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NO. 87376-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

MICHAEL ALLEN CLARK,
Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (WAPA) represents the elected prosecuting attorneys of Washington State. They are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. *See* RCW 36.27.020(4). As such, they have a vital interest in a proper application of State authority to serve process, such as the search warrant that was served in this case. The answer to the question raised by Michael Clark directly affects the validity and ability of the State to investigate and enforce criminal laws for the benefit of the general public. WAPA has a direct interest in protecting all residents and citizens of the State, including the many state citizens who are members of a federally recognized Indian tribe or who reside within the boundaries of an Indian reservation.

County prosecutors are also the legal advisor to the sheriff. *See* RCW 36.27.020(2). Sheriffs are responsible for serving subpoenas and complaints, domestic violence protection orders, and other state process in both civil and criminal matters. *See* RCW 36.28.010(3); RCW 26.50.080. An adverse decision in this case could prevent both civil and criminal litigants from obtaining critical testimony, and could deprive battered women of needed protection.

The county clerk is also a client of the prosecutor. The county clerk is responsible for issuing summons for jury duty. RCW 2.36.095. An adverse decision in this case could result in lower minority participation on juries by creating a barrier to service of juror summons within the boundaries of Indian reservations.

II. ISSUE PRESENTED

This amicus brief addresses the only issue raised by the petitioner: did the Constitution require the police to obtain, or to attempt to obtain, a search warrant issued by a tribal court, prior to searching the home of a tribal member living on trust land within an Indian reservation? Suppl. Br. Pet. at 1.

This case is *not* about whether the state has jurisdiction over the underlying criminal act. Clark concedes that pursuant to RCW 37.12.010, the State may prosecute the crime. Supp. Br. Pet. at 13. This case is *not* about the warrant being defective under either the Fourth Amendment or article I, section 7. It is a question of whether the warrant is invalid and the police action unconstitutional because they did not first attempt to obtain a tribal court warrant.

III. AMICUS CURIAE'S STATEMENT OF THE CASE

The facts as presented in the briefs of the parties are adequate for resolution of this case when supplemented with the following information:

Clark was arrested, by an Omak City police officer, upon “trust property”¹ for the burglary he had committed on non-Indian “fee property” within the exterior borders of the Colville Confederated Tribe’s Reservation. RP (Aug. 9, 2010) at 19, 21, 27-28, 29, 34. Both the situs of the crime and the arrest are within Omak City limits. RP (Aug. 9, 2010) at 19, 29. Clark, an enrolled member of the Colville Confederated Tribe, does not dispute the lawfulness of his arrest.

At the time of the search (January 5, 2010), the Colville Tribal Code only authorized the issuance of search warrants when the application “charg[ed] the commission of an offense against the Tribes.” Former Colville Tribal Code 2-1-35.² The Code did not authorize issuance of search warrants for an offense against the State of Washington. *Id.* Presumably in recognition of this fact, Clark took the position in the trial court that the tribal court did not have “an absolute veto power” over the issuance of a search warrant and that only “propriety” requires a police officer to first request a search warrant from the tribal court before going to state court. RP (Aug. 9, 2010) at 44.

¹The term “trust property” refers to property held in trust by the United States for the tribes or for an individual, and “fee property” refers to lands not held in trust. *See State v. L.J.M.*, 129 Wn.2d 386, 389 n.2, 918 P.2d 898 (1996).

²The text of this provision may be found in Appendix A.

IV. ARGUMENT

A. THE UNITED STATES SUPREME COURT IN *NEVADA v. HICKS* HOLDS THAT STATE POLICE MAY SERVE PROCESS ON TRUST LANDS WITHIN INDIAN RESERVATIONS

In 2001, the United States Supreme Court heard the case of *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001). The dispute in *Hicks* was whether a tribal court had “jurisdiction to adjudicate the alleged tortious conduct of state wardens executing a search warrant for evidence of an off-reservation crime” *Hicks*, 533 U.S. at 357. The Court resolved this issue adversely to the tribe, in light of its landmark case of *Montana v. United States*, 450 U. S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). Under *Montana*,

Where nonmembers are concerned, the “exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes*, and so cannot survive without express congressional delegation.”

Hicks, 533 U.S. at 359 (emphasis added by *Hicks*) (quoting *Montana*, 450 U.S. at 564).

To decide the case, the *Hicks* Court addressed whether a tribe had any authority to prevent state officers from serving a warrant on trust lands. *Hicks*, 533 U.S. at 358. The Court’s discussion of this issue recognized first that

Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 31 U.S. 515, 6 Peters 515, 561, 8 L. Ed. 483 (1832)," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141, 65 L. Ed. 2d 665, 100 S. Ct. 2578 (1980).^{3]} "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State."^{4]}

Hicks, 533 U.S. at 361-62. The Court held that a corollary of State power over certain Indian crimes was the power to enter a reservation, including tribal lands, and serve process, including search warrants.

While it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes, several of our opinions point in that direction. In [*Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980)], we explicitly reserved the question whether state officials could seize cigarettes held for sale to nonmembers in order to recover the taxes due. See 447 U.S. at 162. In *Utah & Northern R. Co.*, however, we observed that "it has . . . been held that process of [state] courts may run

³The decision and statements in *Worcester* is a result of unique language in the 1828 treaty with the Cherokee nation. See *Hicks*, 533 U.S. at 361 n.4. The reservation of the Colville Confederated Tribes was not created by treaty and does not implicate the unique facts of *Worcester*.

⁴In *In re Somday v. Rhay*, 67 Wn.2d 180, 406 P.2d 931 (1965), the defendant, an Indian, was arrested within the external boundaries of the Colville Indian Reservation by an Okanogan County deputy sheriff for an offense committed on a roadway. The court rejected the defendant's challenge to the officer's authority to arrest him, implicitly recognizing that the reservation was still part of Okanogan County. Clark presumably agrees with this holding, as he did not challenge the legality of his arrest.

into an Indian reservation of this kind, where the subject-matter or controversy is otherwise within their cognizance," 116 U.S. at 31.⁵ Shortly thereafter, we considered, in *United States v. Kagama*, 118 U.S. 375, 30 L. Ed. 228, 6 S. Ct. 1109 (1886), whether Congress could enact a law giving federal courts jurisdiction over various common-law, violent crimes committed by Indians on a reservation within a State. We expressed skepticism that the Indian Commerce Clause could justify this assertion of authority in derogation of state jurisdiction, but ultimately accepted the argument that the law

“does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

“It seems to us that this is within the competency of Congress.” *Id.* at 383.

