The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NISQUALLY INDIAN TRIBE,

Plaintiffs,

vs.

CHRISTINE 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

SQUAXIN ISLAND TRIBE'S FRCP 12(b)(7) MOTION TO DISMISS FOR FAILURE TO JOIN AN INDISPENSABLE PARTY UNDER FRCP 19

NOTE ON MOTION CALENDAR: Friday March 21, 2008

Pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure ("FRCP"), the Squaxin Island Tribe respectfully moves to dismiss these proceedings for failure to join an indispensable party pursuant to Rule 19 of FRCP.

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1. INTRODUCTION

The Squaxin Island Tribe ("Squaxin" or "Tribe") brings this Fed. R. Civ. P. 12(b)(7) motion to dismiss to challenge the Nisqually Indian Tribe's failure to join an indispensable party under Fed. R. Civ. P. 19, i.e. the Squaxin. This motion is brought as an adjunct to its request for leave for a limited intervention. The Nisqually Indian Tribe seeks to void an amendment to the cigarette excise tax compact between the Squaxin and the State of Washington and to preclude the Squaxin from operating its retail store at the Frank's Landing Indian Community. Squaxin believes that it is an indispensable party, joinder is not feasible and the case must be dismissed.

The Ninth Circuit considered this issue in examining the cigarette excise tax compact and an absent Swinomish Tribe. The Court definitively answered that the absent tribe must be joined, could not be joined because of its sovereign immunity, and dismissed the case. *Wilbur v. Locke*, 423 F.3d 1101 (2005). The Nisqually Indian Tribe asserts nothing in its complaint that would distinguish this case from *Wilbur*.

2. PRELIMINARY CONSIDERATION

2.1 Squaxin's Request to Consider this Motion in Advance of the Pending Motion for Preliminary Injunction.

The Squaxin requests this Court to expedite consideration of its motion to intervene and the related motions to dismiss so that they may be heard in advance of Plaintiff's motion for injunctive relief. Any consideration of injunctive relief requires consideration of the Plaintiff's likelihood of success on the merits. *Dollar Rent a Car of Wash., Inc. v. Travelers Indem. Co.*, 774 F. 2d 1371, 1374 (9th Cir. 1985). But defendants have raised, and the Squaxin proposes to raise, significant issues going to this Court's subject matter jurisdiction, including whether federal question jurisdiction exists. See State's Motion to Dismiss; §III Defendants' Whitener, Lopeman and Johnson Opposition to Plaintiff's Motion for Preliminary Injunction and Motion to Dismiss.

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For this Court to consider Plaintiff's right to injunctive relief without first being fully briefed on jurisdictional issues would undermine the Supreme Court's longstanding rule that questions pertaining to jurisdiction must be considered before proceeding to the merits. *See e.g. Wilbur v. Locke*, 423 F.3d 1101, 1105 (9th Cir. 2005). Furthermore, as demonstrated in this memorandum, were the injunction to issue, the Squaxin would suffer both interference with its ability to govern its affairs as a sovereign, and significant financial hardship without having the opportunity to present its right to participate in the proceedings.

The Squaxin's lack of party status, together with the local rule eliminating motions for shortened time, prompts a request that the Court consider of its own volition scheduling the jurisdictional matters prior to hearing the motion for a preliminary injunction .

3. FACTUAL BACKGROUND

Please see §2 of Motion of Squaxin Island Tribe for Limited Intervention for the Purpose of Asserting Indispensable Party Status and Memorandum in Support.

4. ARGUMENT

4.1 Fed. R. Civ. P. 19 requires joinder of necessary and/or indispensable parties.

FRCP 19 governs the circumstances under which persons *must* be joined as parties to the action. Rule. 19(a) requires joinder of those traditionally denominated as "indispensable"; a standard that differs from 19(b)'s "necessary party" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F3d 885, 891 (9th Cir. 2006). "Necessary" refers to a party who *should* be joined *if feasible*. "Indispensable" refers to a party whose participation is so important to resolution of the case that, if not joined, the *suit must be dismissed. Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F3d 861, 867, fn. 5 (9th Cir. 2004); *Brown v. Pacific Life Ins. Co.* 462 F3d 384, 393-394 (5th Cir. 2006) (noting that Rule 19 inquiry is "highly practical" and "fact-based").

