The Honorable RONALD B. LEIGHTON

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

DEFENDANT LOPEMAN'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF

NOTE ON MOTION CALENDAR: APRIL 24, 2009

1. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Nisqually Indian Tribe ("Nisqually") seeks to permanently enjoin sales of cigarettes and tobacco products at The Landing smoke shop, and to invalidate the 2008 Addendum to the cigarette tax compact ("Squaxin Compact") between the Squaxin Indian Tribe ("Squaxin" or "Squaxin Island Tribe") and the State of Washington ("State"). Squaxin's tax revenue from the State-regulated cigarette sales at The Landing funds essential governmental services at Squaxin and at the Wa-He-Lut Indian School at Frank's Landing. Nisqually claims: (1) that Squaxin lacks taxing authority at The Landing under federal law (Count 1); (2) that the Secretary of the Interior ("Interior") failed to approve leases between Defendant Theresa

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Bridges, the Frank's Landing Indian Community ("Frank's Landing") and Squaxin (Count 2)[1]; (3) that the Addendum and Squaxin's sale of Tribally taxed cigarettes are not authorized under State law (Count 3); and (4) that Squaxin's Compact Addendum breaches the cigarette tax compact between the State and Nisqually ("Nisqually Compact") (Count 4). (Dkt. No. 92: First Amended Complaint, Claims 1-4, at pp. 10-13).

Notwithstanding protracted discovery, the essential material facts remain the same as when the Court entertained Nisqually's motion for a preliminary injunction: i.e., the respective governments properly executed and entered into a valid, binding and enforceable tax compact, tax compact amendment, inter-governmental agreement, and master lease and sublease. The issues that arise in Nisqually's amended complaint are purely legal.

As described below, the Squaxin Island Tribe's establishment of a retail store at Frank's Landing under Squaxin's Compact does not violate federal or state law, or Nisqually's Compact. In addition, Squaxin, beneficial landowner Theresa Bridges, Frank's Landing and the State all fully consented to the venture through agreements, including an Inter-Governmental Agreement between Frank's Landing and Squaxin, and a lease and sublease approved by Interior. These parties arrived at a mutually beneficial arrangement without litigation over complex jurisdictional issues. Accordingly, the Court should grant Defendants summary judgment and dismiss the case.

The arguments favoring a grant of summary judgment are as follows. First, the federal government has not delimited any of the defendants' respective authorities to regulate, consent to or implement The Landing venture. Section 5.1. Second, the Squaxin Island Tribe has ample authority to establish the venture, to impose a Tribal tax on The Landing's cigarette sales, and to dedicate Tribal tax revenues to essential governmental services that greatly benefit the Squaxin Island Tribe and the Wa-He-Lut Indian School at Frank's Landing. Section 5.2.

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[1] The Nisqually Tribe did not seek permission from the Court to add this new count regarding Interior's approval of the lease and sublease, or to reformulate its facts and claims, as it did in its Amended Complaint filed on June 16, 2008. Dkt # 92; *see* note 2, below). Nonetheless, Defendant Lopeman addresses this Count in Section 5.7 herein.

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Third, Frank's Landing had authority to consent to Squaxin's ownership, operation and regulation of The Landing and to Squaxin's assertion of taxing jurisdiction. Section 5.3. Fourth, the State violated no state laws by entering a compact with the Squaxin Island Tribe that allows Squaxin to levy and collect a Tribal tax on certain sales at Frank's Landing. Section 5.4. Fifth, the State has not breached its compact with Nisqually. Section 5.5. Sixth, Nisqually lacks standing to challenge the validity of the Addendum to Squaxin's Compact. Section 5.6. Finally, Interior approved the master lease and sublease. Section 5.7.

2. RELIEF REQUESTED

Defendant Lopeman[2] respectfully asks the Court to find that there is no genuine issue as to any material fact, and that the Defendant is entitled to a judgment as a matter of law.

3. STATEMENT OF UNDISPUTED FACTS

The Squaxin Island, Nisqually and Puyallup tribes are federally recognized tribes that in 1854 ceded lands and reserved rights under the Medicine Creek Treaty ("Treaty"). (Lopeman Ex. 1: Treaty of Medicine Creek, 10 Stat. 1132). In Article 1 of the Treaty, these three tribes ceded to the federal government their "right, title and interest" to an approximately 4,000 square mile area that encompasses the reservations that these three tribes now occupy.[3]

For over thirty years, Frank's Landing and its members have operated and funded through varied sources the Wa-He-Lut Indian School located at Frank's Landing, which provides children with an education that is integrated with traditional Indian values and culture.[4] Frank's Landing consists of three parcels of land, known as "allotments," that the United States holds in

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[2] "Defendant Lopeman," for the purposes of this motion for summary judgment, refers collectively to all defendants related to the Squaxin Island Tribe. The Court granted authority to amend to name Squaxin's Tribal Chairman consistent with its *Ex Parte Young* ruling. (Dkt. No. 90: Order Denying Preliminary Injunction at pp. 8-9). Nisqually, however, without approval of the Court or the parties, named all Squaxin Tribal Council members and the Director of the Tribe's Finance Department, without any discovery, showing or even allegation in the amended complaint as to how these individuals might be related to the case. (Dkt. No. 92, First Amd. Complaint, caption).

[3] *Id.*; Lopeman Ex. 2: Letter from G. Stevens to Commissioner Manypenny describing area ceded (Dec. 30, 1854).