Hicks, 533 U.S. at 363.

The Court went on to explain how numerous prior cases “suggest state authority to issue search warrants in cases such as the one before us.”⁶

The Court also found it

noteworthy that *Kagama* recognized the right of state laws to “operate . . . upon [non-Indians] found” within a reservation,

⁵As noted *supra* in footnote 3, this holding only applies to the particular reservation in Georgia, that was, at that time, excluded from the territory of a State by treaty. *Hicks*, 533 U.S. at 363 n.5. The reservation of the Colville Confederated Tribes is not analogous to the 1820's Cherokee reservations and they have no such treaty provisions.

⁶The Court explained that “‘Process’ is defined as ‘any means used by a court to acquire or exercise its jurisdiction over a person or over specific property,’ Black’s Law Dictionary 1084 (5th ed. 1979), and is equated in criminal cases with a warrant, *id.* at 1085.” *Hicks*, 533 U.S. at 364.

but did not similarly limit to non-Indians or the property of non-Indians the scope of the process of state courts. This makes perfect sense, since, as we explained in the context of federal enclaves, the reservation of state authority to serve process is necessary to “prevent [such areas] from becoming an asylum for fugitives from justice.” *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 533, 29 L. Ed. 264, 5 S. Ct. 995 (1885).

Hicks, 533 U.S. at 364. The *Hicks* Court

conclude[d] . . . that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations -- to “the right to make laws and be ruled by them.” The State’s interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe’s self-government than federal enforcement of federal law impairs state government.

Hicks, 533 U.S. at 364.

The recognition that reservations are part of states was joined by a clear majority.⁷ Justice Scalia authored the lead majority opinion quoted

⁷As shown by the Court’s express statements, Clark’s *amici* are wrong when they characterize the holding in *Hicks* as non-binding dicta. See *Amicus Curiae* Brief of the Colville Confederated Tribes in Support of Petition for Review, at 5; *Amicus Curiae* Brief of the Tulalip Tribes in Support of Direct Review, at 8. This mischaracterization was forcibly rejected by the New Mexico Supreme Court:

Defendant and Amicus Curiae Santa Ana Pueblo claim that our reliance on *Hicks* is misplaced because the above quoted language constitutes non-binding dicta. Specifically, they claim that the United States Supreme Court’s analysis was joined by only two other justices and was not necessary to the opinion’s holding. We disagree. First, the opinion of the Court was delivered by Justice Scalia and joined by five other Justices--Chief Justice Rehnquist and Justices Ginsburg, Kennedy, Souter, and Thomas. *Id.* at 354. Thus, a majority of the Court joined the analysis regarding state authority to investigate off-reservation crimes committed by Indians in Indian country. Second, although *Hicks* involved “tribal court . . . jurisdiction over civil claims against state officials who entered

above. Justices Souter, Thomas and Kennedy joined the majority fully. They added another reason for reaching the same result, but this does not undermine their agreement with the lead opinion. *See Hicks*, 533 U.S. at 375 (“and I join the Court’s opinion. . . . I agree with the Court’s analysis as well as its conclusion”). Similarly, Justice Ginsburg fully embraced authority of state court’s to authorize warrants. Her concurrence only leaves open the possibility that “a state officer’s conduct on tribal land “unrelated to [performance of his law-enforcement duties] is potentially subject to tribal control.” *Id.*, at 425.

B. OTHER AUTHORITIES SUPPORT THE CONCLUSION THAT A STATE COURT WARRANT CAN BE SERVED ON TRUST PROPERTY WITHIN THE RESERVATION

The holding in *Hicks* is consistent with the Court’s unanimous 1885 decision in *Utah & Northern Railway v. Fisher*, 116 U.S. 28, 31, 6 S. Ct. 246, 29 L. Ed. 2d 542 (1885), which held that “process of [the Territorial] courts may run into an Indian reservation . . . where the subject-matter or

tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation,” the Court’s analysis of state criminal investigative jurisdiction was essential to its holding. *Id.* at 355 (emphasis added). The Court held that the tribal court lacked jurisdiction to adjudicate the Indian plaintiff’s civil claim because the tribe lacked jurisdiction to regulate the execution of state criminal process in Indian country for off-reservation crimes. *Id.* at 357-65. Accordingly, we reject Defendant’s and Amicus Curiae’s claim that *Hicks* is inapplicable to this case.

State v. Harrison, 148 N.M. 500, 238 P.3d 869, 878 (2010).

controversy is otherwise within their cognizance.”

Hicks’ recognition that state authority to serve process within a reservation has existed for over 100 years is also consistent with pre-existing Washington law. The Enabling Act that allowed Washington to join the Union required the State to: (1) “disclaim all right and title” to all lands held by Indian tribes; (2) required the State to not tax property within Indian Country that belongs to non-Indians at a rate higher than applied to property outside the reservation; and (3) not attempt to exercise any authority within a reservation that Congress has prohibited. Enabling Act, ch. 180, § 4, 25 Stat. 676 (1889). *Accord* Wash. Const. art. XXVI. These restrictions do not bar service of state court process within a reservation.

Notably, the State does not need title to a residence or factory to serve process. Private ownership does not remove a home from Washington’s governmental interest or territory. *Cf. Kake v. Egan*, 369 U.S. 60, 69, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962) (a disclaimer “of right and title” in the Alaska Constitution “was a disclaimer of proprietary rather than governmental interest.”). Finally, Congress has enacted no law that prohibits a state government from serving its process within a reservation. *See Hicks*, 533 U.S. at 366 (“Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring

off the reservation.”)⁸

The federal courts have also rejected Clark’s proposition that state officers may not execute a state warrant on trust property without prior authorization from a tribal court. In *Confederated Tribes and Bands of the Yakima Nation v. Holder*, No. CV-11-3028-RMP, 2012 U.S. Dist. Lexis 35304 (Mar. 15, 2012), the Yakima Nation sought an injunction prohibiting federal and county officers from entering trust land to execute search or arrest warrants related to enrolled members of the Yakima Nation. The Nation brought the action after county officers arrested a tribal elder on trust land. *Id.* at *4. Citing to *Nevada v. Hicks*, the court denied a preliminary injunction as there was no likelihood of success on the merits. *Id.* at *6-7. The Court further noted that the Yakima Nation was seeking to “alter policies that have long been followed.” *Id.* at *9.⁹

The Ninth Circuit has recognized that *Hicks* fully supports the execution of state process, including search warrants, within a reservation.