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The burden is on the party raising the defense to demonstrate that the nonparty is a "person needed for just adjudication" under Rule 19(a), or is indispensable under Rule 19(b). *Makah Indian Tribe v. Verity,* 910 F2d 555, 558 (9th Cir. 1990).

The sole consequence of failing to join an indispensable party is a dismissal of the action.

Three questions must be considered under Rule 19:

A. Is there a valid *reason* why the absent party should be joined (e.g., to protect either the interests of the absent party or one of the present parties, or the public interest in orderly and expeditious administration of justice)?

B. If a valid reason for joinder exists, is it *feasible* to order the absent person joined as a party. Joinder is not feasible where sovereign immunity bars suit.

C. If it is not feasible to join the absent party, may the action "*in equity and in good conscience*" proceed in the absence of that party, or must it be dismissed ... "the absent person being thus regarded as *indispensable*"? Fed. R. Civ. P. 19(b).

4.2 The Squaxin Island Tribe should be joined.

Plaintiff is required to join "all persons who are materially *interested* in the subject matter of the case and who are needed for just adjudication." *Advisory Committee Notes to 1966 Amendment to Fed. R. Civ. P. 19 (a).* The primary purpose of Rule 19(a) is to assure that any judgment rendered will provide complete relief to the existing parties and prevent repeated lawsuits on the same subject matter. *Smith v. United Brotherhood of Carpenters*, 685 F2d 164 (6th Cir. 1982); *White Hall Bldg. Corp. v. Profexray Division of Litton Indus. Inc.,* 387 F.Supp.1202, 1206 (E.D. Penn. 1974).

The Plaintiff is required to join any person who meets one of two grounds: (1) a person whose interests are such that in his or her absence complete relief cannot be accorded among those already

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parties (Fed. R. Civ. P. 19(a) (1)); or (2) a person who claims an interest relating to the subject matter of the action and whose absence may: (i) as a practical matter, impair or impede the absent person's ability to *protect that interest*; or (ii) leave any of the existing parties subject to a substantial risk of incurring double, multiple or otherwise *inconsistent obligations*. Fed. R. Civ. P. 19(a)(2); see *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 US 102, 110-111, 88 S.Ct. 733, 738-739 (1968); *U.S. v. Bowen,* 172 F3d 682, 688 (9th Cir. 1999).

The two grounds are analyzed separately; i.e., if either applies, the nonparty is deemed "necessary." *Yellowstone County v. Pease*, 96 F3d 1169, 1172 (9th Cir. 1996).

4.2.1 Meaningful Relief Requires Squaxin's Presence.

The first ground for joinder is whether "in the person's absence complete relief cannot be accorded among those already parties." Fed. R. Civ. P. 19(a)(1); see *Disabled Rights Action Committee v. Las Vegas Events, Inc.,* 375 F3d 861, 879 (9th Cir. 2004). Under this ground, the effect the action may have on an absent party is generally immaterial, *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, supra, 11 F3d at 405; however, joinder will be required if the court cannot provide *meaningful* relief in the absence of the party sought to be joined. *Northrop Corp. v. McDonnell Douglas Corp.,* 705 F2d 1030, 1043-1044 (9th Cir. 1983).

The relief Nisqually seeks cannot be obtained without Squaxin. Nisqually seeks (a) to void the compact amendment between the state of Washington and Squaxin; (b) to prevent either the tax collection and/or tax payment by Squaxin; (c) to preclude the sale of cigarettes and tobacco products at Squaxin's wholly owned and operated retail outlet; (d) to interfere with a Squaxin member's lease interests; and (e) to preclude essential governmental service tax payments. It is not possible to afford such relief without Squaxin as a party.

Squaxin holds rights and obligations pursuant to its contract with the state and its various

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agreements with the Frank's Landing Indian Community and the land holder. "[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 (9th Cir. 1975), cert. denied sub nom. *Susenkewa v. Kleppe*, 425 U.S. 903 (1976) (action to void a coal mining lease without lessor's participation). "All parties to a contract are necessary in litigation seeking to 'decimate' that contract." *Wilbur,* 423 F.2d at 1115.

In *American Greyhound Racing, Inc. v. Hull*,), the 9th Circuit addressed the district court's decision ordering the Governor of Arizona to give notice of intent to terminate gaming compacts and to enjoin the Governor from negotiating new ones. Gaming compacts, like cigarette excise tax compacts, derive from a "rocky" history. 305 F.3d 1015, 1019 (9th Cir. 2002). The Court found that as a "practical matter" the injunction would have affected the compacting tribes' interests, for, among other reasons, an injunction raised the possibility that law enforcement action would follow against the tribes, and that the "sovereign power of the tribes" to negotiate was adversely affected, as to both bargaining power and the authority to bargain. *Id.* at 1023-24.

