UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NISQUALLY INDIAN TRIBE;
Plaintiffs,

vs.

CHRISTINE GREGOIRE, ET AL.

Defendants.

Case No. C08-5069-RBL

PLAINTIFF'S OPPOSITION TO FRANK'S LANDING INDIAN COMMUNITY'S MOTION TO DISMISS FOR FAILURE TO JOIN AN INDISPENSABLE PARTY

NOTED ON MOTION CALENDAR:
APRIL 4, 2008

Plaintiff Nisqually Indian Tribe ("Nisqually") respectfully opposes Frank's Landing Indian Community's Motion to Dismiss for Failure to Join An Indispensable Party Under FRCP 19. As demonstrated hereafter, (i) the Frank's Landing Indian Community ("Community") cannot be a party to this action; (ii) even could it be a party, the Community is not an "necessary" or an "indispensable" party to this action; and (iii) the Community does not possess sovereign immunity that would preclude its joinder (if it could be a party).

I. THE COMMUNITY CANNOT BE A PARTY TO THIS ACTION

The Community is not recognized as an Indian tribe by the United States. The Community is not included in the comprehensive list of recognized Indian tribes annually

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published in the Federal Register pursuant to the Federally Recognized Indian Tribe List Act of 1994, codified at 25 U.S.C. 479a *et seq.* (A copy of the latest annual list is attached as Exhibit A). Furthermore, Congress has declared by statute that the Community is not an Indian tribe. In 1994, when Congress enacted legislation recognizing the Community as "a self-governing dependent Indian Community," it added explicitly that "[n]othing in this section may be construed to constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized Indian tribe." Pub.L. 103-435, 108 Stat. 4569 (Nov. 2, 1994). The legislative history of this provision underscored that the Community "cannot exercise the powers of a sovereign." Cong. Rec. 11140 (Oct. 4, 1994).

Upon information and belief, the Community is an unincorporated association. Accordingly, pursuant to Fed.R.Civ.P. 17(b), its capacity to sue or be sued as a party in this case is governed by the law of Washington, where this Court is located.

Under Washington law, an association can possess or exercise powers or privileges of a corporation only if the State has explicitly granted it such powers by general laws. *Pacific American Realty Trust v. Lonctot*, 381 P.2d 123, 126-27 (Wash. 1963). The State Constitution prevents the formation of self-organized associations for the purpose of transacting business without meeting the obligations and complying with the statutory regulations of corporations. *State ex rel. Range v. Hinkle*, 219 P. 41, 43 (Wash. 1923). Such self-organized associations have no legal status in Washington and are without standing in Washington courts. *Id.; see also Northwest Indep. Forest Mfrs. v. Washington State Dept. of Labor and Industries*, 899 P.2d 6, 10 n.11 (Wash. App. 1995).

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While unincorporated associations sometimes have representational standing to bring claims on behalf of their individual members, they are not separate juristic entities and cannot assert rights on their own behalf. *Stuart v. Coldwell Banker Commercial Group, Inc.*, 745 P.2d 1284, 1288 (Wash. 1987) (en banc).

In this case, the Community asserts that it has a protectable interest in the transaction that is the subject of this action and that it should be allowed to intervene as a party. But the Community lacks capacity to sue or be sued and so is incapable of being a party.

II. THE COMMUNITY IS NOT AN INDISPENSABLE PARTY

Even if the Community could be a party to this action, it is not a "necessary" party, much less an "indispensable" party whose absence requires the dismissal of this action pursuant to Fed.R.Civ.P. 19.[1]

Application of Rule 19 involves three successive inquires. First, the court must determine whether a nonparty is "necessary," that is, whether the party should be joined if feasible. If an absentee is a necessary party, the second determination is whether the absentee can be joined as a party. Finally, if joinder is not feasible, the court must determine whether the case can proceed without the absentee, or whether the absentee is an "indispensable party" without whom the action cannot proceed consistent with equity and good conscience. If the absentee is "indispensable," the action must be dismissed. *See EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 779-80 (9th Cir. 2005). The Community has the burden of persuasion in

[1] On December 1, 2007, Rule 19 was amended. Previously, the predecessor to Rule 19(a)(1)(A) was found at Rule 19(a)(1) and the current version of Rule 19(a)(1)(B) was found at Rule 19(a)(2). Those sections of Rule 19, although re-labeled, remain substantively the same.