[4] Lopeman Ex. 3: Memo from V. Peters, BIA, to BIA Area Contracting Officer, re Wa-He-Lut Community Day School, FY-85, with attached Resolution of Frank's Landing Indian Community (Sept. 28, 1984); Lopeman Ex. 20: Wa-He-Lut School History, from website http://www.wahelut.bia.edu/About%Our%School.html.

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trust for the benefit of individual Indians. *See* Dkt. No. 90: Order Denying Preliminary Injunction ("Order") at p. 3. The Frank's Landing allotments are outside the boundaries of the Nisqually Reservation, but are within the approximately 4,000 square miles that the Medicine Creek tribes ceded by Treaty and thus within the aboriginal territory of the Squaxin Island Tribe (and other tribes). (*See* Lopeman Ex. 1: Treaty). (Lopeman Ex. 21: Locator map).[5] In 1987, Congress enacted legislation that recognized the members of Frank's Landing as eligible for certain federal programs and services provided to Indians; and declared Frank's Landing as eligible to contract and receive grants under the Indian Self-Determination and Education Assistance Act ("ISDEAA").[6]

On October 24, 1994, the Nisqually Tribe amended its Constitution's jurisdictional statement to declare that the "jurisdiction of the Nisqually Indian Tribe" extended "to tracts placed in trust or restricted status for individual Indians. . . . locate in the Nisqually River basin. . . ." (Lopeman Ex. 5: Nisqually Constitution at p. 3, Art. 1). Five days later, however, on November 2, 1994, Congress amended the 1987 law pertaining to Frank's Landing to acknowledge Frank's Landing as a federally recognized "self-governing dependent Indian community" that is "not subject to the jurisdiction of any federally recognized tribe." (Lopeman Exs. 4 and 6: 1987 Act, as amended by 1994 Act). Congress also stated that the 1994 Act did not "constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized tribe." *Id.*

Indian tribes and self-governing Indian communities, lacking a taxable land base, continually seek ways to fund services for their members and communities.[7] In Washington, one approach is to enter into a cigarette tax compact with the State in order to avoid conflicts over

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[5] The Locator Map is provided to demonstrate the relative locations of the various government entities with respect to the Medicine Creek Treaty landmarks. Boundary lines are approximate and not inclusive.

[6] Lopeman Ex. 4, 6: Indian Law Technical Amendments of 1987, Pub. L. No. 100-153, § 10, 101 Stat. 886 (1987), as amended by Indians, Technical Corrections, Pub. L. No. 103-435, § 8 (entitled, "Recognition of Indian Community), 108 Stat. 4566 (1994).

[7] Lopeman Ex. 7: Squaxin's Cigarette Sales and Tax Code § 6.14.020 (discussing need for funding services); Declaration of Henry Adams in Support of Lopeman's Motion for Summary Judgment at ¶ 4 (March 24, 2009).

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dual taxing authorities, tax collection and enforcement. *See* RCW 43.06.450 - .460. The Governor may enter into cigarette tax agreements with specific Indian tribes whereby the State will retrocede from its tax if the tribe (1) collects a tribal tax on Indian retailers' cigarettes sales in Indian country in lieu of and equal to the State cigarette tax (of $20.25 per carton), and (2) spends its tax revenues on "essential governmental services." RCW 43.06.450 - .460, RCW 84.24.020 - .028. Besides conditioning how the revenues are spent, the compact must accomplish specified goals, and address enforcement and other requirements. *Id.*

In recent years, Frank's Landing's sought to compact with the State largely so that it could apply a portion of The Landing's cigarette tax revenues towards the Wa-He-Lut Indian School as an "essential governmental service." *See* RCW 43.06.455; Declaration of Henry Adams in Support of Lopeman's Motion for Summary Judgment (March 24, 2009) ("Adams Dec.") at ¶4. In January of 2006, the State declined because the "special status" of Frank's Landing's precluded the "same solutions that were available to Indian tribes." (Lopeman Ex. 11: Letter from L. Cushman, Washington Department of Revenue, to Billy Frank Jr., Frank's Landing (Jan. 10, 2006)). The State and Nisqually suggested alternatives. *Id.*; Lopeman Ex. 19: Adams Dep. at pp. 73-75, lines 12-10; Lopeman Ex. 12: Ltr. From C. Iyall to C. Holmstrom (Oct. 2, 2007). One option suggested by the State, which fully supported the efforts of Frank's Landing to sustain the Wa-He-Lut School, was to transfer Frank's Landing's cigarette business to a tribe with a compact. (Lopeman Ex. 11: Letter from L. Cushman, Washington Department of Revenue, to Billy Frank Jr., Frank's Landing (Jan. 10, 2006)). Accordingly, Frank's Landing approached the Squaxin Indian Tribe to explore an alternative arrangement to help fund the school. (Adams Dec. at ¶ 5).

In 2004, the Squaxin Island Tribe and the Nisqually Tribe entered into separate cigarette tax compacts with the State. (Lopeman Ex. 9: Nisqually Compact (June 24, 2004); Lopeman Ex. 10: Squaxin Compact (Oct. 28, 2004)). Squaxin's Compact, among other things, requires that the Tribe impose a Tribal sales tax on Tribal retailers for sales occurring within "Indian country." *Id.* at Pt. III(2). The Squaxin Compact's three-part definition of "Indian country"

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includes all land within the limits of the Squaxin Island Indian Reservation and "***allotments held in trust for a Squaxin Island tribal member***. . . ." *Id.* at pp. 2-3, Pt. 1(8)(b) (emphasis added); *see also id.* at p. 5, Pt. III(2)(a) (requiring Tribal tax). A "tribal member" is an enrolled member of the Squaxin Island Tribe. *See id.* at p. 3, Pt. I(21). Squaxin's Compact therefore covers retail sales by Tribal retailers on allotments, regardless of whether they are located within or outside of Squaxin's Reservation.

