THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NISQUALLY INDIAN TRIBE, Plaintiff, v. **CHRISTINE GREGOIRE, et al.**, Defendants.	No. 3:08-cv-05069-RBL **DEFENDANTS FRANK'S LANDING INDIAN COMMUNITY'S AND THERESA BRIDGES'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF** **NOTE ON MOTION CALENDAR: April 24, 2009**

INTRODUCTION

Defendants, Frank's Landing Indian Community ("Frank's Landing") and Theresa Bridges ("Ms. Bridges"), move for summary judgment as to the claims set forth in the amended complaint of Plaintiff, Nisqually Indian Tribe ("Nisqually" or "Plaintiff"). *See* Fed. R. Civ. P. 56. At the heart of this case, Nisqually attacks mutually beneficial arrangements entered into by three self-governing entities: Frank's Landing, Squaxin Island Tribe ("Squaxin") and the State of Washington. These three governments united and contracted to raise revenue to support the education of Indian children, reduce wasteful State tax enforcement expenditures, and enhance government-to-government relations within the State.

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Indeed, the tax revenues derived from implementation of the tri-governmental agreement fund the Wa-He-Lut Indian School, which since 1974 has played a vital and integral role in educating area Indian children, with particular focus on preserving local Indian languages, traditions and values.

Nisqually's attempt to eviscerate that funding is grounded in a misunderstanding of both the law and relevant facts. Further, as we demonstrate below, each and every one of their claims is legally insufficient and, thus, this motion for summary judgment should be granted and the Nisqually's claims dismissed.

SUMMARY OF ARGUMENT

Plaintiff asserts four claims for relief: (1) That the levy by Squaxin of tribal taxes on transactions at a retail store within Frank's Landing, a self governing dependent Indian community, on allotted land of which a member of Squaxin is beneficial owner, with the consent of both Frank's Landing and the State, violates unspecified federal law[1] (Amended Comp. at 10-11); (2) That the lease between Squaxin and Frank's Landing was not approved by the Secretary of Interior as required by 25 U.S.C. §415 (Amended Comp. at 11); (3) That the Addendum and Squaxin's sale of tribally taxed cigarettes violates state law as Frank's Landing has no authority to tax as it is not a tribe (Amended Comp. at 12); and (4) the State's execution of an Addendum to its Compact with Squaxin is in conflict with and a breach of the State's Compact with Nisqually. (Amended Comp. at 13).

Frank's Landing and Ms. Bridges are entitled to summary judgment on the following grounds. First, this Court lacks jurisdiction over Nisqually's claims as Nisqually has failed to

[1] This Court noted in its May 8, 2008 order that "Nisqually has not adequately set forth federal law that creates a cause of action." *Nisqually Indian Tribe v. Gregoire,* 2008 WL 1999830, at *2 (W.D. Wa. May 8, 2008).

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exhaust contractual and administrative remedies. Second, Nisqually lacks Article III standing as it has not suffered an injury in fact. The Addendum to the Squaxin Compact is not in breach of the Nisqually Compact as alleged in Count Four (not to mention that Nisqually has suffered no damage from the sales at Frank's Landing) and, accordingly, Nisqually has no legally protected interest. Therefore, it has no standing to assert the alleged violations in Counts I-III.

Third, even assuming *arguendo* Nisqually has standing, Squaxin has authority under federal and state law to impose a Tribal tax on cigarette sales occurring on allotted land, which a Squaxin member beneficially owns, and to dedicate the tax revenues to promote essential governmental services, including for the support of the Wa-He-Lut Indian School at Frank's Landing. Squaxin has the right to sell and tax cigarettes at Frank's Landing pursuant to the consensual tripartite agreement amongst Ms. Bridges, Frank's Landing, and Squaxin. Indeed, the Department of the Interior ("Interior") has approved those leases in conformity with federal law. Further, if there were any doubt as to whether Squaxin had authority to tax sales of cigarettes on its own member's allotted land, the Addendum to Squaxin's Compact entered into with Washington State eliminates such doubt. Put another way, the record makes plain that the contractual arrangements here involved are perfectly sound under both state and federal law. Accordingly, this Court should grant summary judgment in favor of these Defendants on all counts.

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RELIEF REQUESTED

Defendants Frank's Landing and Ms. Bridges respectfully request that this Court find that there is no genuine issue as to any material fact, and that these Defendants are entitled to a judgment in their favor as a matter of law.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Frank's Landing is a federally recognized "self-governing dependent Indian community" that is "not subject to the jurisdiction of any federally recognized tribe." Pub. L. No. 103-435, § 8 (Nov. 2, 1994).
2. Frank's Landing consists of 19 acres of land held in trust by the United States for the benefit of individual Indians. *Nisqually Tribe,* 2008 WL 1999830, at *9 (citing S. REP. NO. 100-186 (1987)).
3. Congress has recognized the members of Frank's Landing "as eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act[.]" Pub. L. No. 100-153, § 10 (Nov. 5, 1987).
4. The Squaxin, Nisqually and Puyallup tribes are federally recognized tribes that in 1854 ceded lands and reserved rights under the Medicine Creek Treaty ("Treaty"). (Treaty of Medicine Creek, 10 Stat. 1132 (Ex. A)).
5. While the Nisqually has long disputed Frank's Landing's independence and right to self-governance, Frank's Landing allotments are outside of the Nisqually Reservation, Iyall Dep. at 29:9-11; 202:11-13, Feb. 20, 2009 (Ex. B), and Nisqually has no jurisdiction over Frank's Landing. *Nisqually Tribe,* 2008 WL 1999830 at *9.
6. Ms. Bridges is the Chairperson of Frank's Landing and has lived there since 1930. She beneficially owns one of three Frank's Landing allotments, which property is held in

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trust by the federal government for her benefit. Adams Dep. at 65:7-12, Jan. 21, 2009 (Ex. C). She is an enrolled member of Squaxin. *Id.* at 67:5-14.

