THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NISQUALLY INDIAN TRIBE, Plaintiff, v. CHRISTINE O. GREGOIRE, Governor of the State of Washington, ANDREW WHITENER, Director of Skookum Creek Tobacco Co., DAVID LOPEMAN, Director of Skookum Creek Tobacco Co., BRYAN JOHNSON, General Manager of Skookum Creek Tobacco Co., Defendants.	No. 3:08-CV-05069-RBL **FRANK'S LANDING INDIAN COMMUNITY'S MOTION TO DISMISS FOR FAILURE TO JOIN AN INDISPENSABLE PARTY UNDER FRCP 19** **NOTE FOR MOTION CALENDAR: FRIDAY, APRIL 4, 2008**

Pursuant to Federal Rule of Civil Procedure 12(b)(7), the Frank's Landing Indian Community (the "Community") respectfully moves to dismiss this action for failure to join an indispensable party pursuant to Federal Rule of Civil Procedure 19.

I. INTRODUCTION

The Frank's Landing Indian Community has vital, direct and substantial interests in this action, in which the Nisqually Indian Tribe ("Nisqually") challenges the Addendum to a cigarette compact ("Addendum") between the State of Washington and the Squaxin Island Tribe ("Squaxin"). The Addendum clarifies that a portion of trust land within the

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Community, on which a smoke shop sits, falls within the ambit of the Squaxin cigarette compact. Through a separate contractual arrangement with the Community, Squaxin owns and operates the smoke shop at the Community. Proceeds from sales at the smoke shop are utilized to provide essential governmental services at the Community. Therefore, any decision on the validity of the Addendum has significant and direct consequences on the legally-protectable property interests of an absent party—the Community. The Community, thus, is undoubtedly a necessary party under Rule 19, and as such should be joined if feasible.

However, it is not feasible to join the Community. Since the Community is recognized as a "self-governing" Indian community under federal law, it enjoys governmental immunity that prevents its joinder without its consent. Further, the Community is an indispensable party pursuant to Rule 19(b), one without whom in equity and good conscience this lawsuit should not proceed. This action must be therefore dismissed pursuant to Rule 12(b)(7) for failure to join the Community as an indispensable party.

II. PRELIMINARY CONSIDERATION

A. It is Appropriate for the Court to Decide This Motion Prior to Ruling on Nisqually's Pending Motion for a Preliminary Injunction

The Community respectfully requests that this Court expedite consideration of the Motion of Frank's Landing Indian Community for Limited Intervention for the Purpose of Asserting Indispensable Party Status, filed March 6, 2008, and this Motion to Dismiss for Failure to Join an Indispensable Party Under FRCP 19. It is undisputed that Nisqually's pending motion for a preliminary injunction requires consideration of Nisqually's likelihood of success on the merits. *See, e.g., Paramount Land Co. v. Cal. Pistachio Comm'n*, 491 F.3d 1003, 1008 (9th Cir. 2007). It is self-evident that Nisqually has no probability of success on the merits if the case is dismissed on threshold jurisdictional grounds—the failure to join an

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indispensable party[1]—setting aside momentarily the other infirmities of Nisqually's motion. *See, e.g., Vulcan Power Co. v. Davenport Power, LLC*, Civ. No. 07-6105-AA, 2007 WL 1667152, at *5 (D. Or. June 4, 2007) (motion for preliminary injunction denied because plaintiff could not succeed on the merits as an indispensable party could not be joined). Accordingly, in the interest of judicial economy, it is appropriate to first decide whether Nisqually's claims can survive a motion to dismiss for failure to join an indispensable party.

III. BACKGROUND

Frank's Landing Indian Community is a direct successor-in-interest to the self-governing Indian community known as the Muck Creek Village. *See* Declaration of Henry Adams in Support of Frank's Landing Indian Community's Motion for Limited Intervention, at 2, ¶ 3 (March 6, 2008) ("Adams Dec."). Kluck-et-sah (Frank) acted as Village Leader until his death in 1896, after which his son, Willie Frank, born *circa* 1879, assumed the position and title of Leader of the Muck Creek Village. *Id.* After the Kluck-et-sah trust lands were condemned in 1918 to enlarge the Fort Lewis Military Reservation, a six-acre replacement tract was purchased for Willie Frank on the Lower Nisqually River in 1919. *Id.* Related residents of the lost Muck Creek Village relocated to the new Frank property. After relocating, Willie Frank continued as leader of the displaced Muck Creek Village, including that community's ultimately unsuccessful efforts to regain possession of lost lands. *Id.* During this early part of the 20th century, correspondence in the form of letters and petitions were sent from the community as a governing body to federal and state governments, and agencies. *Id.*