Nisqually, during its compact negotiations, tried convincing the State to establish a 20-mile radius around the Nisqually Reservation within which the State could not compact with other "Indian entities or tribes." (Lopeman Ex. 8: Letter from L. Cushman, Wash. Department of Revenue, to Nisqually Cigarette Negotiation Team at p. 2 (July 23, 2003)). The State refused. *Id.* Nisqually's Compact permits a tax exemption for sales by tribal retailers occurring on lands that include those "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." (*See* Lopeman Ex. 9: Nisqually Compact at p. 3, Pt. 1(8)(b) (defining "Indian country"). This language roughly parallels the statement of jurisdiction in the Nisqually Tribe's 1994 amended Constitution, as described above, the approval of which preceded the 1994 Frank's Landing legislation. (Lopeman Ex. 5: Nisqually Constitution at p. 3, Art. 1).

Theresa Bridges, a member of Frank's Landing Indian Community, owns a public domain allotment at Frank's Landing that the United States holds in trust for her benefit. (Adams Dec. at ¶ 2,3). In 2007, with Ms. Bridges' consent, Squaxin and Frank's Landing executed an Intergovernmental Agreement that allowed Squaxin to own and operate a Tribal cigarette retailer on Ms. Bridges' allotment, and assert Squaxin's taxing authority there. (Lopeman Ex. 13: Inter-Governmental Agreement). The Inter-Governmental Agreement provided, among other things:

> **1. REQUEST TO EXTEND AND AGREEMENT TO SUBMIT TO JURISDICTION.** The FLIC affirmatively grants to SIT [the Squaxin Island Tribe] the right to extend its jurisdiction to that portion of the FLIC [Frank's Landing] set aside for economic development purposes, the EDZ [Economic Development Zone]. FLIC consents to its enterprises and concerns subjection to the jurisdiction of the SIT as further described herein.

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> 2. **ASSERTION OF JURISDICTION.** The FLIC assents to, and the SIT asserts general jurisdiction over the FLIC EDZ, including but not limited to Title 6 [Cigarette Sales and Tax Code] of the laws of the Squaxin Island Tribe related to tribal enterprises, provided that nothing contained herein shall establish jurisdiction over the governing body of the FLIC.

Id. at pp. 2-3. By agreement with Frank's Landing, 85% of Squaxin's cigarette taxes from sales at The Landing that are covered by its Compact are directed to the Wa-He-Lut School. (Declaration of Robert Whitener, Jr. In Support of Motion for Summary Judgment (March 24, 2009) ("Whitener Dec.") at ¶ 3). Department of Revenue ("Revenue") representatives had verbally approved using Squaxin taxes for funding the Wa-He-Lut Indian School as a qualifying "essential government service" expenditure during negotiations in 2007. Whitener Dec. at ¶ 3.

Additionally, Frank's Landing and Ms. Bridges executed two agreements to allow Squaxin to own and operate a retail store on a portion of her 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, both of which Interior approved pursuant to 25 U.S.C. § 415. (Lopeman Ex. 14: Ground Lease; Lopeman Ex. 15: Sublease).

Theresa Bridges enrolled in the Squaxin Island Tribe on January 17, 2008. (Lopeman Ex. 16: Squaxin Tribal Council Resolution No. 08-08). She thereby irrevocably relinquished her prior membership in the Puyallup Tribe. (Declaration of Tamatha Ford, Dkt. No. 72 at p. 2, lines 16-22).

On or about January 18, 2008, the Squaxin Island Tribe, through its wholly owned business, Island Enterprises, Inc., began making retail sales of cigarettes at store and collecting a Squaxin Tribal tax. (Whitener Dec. at ¶ 2). On January 22, 2008, the Squaxin Island Tribe and the State signed an Addendum to the Squaxin Compact that acknowledged the Inter-Governmental Agreement between Squaxin and Frank's Landing, and clarified that "Indian country" 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-

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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. (Lopeman Ex. 17: 2008 Addendum).

The Nisqually Tribe initiated this lawsuit on February 6, 2008. (Dkt. No. 1). This Court held a hearing on Nisqually's motion for a preliminary injunction and the several defendants' motions to dismiss on April 15, 2008. (Dkt. No. 89). On May 8, 2008, the Court denied Nisqually's motion, as well as defendants' motions to dismiss. (Dkt. No. 90).

4. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[8] Courts view inferences to be drawn from the underlying facts in the light most favorable to the non-moving party.[9] Once the moving party meets its burden under Rule 56(c), the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial."[10] The non-moving party must do more than simply show "some metaphysical doubt as to the material facts."[11] Summary judgment is particularly appropriate when, as here, the disputed issues are purely legal, *See Hong Wang v. Chertoff*, 550 F.Supp.2d 1253, 1255 (W.D. Wash. 2008). Under such circumstances, courts do not grant deference to the non-moving party. *Id.*

5. ARGUMENT

5.1. <u>This Court Properly Found That The Federal Government Has Not Delimited The Authority of The Squaxin Island Tribe, Frank's Landing, or Theresa Bridges To Implement and Consent To This Venture</u>.

