trust Allotments.
 13 *Id.* at ¶ 5. Following the phone call to Defendant Songer, Yakama Nation's legal
 14 counsel received a phone call from Defendant Prosecuting Attorney David
 15 Quesnel who refused Yakama Nation legal counsel's request for an immediate in
 16 person meeting in Goldendale, Washington, and stated that Defendants intend to
 17 continue its enforcement efforts against Yakama Members selling fireworks on
 18 Yakama Trust Allotments despite the Yakama Nation's objections. *Id.* at ¶ 5.

19 On June 27, 2018, Yakama Nation legal counsel transmitted a letter to
 20 Defendant Quesnel demanding that he immediately work with Defendant Songer
 21 to stop any and all harassment of Yakama Members engaged in the sale of
 22 fireworks on Yakama Trust Allotments. *Id.* at ¶ 6

23 ARGUMENT

24 Defendants have taken significant action that directly and illegally
 25 infringes upon the Yakama Nation's civil regulatory jurisdiction over Yakama
 26

1 Members in Indian Country selling fireworks on trust land in accordance with
 2 Yakama Nation-issued firework permits. Defendants threats to arrest Yakama
 3 Members and seize Yakama Member-owned personal property in violation of
 4 Yakama Nation's inherent sovereign and Treaty-reserved rights and jurisdiction,
 5 which pose an imminent threat of harm to Yakama Nation and its Members.
 6 Yakama Nation requests that this Court issue a temporary restraining and
 7 preliminary injunction order pursuant to Fed. R. Civ. P. 65(b), ordering
 8 Defendants to refrain from (1) taking any further action infringing upon Yakama
 9 Nation's sovereignty, or (2) asserting jurisdiction over or prosecuting any matter
 10 concerning the activities on Yakama Trust Allotments described herein.

11 **A. Standard for Temporary Restraining Order**

12 Temporary restraining orders are designed to preserve the status quo
 13 pending the ultimate outcome of litigation. They are governed by Fed. R. Civ. P.
 14 65(b), which requires the moving party to show that "it clearly appears from
 15 specific facts shown by affidavit or by the verified complaint that immediate and
 16 irreparable injury, loss, or damage will result to the applicant before the adverse
 17 party . . . can be heard in opposition . . .". Under Rule 65(b) and Ninth Circuit
 18 case law, a plaintiff may obtain a temporary restraining order only where he or
 19 she can "*demonstrate* immediate threatened injury." *See, e.g., Caribbean Marine*
 20 *Servs. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis in original).

21 The standards for a restraining order are basically the same as for a
 22 preliminary injunction. While courts are given considerable discretion in deciding
 23 whether a preliminary injunction should enter, and injunctive relief is not
 24 obtained as a matter of right, it is also considered to be an extraordinary remedy
 25 that should not be granted unless the movant, by a clear showing, carries the
 26

1 burden of persuasion. *See Sampson v. Murray*, 415 U.S. 61 (1974); *Brotherhood*
 2 *of Locomotive Engineers v. Missouri-Kansas-Texas R. Co.*, 363 U.S. 528 (1960);
 3 and *Stanley v. Univ. of Southern California*, 13 F.3d 1313 (9th Cir. 1994).

4 In the Ninth Circuit, a party seeking preliminary injunctive relief must
 5 meet one of two tests. Under the first,

6 a court may issue a preliminary injunction if it finds that: (1)
 7 the [moving party] will suffer irreparable harm if injunctive
 8 relief is not granted, (2) the [moving party] will probably
 9 prevail on the merits, (3) in balancing the equities, the [non-
 10 moving] party will not be harmed more than [the moving party]
 11 is helped by the injunction, and (4) granting the injunction is in
 12 the public interest.