The community, which ultimately became known as Frank's Landing Indian Community ("Frank's Landing" or the "Community"), further developed and enhanced its

[1] Nisqually's motion for preliminary injunction also fails because it has no probability of success on the merits for failure to join Squaxin Island Tribe. *See* Squaxin Island Tribe's FRCP 12(b)(7) Motion to Dismiss for Failure to Join an Indispensable Party.

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government-to-government relationship with the United States to sustain and protect the Community's economic viability and promote its social and political interests. *See id.*, at 2, ¶ 5. An example of the varied endeavors of the Community to provide a sustainable economy for its residents was the establishment of a series of fish houses to provide buying stations for canneries and fresh market buyers of salmon. *Id.* Following major floods in 1931 and 1933, the Community worked with state and federal governments to build a piling-and-timbers water break on both sides of the bridge crossing over the Nisqually river adjacent to the Community. *Id.*

The government-to-government relationship with the United States expanded in the early 1970s when the Community began receiving direct funding and assistance from the federal government, including from the Indian Health Services for septic and sewage systems, and residential wells and water works. *Id.*, at ¶ 6. In addition, the Bureau of Indian Affairs directly provided financial support to the Community after floods damaged the Community's smoke shop known as Frank's Landing Indian Trade Center ("Trade Center"). *Id.*

The Community also established a primary school, the Wa-He-Lut Indian School; the proceeds from cigarette sales at the Trade Center funded the school at inception, as they do now. *Id.*, at 2-3, ¶ 7. The Trade Center exclusively funded the development, staffing, operations, maintenance and transportation for the school in its first four years, 1974-1977. *Id.* In 1978, the Bureau of Indian Affairs began direct funding assistance to the Community for the school through annual (and soon thereafter multi-year) contracts with the Wa-He-Lut School as a Community tribal organization under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), Pub. L. No. 93-638, *codified at* 25 U.S.C. § 450 *et seq.* *Id.* The contracting assistance continues to this date. *Id.* These are mere examples of the myriad ways that Frank's Landing Indian Community has historically attended to the educational, political, and socio-economic needs of its residents.

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In 1987 Congress codified its acknowledgement of the long-standing government-to-government relationship between the Community and the federal government. Congress expressly "recognize[d] Frank's Landing Indian Community as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" and further recognized the Community as "eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act for such services ...." Indian Law Technical Amendments of 1987, Pub. L. No. 100-153, § 10, 101 Stat. 886. By this statute, Congress accordingly confirmed the Community's governmental status and that the Community enjoys attributes of sovereignty, such as eligibility for services under the ISDEAA.

Despite the clarity of this congressional mandate, the Community continued to face challenges to its governmental status, principally by the Nisqually Tribe. Thus, Congress, to put all doubts aside, acted yet again and reconfirmed the governmental status of the Community in 1994, amending Section 10 of Public Law 100-153 to make clear that the Community is "a self-governing dependent Indian community" and taking pains to clarify that the Community "is not subject to the jurisdiction of any federally recognized tribe."[2] Act of November 2, 1994, Pub. L. No. 103-435, § 8, 108 Stat. 4566, 4569-70.[3]

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[2]To be sure, the statute also states that nothing in the Act should be construed as congressional acknowledgment of Frank's Landing as a "federally recognized Indian tribe." Pub. L. No. 103-435, November 2, 1994, 108 Stat. 4566, § 8. The provision merely clarifies that while the Community is self-governing, it does not share all the privileges and immunities of a "federally recognized Indian tribe" – a term of specific and well-settled meaning. For example, the Community is not eligible to make claims for a treaty-protected fishing allocation, claims that are open to Nisqually, Puyallup, and Squaxin Island, among others, because of their status as federally recognized Indian tribes that were signatories of the Treaty of Medicine Creek. Notably, designation as a "federally recognized Indian tribe" is not determinative of sovereign immunity. *See Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) (dismissing an action against a "tribal" government based on sovereign immunity even though it was not a "federally recognized Indian tribe").