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[8] FED. R. CIV. P. 56(c).

[9] *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[10] FED. R. CIV. P. 56(e).

[11] *Matsushita*, 475 U.S. at 586.

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This Court found, after "thoroughly research[ing] federal common law and federal statutes and regulations," that "no federal law [ ] prohibits such an arrangement between the Community, the beneficiary of the trust land, and the Squaxin tribe." Order at p. 13. The intervening nine months of discovery have added nothing new to what at core is a legal question about the intersection of Congress' 1994 Frank's Landing legislation and the inherent authorities of the Squaxin Island and Nisqually tribes. There is no dispute over the material elements of the business arrangement: i.e., that Ms. Bridges is an enrolled member of the Squaxin Island Tribe; that she and Frank's Landing entered into a federally-approved lease; that Frank's Landing and Squaxin entered into a federally approved sublease; that Frank's Landing consented to Squaxin's assertion of taxation jurisdiction through an Inter-Governmental Agreement; and that Squaxin owns and operates the store on Ms. Bridges' trust property within Frank's Landing. Accordingly, any arguments are legal, not factual.

As discussed in Section 5.2 below, the federal government has not delimited Squaxin's taxing authority at Frank's Landing. Finally, as discussed in Section 5.3, Congress, through its 1994 Frank's Landing legislation, allowed Frank's Landing, at minimum, to consent to the exercise of jurisdiction by a Medicine Creek Treaty tribe over that tribe's own business, in Indian country, and within Frank's Landing.[12]

5.2. The Squaxin Island Tribe Has Ample Taxing Authority At The Landing.

Nisqually's Count One, which alleges that Squaxin lacks authority to levy Tribal taxes on cigarette sales at The Landing, misapprehends the source and nature of tribal authority. Tribal powers are inherent rather than derived from the federal government. Felix Cohen, *Cohen's Handbook of Federal Indian Law* at § 4.02 (2005 ed.) ("Cohen"). Accordingly, tribes possess all powers of a sovereign government except as limited by federal law. *Id.* at § 4.02. As this Court

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[12] Defendant Lopeman in no way concedes that the taxation authority of Indian tribes under federal common law, which generally describes the boundaries of a tribal government's taxing authority over non-Indians, is necessary or relevant to the questions presented here. The Squaxin Island Tribe's ability to control the pricing and spending behavior of its own business, and the location of that business within "Indian country," is sufficient to qualify the tribe for the state tax exemptions described under RCW 43.06.450 – .460.

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held and as described in Section 5.1 above, federal law does not limit the Squaxin Island Tribe's inherent taxing authority in these particular circumstances. Order at p. 13.

Except as limited by federal law, Indian tribes retain taxing power as an "essential aspect of sovereignty." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-140, 147 (1982); Order at p. 14. The power to raise revenue to provide governmental services is crucial to the continuing progress of Indian tribes, particularly in light of ever-diminishing federal funding and tribes' lack of a taxable land base. *See Merrion*, 455 U.S. at 137; Cohen at § 8.04[1].

As described in the subsections below, Squaxin has authority to assert its inherent taxing authority over its own business at The Landing for two independent reasons: (1) because Theresa Bridges is a member of the Squaxin Island Tribe; and (2) because the unique status of the Frank's Landing allows Frank's Landing to accept Squaxin's exercise of jurisdiction over Squaxin's own business and to prevent any competing assertion of authority by another tribe.

5.2.1. <u>The Squaxin Island Tribe Has Inherent Authority to Assert Civil Jurisdiction Over Its Business That Is Located On Its Consenting Member's Off-Reservation Allotment, Which Is Outside Any Tribe's Reservation</u>.

The Squaxin Tribe has inherent authority to assert its taxing jurisdiction over its own business that is located on a Squaxin member's off-Reservation allotment, particularly when that Tribal member has consented. The classification of land as "Indian country," which undeniably includes Ms. Bridges' allotment, is the "benchmark" for determining the allocation of federal, tribal and state authority, including taxing authority with respect to Indians and Indian lands. *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n,* 829 F.2d 967, 973 (10th Cir. 1987). In Indian country, state taxes are *per se* preempted by federal law if they fall upon tribal members or tribes, *Oklahoma Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 453 (1995), and are subject to a "balancing test" when they fall upon non-members in Indian country, *Blunk v Ariz. Dep't of Transp.,* 177 F.3d 879, 882 (9th Cir. 1999). Similarly, Washington law requires the presence of "Indian country" for a tribe to qualify for a tax exemption under a cigarette tax compact. RCW 43.06.455(2). And, the federal definition of "Indian country" includes

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dependent Indian communities and Indian allotments regardless of their location within or outside of Indian country. 18 U.S.C. § 1151; *see* RCW 82.24.010(3) (cigarette tax law adopts definition in 18 U.S.C. § 1151).

