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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 THE CONFEDERATED TRIBES
8 AND BANDS OF THE YAKAMA
9 NATION, a sovereign federally
10 recognized Native Nation,

11 Plaintiff,

12 v.

13 KLINKITAT COUNTY, a political
14 subdivision of the State of
15 Washington; KLINKITAT COUNTY
16 SHERIFF'S OFFICE, an agency of
17 Klickitat County; BOB SONGER, in
18 his official capacity; KLINKITAT
19 COUNTY DEPARTMENT OF THE
20 PROSECUTING ATTORNEY, an
agency of Klickitat County; and
DAVID QUESNEL, in his official
capacity,

Defendants.

NO. 1:18-CV-3110-TOR

ORDER GRANTING PLAINTIFF'S
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
DENYING MOTION FOR
PRELIMINARY INJUNCTION

19 BEFORE THE COURT is Plaintiff's Motion for Temporary Restraining
20 Order and Preliminary Injunction. ECF No. 3. This matter was heard with oral

ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY
RESTRAINING ORDER AND DENYING MOTION FOR PRELIMINARY
INJUNCTION ~ 1

1 argument on June 28, 2018. The Court has reviewed the record and files therein,
2 and is fully informed. For the reasons discussed below, Plaintiff's Motion for
3 Temporary Restraining Order is **GRANTED** and Motion for Preliminary
4 Injunction is **DENIED**.

5 **BACKGROUND**

6 On June 27, 2018, Plaintiff the Confederated Tribes and Bands of the
7 Yakama Nation filed a Complaint against Defendants Klickitat County, Klickitat
8 County Sherriff's Office, Klickitat's County Sheriff Bob Songer, Klickitat County
9 Department of the Prosecuting Attorney, and Prosecuting Attorney David Quesnel.
10 ECF No. 1. Plaintiff alleges a violation of the Treaty of 1855, requesting
11 declaratory and injunctive relief. *Id.* at ¶¶ 6-7.

12 On June 27, 2018, Plaintiff filed the instant motion for a temporary
13 restraining order ("TRO") and preliminary injunction. ECF No. 3. On June 28,
14 2018, Defendant David Quesnel filed a Notice of Appearance on behalf of all
15 Defendants and Defendants filed a response. ECF Nos. 5; 6; 8.

16 **FACTS**

17 The following facts are drawn from Plaintiff's Complaint and are accepted
18 as true for the purposes of the instant motion. Under the Treaty of 1855, the
19 Yakama Nation reserved its inherent sovereign jurisdiction over its enrolled
20 Members and its land both within and beyond the exterior boundaries of the

1 Yakama Reservation, including off-Reservation trust allotments (“Yakama Trust
2 Allotments”) held by the United States on behalf of Yakama Nation and Yakama
3 Members. ECF No. 1 at ¶¶ 5.1-5.2. The Yakama Nation exercises civil regulatory
4 jurisdiction over its Members’ actions and over actions taken on Yakama Trust
5 Allotments. *Id.* at ¶ 5.3.

6 In regards to fireworks, Yakama Nation has adopted and enforces Yakama
7 laws, regulations, and a permitting regime to regulate Yakama Members’ retail sale
8 of fireworks within the Yakama Reservation and on Yakama Trust Allotments. *Id.*
9 at ¶ 5.4. The Yakama Nation issued firework permits to certain Yakama Members
10 authorizing the retail sale of fireworks at specific locations within the Yakama
11 Reservation and Yakama Trust Allotments. *Id.* at ¶ 5.5. The permits are valid
12 from June 11, 2018 through July 5, 2018. *Id.*

13 On June 26, 2018, Defendant Sheriff Bob Songer issued “cease and desist”
14 notices to Yakama Members selling fireworks on Yakama Trust Allotments, citing
15 RCW 70.77 *et seq.* *Id.* at ¶ 5.6. On the morning of June 27, 2018, Yakama
16 Nation’s legal counsel unsuccessfully attempted to contact Defendant Songer by
17 calling the Klickitat County Sheriff’s Office to request that he not take improper
18 *ultra vires* regulatory or enforcement action against Yakama Members selling
19 fireworks on Yakama Trust Allotments. *Id.* at ¶ 5.9. Yakama Nation then received
20 a phone call from Defendant Prosecuting Attorney David Quesnel who refused

1 Yakama Nation legal counsel's request for an immediate in person meeting in
2 Goldendale, Washington. *Id.* at ¶ 5.10. Plaintiff alleges that Defendant Quesnel
3 stated that the County intends to continue its regulatory and enforcement efforts
4 against Yakama Members selling fireworks on Yakama Trust Allotments despite
5 the Yakama Nation's objections. *Id.*

6 On June 27, 2018, Yakama Nation's legal counsel transmitted a letter to
7 Defendant Quesnel demanding that he immediately work with Defendant Songer
8 to stop any and all harassment of Yakama Members engaged in the lawful sale of
9 fireworks on Yakama Trust Allotments. *Id.* at ¶ 5.11.