7. For the last fifty years, Ms Bridges and Frank's Landing have played an integral role in supporting local Indian customs, language, and values. *See* Declaration of Henry Adams at 2, Mar. 27, 2009 (Ex. D). To that end, Ms. Bridges and Frank's Landing have operated and funded the Wa-He-Lut Indian School, located at Frank's Landing, which educates area Indian children, including on Indian traditions and values. There are approximately 120-130 children enrolled in the school from preschool through the 8th grade. Approximately one-half of the children are from the Squaxin and Nisqually tribes, with the remainder from other tribes. Adams Dep. at 29:11-30-14 (Ex. C).

8. Franks Landing has operated a smoke shop in the community since 1969. *Id.* at 67:15-70:25. In prior years, Frank's Landing attempted unsuccessfully to compact with Washington State to sell and tax cigarettes to support the Wa-He-Lut School and other governmental purposes. *See* Declaration of Henry Adams at 2 (Ex. D). After its smoke shop closed in August 2007 due to legal uncertainty related to the collection of cigarette taxes, Frank's Landing looked to find an alternative method of funding the school and provide other essential services. *See* Declaration of Henry Adams at 2 (Ex. D).

9. The State of Washington proposed that Frank's Landing operate its store under one of the three existing compacts with the Squaxin, Nisqually and Puyallup Tribes. Adams Dep. at 72:11-75:7 (Ex. C). Nisqually contacted Franks Landing about operating under its existing compact. *Id.* However, Frank's Landing subsequently began to negotiate with Squaxin to open a smoke shop under Squaxin's Cigarette Tax Compact to provide the financial support necessary for the Wa-He-Lut school to remain viable.

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10. Those negotiations resulted in an Inter-Governmental Agreement between Frank's Landing and Squaxin, which authorizes Squaxin to assert jurisdiction over an Economic Development Zone within Frank's Landing. *See generally* Inter-Governmental Agreement (Ex. E)). The Economic Development Zone is coextensive with Ms. Bridges's allotment. *Id.*

11. Squaxin's original Compact and Tribal Code permit Squaxin to collect a Tribal tax in lieu of a State tax in "Indian country," which includes "[a]ll Indian allotments or other lands held in trust for a Squaxin Island Tribal member." Lopeman Ex. 16: Compact at Pt. III, § (2) and § (3), Pt. I, §(8)(b)).

12. Ms. Bridges is a member of Frank's Landing, and the beneficial owner of an allotment held in trust by the United States for her benefit. (Statutory Warranty Deed & Surveyor Certificates at BRIDGES0130-133 (Ex. F)).

13. To fully implement the arrangement by which Squaxin would tax the sale of cigarettes, Frank's Landing, Ms. Bridges, and Squaxin, executed two agreements that permit Squaxin to own and operate a retail store on a portion of Ms. Bridges's allotment: (1) a ground lease between Ms. Bridges and Frank's Landing; and (2) a sublease between Squaxin and Frank's Landing, approved by Ms. Bridges. (Enterprise Development Zone Ground Lease at BRIDGES0106 (Ex. F); Enterprise Development Zone Sublease at BRIDGES0116 (Ex. F)).

14. Interior approved both the lease and the sublease. *See* Interior Approval at BRIDGES0102 (Ex. F)).

15. Ms. Bridges had been considering enrolling in Squaxin since 1991. Within the Squaxin reservation is the homestead where she was born and her family gravesite where she

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intended to be buried upon her death. Adams Dep. at 75:18-78:25 (Ex. C). Further, Bridges enrolled in Squaxin on January 17, 2008. *Id.* (Lopeman Ex. 16: Squaxin Tribal Council Resolution No. 08-08).[2] She thereby irrevocably relinquished her prior membership in the Puyallup Tribe. (Declaration of Tamatha Ford, Dkt. No. 72 at p. 2, lines 16-22).

16. By agreement, 85% of all cigarette taxes covered by Squaxin's Compact and collected at Frank's Landing fund the Wa-He-Lut School. (Lopeman Ex. 4: Declaration of Robert Whitener, Jr. In Support of Motion for Summary Judgment (March 24, 2009) ("Whitener Dec.") at ¶ 3).

17. The Washington Department of Revenue verbally confirmed that funding the Wa-He-Lut Indian School qualifies as an "essential government service" under state law. Whitener Dec. at ¶ 3.