⁸Neither Clark nor the *amici* Tribes have identified any post-*Hicks* acts of Congress that bar a state from executing process, including search warrants, within a reservation. This Court may, therefore, presume that there are none. *See generally State v. Young*, 89 Wn.2d 613, 574 P.2d 1171 (1978) (“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”). In fact, all of Congresses’ post-*Hicks*’ legislation has been directed toward strengthening public safety within reservations, which is best advanced by rejecting Clark’s proposed barrier to effective law enforcement. *See generally Tribal Law and Order Act of 2010*; P.L. 111-211, Title II, § 202(a)(4), 124 Stat. 2262.

⁹A copy of this unpublished opinion may be found in Appendix B, as required by GR 14.1(b).

See, e.g., Water Wheel Camp Rec. Area, Inc. v. Larance, 642 F.3d 802, 809 (9th Cir. 2011) (recognizing that in *Hicks*, the United States Supreme Court determined that land ownership “was not dispositive when weighed against the state’s considerable interest in executing a search warrant for an off-reservation crime”). *See also Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 22, 24 (1st Cir.), *cert. denied*, 549 U.S. 1053 (2006) (noting that “the general body of Indian law also supports a conclusion that the State may undertake the enforcement activities [executing a search warrant on settlement land] at issue in this case”); *State ex rel. Suthers v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389, 402-03 (Colo. App. 2008) (states have the authority to execute process on Indian reservations, including search warrants); *HHS v. Maybee*, 2009 ME 15, 965 A.2d 55, 57-58 (2009) (“Activity of tribal members that takes place within the reservation but has an impact outside the reservation may be regulated by the states.”; “ *Nevada v. Hicks*, 533 U.S. 353, 362-66, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (holding that, in the absence of federal legislation to the contrary, the state has the authority to execute a search warrant on a reservation against a tribal member suspected of violating state law outside the reservation).”); *State v. Harrison*, 238 P.3d at 878 (*Hicks* recognized that state sovereignty does not end at a reservation’s border and states retain jurisdiction to execute state criminal process for crimes within the state’s jurisdiction without complying

with tribal procedures).

Many other courts reached this same conclusion prior to *Hicks*. See, e.g., *Kaul v. Stephan*, 83 F.3d 1208, 1216-18 (10th Cir. 1996) (when Congress has delegated jurisdiction to state over crimes committed on a reservation, state has authority to execute search warrants on the reservation); *State Securities v. Anderson*, 84 N.M. 629, 506 P.2d 786 (1973) (service of state process within the exterior boundaries of a reservation does not infringe on the right of reservation Indians to make their own laws and be ruled by them); *LeClair v. Powers*, 632 P.2d 370, 374, 375-76 (Okla. 1981) (“Indian country is not a federal enclave off limits to state process servers.”); service of state process in Indian country did not interfere “with the self-governing activities of the Indian tribe” because it did not violate any governing provision of the tribal code); *Landreman v. Martin*, 191 Wis. 2d 787, 530 N.W.2d 62 (1995) (the service of state process within a reservation in cases in which the state has subject matter jurisdiction does not infringe on tribal sovereignty and furthers compelling state interests); *In re M.L.S.*, 157 Wis. 2d 26, 458 N.W.2d 541 (1990) (same).

C. THE AUTHORITIES CITED BY CLARK AND HIS *AMICI* PRE-DATE *HICKS*, DO NOT APPLY, AND ARE OTHERWISE WRONGLY DECIDED

Clark primarily relies upon pre-*Hicks* opinions invalidating service of state court process, particularly search warrants, within a reservation. See

Supp. Br. Pet. at 10-13 (citing *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990), *State v. Mathews*, 133 Idaho 300, 314, 986 P.2d 323 (1999)). Neither support Clark's suppression motion.

In *Baker*, the Court of Appeals held that a Colorado state court had no jurisdiction to issue a search warrant to seize evidence of suspected methamphetamine manufacturing by a tribal member on property rented by the defendant tribal member within the boundaries of tribal land. This holding turned upon the fact that Colorado had no criminal jurisdiction over the offense. *Baker*, 894 F.2d at 1146.¹⁰ Here, it is undisputed that Washington has criminal jurisdiction over Clark's offense. See Supp. Br. Pet. at 13.

In *Mathews*, the Idaho Supreme Court held that "tribal sovereignty is not infringed when a state court issued search warrant is executed within Indian country where the state possesses jurisdiction over the underlying crime and where tribal law does not provide a procedure for executing the warrant within Indian country." *Mathews*, 986 P.2d at 337. "The mere existence of federal law which simply establishes the Nez Perce Tribal Court cannot be said to represent a specific statutory plan preempting the State of Idaho from executing a search warrant in a case where the state has

¹⁰This same reasoning was applied in the post-*Hicks* case of *United States v. Peltier*, 344 F. Supp. 2d 539 (E.D. Mich. 2004). Michigan lacked criminal jurisdiction over the crime, thus its state search warrant was also invalid within the borders of the reservation.

jurisdiction over the underlying crime.” *Id.* The court’s speculation that the tribe may offer a procedure that the state should utilize, however, is not a holding and, in any event, was made prior to *Hicks*.

Even if *Mathews* were persuasive, it does not apply. The only tribal code provisions that Clark brought to the trial court’s attention restricted the issuance of tribal court search warrants to “offenses against the Tribes.” *See* CP 82 (quoting Former Colville Tribal Code 2-1-35¹¹). He showed no basis for issuance of a tribal court search warrant for evidence of a state crime. This is underscored by the recent amendment to the tribal code which makes such warrants available. *See* Colville Tribal Code 2-1-35 (Resolution 2012-700, codified Oct. 17, 2012) (authorizing the issuance of search warrants to “a . . . state, county, or municipal law enforcement officer of a written or oral complaint, supported by oath or affirmation, establishing probable cause to believe the proposed search will discover property that . . . Constitutes evidence of a violation of any applicable Tribal, federal, or state law”).¹²

D. CLARK’S ARGUMENTS WOULD CLOUD STATE
POWER TO SUBPOENA WITNESSES AND SUMMON
JURORS

Clark’s arguments to avoid *Hicks* would have negative consequences

¹¹Clark had the burden of producing those portions of the Colville Tribal Code he was relying upon. *Cf.* CR 44.1.