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arguing for dismissal. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *accord Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992).

A. The Community Is Not a "Necessary" Party

The Community claims that it is a necessary party within the meaning of Rule 19 for two reasons: (i) because it has legally protected interests in this action that would be impaired by its absence, and (ii) because complete relief cannot be afforded to Nisqually in the absence of the Community. Both of these arguments fail.

1. The Community Does Not Have An Interest In This Action That Would Be Impaired By Its Absence

The Community asserts that its legally protected interests would be impaired by the injunctive relief sought by Nisqually: invalidating the Addendum to the cigarette tax compact between the State of Washington and the Squaxin Island Tribe ("Squaxin") and prohibiting the taxation of cigarette sales at the smoke shop located at 11107 Conine Avenue SE, Olympia, Washington (the "Frank's Landing smoke shop") as though they were being made on Squaxin tribal land.

The Community is not a party to the Addendum and so it cannot invoke the rule that "a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Dawavendewa v. Salt River Project Agr. Imp. And Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002). Instead, the Community contends that the relief being sought in this action would "grievously" impair its economic interests. But a mere economic stake in the outcome of litigation, even if significant, is not enough. *See Greene v. United States*,

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996 F.2d 973, 976 (9th Cir. 1993); *Sirna Therapeutics, Inc. v. Protiva Biotherapeutics*, 2006 WL 3491027 (N.D. Cal.) at *3 (a financial stake in the outcome of litigation is not a legally protected interest giving rise to Rule 19 necessity); *Cortez v. City of Los Angeles*, 96 F.R.D. 427, 428 (C.D. Cal. 1983) (interest must be a legally protected interest, not merely a financial interest).

The Community further contends that the relief sought in this action presents a "latent threat" to its contractual and governmental agreements with Squaxin, which it alleges enable Squaxin to own and operate the smoke shop and give the Community a share of the Squaxin tribal tax proceeds on sales made at that shop. But the Community does not explain the nature of this "latent threat," nor has it produced those agreements for review by the Court and the parties.

More basically, the Community's alleged contractual interests are insufficient under Rule 19. The situation presented here is akin to a case recently decided by the Second Circuit, *MasterCard Int'l v. Visa Int'l Serv. Ass'n*, 471 F.3d 377 (2d Cir. 2006). That case involved a dispute over sponsorship rights to the World Cup soccer event. MasterCard alleged that it had contractual sponsorship rights and sued FIFA, the soccer governing body, for breach of contract after FIFA entered into a sponsorship contract with Visa. Visa asserted that it was an indispensable party and that the case must be dismissed for lack of subject matter jurisdiction because its joinder would destroy diversity. Both the district court and the Second Circuit rejected this contention. The circuit court analyzed the situation as follows:

> It is not enough under Rule 19(a)(2)(i) for a third party to have an interest, even a very strong interest, in the litigation. Nor is it enough for a third party to be adversely affected by the outcome of the litigation. Rather, necessary parties under Rule 19(a)(2)(i) are only those parties whose ability to protect their interests would be impaired ***because of*** that party's absence from the litigation. ... Thus, while Visa may have an interest that would be impaired by the outcome of this litigation, Visa still does not qualify as a necessary party under Rule 19(a)(2)(i) because the harm Visa may suffer is not *caused by* Visa's

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> absence from this litigation. Any such harm would result from FIFA's alleged conduct in awarding Visa sponsorship rights it could not legally give.
> 471 F.3d at 387 (emphasis in the original).

This analysis is equally applicable here. Any harm that the Community may suffer would not be caused by its absence from this action, but instead by Squaxin's conduct in giving the Community a share of tax revenue that Squaxin cannot not legally collect.