18. On January 22, 2008, to eliminate any potential question as to whether the sales and taxation of cigarettes at Frank's Landing by Squaxin was in compliance with state law, Squaxin and the State signed an Addendum to the Squaxin Compact that acknowledged the Inter-Governmental Agreement between Squaxin and Frank's Landing, and confirmed that the geographic area covered by the Compact included:

> public domain allotment lands when under a then existing agreement between the Squaxin Island Tribe and a Self-Governing Dependent Indian Community under Public Law 103-435, November 2, 1994 [108 Stat. 4556] that conveys interest to the Squaxin Island Tribe sufficient to allow the Tribe to operate as a 'tribal retailer' in full compliance with the terms and conditions of the Compact.

[2] All Lopeman exhibits are attached to Defendant Lopeman's Motion for Summary Judgment, filed concurrently on March 27, 2009. [Dkt. No. 130].

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(Lopeman Ex. 17: 2008 Addendum). The Addendum was supported by members of the Nisqually Tribal Council in communications with the Governor. Iyall Dep. at 25:16-27:21. (Ex. B).

19. On or about January 18, 2008, Island Enterprises, Inc., a wholly owned Squaxin Tribal business, began selling cigarettes and collecting a Squaxin Tribal tax at a retail store located on Frank's Landing. *See* Declaration of Henry Adams at 2, Mar. 27, 2009 (Ex. D).

20. The Nisqually Tribe initiated this lawsuit on February 6, 2008. (Dkt. No. 1).

21. Nisqually entered into a cigarette tax compact with the State in 2004. *See* Nisqually Compact at NISQUALLY 10024, June 24, 2004 (Ex. G)).

22. While negotiating with the State for a compact, Nisqually requested the exclusive right to sell and tax cigarettes under its Compact within a 20-mile radius measured from the center of the Nisqually reservation. *See* Jun. 23, 2003 Draft of Nisqually Compact at NISQUALLY 10074 (Ex. J).

23. The State responded as follows: "During the meeting it was noted that this provision impacts the Frank's Landing area…. At this point it is our position that we will not recommend a compact to the Governor if it includes [such] a restriction on the Governor…." (Letter from L. Cushman, Wash. Department of Revenue, to Nisqually Cigarette Negotiation Team at NISQUALLY 10084 (July 23, 2003) (Ex. K).

24. Nisqually's Compact states that "[i]f either party believes a violation of the agreement has occurred, it shall notify the other party in writing." Nisqually Compact at

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NISQUALLY 10037 (Ex. G). Nisqually did not send a notice of violation to the State as required by its Compact.[3]

25. The Compact requires that the State and Nisqually meet to attempt to resolve the dispute. *Id.* at NISQUALLY 10037.

26. The Compact then requires mediation to resolve any remaining disagreements. *Id.* at NISQUALLY 10039 (Part IX, section 6(b)).

27. The Nisqually Compact does not mention the self-governing, dependent Frank's Landing Indian Community**.** *See generally* Nisqually Compact (Ex. G). It permits a tax exemption for sales by tribal retailers occurring on "lands placed in trust or restricted status for individual Indians or for the Tribe located in the Nisqually River basin . . . except as otherwise provided by law." *Id.* at NISQUALLY 10026.

28. In 2007, the smoke shop[4] at Frank's Landing was closed for approximately 4 months. *See* Declaration of Henry Adams at 2, Mar. 27, 2009 (Ex. D).

29. In 2007, Nisqually sold and taxed under its Compact over $8M worth of cigarettes. Tiam Dep. at 70:16-72:9, Feb 23, 2009 (Ex. I).

30. In 2008, the Frank's Landing smoke shop was fully operational. *See* Declaration of Henry Adams at 2, Mar. 27, 2009 (Ex. D).

[3] Cynthia Iyall, chairperson of Nisqually, testifed that she was "not confident" that a letter went to the State complaining of an alleged violation of the Nisqually Compact. Iyall Dep. at 44:7-45:8 (Ex. B). A request for production was served on Nisqually requesting copies of any such correspondence, and none was produced. First Request for Production of Documents of Defendants Frank's Landing Indian Community and Teresa Bridges to Plaintiff at 3 (Dec. 12, 2008) (Ex. H) ("RFP")

[4] That smoke shop was shutdown by federal and state officials because of the sale of untaxed cigarettes. Adams Dep. at 67:18-70:25 (Ex. C).

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31. In 2008, the total monetary amount of cigarettes sold and taxed under the Nisqually Compact exceeded $9.4M. Tiam Dep. at 71:1-72:9 (Ex. I).

32. Thus, when the Frank's Landing smoke shop was open, Nisqually made more money in cigarette sales than when the Frank's Landing smoke shop was closed. Nisqually has failed to produce any evidence demonstrating how its business is injured by Frank's Landing's smoke shop.

33. Further, Nisqually sold 54,000 more cartons of cigarettes in 2008 than in 2007. *Id.* 76:6-12.

STANDARD OF REVIEW

Summary judgment is appropriate when, viewing the facts in the light most favorable to the non-movant, no genuine issue of material fact exits that would preclude summary judgment as a matter of law. *See* Fed. R. Civ. P. 56. Once the movant has satisfied its burden, it is entitled to summary judgment if the non-movant fails to present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v. Square D Co.,* 68 F.3d 1216, 1221 (9th Cir. 1995). Thus, "summary judgment should be granted where the non-moving party fails to offer evidence from which a reasonable [fact finder] could return a [decision] in its favor." *Triton Energy Corp.,* 68 F.3d at 1220.