Courts analyzing whether a tribe may assert jurisdiction over a particular part of off-reservation Indian country ordinarily rely on the membership of the beneficial Indian owner. *See e.g. Alaska v. Native Village of Venetie Tribal Gov't,* 522 U.S. 520, 527 at n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it"). Tribes have routinely asserted jurisdiction over activities occurring on their tribal members' off-reservation allotments.[13] Moreover, courts examining tribal sovereignty "look to the character of the power that the tribe seeks to exercise, not merely the location of the events."[14]

These rulings underscore the appropriate "character" of Squaxin's inherent authority. *See John*, 982 P.2d at 752 (n. 4, below). The Squaxin Tribe is regulating its own enterprise on its own member's off-reservation allotment that is within Squaxin's aboriginal territory, after having obtained the consent of both the allottee and the self-governing dependent Indian community whose boundaries encompass her allotment.

Moreover, Squaxin's original Compact and its Tribal Code expressly supported such an assertion of jurisdiction – both well *before* the Addendum was signed in 2008 and after. Squaxin's original, unamended Compact defined "Indian country" (where it could collect the

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[13] *See e.g., Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1385-86 (10th Cir. 1996) (Cheyenne-Arapaho Tribes had authority to impose severance and business activity taxes on off-reservation allotments held by its members); *Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531, 1540-41 (10th Cir. 1995) (Navajo Nation had authority to impose a business activity tax on mining activity occurring on off-reservation land held in trust for individual Navajo allottees); *Arizona Public Svc. Co. v. EPA,* 211 F.3d 1280, 1294-95 (10th Cir. 2000) (upholding EPA regulations recognizing tribes' inherent authority to regulate off-reservation allotments and dependent Indian communities).

[14] *John v. Baker*, 982 P.2d 738, 752 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000), *appeal after remand*, 30 P.3d 68 (2001), *appeal after remand*, 125 P.3d 323 (2005). The Alaska Supreme Court, in a lengthy opinion examining inherent tribal sovereignty, upheld a tribal court's inherent authority to adjudicate a child custody dispute between the father, who was a member of the tribe that housed the tribal court, and the mother, a member of a different Alaska Native tribe. 982 P.2d at 743-744. The 1999 trial court decision cited as support for the above

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Tribal tax and forego the State tax) as including "[a]ll Indian allotments or other lands held in trust for a Squaxin Island Tribal member," without requiring that the allotment be located within the boundaries of Squaxin's Reservation. (Lopeman Ex.17: Squaxin Compact at p. 3, Pt. I(22); p. 5, Pt. III(2) and (3)).

Similarly, Squaxin's 2002 Cigarette Sales and Tax Code, which established the Tribal tax, expressly and broadly applies "to the full extent of the sovereign jurisdiction of the Squaxin Island tribe ***in Indian country***." Code at § 6.14.030 (emphasis added). "Tribal retailer[s]" subject to the tax are cigarette retailers that are wholly owned by the Squaxin Island Tribe and located "***in Indian country***." *Id.* at § 6.14.040 (emphasis added). Even before the 2008 Addendum, Squaxin's Code broadly defined "Indian country" as "consistent with the meaning given in 18 U.S.C. [§] 1151", and thus as including (1) land within the Reservation, and (2) "***[a]ll Indian allotments or other lands held in trust for a Squaxin Island Tribal member*** or the Tribe, the Indian titles to which have not been extinguished, including rights of way running through the same." *Id.* at § 6.14.040 (emphasis added). Accordingly, even if Squaxin's Addendum is declared void as Nisqually desires, Squaxin's original Compact allows it to continue collecting the Tribal cigarette tax at Frank's Landing under its original Compact.

Finally, both the Squaxin and Nisqually cigarette tax compacts accept tribal affiliation of the beneficial owner as the default rule for determining which tribe, if any, has taxing jurisdiction over an off-reservation allotment.[15] While Nisqually's Compact (like its constitution) also purports to include allotments owned by "individual Indians" belonging to any tribe within "the Nisqually River basin," Congress in the 1994 legislation effectively prohibited Nisqually or any other tribe from extending jurisdiction to the Frank's Landing allotments absent Frank's Landing's consent. Section 3 above; Lopeman Ex. 9: Nisqually Compact at p. 3, Pt.

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quoted statement the U.S. Supreme Court cases of *Montana v. United States*, 450 U.S. 544 (1981), and *Duro v. Reina*, 495 U.S. 676 (1990).

[15] Lopeman Ex. 10: Squaxin Compact at p. 2, Pt. I(8)(b) (Indian country includes "allotments held in trust for a Squaxin Island tribal member or the Tribe …"); Lopeman Ex. 9: Nisqually Compact at p. 3, Pt. I(8)(c) (Indian country includes "allotments or other lands held in trust for a Nisqually tribal member or the Tribe …).

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I(8)(b). The Landing, then, is not subject to any competing assertion of tribal authority. Ms. Bridges allotment at Frank's Landing is "Indian country"[16] and, under both Squaxin's Compact and Code, the Squaxin Island Indian Tribe may regulate "Tribal retailers" located there, so long as Frank's Landing permits the assertion of Squaxin jurisdiction.

5.2.2. Regardless of Theresa Bridges' Membership, The Landing Venture Is Legal Under The 1994 Federal Legislation Governing Frank's Landing And The Inter-Governmental Agreement Between Squaxin And Frank's Landing.

Theresa Bridges' membership at Squaxin aside, the legality of The Landing venture is sustained because it fully comports with Congress' 1994 legislation concerning Frank's Landing and the Inter-Governmental Agreement executed by Frank's Landing and Squaxin. The 1994 Act empowered Frank's Landing to agree to the assertion of jurisdiction by the Squaxin Island Tribe, a Medicine Creek Treaty tribe with the same aboriginal ceded lands as the ancestors of Frank's Landing's members.