10 Plaintiff asserts that Washington's Fireworks Regulations include an express
11 statement of legislative intent that the regulations are intended to be "regulatory
12 only, and not prohibitory." ECF No. 1. at ¶ 5.7; RCW § 70.77.11. Plaintiff argues
13 that the United States has not authorized Defendants to exercise civil regulatory
14 jurisdiction over Yakama Members on Yakama Trust Allotments. ECF No. 1 at ¶
15 5.8. Plaintiff alleges that Defendants threaten to arrest Yakama Members and seize
16 Yakama Member-owned personal property in violation of the Yakama Nation's
17 inherent sovereign and Treaty-reserved rights and jurisdiction, posing an imminent
18 threat of harm to the Yakama Nation and its Members. *Id.* at ¶ 5.12.

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DISCUSSION

Pursuant to Federal Rule of Civil Procedure 65, a district court may grant a TRO in order to prevent “immediate and irreparable injury.” Fed. R. Civ. P. 65(b)(1)(A). A court may (1) “issue a preliminary injunction only on notice to the adverse party” or (2) “issue a temporary restraining order without written or oral notice to the adverse party or its attorney.” Fed. R. Civ. P. 65(a)-(b). The analysis for granting a temporary restraining order is “substantially identical” to that for a preliminary injunction. *Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). It “is an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain this relief, a plaintiff must demonstrate: (1) likelihood of success on the merits, (2) a likelihood of irreparable injury in the absence of preliminary relief, (3) that a balancing of the hardships weighs in plaintiff’s favor, and (4) that a preliminary injunction will advance the public interest. *Winter*, 555 U.S. at 20; *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012).

To demonstrate that a plaintiff is entitled to a TRO, plaintiff must satisfy each element. Yet, the Ninth Circuit uses a “sliding scale” under which the injunction may be issued if there are serious questions going to the merits and the balance of hardships tips sharply in the plaintiff’s favor, along with two other *Winter* factors. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.

2011) (“[A] stronger showing of one element may offset a weaker showing of another.”); *see also Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (“We have also articulated an alternate formulation of the *Winter* test, under which serious 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.” (quotation marks and citation omitted)).

A. Likelihood of Success on the Merits

Plaintiff must show that there are “serious questions going to the merits” of its claim. *Cottrell*, 632 F.3d at 1131. Plaintiff must also show that it is likely to succeed on those questions of merit. *Farris*, 677 F.3d at 865. Here, Plaintiff contends that it is likely to prevail on the merits because Defendants lack the civil regulatory authority they have tried to claim and enforce over Yakama Members selling fireworks on Yakama Trust Allotments. ECF No. 3 at 6-7. Plaintiff asserts that federal law recognizes that Indian tribes have plenary and exclusive power over their members and their territory, subject only to limitations imposed by federal law. *Id.* at 7. Plaintiff states that the Yakama Nation’s territory includes Yakama Trust Allotments held in trust by the United States for the Yakama Nations and its Members, which are located outside the exterior boundaries of the Yakama Reservation. ECF No. 3 at 7; 18 U.S.C. § 1151 (“Indian Country”

1 includes “all Indian allotments, the Indian titles to which have not been
2 extinguished”).

3 Public Law 280 and the Assimilative Crimes Act (“ACA”) provide
4 Washington State with a limited basis to enforce criminal or prohibitory state laws
5 against Indians in Indian Country. ECF No. 3 at 7; Pub. L. No. 83-280, 67 Stat.
6 588 (1953); Assimilative Crimes Act, 18 U.S.C. §§ 13, 1152. Yet, Plaintiff argues
7 that neither of these laws provide a basis for Defendants to assert jurisdiction over
8 firework sales because the laws do not give states any civil regulatory authority in
9 Indian Country. ECF No. 3 at 7.

10 In 1995, Washington changed its fireworks laws, declaring “that fireworks,
11 when purchased and used in compliance with the laws of the state of Washington,
12 are legal. The legislature intends that this chapter is regulatory only, and not
13 prohibitory.” RCW § 70.77.111. Defendants cite to *United States v. Marcyse*,
14 which found that Washington’s fireworks law is prohibitory rather than regulatory.
15 ECF No. 8 at 7; *United States v. Marcyse*, 557 F.2d 1361, 1364 (9th Cir. 1977).
16 Yet, this case was decided prior to the 1995 amendment, which Defendants
17 conceded at oral argument. Additionally, the Ninth Circuit distinguished *Marcyse*
18 and found speeding was decriminalized in Washington, making it regulatory and
19 not subject to enforcement by the state on roads within the reservation.