ARGUMENT

I. This Court Lacks Jurisdiction Because Nisqually Has Failed To Exhaust Administrative And Contractual Remedies

The linchpin of Nisqually's challenge is that Squaxin cannot sell and tax cigarettes at Frank's Landing pursuant to the two separate contractual arrangements that authorize Squaxin

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to do so. Because Nisqually has failed to exhaust administrative and contractual remedies, Nisqually's complaint fails.

Under both Washington and federal law, a party must exhaust contractual and administrative remedies[5] before it can seek judicial relief. *See, e.g., Shin v. Esurance Ins. Co.*, 2009 WL 688586 (W.D. Wash. March 13, 2009). *See also Davis v. State*, 159 P.3d 427, 429 (Wash. App. Div. 2007), *review denied*, 180 P.3d 1291 (2008) (reversing and remanding for entry of a summary judgment for plaintiffs "failure to exhaust either their contractual remedies … or their administrative remedies."). Nisqually failed to exhaust administrative remedies with respect to the federally approved leases among Squaxin, Frank's Landing and Ms. Bridges. *See* 25 C.F.R. Part 2. Likewise, Nisqually failed to exhaust contractual remedies with respect to its claim that the Squaxin Compact Addendum violated it's Compact.

A. Nisqually Has Failed To Exhaust Administrative Remedies

When an agency rule demands exhaustion of administrative remedies, "the federal courts may not assert jurisdiction to review agency action until the administrative appeals are complete." *White Mountain Apache Tribe v. Hodel,* 840 F.2d 675, 677 (9th Cir. 1988). *See also Joint Board of Control of the Flathead. Mission and Jocko Irrigation Districts v. United States,* 862 F.2d 195, 199 (9th Cir. 1988); *Attakai v. United States,* 746 F. Supp. 1395, 1412 (D. Ariz. 1990). Nisqually is challenging the leases amongst Ms. Bridges, Frank's Landing and Squaxin.[6] *See, e.g.,* Amended Compl. at 10 ¶ 37 ("Squaxin cannot, pursuant to federal law, levy tribal taxes on transactions … regardless of what 'agreement' it may make with the

[5] Under Washington case law, "administrative" and "contractual" remedies are treated the same for exhaustion purposes. *See, e.g., Moran v. King County,* 724 P.2d 396, 401 (Wash. Ct. App. 1986).

[6] *See also* Amended Compl. at 14 (Nisqually's Prayer for Relief C requests this Court to declare that the sale of cigarettes and tobacco products at Frank's Landing violates federal and state law.).

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Community or with the State"). Those leases, however, have been approved by the Northwest Regional Director, Bureau of Indian Affairs. Interior Approval at BRIDGES0102 (Ex. F). Accordingly, in order for Nisqually to judicially challenge the validity of the approved arrangement, it must first administratively challenge the contracts. *See, e.g., Lyons v. England,* 307 F.3d 1092, 1103 (9th Cir. 2002) ("Exhaustion of administrative remedies is a jurisdictional prerequisite."); 25 C.F.R. Part 2.

If there were any doubt as to this requirement, long-standing applicable regulations provide that any person or entity claiming to be adversely affected by a decision of a Bureau of Indian Affairs ("BIA") official must first administratively appeal that decision prior to seeking judicial review. *See* 25 C.F.R. § 2.6(a). Here, the Northwest Regional Director approved the commercial ground lease between Bridges and Frank's Landing and the sublease between Frank's Landing and Squaxin, by which the parties agreed to permit the sale and taxation of cigarettes at Frank's Landing. *See* Interior Approval at BRIDGES0102 (Ex. F). To challenge those agreements, Nisqually must appeal the Regional Director's approval to the Interior Board of Indian Appeals. *See* 25 C.F.R. § 2.4(e); 43 C.F.R. § 4.1(b)(2)(i). Nisqually failed to do so.

Administrative exhaustion rules have two principal purposes both of which would be frustrated if Nisqually were permitted to proceed in this federal court action. The first is to protect an administrative agency's authority by giving the agency the first opportunity to resolve a controversy before a court intervenes in the dispute. *See McCarthy v. Madigan,* 503 U.S. 140, 145-46 (1992). *See also Stock West,* 982 F. 2d at 1394; *Joint Bd. Of Control*, 862 F.2d at 199. The second is to promote judicial efficiency by either resolving the dispute outside of the courts, or by producing a factual record that can aid the court in processing a

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plaintiff's claim. *Id.* In this instance, the BIA, who approved the leases, has procedures for "resolv[ing the] controversy before [this] court intervenes in the dispute." *Id.*; 25 C.F.R. Part 2. "Exhaustion insures that a court will have the benefit of the agency's experience in exercising administrative discretion, as well as a factual record to review." *Confederated Tribes and Bands of Yakama Nation v. U.S.*, 2006 WL 3750294, at *4 (E.D. Wash. Dec. 19, 2006).