Even if the Community could demonstrate that it has a legally protected interest in this litigation, the Court must further determine whether that interest will be impaired or impeded by its absence from this suit. There is no such impairment if the Community's interest already is adequately represented by the existing parties. *See Shermoen v. United States*, 982 F.2d at 1318. In determining whether existing parties adequately represent the interests of the absentee, three factors are considered: whether the interests of a present party are such that it will make all of the absent party's arguments; whether the party is capable of and willing to make such arguments; and whether the absent party would offer any necessary element to the proceedings that the present parties would neglect. *Id.*

In this case, the Community is not a necessary party because the existing defendants, especially the Squaxin defendants, will adequately represent the Community's interests. The fundamental issue in this case is whether federal law prohibits Squaxin from imposing its tribal taxes on cigarette sales made outside tribal land. There is no conflict of interest between the existing defendants and the Community with respect to this issue or with respect to Nisqually's pendent state law claims. To the contrary, the present defendants and the Community have virtually identical interests and share a strong interest in defeating the action. The existing defendants are ready, willing and able to make all of the arguments that the Community might

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make. Indeed, the arguments that the existing defendants and the Community have advanced thus far mirror each other. There is no reason to conclude that the Community would offer any necessary element to the proceedings that the present parties would neglect. Accordingly, the Community is not a necessary party. *See Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (absent Indian tribes not necessary parties because the United States would adequately represent their interests).

2. The Community's Presence Is Not Required To Afford Nisqually Complete Relief

The Community also argues that, in its absence, the Court cannot afford complete relief to Nisqually. It asserts that Squaxin and the Community could continue to run the smoke shop and, presumably, to continue collecting the Squaxin tribal tax, or else Squaxin would find itself in the quandary of having to choose whether to comply with this Court's injunction or comply with its agreements with the Community. These arguments also fail.

There is no question that the Court can afford complete relief to Nisqually with the existing parties. Indeed, complete and effective relief can be provided by an injunction directed to Governor Gregoire, alone, regardless of whether the individual Squaxin defendants are also named. All that need happen is for the State once again to require the collection of State taxes on cigarette and tobacco sales made at the Frank's Landing smoke shop. Competitive forces will preclude Squaxin from attempting to impose its tribal taxes in addition thereto. Consequently, the Community is not a necessary party under Rule 19. *See Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879-80 (9th Cir. 2004) (absentee not a necessary party where court could grant meaningful relief by enjoining existing parties).

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Furthermore, pursuant to Fed.R.Civ.P. 65(d)(2), an injunction would bind other persons who are in active concert or participation with the parties or their officers, agents, servants, employees, and attorneys. Thus, as a practical matter, an injunction directed against the Governor and the Squaxin defendants would effectively bind the State, Squaxin, and the Community as well.

The Community fares no better with its alternate argument that its absence could place Squaxin in the dilemma of having to choose whether to comply with this Court's injunction or comply with its agreements with the Community. First, the Community has not demonstrated that its agreements with Squaxin would create any conflicting obligations for the Squaxin defendants if the Addendum were invalidated. It is entirely possible that no such conflict exists. *See Las Vegas Events*, 375 F.3d at 880 (circuit court reviewed lease agreement between parties and absentee to determine whether it would prevent the parties from complying with relief ordered by district court and found no conflict).

Moreover, this issue actually implicates Rule 19(a)(1)(B)(ii) rather than 19(a)(1)(A), and the Community's argument fails for reasons that the Second Circuit articulated in *MasterCard Int'l v. Visa Int'l Serv. Ass'n*:

> Once again, Visa is ignoring a critical element in [Rule 19(a)(1)(B)(ii)]: the substantial risk of inconsistent obligations must be ***caused by*** the nonparty's absence in the case. … FIFA's risk of multiple obligations to different parties is not a result of Visa's absence in this lawsuit; it is the result of FIFA allegedly breaching its contract with MasterCard and awarding Visa sponsorship rights it was contractually prohibited from granting. Visa's presence in this lawsuit will not remedy that fact. Whether Visa is or is not a party in the underlying lawsuit, FIFA and Visa will litigate *their* dispute under *their* contract later on down the road if MasterCard prevails here.
> 471 F.3d at 388 (emphasis in the original).

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Once again, this analysis is equally applicable here. The Community's participation in this action will not alter the Court's decision about whether the Addendum conflicts with governing federal law. If the Court invalidates the Addendum, then the Community and Squaxin will resolve any issues between them under their contracts later on down the road. This Court would not address those issues in this litigation in any event.

In summary, the Community is not a necessary party under Rule 19. The Court need not engage in any further inquiry pursuant to the Rule in order to deny the Community's motion to dismiss. Nonetheless, we will complete that analysis and demonstrate that, even were the Community a necessary party, it is not an indispensable party whose absence requires the dismissal of this action.