¹²The complete text of Colville Tribal Code 2-1-35 may be found in Appendix A.

to the interests of Indian and non-Indian citizens, far beyond his case. It would suggest that a witness could ignore a state court subpoena served on trust property, within an Indian reservation. This would harm a defendant's ability to get a fair trial. It would suggest that a jury summons sent to an enrolled tribal member's trust property home is invalid and may be ignored. This would harm a defendant's ability to have jurors reflect the community. It would put a cloud over the validity of a state court's protection order served on a batterer on trust property within the reservation. It would affect the service of civil complaints, frustrating the ability of Indian and non-Indian citizens to use the state courts for civil actions.

E. NEITHER THE WASHINGTON CONSTITUTION NOR
THE UNITED STATES CONSTITUTION REQUIRE A
STATE POLICE OFFICER TO SEEK A TRIBAL SEARCH
WARRANT

Clark claims that the constitution requires a state police officer to obtain a tribal court warrant when the location of the search is trust property within the exterior boundary of the reservation. Clark's position is not supported by the language of either the United States or the Washington Constitutions.¹³ Clark's position is also contrary to the historical record.

Tribal courts, at least as they are now composed, did not exist when either the federal or state constitutions were adopted. *See generally* S.

¹³Clark does not indicate in any of his briefing whether his argument is based upon the United States Constitution or the Washington Constitution.

O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L. Rev. 1 (1997) (most present day tribal courts date from the Indian Reorganization Act of 1934); A. Carr & S. Johnanson, *Extent of Washington Criminal Jurisdiction Over Indians*, 33 Wash. L. Rev. 289, 292 (1958) (as late as 1958, only 5 of the then 21 recognized Washington tribes had tribal court systems capable of handling criminal prosecutions). Delegates to the constitutional conventions could not have intended to require state police to resort to such courts.

The United States Constitution makes limited references to Indians or to Tribes. The references that do exist, grant Congress plenary and exclusive powers, under the Indian commerce clause (Art. I, § 8, cl 3) and the treaty clause (Art. II, § 2, cl 2), to legislate with respect to Indian tribes. *See United States v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004). Congress, pursuant to this power, has enacted no statute that restricts the service of state process, including search warrants, within reservations. *Hicks*, 533 U.S. at 366.

Both the federal and the Washington constitutions require that a search warrant be supported by probable cause as established by sworn testimony. Fourth Amendment; Const. art. I, § 7. Both the federal and the Washington Constitution require that a search warrant be issued by a neutral and detached magistrate. Clark has conceded that these requirements were

all satisfied in the instant case. His conviction must be affirmed.

F. ERECTING BARRIERS TO THE OBTAINING OF
SEARCH WARRANTS IS NOT IN THE PUBLIC'S
INTEREST

Clark and *amici* Tribes urge this Court to invent barriers to the obtaining and execution of search warrants. Their request must be denied as tribal members are already protected, when the State has jurisdiction over an offense, by the state and federal constitutions.

Clark invites the Court to invent a one-size-fits all policy for Washington law enforcement, “direct[ing] the police of this State to work with the tribal courts for searches on trust land.” Supp. Br. Pet.at 13. That choice, however, belongs to state and local legislative or executive branches, who can address the circumstances, the compelling needs of law enforcement and the general public, and the possibilities for coordination with a tribal police forces and/or courts. There are obviously compelling reasons why the state and tribes often cooperate in such matters. But, the United States Constitution and the self-governing powers of Indian tribes does not require this Court to invalidate the warrant served on Clark’s trailer or to add additional requirements to service of state court process.

There are, moreover, barriers to Clark's requested constitutional rule. First, court rules, codes, and constitutions for all 29¹⁴ of Washington's federally recognized tribes are not generally available to police officers. While some tribes have made their codes available on-line, others have not.¹⁵

Second, many of the tribal codes restrict the issuance of tribal search warrants to offenses against the tribe.¹⁶ In such cases, a tribal search warrant for evidence related to a violation of State law would clearly be open to a challenge that it was issued without authority of law.

Third, ascertaining whether a particular location is trust or fee land is not simple. While local officers may have lists of trust property, *see* RP (Aug. 9, 2010) 37, local officers are not always involved in the application process or the execution of search warrants. *See* RCW 10.93.070(5) (a general authority Washington peace officer may execute a search warrant anywhere within the territorial bounds of this state). The lists possessed by local officers, moreover, are unlikely to identify which portions of public

¹⁴*See* Governor's Office of Indian Affairs, Washington State Tribal Directory, Washington State Federally Recognized Indian Tribes (Nov. 2012). Available at <http://www.goia.wa.gov/Tribal-Directory/TribalDirectory.pdf> (last visited Dec. 13, 2012).

¹⁵As an example, although the Yakama Nation maintains a web site, its legal code does not appear on that site. *See generally* Yakama Nation's website, <http://www.yakamanation-nsn.gov> (last visited Dec. 13, 2012). The most recent code contained in the University of Washington's Law Library is dated 2000. The most recent copy of the code contained in the State Law Library's collection is dated 1953.

¹⁶*See, e.g.*, Makah Law and Order Code § 2.2.05. Available at <http://narfl.securesites.net/nill/Codes/makahcode/makahlaw2.htm#2title> (last visited Dec. 13, 2012).

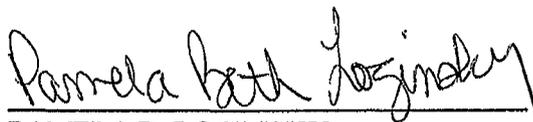
roads are trust and which are fee. See *State v. Pink*, 144 Wn. App. 945, 952-53, 185 P.3d 634 (2008) (roads constructed over an easement granted by a tribe is treated as trust property).