Having failed to exhaust administrative remedies, Nisqually's complaint should be dismissed. *See, e.g., Lyons*, 307 F.3d at 1103; *Casanova v. Norton*, 2006 WL 2683514 (D. Ariz. 2006) (holding that dismissal of an action challenging non-final agency action by the BIA was required due to plaintiff's failure to exhaust administrative remedies under 25 C.F.R. Part 2). It may not challenge the leases approved by BIA until it does so.

There are two separate contractual arrangements that authorize Squaxin to sell and tax cigarettes at Frank's Landing: (1) the leases amongst Ms. Bridges, Frank's Landing and Squaxin which Interior has approved, *see infra* at p. 6 ¶¶ 11, 13-14; and (2) the original Squaxin Compact and its Addendum. Each contractual arrangement stands as an independent basis for validating the existing business relationship between Squaxin and Frank's Landing. Therefore, as these federally approved leases alone justify the existing arrangement among Squaxin, Frank's Landing and Ms. Bridges, until administrative procedures are completed the remaining claims of Nisqually's complaint are not ripe for consideration and should be dismissed.

B. Because Nisqually Has Failed To Exhaust Contractual Remedies, Defendants Are Entitled To Summary Judgment As A Matter Of Law

Nisqually contends that actions the State has taken, such as the adoption of the Addendum to Squaxin's Compact, are in violation of the terms of Nisqually's Compact. But

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Nisqually cannot challenge such alleged violations without first exhausting contractual remedies as set forth in its Compact.

Nisqually's Compact mandates that "[i]f either party believes a violation of the agreement has occurred, it shall notify the other party in writing." Nisqually Compact at NISQUALLY 10037 (Ex. G). Notice of a violation is required because the State and Nisqually have agreed to "quickly and effectively resolve … violations when they arise … [using] informal methods … before engaging in the formal processes provided by th[e Compact.]" *Id.* at NISQUALLY 10036. The "informal methods" require first that the State and Nisqually meet to attempt to resolve the dispute. *Id.* at NISQUALLY 10037. The Compact then outlines "formal processes" – mediation to resolve any remaining disagreements. *Id.* Part IX, section 6(b) confirms that mediation is required. *Id.* at NISQUALLY 10039 **(**listing one of five of the possible bases for terminating the compact for cause as **"**Failure to submit to mediation as required by this Part IX").

The Nisqually Compact contains remedies for dispute resolution because State law requires it. *See* RCW 43.06.455(13) (requiring that cigarette tax contracts "shall include" procedures to resolve disputes that include notice to the other party, chance to correct the problem, and termination as a remedy if the violation cannot be resolved within a specified time period). Further, strong public policy in Washington State favors alternative dispute resolution. *See, e.g., Perez v. Mid-Century Ins. Co.,* 934 P.2d 731, 733 (Wash. Ct. App. 1997).

In violation of its Compact and State law, however, Nisqually failed to notify the State or engage in mediation.[7] Nisqually thus has failed to follow the contractual process outlined

[7] *See* RFP No. 4 (Ex H).

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in its Compact to which it agreed. Requiring Nisqually to exhaust contractual remedies merely is holding Nisqually to its word and serves the laudable goal of protecting the State's authority to resolve this controversy before this Court intervenes in the dispute. *See McCarthy,* 503 U.S. at 145-46. It also preserves scarce judicial resources. *Id.* This Court should therefore grant summary judgment as to Count Four for Nisqually's failure to exhaust contractual remedies. *See Shin*, 2009 WL 688586 (W.D. Wash. March 13, 2009). *See also Davis*, 159 P.3d at 429. Moreover, as the Squaxin Compact and its Addendum serve as an independent basis for supporting the business arrangement among Squaxin, Frank's Landing and Ms. Bridges, until the contractual remedies are satisfied the remaining allegations of the Complaint are not ripe for review and should be dismissed.

II. Nisqually Lacks Article III Standing To Challenge Whether The Addendum Violates Federal Or State Law

In Counts One and Three, Nisqually challenges the sale of cigarettes by Squaxin at Frank's Landing. Amended Comp. at pp. 10-11, 12-13. For Nisqually to challenge the sale and taxation, it must first establish standing. Nisqually cannot do so.

Federal courts may only hear "Cases" and "Controversies." U.S. CONST. art. III, § 2. "One of [the] landmarks setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III ... is the doctrine of standing." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-560 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.* 528 U.S. 167, 185 (2000) (standing implicates courts' subject matter jurisdiction). A plaintiff must demonstrate standing "for each claim he seeks to press" and for "each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quoting *Friends*, 528 U.S. at 185). The minimum constitutional requirements for standing are threefold. First, a plaintiff must have suffered an "injury in fact," *i.e.*, an invasion of a "legally protected

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interest" that is (a) concrete and particularized, and (b) actual or imminent, and not conjectural or hypothetical. *Lujan*, 504 U.S. at 560-561. Second, a causal connection must exist between the injury and conduct complained of, so that the injury is fairly traceable to the challenged action. *Id.* Third, it must be likely that the injury will be "redressed by a favorable decision." *Id*. at 561.