There are certain categories of claims where the competing interests regularly warrant joinder. For example, conflicting claims to common fund or property regularly requires joinder. Here, Nisqually appears to lay claim to the tax revenues from the Squaxin retail operation at the Landing. Those competing interests also warrant joinder. Courts will frequently order joinder when there are multiple claims to a limited fund or if there are multiple and separate claims to real property. See for example, *Broussard v. Columbia Gulf Transmission Co.*, 398 F2d 885, 887-889 (5th Cir. 1968). (In an action to complete removal of pipeline from plaintiff's property, the owner of undivided interest in the property was ordered joined to avoid risk of additional litigation.)

As a further example, where a number of persons have an undetermined interest in the same

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property or fund, each is an indispensable party to an action by the other to obtain his or her share of the property or fund, and the matters are regularly dismissed. See *In re Republic of Philippines,* 309 F3d 1143, 1153 (9th Cir. 2002); *Arizona Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.,* 753 F2d 1512, 1521(9th Cir. 1985). Here, Nisqually asserts its interest in the tax revenue collected by the Squaxin. Nisqually asserts an interest in the same property as the Squaxin.

As a final example, all parties to a contract and "others having a substantial interest in it" are "indispensable" in an action to rescind or set aside the contract: *Virginia Sur. Co. v. Northrop Grumman Corp.,* 144 F3d 1243, 1248 (9th Cir. 1998). Here Nisqually seeks termination of the Squaxin amendment. "Because the Tribe has an interest in retaining the rights granted by the Compact, the requirement of a 'legally protected interest' is satisfied." *Wilbur,* 423 F.2d at 1112.

See also Wright and Miller, "In cases seeking … cancellation … or otherwise challenging the validity of a contract, all parties to the contract probably will have a substantial interest in the outcome of the litigation and their joinder will be required." 7C WRIGHT & MILLER, FED. PRAC. & PROC. CIV. 3d § 1613, at 200-03.

It is not possible to obtain the relief sought by the Nisqually without joining Squaxin.

4.3 Both Current and Absent Parties are Prejudiced.

The second ground for ordering joinder is potential prejudice to the interests of the parties, both existing parties and those sought to be joined. See *Aguilar v. Los Angeles County,* 751 F2d 1089, 1094 (9th Cir. 1985).

4.3.1 The Risk to the Absent Squaxin is Significant.

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Absent parties must be joined if they *claim an interest* in the subject of the action and are so situated that any judgment rendered in their absence "may ... *as a practical matter* impair or impede (their) ability to protect that interest." Fed. R. Civ. P. 19(a)(1)(B) (emphasis and parentheses added); *see also Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 US 102, 110-111, 88 S.Ct. 733, 738-739 (1968).

The absent party need not actually possess an interest relating to the subject of the action. It is sufficient that he or she *claims such an interest* and that the claim is not patently frivolous, *Citizen Potawatomi Nation v. Norton,* 248 F3d 993, 998 (10th Cir. 2001); however, the absent party's claimed interest "must be more than a financial stake" and "more than speculation about a future event." *Makah Indian Tribe v. Verity,* 910 F2d 555, 558 (9th Cir. 1990).

The prejudicial effect of nonjoinder need not be absoLute to a legal degree (such as res judicata or binding precedent). It need only be that the first action may detrimentally affect the nonparty's rights. Fed. R. Civ. P. 19(a) (2) (i); *see also Shermoen v. U.S.*, 982 F.2d 1312, 1317-1318 (9th Cir. 1992).

The *Wilbur* Court expanded on those interests,

> In addition, disposition of this action in the Tribe's absence may impair or impede the Tribe's ability to protect its interest. If the Compact is invalidated, the State would be released from its contractual obligation to refrain from taxing cigarette sales by Indian retailers to non-Indians and non-Tribe members. If the State resumed imposing such taxes, the Tribe would be forced to choose between double-taxing its own retailers or foregoing tax revenue for essential government services. Thus, "the instant litigation threatens to impair the [Tribe's] contractual interests, and ... its fundamental economic relationship with [the State]." *Id.* at 1157. (citing *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.,* 276 F.3d 1150, 1156-57 (9th Cir.2002).
>
> *Wilbur,* 423 F.2d at 1112 – 13.