Congress in its 1994 legislation expressly recognized "The Frank's Landing Indian Community" as a "self-governing dependent Indian community that is not subject to the jurisdiction of any federally recognized tribe." (Lopeman Ex. 6: Pub. L. No. 103-435). Accordingly, Congress explicitly prohibited any other tribe, including Nisqually, from asserting jurisdiction at Frank's Landing, and thus implicitly allowed Frank's Landing to consent to another tribe's exercise of jurisdiction. *See id.* While Frank's Landing appears to not have all the powers of a federally-recognized tribe,[17] it is certainly not prohibited by federal law from deciding which federally-recognized Medicine Creek Treaty tribe may provide government services and exercise jurisdiction within this particular part of Indian country.

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[16] Order at p. 14 ("The parties do not disagree that the land at Frank's Landing is Indian country under 18 U.S.C. § 1151.").

[17] The 1994 law provided, "Nothing in this section may be construed to constitute the recognition by the United States that Frank's Landing Indian Community is a federally recognized Indian tribe." (Lopeman Ex. 6: Pub. L. No. 103-435, § 8 at subsec. §(2)(b)(2)).

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Frank's Landing's consent was memorialized in the December 2007 "Inter-Governmental Agreement Between The Squaxin Island Tribe [ ] and The Frank's Landing Indian Community." (Lopeman Ex. 13: Inter-Governmental Agreement). Frank's Landing agreed, among other things, to Squaxin's extension of jurisdiction over the portion of Frank's Landing set aside for economic development purposes. *Id.* at p. 2, ¶ 1. The Agreement specifies that Frank's Landing's consent to jurisdiction includes the Squaxin Island's Tribe's Cigarette Sales and Tax Code as related to Tribal enterprises. *Id.* at ¶ 2.

Ironically, Nisqually previously sought to do what Squaxin and Frank's Landing have accomplished. In late spring of 2007, Nisqually's Chair offered to bring the store under the Nisqually corporate code and tax compact, and later made the same offer to the Governor. (Lopeman Ex. 18: Iyall Deposition at pp. 31-32, lines 22-12; at pp. 33-34, lines 18-5). In fact, it was Nisqually's offer that ultimately prompted the Landing to enter into serious negotiations with Squaxin. (Lopeman Ex.19: Adams Deposition at pp. 73-75, lines 15-7). Nisqually now challenges Squaxin's implementation of the plan Nisqually itself promoted. *See* Lopeman Ex. 18: Iyall Deposition at pp. 168-170, lines 24-17; Ex. 12: Ltr from C. Iyall to C. Holmstrom.

Finally, the Bureau of Indian Affairs ("BIA") was obligated to consider the unique jurisdictional arrangement here when it approved the lease and sublease. BIA must "recognize the governing authority of the tribe having jurisdiction over the land to be leased, preparing and advertising leases in accordance with applicable tribal laws and policies." 25 C.F.R. § 162.107(b). Accordingly, section 18(b) of the sublease states:

> The laws of the United States, including specifically the Intergovernmental Agreement between the Frank's Landing Indian Community and the Squaxin Island Tribe, and the laws of the State of Washington, when federal laws are silent, shall govern this lease.

(Lopeman Ex. 15: Sublease at p. 6, ¶ 18(b). Therefore, the BIA approved: (1) the Squaxin Island Tribe's exercise of jurisdiction over the leased land, and (2) the ability of Frank's Landing and the Squaxin Island Tribe to agree to Squaxin's exercise of jurisdiction over the leased land.

5.3. <u>Frank's Landing Has Authority To Contract With The Squaxin Island Tribe And Theresa Bridges</u>.

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The Court should follow its earlier analysis in which it determined that Frank's Landing had the necessary authority to contract for The Landing venture. As the Court correctly held, Congress "***has not prohibited the Community from contracting with a member's tribe*** to allow the tribe to sell tribal taxed cigarettes on land within the dependent Indian community in exchange for a percentage of the tribal tax revenue." Order at 15 (emphasis added). The Court further found, "Congress clearly intended with the enactment of [the 1994 legislation] for the Community to be given limited sovereign powers, as a dependent Indian community, in order to sustain its governmental programs, ***and this includes the power to contract with other tribes***." *Id.* (emphasis added).

While the precise scope of Frank's Landing's governmental authority remains undefined, it is entirely consistent with Congress' intent that, as a self-governing entity, Frank's Landing would have powers that include entering into contracts that benefit Frank's Landing and its Wa-He-Lut School In 1987, Congress specifically recognized Frank's Landing as a government entity "eligible to contract" with the United States under ISDEAA. In 1994, Congress further confirmed Frank's Landing's powers by expressly recognizing Frank's Landing as "***a self governing Indian community*** that is not subject to the jurisdiction of any federally recognized tribe," while stating that the law should not be "construed to constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized tribe." (Lopeman Ex. 6: Pub. L. No. 103-435) (emphasis added)).

Congress, by expressly allowing a self-governing dependent Indian community to contract with federal agencies, implicitly recognized Frank's Landing's authority to enter into all necessary contracts with third parties (e.g., with teachers, administrators and school janitors for the Wa-He-Lut school) to fully implement those contracts.[18] And, "by granting the Community

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[18] *See Okeson v. City of Seattle*, 159 Wash.2d 436, 445, 150 P.3d 556 (2007) (local government's powers limited to those "granted in express words, or to those necessarily or fairly implied in or incident to the powers expressly granted, and also to those essential to the declared objects and purposes of the corporation.").