Nisqually does not have standing to maintain this action against these defendants for it can show no particularized and concrete harm to a legally protected interest. *Lujan*, 504 U.S. at 560-561. The Nisqually Compact is the only operative document that creates a legally protected interest by providing Nisqually with the right to sell and tax cigarettes in "Indian Country." The area covered by the Nisqually Compact, defined as "Indian Country," includes:

> (a) [a]ll lands within the confines of the Nisqually Reservation as established by the Treaty of Medicine Creek . . .and [1857 Executive Order]; (b) ***all lands placed in trust or restricted status for individual Indians or for the Tribe located in the Nisqually River basin***, and such other lands as may hereafter be added thereto under any law of the United States, ***except as otherwise provided by* law**"; and (c) all Indian allotments or other lands held in trust for a Nisqually tribal member or the Tribe . . . .

Nisqually Compact at NISQUALLY 10026, Part I, §8 (emphasis added) (Ex. G). The phrase "except as otherwise provided by law" limits the definition of "Indian Country" and thus the area covered by the Nisqually Compact. *See Sehome Park Care Center v. Washington*, 903 P.2d 443, 447 (Wash. 1995) (en banc) (under last antecedent rule, modifying phrase following a comma modifies all antecedents).

Indeed, Congress has provided otherwise. In 1994, Congress confirmed that Frank's Landing is "self-governing" and is "not subject to the jurisdiction of any federally recognized tribe." Pub. L. No. 103-435, § 8. This provision of the 1994 Act conclusively forecloses

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Nisqually's assertion of jurisdiction over Frank's Landing since the Congress clarified beyond peradventure that no tribe has jurisdiction over the Landing – at least not without the consent of the Frank's Landing "self-governing" government. Put simply, in light of the dispositive language of the 1994 Act, Frank's Landing is outside the ambit of the Nisqually Compact.

Therefore, the Nisqually Compact is inapplicable to cigarette sales occurring at Frank's Landing. Nisqually essentially claims an implied entitlement to a legally protected interest in the sale of cigarettes in areas not encompassed by its Compact. This is not warranted by the Compact, and this Court should not read such a right into its terms.

The sole source of Nisqually's alleged legally protected interest is the Compact. And, if the Compact does not extend to Frank's Landing, as it does not, then there is no other basis for Nisqually's interest in cigarette sales at Frank's Landing. Therefore, the Court should grant summary judgment in favor of all defendants because plaintiff lacks standing.

III. Nisqually Has Suffered No Financial Harm

Nisqually seeks to enjoin the sale and taxation of cigarettes at Frank's Landing, alleging that those sales "come at the expense of Nisqually." Amended Compl. at 10, ¶ 34. As discussed *supra*, to have standing, a plaintiff must have suffered an "injury in fact," *i.e.,* an invasion of a **"**legally protected interest" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan,* 504 at 560-561. "Injury" is synonymous with damages, including loss of business revenue, resulting from the violation of a legal right for which the law provides a remedy. *See U.S. v. Hackett*, 311 F.3d 989 (9th Cir. 2002) (citing BLACK'S LAW DICTIONARY 789 (7th ed.1999)); *see also Clark v. City of Lakewood,* 259 F.3d 996, 1006-07 (9th Cir. 2001) (interpreting Article III's requirement of an " injury-in-fact" to include loss of business revenue). As demonstrated, Nisqually lacks standing because

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it does not have a legally protected interest. *See supra* at Part II. Even if Nisqually has some undefined legally protected interest, however, Nisqually has not suffered any financial harm to establish "injury in fact."[8]

Nisqually's own records reveal that it sold significantly more cigarettes in 2008 than in 2007. In 2007, according to its own tax calculations, Nisqually sold $8,182,488 worth of cigarettes. Tiam Dep. at 70:16-19 (Ex. I). But in 2008 the total monetary amount of cigarettes sold jumps by more than $1.3M to a total of $9,445,026. *Id.* at 70:22-71:4 (Ex. I). Nisqually's CFO herself confirmed that Nisqually's tax calculations make clear that sales increased from 2007 to 2008. *Id.* at 72:6-9 (Ex. I). Thus, Nisqually cannot show loss of business revenue and lacks standing.

It is therefore impossible for Nisqually to establish that it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 560. And although this Court has "acknowledged that Nisqually faces injury in the form of a reduction in tobacco sales at Nisqually's own smoke shop if the Frank's Landing smoke shop is permitted to continue sales," *Nisqually Tribe,* 2008 WL 1999830 at * 12. discovery has proven that the injury is conjectural or hypothetical. There has been no reduction in tobacco sales at Nisqually's smoke shop. For this reason alone, this Court should grant summary judgment on all counts. *See, e.g., Krasnyi Oktyabr, Inc. v. Trilini Imports*, 578 F. Supp. 2d 455, 465 (E.D.N.Y. 2008) (granting summary judgment on grounds that plaintiff lacks standing because "even after discovery, the evidence

[8] Plaintiff's counsel, himself, acknowledged this duty to show damage: "[W]e probably have a duty to show that we're damaged." Adams dep. at 59:9-10.

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plaintiff presents of damages viewed in the light most favorable to it is insufficient to show lost profits … arising from defendants' conduct").