[3] The unofficial "codification" of the relevant provisions of the 1987 Act as amended by the 1994 Act are attached as Appendix A to the Motion of Frank's Landing Indian Community for Limited Intervention (March 6, 2008). Because the 1994 Act is not codified elsewhere and it amends the 1987 law, it is difficult to read without a document such as this, which the Community has produced for the Court's convenience.

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The Community is located on the banks of the Nisqually River and includes 19 acres of land held in trust by the United States. Adams Dec., at 2, ¶ 4. The Landing has its own Governing Council and Constitution, and the Community runs numerous government-sponsored programs, including the Wa-He-Lut Indian School and the Alesek Institute, for the benefit of the members of the Community and neighboring tribes. *Id.*, at ¶ 4. Principal funding for the Wa-He-Lut Indian School and all the other governmental services provided by the Landing, including flood control, mental health services through the Alesek Institute, environmental preservation, and cultural development and enhancement, have been sustained through the proceeds of the Trade Center. *Id.*, at 3, ¶ 8. In July of 2007, because of concerns over whether the Trade Center was in complete compliance with state law, the Community decided to close the Trade Center. *Id.* Shutting down the Community's chief source of income severely strained the Community and its ability to provide the services it had traditionally provided to its members, with a particularly grievous impact on the Wa-He-Lut Indian School. *Id.*

In the months between the closing of the Trade Center and the end of 2007, Squaxin and the Community negotiated an inter-governmental partnership through which Squaxin now owns and operates the smoke shop (formerly the Trade Center) on trust land within Frank's Landing Indian Community. Squaxin leases the land and improvements on which the smoke shop sits, land held in trust for a member of the Squaxin Island Tribe.[4] In their agreements, the Community granted Squaxin certain rights to that portion of the Community on which the smoke shop lies. To eliminate any doubt and to confirm with Washington State that Squaxin's operation of the smoke shop was consistent with state law, Squaxin negotiated the

[4] The land within Frank's Landing Indian Community on which the smoke shop sits is held in trust by the United States for Theresa Bridges, an enrolled member of the Squaxin Island Tribe. Squaxin leases a portion of Ms. Bridges' trust land. *See* Declaration of Jim Peters in Support of Squaxin Island Tribe's Motions to Dismiss and Intervene, at 3, ¶ 6 (February 22, 2008).

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Addendum to its Cigarette Tax Compact.[5] The Addendum, which was executed by Washington State and Squaxin on January 22, 2008, amends the Compact's definition of "Indian Country" to clarify that it includes lands within the Community. Squaxin and the Community also agreed that Squaxin will share the tax proceeds from the sale of cigarettes at the Community to ensure a consistent revenue stream for the Wa-He-Lut Indian School and other essential governmental services provided by the Community.

Through this litigation, Nisqually seeks to invalidate the Addendum and enjoin the sale of cigarettes at the smoke shop in the Community. To obtain complete relief, however, both the Community and Squaxin must be joined, if feasible. Further, if Nisqually is successful in obtaining an injunction—whether preliminary or permanent—or other relief, it would impair the property and contractual interests of the Community and severely limit the Community's ability to continue to provide essential governmental services to its members, including providing the necessary resources to fund Wa-He-Lut Indian School. Yet, the Community cannot be joined as it has not waived its sovereign immunity or otherwise consented to be sued.

IV. ARGUMENT

A. This Action Must Be Dismissed for Failure to Join the Community as an Indispensable Party

Determination of whether a party is indispensable is resolved by reference to Federal Rule of Civil Procedure 19. Pursuant to Rule 19, this Court must consider: (1) whether an absent party is necessary to the action; and then, (2) if the party is necessary, but cannot be joined, whether the party is indispensable such that in "equity and good conscience" the suit should be dismissed. *Dawavendewa v. Salt River Project Agricultural Improvement and*

[5] A copy of the "Addendum to Cigarette Tax Compact Between the Squaxin Island Tribe and the State of Washington" (January 22, 2008) is attached as Exhibit A to the Declaration of Cameron Comfort (February 25, 2008), filed in support of Defendant Christine Gregoire's Opposition to Plaintiff's Motion for Preliminary Injunction and Motion to Dismiss.