Fourth, tribal courts may not have procedures for telephonic or remote search warrants, may have limited hours, may be served by non-lawyer judges, and may not possess the ability to seal documents to protect the integrity of the investigation. These concerns counsel strongly against Clark's invitation that this Court mandate a "tribal court first" rule for search warrant.

V. CONCLUSION

The Court of Appeals correctly determined that the United States Supreme Court's decision in *Nevada v. Hicks* authorizes the execution of state search warrants within the exterior borders of a reservation when the evidence is sought in relation to a crime for which the state court has jurisdiction. The Court of Appeals' decision must be affirmed.

Respectfully submitted this 14th day of December 2012.



PAMELA B. LOGINSKY
WSBA No. 18096
Staff Attorney

APPENDIX A

Former Colville Tribal Code 2-1-35 provided as follows:

Every judge of the Court shall have authority to issue warrants for search and seizure of the premises and property of any person under the jurisdiction of the Court. However, no warrant of search and seizure shall be issued except upon a presentation of a written or oral complaint based upon probable cause, supported by oath or affirmation and charging the commission of an offense against the Tribes. No warrant for search and seizure shall be valid unless it contains the name or description of the person or property to be searched and seized and bears the signature of a judge of competent jurisdiction. Service of warrants of search and seizure shall be made by an officer.

See CP 82.

Colville Tribal Code 2-1-35 was amended on October 11, 2012, to now provide:

(a) Except as provided in section 2-1-36 of this Chapter, no law enforcement officer may search or seize persons or property under the jurisdiction of the Colville Tribes except pursuant to a valid search warrant. A search warrant shall not be valid unless:

(1) Signed by a judge of the Tribal Court or a judge of a court of competent jurisdiction; and

(2) Describes with reasonable detail the person, property, or place to be searched and the property to be seized.

(b) No judge of the Court shall sign a search warrant except upon presentation by a Tribal, federal, state, county, or municipal law enforcement officer of a written or oral complaint, supported by oath or affirmation, establishing probable cause to believe the proposed search will discover

property that:

(1) Is possessed in violation of any applicable Tribal, federal, or state law;

(2) Has been or is being used to commit a violation of any applicable Tribal, federal, or state law; or

(3) Constitutes evidence of a violation of any applicable Tribal, federal, or state law.

(c) Any search warrant issued pursuant to this section to a federal, state, county, or municipal law enforcement officer shall be executed in the presence of and in coordination with a Tribal law enforcement officer. Colville Tribal Police and other Tribal law enforcement agencies shall cooperate to the fullest extent feasible in the execution of such a warrant.

(d) Any search warrant issued pursuant to this section shall be valid for a period not to exceed 20 days.

(e) The law enforcement officer taking property under the warrant shall give to the person from whose premises or from whom the property is taken a copy of the warrant and a receipt for any items seized, if no person is present the officer may post a copy of the warrant and receipt.

(f) Motion for return of property: A person effected by an unlawful search and seizure may move the court for return of the property, unless the property is contraband. If a motion is made or comes for hearing after a complaint is filed in court it shall be treated as a motion to suppress.

(Amended 10/11/12, Codified 10/17/12, Resolution 2012-700)

Available at <http://www.colvilletribes.com/media/files/Chapter%20201%20Criminal%20Actions.pdf> (last visited Dec. 12, 2012).



2 of 4 DOCUMENTS

**CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a
federally-recognized Indian tribal government and as parens patriae on behalf of the
Enrolled Members of the Confederated Tribes and Bands of the Yakama Nation;
Plaintiff, v. ERIC H. HOLDER, JR., Attorney General of the United States; et al.,
Defendants.**

NO: CV-11-3028-RMP

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

2012 U.S. Dist. LEXIS 35304

**March 15, 2012, Decided
March 15, 2012, Filed**

SUBSEQUENT HISTORY: Motion to modify denied by *Confederated Tribes & Bands of the Yakama Nation v. Holder*, 2012 U.S. Dist. LEXIS 48586 (E.D. Wash., Apr. 4, 2012)

PRIOR HISTORY: *Confederated Tribes & Bands of the Yakama Nation v. Holder*, 2011 U.S. Dist. LEXIS 134306 (E.D. Wash., Nov. 21, 2011)

COUNSEL: [*1] For Confederated Tribes and Bands of The Yakama Nation, a federally-recognized Indian tribal government and as parens patriae on behalf of the enrolled members of the Confederated Tribes and Bands of the Yakama Nation, Plaintiff: Gabriel S Galanda, LEAD ATTORNEY, Anthony Stephen Broadman, Galanda Broadman PLLC, Seattle, WA; Julio VA Carranza, Office of Legal Counsel, Yakama Nation, Toppenish, WA; Robert Joseph Sexton, Yakama Nation Office of Legal Counsel, Toppenish, WA.

For Eric H Holder, Jr, Attorney General of the United States, United States Department of Justice, Robert S Mueller, III, Director of the Federal Bureau of Investigation, United States of America, Federal Bureau of Investigation, United States Marshals Service, Kenneth E Melson, Director of Bureau of Alcohol Tobacco Firearms and Explosives, Defendants: Maureen Elizabeth Rudolph, US Department of Justice, ENRD/NRS, Washington, DC; Pamela Jean DeRusha, U S Attorney's Office - SPO, Spokane, WA.

For Yakima, County of, a Washington State county, Defendant: Kenneth W Harper, LEAD ATTORNEY, Quinn N Plant, Menke Jackson Beyer Ehlis & Harper, Yakima, WA.

For Stacia Hylton, Director of the United States Marshals Service, Defendant: [*2] Pamela Jean DeRusha, LEAD ATTORNEY, U S Attorney's Office - SPO, Spokane, WA; Andrew Sean Biviano, U.S. Attorney's Office, Eastern District of Washington, Spokane, WA; Maureen Elizabeth Rudolph, US Department of Justice, ENRD/NRS, Washington, DC.