IV. The State Did Not Breach The Nisqually Compact By Executing The Addendum

The State has not breached the Nisqually Compact by executing an Addendum to the Squaxin Compact. Importantly, the Addendum added nothing to Squaxin's rights under the Compact. Squaxin's original Compact and Tribal Code permit Squaxin to collect a Tribal tax in lieu of a State tax in "Indian country," which includes "[a]ll Indian allotments or other lands held in trust for a Squaxin Island Tribal member." Lopeman Ex. 16: Compact at Pt. III, § (2) and § (3), Pt. I, §(8)(b)). Ms. Bridges's land satisfies those requirements: she beneficially owns an Indian allotment and is a Squaxin Island Tribal member. *See infra* at pp 4, 6-7 ¶¶ 6, 15. The Addendum merely clarified that Squaxin may collect a Tribal tax in lieu of a State tax on Ms. Bridges allotment at Frank's Landing. *See infra at* p 7, ¶18.

State law controls Nisqually's claim for breach of contract. *See Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang,* 376 F.3d 831, 840 (9th Cir. 2004). Under Washington law, a court may grant summary judgment as a matter of law when interpreting a contract if "(1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence." *Tanner Elec. Coop. v. Puget Sound Power & Light,* 128 Wash.2d 656, 674, 911 P.2d 1301 (1996).

As described above, Frank's Landing is not covered under the Nisqually Compact's definition of "Indian Country." *See supra* at Part II. The Nisqually Compact defines "Indian Country" in relevant part to include "all lands placed in trust or restricted status for individual Indians or for the Tribe located in the Nisqually River basin,… except as otherwise provided by law." Nisqually Compact at NISQUALLY 10026, Part I, §8 (Ex. G). Congress clarified

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and restated that Frank's Landing is "not subject to the jurisdiction of any federally recognized tribe" and is in fact "self-governing." Pub. L. No. 103-435, § 8. Because the Compact is unambiguous, this Court should grant summary judgment by interpreting the plain meaning of the Compact as not including Frank's Landing within the definition of "Indian Country." *See, e.g., Dice v. City of Montesano*, 131 Wash. App. 675, 685, 128 P.3d 1253 (2006).

Even if the term "Indian Country" was ambiguous, which it is not, defendants are entitled to judgment as a matter of law. In Washington, "[t]he touchstone of contract interpretation is the parties' intent." *Tanner Elec. Coop.,* 128 Wash.2d at 674. Under the parol evidence rule, "prior or contemporaneous negotiations and agreements are said to merge into the final, written contract." *Emrich v. Connell,* 105 Wash.2d 551, 556, 716 P.2d 863 (1986). A party may offer extrinsic evidence in a contract dispute to help the fact finder interpret a contract term and determine the contracting parties' intent regardless of whether the contract's terms are ambiguous. *Berg v. Hudesman,* 115 Wash.2d 657, 667-69, 801 P.2d 222 (1990). Even if interpretation of a contract depends on the use of extrinsic evidence, interpretation of a contract provision is a question of law suitable for summary judgment when only one reasonable inference can be drawn from the extrinsic evidence. *Tanner,* 128 Wash.2d at 674, 911 P.2d 1301. *See also Hearst Comms., Inc. v. Seattle Times Co.,* 115 P.3d 262, 267 (Wash. 2005) (clarifying that extrinsic evidence applies "to determine the meaning of *specific words and terms used*") (citations and internal quotations omitted).

Prior and contemporaneous negotiations between the State and Nisqually make clear that the State did not intend to include Frank's Landing within the Nisqually Compact. During negotiations with the State, the Nisqually Tribe requested the exclusive right within a

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20-mile radius measured from the center of the Nisqually reservation to sell and tax cigarettes under its Compact. *See* Jun. 23, 2003 Draft of Nisqually Compact at NISQUALLY 10074 (Ex. J). The State unequivocally rejected Nisqually's blatant attempt to control the sale and taxation of cigarettes at Frank's Landing: "During the meeting it was noted that this provision impacts the Frank's Landing area…. At this point it is our position that we will not recommend a compact to the Governor if it includes [such] a restriction on the Governor…." (Letter from L. Cushman, Wash. Department of Revenue, to Nisqually Cigarette Negotiation Team at NISQUALLY 10084 (July 23, 2003) (Ex. K). The only reasonable inference that can be drawn from this extrinsic evidence stemming from prior and contemporaneous negotiations is that the term "Indian Country" does not include Frank's Landing (that the State did not intend to grant Nisqually the right to sell and tax cigarettes at Frank's Landing). *See Tanner,* 128 Wash.2d at 674, 911 P.2d 1301.[9]

Thus, the plain language of the Nisqually Compact and the intent of the State at the time of contracting make clear that the area covered by the Nisqually Compact does not include Frank's Landing. Based on this conclusion, this Court should grant summary judgment in favor defendants because the execution of the Addendum by the State cannot violate Nisqually's Compact, since it is quite clear that Frank's Landing was intended to be outside the scope of the Nisqually Compact. As the Squaxin Compact and Addendum are proper, there is an independent basis for the validity of the business arrangement between Squaxin, Frank's Landing and Ms. Bridges. All remaining claims are thereby rendered moot and should be dismissed.

[9] That Nisqually thought it necessary to seek a 20-mile radius exclusive territory reveals that Nisqually itself did not believe its Compact's definition of Indian Country included Frank's Landing.