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independence from any tribe's jurisdiction", *see* Order at p. 15, Congress implicitly granted Frank's Landing the much-needed power to consent to the jurisdiction of another tribe.

5.4. The State Has Not Violated State Law By Compacting With The Squaxin Island Tribe As To Frank's Landing.

In Count Three, Nisqually asserts that the Addendum between the State and Squaxin is invalid under Washington law. Plaintiff argues that RCW 43.06.450-460 require that the State, before entering into a compact and granting a tax exemption, make formal findings that tribal taxing authority exists and/or the legal basis for the State's authority to retrocede from the tax; that the State failed to make such findings; and that Squaxin lacks taxing authority at The Landing. The last point, as pertains to Squaxin's taxing authority, is addressed in Section 5.2 above.

The State has not violated any applicable Washington laws, which are summarized as follows. The Legislature authorized the Governor to enter into tax compacts concerning cigarette sales to further numerous goals. RCW 43.06.450. These goals include strengthening "the government-to-government relationship" between tribes and the State; promoting "economic development"; raising revenues for "tribal governments and Indian persons"; and "enhancing enforcement of the state's cigarette tax law." *Id.* Accordingly, Washington State exempts sales made by Indian retailers from cigarette, sales and use taxes to the extent that such sales are made under a cigarette tax compact. *See* RCW 82.24.295(1), RCW 82.08.0316, and RCW 82.12.0316. By statute, such compacts extend only to sales of cigarettes made by "Indian retailers" in "Indian country" that are subject to a tribal tax. RCW 43.06.455(1) - (3). The law imposes other requirements, including that the tribal tax must be equal to the State tax that would otherwise have been collected, and must be used for "essential government services," *see* RCW 43.06.455, .460[19] The Legislature keeps track of the cigarette tax and other exemptions through

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[19] "Essential governmental services are "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).

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periodic reports that Revenue must submit that describe, among other things, the purpose of the exemption, the amount of revenue that the State has foregone, and whether the benefits continue to run to the targeted "parts of the population." *See* RCW 43.06.400.

The Washington legislature has broad authority to grant tax exemptions for reasons of public policy. *Commonwealth Title Insurance Co. v. Tacoma*, 81 Wn.2d 391, 395-96, 502 P.2d 1024 (1972). Washington's compacting law does not require that the State make formal findings as to the level of tribal taxing authority required; as to whether any demonstration of taxing authority is required beyond the actual collection of tax and appropriate use of the proceeds; as to the incidence of the tribal tax; or as to what tribal jurisdiction is required or presumed, stating only that the law does not constitute a grant of State taxing authority. *See* RCW 43.06.450 - .460. Basically, as long as a compact meets the listed requirements and furthers the statutory goals, the Governor and Revenue have complied with the statute. If a problem arises with regard to the interpretation, enforcement or violation of a compact, then the compacting parties must comply with the statutory notification requirement and the compact's dispute resolution provision and, if that fails, can terminate the compact. *See* RCW 43.06.455.

Here, every single element for a statutory exemption has been met. The Legislature identified the Squaxin Island Tribe as an entity with whom the State could reach a compromise over taxation and enforcement in Indian country. RCW 43.06.460. The Tribe owns and operates The Landing store, which qualifies it as an "Indian retailer." *See* RCW 43.06.455(14)(b). Frank's Landing and Ms. Bridges' land are undeniably "Indian country" under federal law, the 2004 Squaxin Compact and its Addendum. *See* 18 U.S.C. § 1151; Lopeman Ex. 10: Squaxin Compact at 2, Pt. I(8); Lopeman Ex. 17: Addendum; Order at p. 14. Squaxin has clear authority to compel *its own business* to dedicate $20.25 of the amount received per carton sold under the Addendum to "essential government services." *See* Section 5.2 above. The Compact requires verification through third-party audit that the tax revenue be applied to essential government services. (Lopeman Ex. 10: Squaxin Compact at pp. 10-12, Pt. VIII). Accordingly, Squaxin has retained a third party auditor to review its records and report on its compliance with the terms of

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the Compact for every completed fiscal year, including the time period that The Landing has operated. (Whitener Dec. at ¶ 4 with attached audit report for FY 2008).[20] Finally, the compact accomplishes all statutory goals, including but not limited to benefiting "Indian persons" – i.e., Indian children who are educated at the Wa-He-Lut School and their families. *See* RCW 43.06.450. Thus, the Tribe's taxation of cigarette sales at The Landing and expenditure of its tax revenues fall well within the plain language of the State's statutory authorization. *See* RCW 43.06.450 - .460.

Finally, courts grant deference to a state agency's reasonable interpretation of a state statute, particularly when that agency is charged with the statute's administration. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659, 672 (2004). Here, the Governor executes such compacts but has delegated responsibility for compact negotiation to Revenue, which administers the sales, use, and cigarette tax exemptions available to compact sales. RCW 43.06.455(10); RCW 82.08.140, 82.12.080, RCW 82.24.230; and Ch. 82.32 RCW. Revenue's interpretation of its own tax exemption is consistent with State policy concerns over enforcement, which prompted the compacting statutes. *See e.g.* Final Bill Report, ESB 6198, Regular Session 2003 ("Enforcement of state cigarette taxes in respect to tribal retail operations has involved considerable difficulty and litigation, with mixed results."). Squaxin's Compact and Addendum are completely consistent with the State's desire to mitigate its limited ability to enforce its tax as against Indian retailers in Indian country, minimize litigation, and benefit Indians in Washington State. Deference is particularly appropriate when, as here, all key parties – the State, the landowner, a tribal taxing authority, the self-governing dependent Indian community and the federal government – have consented to a Compact and Addendum that fully meets the Legislature's policy goals.