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Power District, 276 F.3d 1150, 1155 (9th Cir. 2002); *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (internal quotations omitted).

1. The Community is Necessary to This Action

Courts turn to Rule 19(a) to determine if an absent party is necessary, and, therefore, should be joined, if feasible. A party is deemed necessary if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). A party need only satisfy one of these alternative tests to be deemed "necessary." *See, e.g., Dawavendewa*, 276 F.3d at 1155.

Here, the Community is a necessary party under each of the alternative Rule 19 tests. First, the Community is necessary because it claims a legally-protected interest[6] in the subject of this suit such that a decision in its absence will necessarily impair or impede its ability to protect that interest. *See* Fed. R. Civ. P. 19(a)(2); *Dawavendewa*, 276 F.3d at 1155. Second, the Community is also necessary under Rule 19 because complete relief cannot be accorded to Nisqually in the absence of the Community. *See, e.g., Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992).

a. Injunctive Relief Would Impair the Community's Legally-Protected Interests

The Community is a necessary party under Rule 19 because it possesses legally-protected interests related to this litigation such that a decision in its absence will impair or

[6] The Community need only "*claim*" a legally-protected interest in this suit because "[j]ust adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party." *Shermoen*, 982 F.2d at 1317.

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impede its ability to protect those interests. *See* Fed. R. Civ. P. 19(a)(2) (A party is necessary if "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may [] as a practical matter impair or impede the person's ability to protect that interest"). The Ninth Circuit's decision in *Dawavendewa* provides helpful instruction. There, the Court held that the Navajo Nation was a necessary party since the Navajo Nation "claim[ed] a cognizable economic interest in the subject of th[e] litigation which may be grievously impaired by a decision rendered in its absence." *Dawavendewa*, 276 F.3d at 1157. Similarly, here, the Community is a necessary party because it has economic interests that would be "grievously impaired" if Nisqually receives the relief sought.

Here, the Community seeks to protect, *inter alia,* the Squaxin tax revenues derived from the sale of cigarettes which are utilized to fund essential governmental services at the Community. The Community also seeks to protect its contractual and governmental agreements with Squaxin. An injunction invalidating the Addendum and enjoining the sale of cigarettes would eliminate the Community's tax revenue and threaten the contractual and governmental relationship with Squaxin. Indeed, the fact that the relief Nisqually seeks will negatively impact the Community's contractual interests is worth special note. It is settled law that "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975).

In addition, setting aside the Addendum and enjoining the sale of cigarettes would affect the Community by eliminating the revenue stream utilized to provide its members with essential governmental services. And therefore, by definition, the relief Nisqually seeks would impinge on the governmental interests of the Community. *See Dawavendewa*, 276 F.3d at 1157 ("[A]s a result of its multiple economic and sovereign interests, the Nation

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sufficiently asserts claims relating to this litigation which may be impaired in its absence.").

In short, the relief Nisqually seeks, if granted, would negatively impact legally-protected interests of the Community. This latent threat to the Community's legally-protected interests make it a necessary party under Rule 19(a)(2) because disposition of this action in the Community's absence may "as a practical matter impair or impede [its] ability to protect th[ose] interest[s]." Fed. R. Civ. P. 19(a)(2)(i); *Dawavendewa*, 276 F.3d at 1157. Therefore, the Community is a necessary party under Rule 19.

b. Complete Relief Cannot be Afforded to Nisqually in the Absence of the Community

The Community is also a necessary party under Rule 19 because even if ultimately victorious in this action, Nisqually cannot be accorded complete relief in the absence of the Community (and Squaxin). Under Rule 19(a)(1) an absent person is necessary if "in the person's absence complete relief cannot be accorded among those already parties[.]"

Nisqually seeks injunctive relief to enjoin the sale of cigarettes within the Community and to invalidate the Addendum. Nisqually only named as defendants Washington Governor Gregoire and individuals who are allegedly officials of Skookum Creek Tobacco. By failing to name Squaxin and the Community as defendants, Nisqually cannot hope to realize the plain objective of this lawsuit—to stop the sale of cigarettes at the smoke shop. The contractual relationship between Squaxin and the Community would remain undisturbed. Thus, even if the Skookum Creek Tobacco officials and Governor Gregoire could comply with the injunction,[7] the Community could take action to uphold its contractual and governmental rights against Squaxin.