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V. The State Has Not Violated State Law By Allowing Squaxin To Tax Cigarette Sales Made At Frank's Landing

Even if Nisqually has standing to challenge the Addendum, which it does not, the Addendum between the State and Squaxin does not violate Washington law as alleged in Count Three. In Washington, cigarette sales made by "Indian retailers" in "Indian Country" under an approved tax compact are exempt from all state cigarette taxes and local sales and use taxes so long as a tribal tax is levied. RCW 43.06.455(1)-(3). Indian retailers[10] must levy a tribal tax equal to the State tax and use the proceeds for essential government services. RCW 43.06.460; RCW 43.06.455(8). The State defines "[e]ssential governmental services" as "services such as tribal administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development." RCW 43.06.455(14)(a).

The Addendum that Nisqually challenges does not violate State law as it meets all statutory requirements. Island Enterprises, Inc. is an "Indian retailer" under RCW 43.06.455(14)(b) and collects a Squaxin Tribal tax. *See generally* Whitener Dec. Frank's Landing is "Indian country" under federal law, 18 U.S.C. § 1151, and Washington law, RCW 82.24.010(3). *Nisqually Tribe,* 2008 WL 1999830, at *10. The collected tax funds essential governmental services of Squaxin and Frank's Landing. Declaration of Jim Peters [Dkt. No. 23]. Thus, implementation of the Addendum, *i.e.,* Squaxin's taxation of cigarette sales and expenditure of the collected tax, does not violate State law. Further, this Court should defer to

[10] RCW 43.06.455(14)(b) defines "Indian retailer" as "(i) a retailer wholly owned and operated by an Indian tribe, (ii) a business wholly owned and operated by a tribal member and licensed by the tribe, or (iii) a business owned and operated by the Indian person or persons in whose name the land is held in trust."

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the Department of Revenue's reasonable interpretation of RCW 43.06.450 – 460.[11] *See Port of Seattle v. Pollution Control Hearings Bd.*, 90 P.3d 659, 672 (Wash. 2004) (en banc).

Nisqually also alleges the State cannot allow a tribe to tax cigarette sales unless the tribe has the authority to tax at the particular area where the sales occur. As Defendant Lopeman explains in Part 5.2 of his Motion for Summary Judgment, Squaxin has the authority to tax at Frank's Landing.[12] First, Frank's Landing is a self-governing, dependent Indian community that has authorized Squaxin to exercise jurisdiction over a portion of land set aside for economic development. *See generally* Inter-Governmental Agreement (Ex. E). By agreement, that jurisdiction extends to the sale and taxation of cigarettes. *Id.* at § 2. Second, as a member of Squaxin and because of Frank's Landing's consent, Bridges' allotment falls within Squaxin's taxing jurisdiction. *See* Defendant Lopeman's Motion for Summary Judgment at Part 5.2.1 (citing 18 U.S.C. § 1151 and RCW 82.24.010(3) to note that Bridges' allotment is considered "Indian country"). Accordingly, Squaxin has the authority to tax at the sale of cigarettes at Frank's Landing,[13] and the Addendum between the State and Squaxin does not violate Washington law.

VI. Interior Approved The Lease And Sublease That Authorize Squaxin To Sell And Tax Cigarette At Frank's Landing

Count Two of Nisqually's Amended Complaint alleges that Interior has not approved the contractual arrangement among Bridges, Frank's Landing, and Squaxin as required by 25

[11] *See also* Defendant Lopeman's Motion for Summary Judgment at Part 5.4.

[12] Defendants Frank's Landing and Bridges adopt and endorse the entirety of Defendant Lopeman's Argument Section, which provides a more fulsome discussion of Squaxin's authority to tax. Because Squaxin has the authority to tax at Frank's Landing, summary judgment is proper for Counts One and Three.

[13] As Defendant Lopeman explains, *see* Defendant Lopeman's Motion for Summary Judgment Part 5.2, Squaxin can tax economic activity taking place on Bridges's allotment within Frank's Landing. Thus, defendants are entitled to summary judgment as to Count One. *Cf. Nisqually Tribe,* 2008 WL 1999830, at *2 (explaining that "Nisqually's requested relief depends on whether Squaxin can exercise its power as a sovereign, federally recognized tribe, to tax economic activity occurring on land held in trust by the United States for a member of the Squaxin Tribe–land that is within the territory of a self-governing dependent Indian Community.").

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U.S.C. § 415. Amended Compl. at 11 ¶¶ 41-42. Interior, however, has approved both a commercial ground lease between Bridges and Frank's Landing, and a sublease between Frank's Landing and Squaxin. *See* Interior Approval at BRIDGES0102 (Ex. F). This count is thus moot. Accordingly, this Court should grant summary judgment as to this count.

CONCLUSION

For the above reasons, Defendants Frank's Landing and Bridges respectfully request this Court find that there is no genuine issue as to any material fact, and that the Defendants are entitled to a judgment in their favor as a matter of law.

DATED: March 27, 2009

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CERTIFICATE OF SERVICE

Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 27th day of March, 2009, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the parties.

Executed on 27th day of March, 2009, at Portland, Oregon.

s/ Steven B. Ungar

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