For Bureau of Alcohol Tobacco Firearms and Explosives, Timothy Geithner, Secretary of the Department of Treasury, United States Department of Treasury, Douglas H Shulman, Commissioner of the Internal Revenue Service, Internal

Revenue Service, John J Manfreda, Administrator of the Alcohol and Tobacco Tax and Trade Bureau, Alcohol and Tobacco Tax and Trade Bureau, Defendants: Pamela Jean DeRusha, LEAD ATTORNEY, U S Attorney's Office - SPO, Spokane, WA; Maureen Elizabeth Rudolph, US Department of Justice, ENRD/NRS, Washington, DC.

For Marshall County of a Mississippi county, Defendant: William M Symmes, LEAD ATTORNEY, Witherspoon Kelley Davenport & Toole - SPO, Spokane, WA.

For Tulepo, City of a Mississippi municipality, Defendant: Michael John Kapaun, LEAD ATTORNEY, Witherspoon Kelley, Spokane, WA; William M Symmes, LEAD ATTORNEY, Witherspoon Kelley Davenport & Toole - SPO, Spokane, WA.

For Roanoke County of a Virginia municipality, Defendant: Meriwether [*3] D Williams, LEAD ATTORNEY, Winston & Cashatt - SPO, Spokane, WA.

For Martinsville City of a Virginia municipality, Vinton City of a Virginia municipality, Defendants: Gregory C Hesler, Paine Hamblen Coffin Brooke & Miller - SPO, Spokane, WA; William John Schroeder, Paine Hamblen LLP - SPO, Spokane, WA.

JUDGES: ROSANNA MALOUF PETERSON, Chief United States District Judge.

OPINION BY: ROSANNA MALOUF PETERSON

OPINION

ORDER ADDRESSING MOTION FOR TEMPORARY RESTRAINING ORDER

This matter comes before the Court on the Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, ECF No. 227. Telephonic argument was had on March 14, 2012. The Court has reviewed the motion, the memoranda in support of and opposition to the motion, the various declarations filed by the parties, the relevant filings, and is fully informed.

BACKGROUND

This case originated out of an entry by federal and state agents onto the reservation land of the Plaintiff, Confederated Tribes and Bands of the Yakama Nation ("Nation"). The Nation brought the action seeking declaratory and injunctive relief against a myriad of government defendants both local and federal. Yakima County ("County") is one of the defendants against whom the Nation seeks [*4] an injunction.

After the filing of this case, the Nation alleges that the County has made other entries onto Nation land without Nation permission. Of particular note were two entries onto Nation trust land by County officers effecting an arrest warrant for enrolled member, and tribal elder, Jessie M. Sampson. In response to the recent entries onto Nation trust land without permission, and in response to the apparent position of the County that such permission was not required, the Nation filed the instant motion seeking a temporary restraining order and preliminary injunction restricting the County from entering trust land without permission by the Nation.

DISCUSSION

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Id.* at 24. "In each case, courts must balance the competing claims of injury and must consider the [*5] effect on each party of the granting or withholding of the requested relief." *Id.* (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987)). "In exercising their sound discretion, courts of equity should pay particular regard for the public

consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982)).

Scope of Injunction

As an initial matter, the Nation clarified at oral argument that it seeks injunction solely against the County and solely to prevent County incursions onto Nation trust land and only with respect to searches and arrests of enrolled members of the Nation. However, the Nation's materials also make clear that the restriction sought would apply regardless of whether the searches and arrests were pursuant to criminal conduct occurring off Nation trust land.

Likelihood of Success on the Merits

The Nation makes two arguments in support of its position that the County may not enter onto trust land to search or arrest enrolled tribal members: (1) that such incursions violate Title 2011 of the Revised Yakama Code and, as a result, the incursions undermine the Nation's ability to make its own laws [*6] and be bound by them; and (2) that such incursions violate rights guaranteed to the nation under Article II of the Treaty of 1855, 12 Stat. 951.

"The grant of a preliminary injunction is the exercise of a very far reaching power never to be indulged except in a case clearly warranting it." *Dymo Indus., Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964). To that end, "on application for preliminary injunction the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact." *Id.* at 143.

With regard to the violation of Title 2011, there is little question that, by its terms, it restricts access to the reservation by state officers without permission by the Nation. However, there are questions about whether the Nation has legislative authority to restrict incursions by state officers onto trust land where the state officers are investigating criminal conduct that occurred outside Indian country. See *Nevada v. Hicks*, 533 U.S. 353, 364, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001). Additionally, it is unclear whether the Nation may restrict entry of state officers who are investigating crimes which fall under the eight subject matter areas over which Washington State asserted jurisdiction [*7] under Public Law 280. RCW 37.12.010; see also *State v. Abrahamson*, 157 Wn. App. 672, 674, 238 P.3d 533 (2010) ("Under RCW 37.12.010, the State of Washington assumed criminal and civil jurisdiction over Indians on Indian lands for eight specific areas of law.").

With regard to Article II of the Treaty of 1855, the Court is not aware of any authority interpreting Article II with regard to a right to exclude county officers proceeding in the criminal context. Accordingly, the scope of any exclusionary right is unclear. Additionally, it is unclear what effect, if any, Washington's assertion of criminal jurisdiction under Public Law 280 has on the Nation's treaty rights, or what other concerns may be implicated given the complex, overlapping jurisdictional relationship between the state, federal, and tribal governments. While the Court finds the Nation's argument compelling that the treaty, by its terms and through assurances made during negotiations, provides for a broad right to exclude non-members from tribal land, the legal landscape is not sufficiently clear for the Court to say that an injunction is "clearly warranted." The Court is reluctant to "decide doubtful and difficult questions of law" at [*8] the accelerated pace of a temporary restraining order. See *Dymo Indus., Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964).

Public Interest

The Court's conclusion that a preliminary injunction is not warranted in this case is confirmed by review of the public interest. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. at 311-12).

In support of its motion, the Nation argues that the public interest supports enjoining the County because to do otherwise will lead to irreparable cultural and political harm to the Nation. In support of its argument in favor of injunction, the Nation cites to *Miccosukee Tribe of Indians of Florida v. United States*, 00-3453CIV, 2000 U.S. Dist. LEXIS 22929, 2000 WL 35623105 (S.D. Fla. Dec. 15, 2000), for the proposition that the public interest in maintaining the balance of state-tribal relations outweighs the impact of an injunction on criminal cases. ECF No. 237 at 17. However, the *Miccosukee* case actually spoke to the balancing of state-tribal relations versus a single case. The

injunction sought here has the potential to [*9] impact a number of cases involving enrolled members of the Nation. Additionally, in this case, where the record reflects that an injunction would alter policies that have long been followed, the hesitancy of the *Miccousukee* court to disturb the relationship between the state and tribe may arguably cut against the Nation in this case.