1 *Confederated Tribes of Colville Reservation v. State of Wash.*, 938 F.2d 146, 149
2 (9th Cir. 1991).

3 Similar to *Colville Reservation*, this Court determines that Washington
4 explicitly declared that its fireworks laws are only regulatory, not prohibitory.
5 While the law may carry some criminal sanctions, this does not necessarily convert
6 a regulatory law into a criminal law within the meaning of Public Law 280. *See*
7 *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211 (1987). The
8 Court then finds that Washington's fireworks laws are merely regulatory and
9 Defendant does not have criminal jurisdiction pursuant to Public Law 280 or the
10 ACA.

11 Additionally, Defendants contend they still have jurisdiction over trust land
12 not within the reservation. Defendants cite to *State v. Comenout*, which
13 determined that allotted or trust lands are not excluded from full nonconsensual
14 state jurisdiction unless they are within an established Indian reservation. *State v.*
15 *Comenout*, 173 Wash.2d 235, 239 (2011) (citing RCW 37.12.010). The Court
16 finds that while Washington may distinguish this issue, federal law includes
17 allotments off the reservation as Indian Country. *See* 18 U.S.C. § 1151(c). The
18 Eighth Circuit found this federal statute self-explanatory and determined that
19 allotments are Indian Country whether or not they are located within a reservation.
20 *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022 (8th Cir. 1999). The Court

1 determines that trust property and trust allotments outside of the reservation are
2 Indian Country and not subject to the state's civil regulatory jurisdiction.

3 Plaintiff is then likely to succeed on the merits because Defendants likely do
4 not have jurisdiction to enforce Washington's fireworks regulations in Indian
5 Country, as the legislature makes clear that it is not a criminal or prohibitory state
6 law.

7 **B. Irreparable Harm**

8 A plaintiff seeking injunctive relief must "demonstrate that irreparable injury
9 is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in
10 original). "Issuing a preliminary injunction based only on a possibility of
11 irreparable harm is inconsistent with [the Supreme Court's] characterization of
12 injunctive relief as an extraordinary remedy that may only be awarded upon a clear
13 showing that the plaintiff is entitled to such relief." *Id.*

14 Here, Plaintiff insists that Yakama Nation and Yakama Members will suffer
15 immediate, concrete, and irreparable harm absent this Court's intervention. ECF
16 No. 3 at 9. Plaintiff alleges that Defendants' threat to exercise civil regulatory
17 jurisdiction violates the rights reserved to the Yakama Nation in the Treaty of
18 1855, threatening the political integrity of the Yakama Nation. *Id.* Plaintiff argues
19 that the harm includes illegal trespass against its civil regulatory jurisdiction,
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1 impairment of Yakama Members' rights under Yakama law, and interference with
2 Yakama Nation's right to make its own laws and live by them. *Id.* at 9-10.

3 Defendants argue that Plaintiff merely asserts economic harm, but the harm
4 to Defendants is very real considering a past devastating wildfire caused by a
5 firework. ECF No. 8 at 9. The Court disagrees and finds that Plaintiff's harm is
6 not simply economic. The Court finds that Plaintiff establishes that it will suffer
7 harm absent injunctive relief. Without an injunction, the Yakama Nation would
8 not be able to enforce its own civil regulatory authority over its Members within
9 Indian Country. When accepting the Complaint as true, Defendants have also
10 threatened to arrest Yakama Members and seize their property, potentially
11 violating the Yakama Nation's sovereignty. *See* ECF No. 1 at ¶ 5.12. As
12 discussed at oral argument, the Court emphasizes that three out of five fireworks
13 stands did not open today for fear of prosecution. The Court finds that economic
14 damages cannot easily remedy a defense of sovereignty and fear of prosecution.
15 The Court also notes that there is no suggestion that Defendants are subject to an
16 award of damages were Plaintiff to succeed in this case, as Defendants may have
17 sovereign immunity from money damages. Accordingly, the Court then
18 determines that Plaintiff will suffer irreparable harm in the absence of an
19 injunction and Defendants may not be amenable to pay money damages.

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C. Balance of Hardships and Public Interest

“In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24 (quotation marks and citation omitted). The Court must balance the hardships to the parties should the *status quo* be preserved against the hardships to the parties should Plaintiff’s requested relief be granted. “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Id.* (quotation omitted). “The public interest inquiry primarily addresses impact on non-parties rather than parties.” *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (citation omitted). Regardless, the Court will not grant an injunction unless the public interests in favor of granting an injunction “outweigh other public interests that cut in favor of *not* issuing the injunction.” *Cottrell*, 632 F.3d at 1138 (emphasis in original).