In this and other circuits, Courts have routinely concluded that where absent parties can, under a contract or other lawful agreement, continue the very activity the litigation seeks

[7] The three named individual tribal defendants do not have any authority or control over the smoke shop or the collection of taxes. *See* Opposition of Defendants Whitener, Lopeman, and Johnson to Plaintiff's Motion for Preliminary Injunction and Motion to Dismiss, pp. 7-9.

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to enjoin, those absent parties are deemed not only necessary under Rule 19, but indispensable. *See, e.g., Dawavendewa*, 276 F.3d 1150; *Pit River Home & Agric. Coop. Assoc. v. United States*, 30 F.3d 1088, 1098 (9th Cir. 1994); *Confederated Tribes*, 928 F.2d 1496. For example, in *Dawavendewa*, the plaintiff failed to join the Navajo Nation in an action that sought injunctive relief to ensure his employment at a company leasing land from the Nation, and to prevent that company from applying the Navajo hiring preference policy required by its lease with the Nation. 276 F.3d at 1155-56. Because the Navajo Nation consequently would not have been bound by the injunction, the court concluded that Dawavendewa could not possibly be accorded complete relief without the Nation because "[t]he Nation could still attempt to enforce the lease provision . . ." and the company "would be between the proverbial rock and a hard place—comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it." *Id.* at 1155, 1156. Ultimately, the court affirmed the dismissal of Dawavendewa's complaint for failure to join the Navajo Nation as an indispensable party. *Id.* at 1163. *Accord Pit River*, 30 F.3d at 1099 ("[E]ven if the [plaintiff] obtained its requested relief ... it would not have complete relief, since judgment against the government would not bind the [absent party], which could continue to assert its right to [] the [property]."); *Confederated Tribes*, 928 F.2d at 1498 ("Judgment against the federal officials would not be binding on the Quinault Nation, which could continue to assert sovereign powers and management responsibilities over the reservation.").

Similarly, here, if Nisqually obtains an injunction against the named defendants then the contractual arrangements between Squaxin and the Community would remain undisturbed. This would result in one of two things: (1) Squaxin and the Community could continue to run the smoke shop (since neither Squaxin or the Community are presently named defendants) or (2) if Squaxin was somehow enjoined, then like the company in *Dawavendewa,* Squaxin "would be between the proverbial rock and a hard place" as it too would have to choose whether to "comply with the injunction . . . or comply with the lease."

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Id. at 1155, 1156. As in *Dawavendewa* then, Nisqually cannot be accorded complete relief in the absence of the Community. Thus, the Community is a necessary party under Rule 19.

2. The Community Cannot Be Joined Because of Its Sovereign Immunity

Because the Community is a necessary party to the instant litigation, the next step in the analysis under Rule 19 is to determine whether it can be feasibly joined as a party. *See, e.g., Dawavendewa*, 276 F.3d at 1159; Fed. R. Civ. P. 19(a) ("If the [necessary] person has not been so joined, the court shall order that the person be made a party."). Here, because the Community enjoys governmental immunity from suit as a quasi-sovereign, it cannot be joined in this litigation. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Dawavendewa*, 276 F.3d 1150; *Confederated Tribes*, 928 F.2d 1496.

Governmental immunity for Indian governmental entities flows from their self-governance. *See, e.g., Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890 (1986) (Sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance.") (emphasis added). Congress has plenary power over Indians and, therefore, Congressional recognition of an Indian community's governmental status is dispositive generally and of a community's governmental immunity specifically. *See, e.g., Three Affiliated Tribes*, 476 U.S. at 891 (noting that Indian sovereignty is "subject to plenary federal control and definition"); *see also* U.S. CONST. art. I, § 8, cl. 3. *Cf. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe Of Oklahoma*, 498 U.S. 505, 510 (1991) (noting that "Congress has consistently reiterated its approval of the immunity doctrine" through "Acts [that] reflect Congress's desire to promote the goal of Indian self-government") (internal citations and quotations omitted).

Here, Congress has expressly recognized the quasi-sovereign nature of the Frank's Landing Indian Community. *Id.* First, in 1987 Congress "recognized [the Community] as eligible for the special programs and services provided by the United States to Indians because of their status as Indians . . . ." Pub. L. No. 100-153, November 5, 1987, 101 Stat.