The Squaxin's interests lie in:

(a) The authorization to enter into, and to implement, its tax compact. The compact

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represents a dramatic shift in state-tribal relations, indeed, the entire economy where, and at a time when, tribal government relied almost entirely on the sale of cigarettes that were not taxed by the state. The value of being and being perceived as leading that change is immeasurable in state-tribal and tribal-federal relations.

(b) Its authority as a sovereign government. Where the attributes of and very existence of sovereign immunity are regularly and systematically challenged, a positive expression of a sovereign's choice to resolve disputes with another sovereign is critical to the continued vitality of the doctrine.

(c) The resolution of a long standing tax dispute;

(d) The certainty of, and the dollar value of the tax revenues generated by the authorized retail sales.

(e) The affect on its various economic enterprises consisting of its manufacturing facility, wholesale distributor and retail operation. The Squaxin Tribe is located in a rural economically depressed county with a reservation initially limited to an island with no potable water. With a limited land base and so few economic opportunities available to it, the businesses the Tribe develops are critical to its success.

(f) The affect on the essential governmental services funded with those tax revenues, including the Wa-He-Lut Indian School. The school, located at Frank's Landing, has long been dependent on revenues from the smoke shop there. Since the smoke shop closed in May 2007, the School has operated on a shoe-string. The Frank's Landing Indian Community asked for assistance in re-opening the store to ensure a stable revenue stream for the School. Any one of the Medicine Creek Tribes could have aided Frank's Landing Indian Community. Squaxin, with many of its members and members' children attending, readily agreed to assist. In addition, a percentage of the tax revenues will be dedicated to the Squaxin Island Tribe's programs for, health, education, elders, and other social

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services. The loss of those tax revenues will be significant and will undermine those programs. They are significant because the Tribe has a very limited tax base, and cannot readily replace tax revenues that result from closing a tribal business. Decl. Jim Peters ¶8. Nisqually seeks to break the life line extended by Squaxin to the Landing and the School.

(g) In the right of one of its members to engage in lawful activities. Any tribe, Nisqually included, is keenly interested in the well being of its members. Nisqually seeks to undermine the financial rights of one of Squaxin's members and deny her lease revenues.

(f) In the continuing relationship between the Squaxin Island Tribe and Frank's Landing. The relationship is important, has lasted many lifetime, and, as often expressed in Indian Country, is positioned to last at least seven generations. Nisqually seeks to interfere with that relationship. Jim Peters ¶7.

Clearly, Squaxin interests are substantial and will be impaired by the relief requested.

Prejudice has also been evaluated by determining whether the representation by existing parties is adequate. Courts must evaluate whether (i) the existing parties "will undoubtedly make all" of the absent party's arguments; (ii) the existing parties are *capable* of making and willing to make such arguments; and (iii) the absent parties would offer any "necessary element" to the proceedings the present parties would neglect. *Shermoen v. U.S.*, 982 F2d 1312, 1318 (9th Cir. 1992). As stated in *Wilbur*,

> In *American Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1018 (9th Cir.2002), plaintiffs "challenge [d] the legality of the [Arizona] Governor's actions in negotiating new gaming compacts with Indian tribes, or in extending the tribes' existing compacts." We held that the Governor could not adequately represent the absent tribes because, among other reasons, "the State and the tribes have often been adversaries in disputes over gaming, and the State owes no trust duty to the tribes." *Id.* at 1023 n. 5. Here, too, the Wilburs challenge the state's actions in entering into agreements with the Tribe; the Tribe and the state have been adversaries in disputes over the subject of those agreements in the past (indeed,

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> resolution of a "long-standing disagreement" regarding cigarette taxation was one of purposes recited in the Compact's preamble); and the state owes the Tribe no trust duty that might ensure vindication of the Tribe's interest. *Hull* thus requires us to reject the Wilburs' contention.
>
> *Wilbur,* 423 F.2d at 1113.

Here, while the state's interests are generally aligned, they are incomplete and not identical to that of the Squaxin. The State's interests are primarily in affirming the Governor was authorized to act, and did act in accordance with the state statute, and in ensuring that tax matters are resolved, that is, there is no longer a continuing controversy or related cigarette sales that are not taxed by the state.