B. The Community Can Be Joined As a Party If It Has the Requisite Capacity

The Community asserts that it cannot be joined as a party because it has sovereign immunity. It concedes that it is not a federally recognized Indian tribe but argues that this is not determinative. The Community asserts that Congress has expressly recognized its "quasi-sovereign" nature and that its sovereign immunity naturally follows from Congress's acknowledgement of the "self-governing" nature of the Community. Finally, the Community contends that it meets the common law standard for immunity even in the absence of Congressionally-recognized status. These arguments are audacious but meritless.

"'[S]overeign immunity is an incident of sovereign power, and … the sovereign power of an Indian community depends on its tribal status.'" *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 634-35 (9th Cir. 1992), *quoting Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988). Thus, in order to be entitled to sovereign immunity, the Community must constitute

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a tribe. *Tyonek*, 957 F.2d at 635. "Whether a group constitutes a 'tribe' is a matter that is ordinarily committed to the discretion of Congress and the Executive Branch, and courts will defer to their judgment." *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1496 (D.C. Cir. 1997).

The Community unquestionably is not a tribe. Congress has said so by statute. The very enactment that recognized the Community's status as "a self-governing dependent Indian Community," added explicitly that "[n]othing in this section may be construed to constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized Indian tribe." Pub.L. 103-435, 108 Stat. 4569 (Nov. 2, 1994). The legislative history of this provision underscored that the Community "cannot exercise the powers of a sovereign." Cong. Rec. 11140 (Oct. 4, 1994).

Nor has the Executive Branch recognized the Community as an Indian tribe. The Community is not included in the comprehensive list of recognized Indian tribes annually published in the Federal Register pursuant to the Federally Recognized Indian Tribe List Act of 1994, codified at 25 U.S.C. 479a *et seq.* (A copy of the latest annual list is attached as Exhibit A).

This Court must defer to the judgment of Congress and the Executive Branch. "[T]he action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review." *Miami Nation of Indians v. U.S. Dep't of Interior*, 255 F.3d 342, 347 (7th Cir. 2001) (citation omitted). "In the absence of explicit governing statutes or regulations, we will not intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence." *Price v. State of Hawaii*, 764 F.2d 623, 628 (9th

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Cir. 1985). The decision of the Department of the Interior whether to recognize a tribe pursuant to 25 C.F.R. § 83.7 may be subject to judicial review under the Administrative Procedure Act ("APA"), *Miami Nation of Indians*, 255 F.3d at 348-51,[2] but the judgment of Congress is unreviewable. *See Kahawaiolaa v. Norton*, 222 F.Supp.2d 1213, 1222 (D. Haw. 2002) (Congress' decision not to deal with Native Hawaiians as an Indian tribe is a political one and is not subject to judicial review).

Accordingly, because the Community is not an Indian tribe, it does not enjoy sovereign immunity. If it had capacity to sue and be sued – which it does not – there is nothing that bars its joinder as a party.

C. The Community Is Not An "Indispensable" Party

Finally, even were the Community a "necessary" party and even if it had sovereign immunity, it would not be an indispensable party whose absence requires the dismissal of this action. The Community is, at most, a third-party beneficiary of the Addendum. It has repeatedly been held that third-party beneficiaries to a contract are not indispensable parties in an action seeking to invalidate the contract. *See Prudential Oil & Minerals Co. v. Hamlin*, 277 F.2d 384, 387 (10th Cir. 1960); *Inmobiliaria Axial, S.A. de C.V. v. Robles Intern. Services, Inc.*, 2007 WL 2973483 (W.D. Tex.) at *6; *Fifth Third Bank of Western Ohio v. United States*, 55 Fed.Cl. 372, 380 (2003); *Weniger v. Union Center Plaza Assocs.*, 387 F.Supp. 849, 856 (S.D.N.Y. 1974); 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice And Procedure* § 1613 n. 18 (3d ed. 2001).

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[2] In this case review under the APA presumably is not available because the Community has offered no evidence that it has sought tribal recognition pursuant to the regulation and been denied. *See United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 550-51 (10th Cir. 2001); *Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F.Supp.2d 76, 78-79 (D.D.C. 2002).

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WHEREFORE, it is respectfully submitted that the Community's motion to dismiss should be denied.

DATED this 24th day of March, 2008.

Respectfully submitted,
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