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886, § 10. Among other things, this recognition permitted the Community to formally enter into government-to-government contracts under the ISDEAA. Then, in 1994 Congress specifically confirmed the Community's governmental status by explicitly acknowledging the Community as "a self-governing dependent Indian community." Pub. L. No. 103-435, November 2, 1994, 108 Stat. 4566, § 8 (Frank's Landing is recognized "as a self-governing dependent Indian community that is not subject to the jurisdiction of any federally-recognized tribe.") (emphasis added). Whatever the full scope of the Community's governmental powers, it is plain that it has a unambiguous right to "self-govern[ance]."

What is more, it naturally follows from Congress's acknowledgement of the "self-governing" nature of the Community that the Community enjoys immunity from suit. As previously discussed, Congress has plenary power over Indians. *See, e.g., Three Affiliated Tribes*, 476 U.S. at 891; *see also* U.S. Const. art. I, § 8, cl. 3. Congressional recognition of the Community's self-governing status is an unequivocal and dispositive determination of the Community's immunity from suit. *Three Affiliated Tribes*, 476 U.S. at 890 (Sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance.") (emphasis added). Thus, as an autonomous, self-governing Indian Community, Frank's Landing Indian Community enjoys governmental immunity.

The Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, codified at 25 U.S.C. § 81, confirms that conclusion. Pursuant to Section 81, "Indian tribe" has the meaning given to that term in the ISDEAA, which defines it as "any Indian tribe, band, nation, or other organized group or community, . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *See* ISDEAA, 25 U.S.C. § 450b(e) (emphasis added). Indeed, Frank's Landing is exactly that: A "self-governing" community "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians . . . ." Pub. L. No. 100-153, November 5, 1987, 101 Stat.

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886, § 10. The statute therefore applies with full force to the Community. Further, subsection (d) of § 81 provides that the Secretary of the Department of the Interior shall refuse to approve certain agreements or contracts that encumber Indian lands unless those agreements or contracts "disclose[] the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe . . . [or] include[] an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense . . . ." 25 U.S.C. § 81(d)(2)(B)-(C) (emphasis added). This statute is further confirmation that Congress—which exercises plenary authority—views self-governing Indian communities such as Frank's Landing as possessing immunity from suit, otherwise there would be no reason to require waiver of immunity under certain circumstances.

Finally, it bears noting that Frank's Landing would meet the standard for immunity from suit, even in the absence of Congressionally-recognized status. In this circuit, sovereign status is presumed if the requirements of the common law test announced in *Montoya v. United States*, 180 U.S. 261, 266 (1901) are met. *See, e.g., Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992). *Montoya* defines a sovereign tribal entity as: "[A] body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." 180 U.S. at 266. The entity need only have, historically, minimal "governmental" functions. *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559 (9th Cir. 1991).

Frank's Landing meets the *Montoya* test. The first part of the test is easily met as the Community is a "body of Indians of the same or a similar race." The group of Indians comprising the Community derive from the Indians once known as the Muck Creek Village. Indeed, Billy Frank, Jr. and Theresa Bridges are the grandchildren of Kluck-et-sah, the Muck Creek Village Leader until his death in 1896, and children of Willie Frank, the last Leader of the Muck Creek Village. They are on the Community's Governing Council. *See* Adams Dec., at 2, ¶ 3.

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The Community also meets the second part of the *Montoya* test. The Community is "united in [] under one leadership or government;" because it has its own Governing Council. *Id.*, at ¶ 4. The Governing Council of the Community operates as a government and adheres to the Community's Constitution, which formally acknowledges the Council's singular leadership of the Community.

The Community satisfies the third part of the *Montoya* test as well. The Community is, and always has been, located on land on the banks of the Nisqually River, albeit not the exact same lands since the original lands where federally confiscated. Adams Dec., at 2, ¶ 4.

Finally, the sovereign status of the Community is confirmed because it is "the modern-day successor" to a historical entity that exercised the functions of a governing body—the self-governing Indian community known as the Muck Creek Village. *Native Village of Venetie*, 944 F.2d at 559; *see also* Adams Dec., at 2, ¶ 3. That the Community meets the *Montoya* standard is an independent reason for establishing that it has immunity from suit.