For its part, Squaxin has the additional governmental interests as a sovereign in its relations with the State, another sovereign, the proprietary interests in its economic enterprises, and the governmental interests in its tax base and programs, particularly the Wa-He-Lut Indian School. It may matter little to the State who owns and operates the retail operation, so long as it is done so in a manner that is consistent with the statute, and the compact can be effectively implemented and enforced. Squaxin's interests are far broader. The State cannot adequately represent Squaxin's interest in its bargain with the State, or the benefits Squaxin derives from that bargain, or continues to derive from that bargain.

4.3.2 The risk to *existing* parties' interests is also substantial.

Absent parties must also be joined where a judgment rendered in their absence would "leave any of the persons already parties subject to a *substantial risk* of incurring double, multiple or otherwise inconsistent obligations by reason of the (absent parties') claimed interest." Fed. R. Civ. P. 19(a) (2) (ii) (emphasis and parentheses added); See *Shimkus v. Gersten Cos.,* 816 F2d 1318, 1322 (9th Cir. 1987).

The relief requested will not be res judicata as to the absent Squaxin (or the absent Frank's Landing or the absent lessor). *Confederated Tribes v. Lujan*, 928 F2d 1496, 1499 (9th Cir. 1991). The State will have inconsistent obligations to Squaxin per its compact and the Court's order. Further, Squaxin will continue to operate its retail store at the Landing, and to give effect to the Court's order, a

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police action or other enforcement, or indeed, a claim of breach or termination of its compact by the State against Squaxin will likely follow. It in turn will prompt a reaction to litigate the rights and interests of the Squaxin.

4.4 Joinder is not feasible.

If the persons sought to be joined are of the type above (complete relief unavailable in their absence, etc.) and plaintiff has not named them as parties, the court will order their joinder if feasible Fed. R. Civ P. 19(a). However, joinder is not "feasible" where the party sought to be joined is *immune* from suit. *Confederated Tribes v. Lujan*, 928 F2d 1496, 1499 (9th Cir. 1991) (Indian Nation entitled to sovereign immunity in state or federal court); *Kickapoo Tribe v. Babbitt*, 43 F3d 1491, 1496 (DC Cir. 1995) (State entitled to 11th Amendment immunity in federal court).

An absent person's joinder is not feasible where it is entitled to invoke sovereign immunity. *Dawavendewa v. Salt River Project Agricultural Improvement & Power Dist.* 276 F3d 1150, 1159 (9th Cir. 2002) (Navajo Nation's joinder not feasible due to tribal sovereign immunity); *American Greyhound Racing, Inc. v. Hull*, 305 F3d 1015, 1024 (9th Cir. 2002) (Interest in tribal immunity overcomes lack of alternative forum or remedy for plaintiffs.)

The inquiry whether an absent party is indispensable is a "pragmatic and equitable judgment, not a jurisdictional one." *Gonzalez v. Metropolitan Transp. Authority*, 174 F3d 1016, 1019 (9th Cir. 1999), where the absent party is a sovereign, "'there is little room for balancing of other factors' set out in Rule 19(b) because 'immunity may be viewed as one of those interests 'compelling by themselves'". *Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (quoting *Wichita and Affiliated Tribe*, 788 F.2d at 777 n. 13 (quoting 3A Moore's Federal Practice P 19.15, at 19-226 n6 (1984)).

The *Enterprise* court also noted that proceeding with the suit "would effectively abrogate the

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tribe's sovereign immunity by adjudicating its interest in that contract without consent" and dismissed the suit. Id (citing *Jicarilla Apache Tribe v. Hodel*, 821 F. 2d 537, 540-41 (10th Cir. 1987)). Indeed proceeding with an equitable determination whether to go forward is in effect an abrogation of sovereign immunity, and thus, sovereign immunity is dispositive or, at least, compelling. *Wilbur,* 423 F.2d at 1116.

4.5 An Equitable Determination of "in equity and in good conscience" warrants dismissal.

Where joinder of a person needed for just adjudication is not feasible, the court must determine "whether in equity and good conscience": (a) the action should proceed among the parties before it (the absent party thus regarded as merely "necessary" but not indispensable); or (b) the action should be dismissed ("the absent person being thus regarded as indispensable"). Fed. R. Civ P. 19(b); see *Wilbur, 423 F.2d at* 1114; *Pit River Home & Agric. Co-op Ass'n v. United States* 30 F3d 1088, 1098 (9th Cir. 1994); *Rishell v. Jane Phillips Episcopal Mem. Hosp. Ctr.,* 94 F3d 1407, 1412 (10th Cir. 1996); *Soberay Machine & Equip. Co. v. MRF Ltd., Inc.,* 181 F3d 759, 764 (6th Cir. 1999).