Ultimately, however, the Court's decision that public policy counsels against entering a preliminary injunction rests predominantly on the public's strong interest in the investigation of crime and apprehension of criminals. The record reflects that the Yakama reservation contains a checkerboard of incorporated municipal land, fee land, and trust land. The injunction sought would be limited to trust land. The County officers navigate a complicated terrain when investigating crimes because their authority shifts depending on the status of land involved. The Nation's proposed solution that the County contact the auditor's office to determine the tax status of a parcel before entering the land appears to impose an impediment to effective law enforcement. Although such a requirement may be part of an ultimate resolution in this case, for purposes of a preliminary [*10] injunction the Court is convinced that the public's interest in effective law enforcement outweighs the Nation's need for immediate relief.

The Nation's guarantee that its intent is not to frustrate criminal investigations does not require a different result. The Court does not doubt the earnest commitment of the Nation to investigate crime in conjunction with the County. However, the express language of Title 2011 imposes strict requirements on county officers seeking permission to enter Nation land and does not allow for flexibility absent exigent circumstances. ECF No. 234 at 9-13. In short, entry of a preliminary injunction could frustrate law enforcement by inserting rigid, technical permission requirements into a landscape of vague and shifting jurisdiction. The Court declines to make such a decision with abbreviated briefing.

As the Court declines to enter a preliminary injunction on the grounds that unclear legal precedent preclude a finding of a likelihood of success on the merits and that public policy counsels against injunction, the Court does not reach the issues of irreparable harm and the balance of the equities. The Court notes, however, that this decision should not [*11] be seen as a comment on the ultimate merits of this case. Policies that counsel against the extraordinary remedy of a preliminary injunction may have no relevance to the ultimate questions of tribal and state sovereignty which are at issue in this case.

Additionally, the Court's unwillingness to enter an injunction should not be construed as an invitation to the County to ignore the jurisdictional concerns raised by the Nation in the materials supporting this motion. It appears that the parties have the capacity to resolve many of their concerns by finding common ground through their shared interest in investigating and punishing crime. To that end, an agreement or memorandum of understanding respecting the jurisdictional authority of both parties could clarify what the County refers to as a "jurisdictional maze."

Accordingly, **IT IS HEREBY ORDERED:**

1. The Plaintiff's motion for temporary restraining order and preliminary injunction, ECF No. 227, is **DENIED.**

IT IS SO ORDERED.

The District Court Executive is hereby directed to enter this Order and to provide copies to counsel.

DATED this 15th of March 2012.

/s/ Rosanna Malouf Peterson

ROSANNA MALOUF PETERSON

Chief United States District Court [*12] Judge



1 of 4 DOCUMENTS

**CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a
federally-recognized Indian tribal government and as parens patriae on behalf of the
Enrolled Members of the Confederated Tribes and Bands of the Yakama Nation;
Plaintiff, v. ERIC H. HOLDER, JR., Attorney General of the United States; et al.,
Defendants.**

NO: CV-11-3028-RMP

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

2012 U.S. Dist. LEXIS 48586

**April 4, 2012, Decided
April 4, 2012, Filed**

PRIOR HISTORY: *Confederated Tribes & Bands of the Yakama Nation v. Holder, 2012 U.S. Dist. LEXIS 35304
(E.D. Wash., Mar. 15, 2012)*

COUNSEL: [*1] For Confederated Tribes and Bands of The Yakama Nation, a federally-recognized Indian tribal government and as parens patriae on behalf of the enrolled members of the Confederated Tribes and Bands of the Yakama Nation, Plaintiff: Gabriel S Galanda, LEAD ATTORNEY, Anthony Stephen Broadman, Galanda Broadman PLLC, Seattle, WA; Julio VA Carranza, Office of Legal Counsel, Yakama Nation, Toppenish, WA; Robert Joseph Sexton, Yakama Nation Office of Legal Counsel, Toppenish, WA.

For Eric H Holder, Jr, Attorney General of the United States, Kenneth E Melson, Director of Bureau of Alcohol Tobacco Firearms and Explosives, United States Marshals Service, Federal Bureau of Investigation, United States of America, Robert S Mueller, III, Director of the Federal Bureau of Investigation, United States Department of Justice, Defendants: Maureen Elizabeth Rudolph, US Department of Justice, ENRD/NRS, Washington, DC; Pamela Jean DeRusha, U S Attorney's Office - SPO, Spokane, WA.

For Yakima, County of, a Washington State county, Defendant: Kenneth W Harper, LEAD ATTORNEY, Quinn N Plant, Menke Jackson Beyer Ehlis & Harper, Yakima, WA.

For Stacia Hylton, Director of the United States Marshals Service, Alcohol [*2] and Tobacco Tax and Trade Bureau, John J Manfreda, Administrator of the Alcohol and Tobacco Tax and Trade Bureau, Internal Revenue Service, Douglas H Shulman, Commissioner of the Internal Revenue Service, United States Department of Treasury, Timothy Geithner, Secretary of the Department of Treasury, Bureau of Alcohol Tobacco Firearms and Explosives, Defendants: Pamela Jean DeRusha, LEAD ATTORNEY, U S Attorney's Office - SPO, Spokane, WA; Maureen Elizabeth Rudolph, US Department of Justice, ENRD/NRS, Washington, DC.

For Benton, County of, a Washington State county, also known as Tri Cities Regional SWAT Team, Defendant: Stephen John Hallstrom, LEAD ATTORNEY, Benton County Prosecutor's Office, Kennewick, WA.

Appendix B -- 7

For Marshall County of, a Mississippi county, Defendant: William M Symmes, LEAD ATTORNEY, Witherspoon Kelley Davenport & Toole - SPO, Spokane, WA.

For Tulepo, City of, a Mississippi municipality, Defendant: Michael John Kapaun, LEAD ATTORNEY, Witherspoon Kelley, Spokane, WA; William M Symmes, LEAD ATTORNEY, Witherspoon Kelley Davenport & Toole - SPO, Spokane, WA.