13 *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 674-675 (9th Cir. 1984) (internal
 14 quotations and citations omitted); and *Stanley v. Univ. of Southern California*, 13
 15 F.3d 1313, 1319 (9th Cir. 1994). Under the second, the movant must show “either
 16 (1) a combination of probable success on the merits and the possibility of
 17 irreparable harm, or (2) the existence of serious questions going to the merits, the
 18 balance of hardships tipping sharply in its favor, and at least a fair chance of
 19 success on the merits.” *Miller v. California Pacific Medical Center*, 19 F.3d 449,
 20 456 (9th Cir. 1994) (*en banc*). This alternative test is on a sliding scale: the
 21 greater the likelihood of success, the less risk of harm must be shown, and vice
 22 versa. *Id.*

23 B. Yakama Nation Is Likely to Prevail on the Merits.

24 Yakama Nation is likely to prevail on the merits in this case because
 25 Defendants lack the civil regulatory authority that they have tried to claim and
 26 enforce over Yakama Members selling fireworks on Yakama Trust Allotments

1 within Yakama Nation's territorial jurisdiction.

2 Federal law recognizes that Indian tribes have plenary and exclusive
 3 power over their members and their territory, subject only to limitations
 4 imposed by federal law. *See e.g., Worcester v. Georgia*, 31 U.S. 515, 555
 5 (1832); *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976). Yakama Nation's territory
 6 includes Yakama Trust Allotments held in trust by the United States for
 7 Yakama Nation and Yakama Members, which are located outside the exterior
 8 boundaries of the Yakama Reservation. *See* 18 U.S.C. § 1151 ("Indian
 9 Country' . . . [includes] all Indian allotments, the Indian titles to which have
 10 not been extinguished . . ."). Thus, Yakama Nation has exclusive authority to
 11 regulate fireworks sales by Yakama Members on Yakama Trust Allotments
 12 absent applicable federal law.

13 Although Public Law 83-280, 67 Stat. 588 (1953) ("PL-280") and the
 14 federal Assimilative Crimes Act ("ACA"), 18 U.S.C. §§ 13, 1152, each
 15 provide a limited basis for Washington State to enforce *criminal or prohibitory*
 16 state laws against Indians in Indian Country, neither of these laws provide a
 17 basis for Defendants to assert jurisdiction over Yakama Member fireworks
 18 sales on Yakama Trust Allotments. Critically, neither PL-280 nor the ACA
 19 give States any *civil regulatory* authority in Indian Country. *See e.g.*
 20 *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987)
 21 ("when a State seeks to enforce a law within an Indian reservation under the
 22 authority of Pub. L. 280, it must be determined whether the law is criminal in
 23 nature, and thus fully applicable to the reservation. . . , or civil in nature, and
 24 applicable only as it may be relevant to private civil litigation in state court");
 25 *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977) (noting the
 26

1 ACA's purpose was to fill in gaps in federal criminal laws, and finding
 2 dispositive the criminal/prohibitory nature of the state laws being applied). As
 3 described below, Washington's current fireworks laws are expressly intended
 4 to be civil/regulatory, and thus may not be imposed on Yakama Members.

5 The Court in *Marcyes* held that Washington State's then-current
 6 fireworks regulations were criminal/prohibitory and applied them to Indians
 7 acting within a tribal reservation via the ACA. *Id.* However, Washington
 8 subsequently changed its fireworks laws in 1995 and added a new section
 9 expressly stating its legislative intent that Washington fireworks laws be
 10 considered civil/regulatory and not criminal/prohibitory. *See* 1995 Washington
 11 SB 5997.

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

16 . . . [F]ireworks, when purchased and used in compliance with the
 17 laws of the state of Washington, are legal . . . [and] [t]he legislature
 18 intends [Washington State's fireworks regulations to be] regulatory
 19 only, and not prohibitory.

20 Nor is the regulatory nature of Washington's fireworks laws undermined
 21 by the inclusion of certain criminal penalties within such laws. *See e.g.*
 22 *California v. Cabazon*, 480 U.S. 202, 211 (the fact that an otherwise
 23 regulatory law is enforceable by criminal as well as civil means does not convert
 24 it into a criminal law within the meaning of PL-280); *Johnson v. Yellow Cab*
 25 *Transit Co.*, 321 U.S. 383, n.8 (1944), (indicating that Congress did not intend to

1 include the penal provisions of a state regulatory system within the ACA).
 2 Because Washington's fireworks laws are regulatory in nature, Defendants lack
 3 federal authorization to impose them on Yakama Members operating firework
 4 stands on lands within Yakama Nation's jurisdiction.