Most important, Congress has spoken and a unquestionable result of congressional acknowledgment of the Community's "self-governing" status is that it is immune from suit. *Three Affiliated Tribes*, 476 U.S. at 890 (Sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance.") (emphasis added). Because the Community enjoys sovereign immunity, it cannot be joined in this litigation. *See, e.g., Santa Clara Pueblo*, 436 U.S. 49; *Dawavendewa*, 276 F.3d 1150; *Confederated Tribes*, 928 F.2d 1496.

3. The Community is Indispensable and This Action Must be Dismissed

As set forth above, the Community is a necessary party that cannot be joined due to its sovereign immunity. Accordingly, the next step in the analysis is determining whether the Community is indispensable such that Nisqually's action must be dismissed. *See* Fed. R. Civ. P. 19(b). A party is indispensable if in "equity and good conscience," the court should not allow the action to proceed in its absence. *Id.* To make this determination, courts balance four factors: (1) the prejudice to any party or to the absent party; (2) whether relief can be

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shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *See, e.g., Dawavendewa*, 276 F.3d at 1161.

The prejudice to the Community if Nisqually is successful flows from the same legally-protected interests—the Community's contractual and governmental agreements with Squaxin—that make the Community a necessary party under Rule 19(a). *See Confederated Tribes*, 928 F.2d at 1499 (prejudice test under Rule 19(b) is essentially the same as the inquiry under Rule 19(a)); *accord Dawavendewa*, 276 F.3d at 1162. A decision favorable to Nisqually prejudices the Community's economic and governmental interests that arise from its contractual and governmental agreements with Squaxin, and inhibits the generation of revenue through cigarette taxes. In turn, the prejudice to those interests will grievously hinder the Community's ability to fund essential governmental services, including the Wa-He-Lut Indian School. The harm to the Community's ability to generate the revenue necessary for such essential governmental services militates strongly in favor of dismissal. *See Dawavendewa*, 276 F.3d at 1162 (finding the prejudice to the Navajo Nation's "ability to provide employment and income for the reservation" weighed in favor of dismissal).

In addition, relief cannot be shaped to mitigate the prejudice the Community faces. Any decision in favor of Nisqually would prejudice the Community's economic and sovereign interests in its contractual and governmental agreements with Squaxin. *Id.* (finding that relief could not be shaped to minimize prejudice because "[a]ny decision [in favor of the plaintiff] would prejudice the [Navajo] Nation in its contract with SRP and its governance of the tribe."). This inability to shape relief to lessen the prejudice to the Community weighs in favor of dismissal.

Further, no adequate remedy can be awarded to Nisqually without the Community. Adequacy for purposes of Nisqually requires a judgment for injunctive relief that has binding affect on the Community. That is not possible in this case. Thus, the smoke shop will

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continue to operate and Nisqually will be left without the requested relief, or the Community will still be able to enforce contractual rights against Squaxin. This factor also weighs in favor of dismissal.

Finally, it is notable that the absence of an alternative forum, does not mean dismissal is inappropriate here. The "lack of an alternative forum does not automatically prevent dismissal of a suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990); *see also Confederated Tribes*, 928 F.2d at 1500 (plaintiff's suit dismissed despite lack of alternative forum for plaintiff tribe to bring action for injunctive relief against the Secretary). Indeed, this Circuit has "regularly held" that an Native group's interest in "immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Wilbur v. Locke*, 423 F.3d 1101, 1115 (9th Cir. 2005). Consequently, the Community's interest in maintaining its sovereign immunity outweighs Nisqually's interest in litigating this claim. *See Confederated Tribes*, 928 F.2d at 1500. And, accordingly, this suit should be dismissed.

V. CONCLUSION

Nisqually Indian Tribe seeks to invalidate an Addendum to the cigarette tax compact between Squaxin Island Tribe and Washington State, and enjoin the sale of cigarettes at the smoke shop located on land within Frank's Landing Indian Community. Yet, Nisqually has failed to join a necessary party - Frank's Landing Indian Community. The Community, however, cannot be joined in this litigation because of its sovereign immunity, and this suit should not, in equity and good conscience go forward without the Community. Because the

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equities favor the dismissal of this action, the Community respectfully requests that this action be dismissed for failure to join an indispensable party.

Respectfully submitted this 12th day of March 2008.

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