Here, Plaintiff contends that in balancing the equities, the public interest is served when governments and government actors act only within the scope of their jurisdiction. ECF No. 3 at 10. Plaintiff argues that the balance of hardships “tips sharply in Yakama Nation’s favor given Defendants’ threat to undermine the sovereignty of the Yakama Nation.” *Id.*

1 The Court finds that the *status quo* should be preserved to allow the Yakama
2 Nation to continue asserting its own civil regulatory authority over its Members
3 within Indian Country. Any potential burden to Defendants is minimal, as they
4 may not be able to regulate the Yakama Nation's selling of fireworks. Yet, these
5 sales are already being regulated by the Yakama Nation and fireworks are not
6 illegal in Washington State. Defendants' limited interest in regulating the sales
7 themselves is not a sufficient burden to justify potentially infringing on the
8 Yakama Nation's sovereign rights.

9 Additionally, the Court determines that the public interest weighs in favor of
10 Plaintiff, as an injunction recognizes and maintains the importance of a nation's
11 sovereignty. Allowing a state to potentially infringe on the sovereignty of another
12 for a regulatory concern does not serve the public interest. Accordingly, the Court
13 grants Plaintiff's Motion for Temporary Restraining Order.

14 **D. Preliminary Injunction**

15 The Court declines to grant a preliminary injunction. An order granting a
16 TRO "expires at the time after entry – not to exceed 14 days – that the court sets,
17 unless before that time the court, for good cause, extends it for a like period or the
18 adverse party consents to a longer extension." Fed R. Civ. P. 56(b)(2). Here,
19 Plaintiff's permit period only lasts until July 5, 2018. ECF No. 1. at ¶ 5.5 A TRO
20

1 would extend past this period and the issues would likely be moot. The Court then
2 declines to grant a preliminary injunction at this time.

3 **E. Injunction Bond**

4 Plaintiff requests the Court waive or set a nominal sum for any injunction
5 bond under Federal Rule of Civil Procedure 65(c). ECF No. 3 at 10. Rule 65(c)
6 permits a court to grant preliminary injunctive relief “only if the movant gives
7 security in an amount that the court considers proper to pay the costs and damages
8 sustained by any party found to have been wrongfully enjoined or restrained.”
9 Fed. R. Civ. P. 65(c). This Rule “invests the district court with discretion as to the
10 amount of security required, *if any*.” *Johnson v. Couturier*, 572 F.3d 1067, 1086
11 (9th Cir. 2009) (quotation and citation omitted) (emphasis in original). The court
12 “may dispense with the filing of a bond when it concludes there is no realistic
13 likelihood of harm to the defendant from enjoining his or her conduct.” *Id.*

14 Here, Plaintiff insists that Yakama Nation is attempting to protect its Treaty
15 and its sovereignty. ECF No. 3 at 10. Plaintiff states that a bond would come
16 directly from Tribal resources needed by Yakama Nation to provide governmental
17 services and thus no bond should be required. *Id.*

18 The Court finds that Defendants would not suffer potential damage arising
19 from the operation of the injunction itself. The TRO merely maintains the *status*
20 *quo* regarding Yakama Nation’s sovereignty and Defendants will only be

1 minimally burdened by not regulating the sale of fireworks by enrolled Yakama
2 Members in Indian Country. This minimal damage is not persuasive to justify an
3 injunction bond. Accordingly, the Court waives the injunction bond.

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

5 1. Plaintiff's Motion for Temporary Restraining Order and Preliminary
6 Injunction (ECF No. 3) is **GRANTED in part** and **DENIED in part**.

7 The Temporary Restraining Order is **GRANTED**. At this time, the
8 motion for Preliminary Injunction is **DENIED**. **Effective immediately**
9 **and expiring 14-days from today**, Defendants are temporarily enjoined
10 from:

11 taking any action to enforce Chapter 70.77 of the Revised Code of
12 Washington against Members of the Yakama Nation within the
13 boundaries of the Yakama Reservation, upon Tribal Trust
14 Property, and upon Tribal Trust Allotments whether or not they are
15 located within the Reservation, including arresting, detaining, or
16 prosecuting any Member of the Yakama Nation for the possession
17 or sale of fireworks or seizing or confiscating any fireworks or
18 other possessions of any Member of the Yakama Nation
19 conducting the sale of fireworks.

20 2. Plaintiff's Motion to Expedite Hearing on Motion for Temporary
Restraining Order (ECF No. 4) is **GRANTED**.

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1 The District Court Executive is directed to enter this Order and furnish
2 copies to counsel.

3 **DATED** June 28, 2018.



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THOMAS O. RICE
6 Chief United States District Judge