5 **C. The Yakama Nation Will Suffer Immediate Irreparable Harm Absent
 6 Injunctive Relief.**

7 Yakama Nation and Yakama Members face more than the "possibility of
 8 irreparable harm." *Winter v. Natural Resources Defense Council, Inc*, 555 U.S. 7,
 9 22 (2008). Rather, Yakama Nation is able to demonstrate the likelihood of
 10 immediate, concrete, irreparable harm absent this Court's intervention.
 11 Defendants' threat to exercise ultra vires civil regulatory jurisdiction under Wash.
 12 Rev. Code 70.77 over Yakama Members on Yakama Trust allotments violate the
 13 rights reserved to the Yakama Nation in the Treaty of 1855, and threaten the
 14 political integrity of the Yakama Nation.

15 Exercise of ultra vires state jurisdiction in Indian Country directly harms
 16 the Yakama Nation by undermining the Yakama Nation's sovereign authority to
 17 govern Yakama Members. *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("There
 18 can be no doubt that to allow the exercise of state jurisdiction here would
 19 undermine the authority of the tribal courts over Reservation affairs and hence
 20 would infringe on the right of the Indians to govern themselves.").

21 If injunctive relief is not granted, the immediate irreparable harm to
 22 Yakama Nation will include illegal trespasses against its civil regulatory
 23 jurisdiction over Yakama Members' actions in Indian Country exclusive of
 24 Defendants; impairment of Yakama Members rights under Yakama law pursuant
 25 to a valid Yakama Nation fireworks permit; and interference with Yakama

1 Nation's right to make its own laws and live by them.

2 **D. In Balancing Equities, the Public Interest Favors Yakama Nation.**

3 The public interest is served when governments and governmental actors
4 act only within the scope of their jurisdiction. As such, the balance of hardships
5 tips sharply in Yakama Nation's favor given Defendants' threat to undermine the
6 sovereignty of the Yakama Nation through ultra vires civil regulatory action upon
7 the lands, people, and actions over which Yakama Nation has jurisdiction.

8 **E. Posting a Bond Should be Waived or Set at a Nominal Sum.**

9 Fed. R. Civ. P. 65 references the posting of a security upon issuance of a
10 temporary restraining order; however, the Court has authority to dispense with
11 the security or to require mere nominal security. *People ex. rel. Van de Kamp v.*
12 *Tahoe Regional Planning Agency*, 766 F.2d 1316, 1325-26 (9th Cir. 1985). "The
13 court has discretion to dispense with the security requirement, or to request mere
14 nominal security, where requiring security would effectively deny access to
15 judicial review." *Id.* at 1325. Here, Yakama Nation is attempting to protect its
16 Treaty and its sovereignty. A bond would come directly from Tribal resources
17 needed by Yakama Nation to provide governmental services. No bond should be
18 required.

19 **CONCLUSION**

20 Yakama Nation requests that the Court grant its motion for a temporary
21 restraining order enjoining Defendants, and all persons acting on Defendants'
22 behalf, from unlawfully exercising civil regulatory jurisdiction over the retail sale
23 of fireworks by Yakama Members in Indian Country.

24
25 DATED this 27th day of June, 2018.
26

s/Ethan Jones
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Attorneys for the Confederated Tribes and Bands of the Yakama Nation

PLAINTIFF'S EX PARTE MOTION FOR
TEMPORARY RESTRAINING ORDER AND
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1 CERTIFICATE OF SERVICE

2 I, Ethan Jones, say:

3 1. I am now, and at all times herein mentioned, a citizen of the United
4 States, a resident of the State of Washington, over the age of 18 years, not a party
5 to or interested in the above-entitled action, and competent to be a witness herein.

6 2. On June 27, 2018, I electronically filed this document and the
7 attached Declaration of Ethan Jones in Support of Plaintiff's Motion for Temporary
8 Restraining Order and Preliminary Injunction, and [Proposed] Order Granting
9 Plaintiff's Ex Parte Motion for Temporary Restraining Order and Preliminary
10 Injunction, and sent the same via email to:

11 **David Quesnel, Prosecuting Attorney**

12 Klickitat County Department of the Prosecuting Attorney
13 205 S. Columbus Ave., Room 106
14 Goldendale, WA 98620
15 Office: (509) 773-5838
16 davidq@klickitatcounty.org

17 DATED this 27th day of June, 2018.

18 s/Ethan Jones
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