For Roanoke County of, a Virginia municipality, Defendant: Meriwether D Williams, LEAD ATTORNEY, Winston & Cashatt - SPO, [*3] Spokane, WA.

For Martinsville City of, a Virginia municipality, Vinton City of, a Virginia municipality, Defendants: Gregory C Hesler, Paine Hamblen Coffin Brooke & Miller - SPO, Spokane, WA; William John Schroeder, Paine Hamblen LLP - SPO, Spokane, WA.

JUDGES: ROSANNA MALOUF PETERSON, Chief United States District Court Judge.

OPINION BY: ROSANNA MALOUF PETERSON

OPINION

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND ORDER

This matter comes before the Court on the Plaintiff's Motion to Alter or Amend Order, ECF No. 267. Telephonic argument was held on April 2, 2012. The Court has reviewed the motion, the memoranda in support of and opposition to the motion, all declarations filed in relation to the instant motion as well as the original motion for temporary restraining order, all other relevant filings, and is fully informed.

On March 15, 2012, this Court entered an order denying a motion for a temporary restraining order and preliminary injunction by Plaintiff Confederated Tribes and Bands of the Yakama Nation ("Nation"). ECF No. 258. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary [*4] relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The Court concluded that the Nation had failed to establish a likelihood of success on the merits and that the public interest favored injunction. ECF No. 258. The Nation now asks the Court to reconsider its decision.

The Nation has moved pursuant to *Federal Rule of Civil Procedure 59(e)*. "A *Rule 59(e)* motion may be granted if '(1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law.'" *Ybarra v. McDaniel*, 656 F.3d 984, 998 (9th Cir. 2011) (quoting *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001)). The Nation has not asserted that there has been an intervening change in the law. Instead, the Nation seeks reconsideration arguing: (1) newly discovered evidence supports amendment of the order; (2) the court made clear error in its interpretation of *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), and *Public Law 280*; and (3) the Court's decision gives rise [*5] to a manifest injustice.

New Evidence

As new evidence warranting modification of the Court's March 15, 2012, order, the Nation presents statements by Yakima County Sheriff Ken Irwin to the effect that the County would proceed with "business as usual," and will continue to arrest enrolled members of the Nation on Nation trust land for crimes committed outside of the Yakama reservation. ECF No. 263. While this evidence may have some bearing on the issue of irreparable harm, irreparable harm was not a basis for the Court's decision to deny issuance of a preliminary injunction and Sheriff Irwin's statements do not constitute "new evidence" justifying reconsideration of the Court's previous order. The Court declines to modify its opinion in light of Sheriff Irwin's statements.

Clear Error

In support of its argument that the Court committed clear error, the Nation asserts that the Court misapprehended the Nation's position as well as how *Hicks* and *Public Law 280* applied to the motion for temporary restraining order and preliminary injunction. The Nation further argues that the Court committed clear error by misapprehending the impact of Title 2011.

While the Court welcomes the Nation's clarification [*6] that it does not seek an injunction barring entry by state officers onto Nation trust land with regard to those eight subject matters over which Washington has asserted jurisdiction under *Public Law 280*, that clarification does not change the Court's conclusion that preliminary relief is not warranted. The Nation's attempts to characterize the *Hicks* majority as a plurality or its relevant language as dicta are unconvincing.

The Nation argues that the Court misapprehended its position regarding the requirements of Title 2011, and the Nation reiterated that permission to enter Nation trust land may be granted by an informal phone call. However, such a procedure contrasts sharply with a plain reading of Title 2011, which expressly provides that state officers are to seek permission in writing with a copy of such writing to be provided to the Bureau of Indian Affairs. Rev. Yakama Code 2011.01.04.

The Nation's arguments in support of the current motion to amend or alter order have not convinced the Court that the Court made clear error.

Manifest Injustice

In support of its argument that the Court's March 15, 2012, order will lead to a manifest injustice, the Nation argues that violations of [*7] tribal sovereignty or treaty rights constitute manifest injustice. However, this argument is identical to the Nation's argument that it will suffer irreparable harm should a preliminary injunction not issue. As the Court's March 15, 2012, order did not rest on the issue of irreparable harm, violation of the Nation's sovereignty cannot serve as a basis for reconsideration of the Court's order.

This is the second motion for reconsideration filed by the parties in this case. The Court assures the parties that each of the Court's orders is thoroughly researched and considered after due deliberation of all the pleadings. Motions for reconsideration without a valid basis for so moving merely complicate the litigation in this matter and increase each of the party's litigation costs.

Accordingly, **IT IS HEREBY ORDERED:**

1. The Plaintiff's Motion to Alter or Amend Order, **ECF No. 267**, is **DENIED**.

IT IS SO ORDERED.

The District Court Executive is hereby directed to enter this Order and to provide copies to counsel.

DATED this 4th of April 2012.

/s/ Rosanna Malouf Peterson

ROSANNA MALOUF PETERSON

Chief United States District Court Judge

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, December 14, 2012 12:38 PM
To: 'Pam Loginsky'; sbozarth@co.okanogan.wa.us; dana.cleveland@colvilletribes.com; timothy.woolsey@colvilletribes.com; steve@grahamdefense.com; lkoop@tulaliptribes-nsn.gov; sosawa@tulaliptribes-nsn.gov; bgruber@zcvbs.com; joshok@zcvbs.com
Subject: RE: State v. Clark, No. 87376-3

Rec'd 12-14-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Pam Loginsky [<mailto:Pamloginsky@waprosecutors.org>]
Sent: Friday, December 14, 2012 12:27 PM
To: sbozarth@co.okanogan.wa.us; dana.cleveland@colvilletribes.com; timothy.woolsey@colvilletribes.com; OFFICE RECEPTIONIST, CLERK; steve@grahamdefense.com; lkoop@tulaliptribes-nsn.gov; sosawa@tulaliptribes-nsn.gov; bgruber@zcvbs.com; joshok@zcvbs.com
Subject: State v. Clark, No. 87376-3

Dear Clerk and Counsel:

Attached for filing is a motion for leave to file an amicus curiae brief, the proposed brief, and a proof of service.

Please let me know if you encounter any difficulties in opening these documents.

Sincerely,

Pam Loginsky
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