The factors to be considered by the court include: (a) the extent to which its judgment may prejudice the absent party or the parties already before the court; (b) the extent to which such prejudice may be lessened or avoided by protective provisions in the judgment, or other measures; (c) whether a judgment rendered in such person's absence will provide an adequate remedy to the parties before the court; and (d) whether, if the action is dismissed for nonjoinder, plaintiff will have an adequate remedy elsewhere. Fed. R. Civ P. 19(b); see *Pit River Home & Agric. Co-op Ass'n v. United States*, supra, 30 F3d at 1101; see also, *Owens-Illinois, Inc. v. Meade* (4th Cir. 1999) 186 F3d 435, 442.

None of these factors is determinative; nor is the list exclusive. Rather, the matter is determined by the court after balancing the interests involved; i.e., to determine whether "in equity and good conscience" the action should continue in the party's absence. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 US 102, 108, 88 S.Ct. 733, 737 (1968); *Merrill Lynch, Pierce, Fenner & Smith,*

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Inc. v. ENC Corp., 464 F3d 885, 891 (9th Cir. 2006).

These factors parallel to some extent, particularly (a), the considerations governing whether a nonparty "should be joined" in the first instance (i.e., whether "complete relief" can be afforded in the party's absence, etc.). *Wilbur,* 423 F.2d at 1114.

As to (b), (FRCP 19(b)(2)), the Nisqually case is an all-or-nothing proposition – it seeks the elimination of Squaxin's contract rights and business arrangements, nothing less. There are no measures that might be taken to lessen or eliminate the consequences of the relief that Nisqually seeks. *Wilbur,* 423 F.2d at 1114.

As to (c), (FRCP 19 (b)(3)), no meaningful relief can be provided Nisqually with or without Squaxin's joinder. Presuming that Nisqually obtains its desired result – voiding the compact amendment between the State and Squaxin – Squaxin would not be bound by the result if it was not joined and cannot be compelled to act differently; further, that relief is meaningless in that it obtains nothing, as Squaxin can continue to operate at the Landing under the remaining two compact provisions – as a member's land and as Indian country.

As to (d), (FRCP 19 (b)(4)), the Nisqually agreed in its compact to address disputes through an alternate dispute process and agreed to an exclusive remedy, the termination of it cigarette excise tax compact. Nisqually has chosen not to invoke the ADR provisions and not to address its state law claims in state court, but to shop for a federal forum while indirectly engaging the state and not engaging the Squaxin. Alternates exist, and alternates were agreed to. Nisqually would not be prejudiced by adhering to its agreement or by presenting its state law claims in state court. *LakerAirways, Inc. v. British Airways, PLC*, 182 F3d 843, 849 (11th Cir. 1999) (when administrative agency is authorized to address plaintiff's complaint, plaintiff has adequate remedy under Rule 19(b)).

In addition to the several equitable factors noted above, the following additional factors warrant

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dismissal: (1) The immunity of an absent sovereign is compelling. *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991)(2) A tribe's interest in maintaining its sovereign immunity is in and of itself, sufficient to warrant dismissal. *Kescoli v. Babbitt*, 101 F3d 1304, 1307 (9th Cir. 1996)(Indian Tribe's interest in maintaining sovereign immunity made it indispensable party in proceedings involving mining permits on tribal land, mandating dismissal despite absence of alternative forum).

5. CONCLUSION.

The Nisqually seek to void a Squaxin contract, affect its tax and business revenue, and disrupt its relations with the State, Frank's Landing and one of its members without joining Squaxin. Squaxin is indispensable, and absent its agreement, cannot be joined. Nisqually has demonstrated no basis – and made no allegations in its complaint that warrant any result other than dismissal under the *Wilbur* and *Hull* line of cases. Further exacerbating their claims, Nisqually has chosen the most distant forum for its state law claims and unarticulated and irrelevant federal claim, ignoring the exclusive remedy and ADR processes that it agreed to. Insofar as sovereign immunity is a complete bar, and an equitable analysis favors dismissal, the only remedy is dismissal. The Squaxin respectfully request that this matter be dismissed.

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Respectfully presented this 26th day of February, 2008 by,

THE SQUAXIN ISLAND LEGAL DEPARTMENT

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