5.5. The State Has Not Breached The State-Nisqually Compact.

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[20] The most recent audit period ran from October 1, 2007, to September 30, 2008, and therefore includes nine months in which The Landing was under Squaxin ownership. Whitener Dec. at ¶ 4.

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5.5.1. Frank's Landing Is Not Within Nisqually "Territory" Under Nisqually's Constitution Or Nisqually "Indian Country" Under Its Tax Compact.

In Count Four, Nisqually alleges that the Addendum and cigarette sales at Frank's Landing violate its Compact. (Dkt. No, 92: First Amended Complaint at p. 13). Nisqually asserts that its Compact grants Nisqually tribal retailers the exclusive right to tax cigarette sales at Frank's Landing because Frank's Landing is located within "Indian country" as defined in Nisqually's Compact. *See id.* Nisqually is mistaken, as described below.

The Nisqually Compact defines "Indian country" as consistent with the meaning in 18 U.S.C. § 1151 and as including:

> (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 . . . .

Lopeman Ex. 9: Nisqually Compact at p. 3, Pt. I(8) (emphasis added). This language mirrors language in the 1994 Nisqually Constitution, which states that Nisqually jurisdiction extends to territory within the Reservation, to allotments "in the Nisqually River basin," and other later-added lands, "***except as otherwise provided by law.***" (Lopeman Ex. 5: Nisqually Constitution at p. 3, Art. I (emphasis added)).

The phrase "except as otherwise provided by law" limits the Nisqually Constitution's and Nisqually Compact's statements of jurisdiction. *See Sehome Park Care Center v. Washington*, 127 Wn.2d 774, 781-82, 903 P.2d 443 (1995) (under last antecedent rule, modifying phrase following a comma modifies all antecedents). Accordingly, Nisqually's jurisdiction over tracts "placed in trust. . . for individual Indians . . . in the Nisqually River basin" must yield if there is an exception that is "otherwise provided by law." *See* Lopeman Ex. 9: Nisqually Compact at p. 3, Part I(8).

Such an "exception" exists. Shortly after the BIA approved Nisqually's amended Constitution in 1994, Congress declared that the Frank's Landing Indian Community was "not

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subject to the jurisdiction of any federally recognized tribe." (Lopeman Ex. 6: Pub. L. No. 103-435, § 8). Nisqually lacks jurisdiction at Frank's Landing because in 1994 Congress "expressly divested" any jurisdiction that Nisqually might have had. Order at p. 15 and n.4. Accordingly, since there is an "exception" to "Indian country" as defined in Nisqually's Compact that is "otherwise provided by law," there is no violation of Nisqually's Compact.

5.5.2. Even If Frank's Landing Was "Indian Country" As Defined By Nisqually's Compact, The State Neither Granted, Nor Could Have Granted, To Nisqually An Exclusive Right To Sell Cigarettes In The Nisqually River Basin.

Nisqually asserts that Part XIII(9) of its Compact grants it an exclusive right for the Nisqually Tribe to make cigarette sales in the Nisqually River Basin, and thus compels the State to actively prevent sales within the Basin by the Squaxin Island Tribe or any retailer besides Nisqually. Dkt. No. 92: First Amended Complaint at p. 13. This argument is unsupported for the following reasons.

First, Nisqually's Compact states *nothing* about creating exclusive Nisqually Tribal sales territory throughout the Basin, to the exclusion of all others. Part XIII(9) of Nisqually's Compact states that –as between Nisqually and the State – only Nisqually-owned retailers, and not Nisqually tribal members, can sell cigarettes in Nisqually's "Indian county." Entitled, "Other Retail Sales within Indian country by tribal Members," the provision states in its entirety: "Only tribal retailers are permitted to make retail cigarette sales within Indian country." (Lopeman Ex. 9: Nisqually Compact at p. 18, Pt. XIII(9)).[21]

Second, "Indian country" as defined in Nisqually's Compact excludes Frank's Landing, as explained in Section 5.1.1 above. Thus, any exclusive right that Nisqually claims to have could not possibly include Frank's Landing. Third, the plain language of this provision certainly

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[21] Nisqually's Compact defines "Tribal member" as "an enrolled member of the Nisqually Tribe," and "Tribal retailers" as a retailer wholly owned by the Nisqually Tribe in Indian country. *Id.* at pp. 4-5, Pt. I(23) and (24) (emphasis added). The Compact's scope is intentionally less than permitted under State law, which permits the state to compact with respect to sales by retailers owned by tribal governments and by individual tribal members. *See* RCW 43.06.455(14)(b).

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does not require that the State affirmatively act to stop sales by Squaxin or any other retailers, particularly those that are otherwise allowed by Frank's Landing and a State compact. Fourth, Nisqually's interpretation is contrary to the State's policy goals in entering compacts, which is to use compacts to *reduce* enforcement efforts in Indian country.

Finally, the Nisqually Tribe's request for an exclusive cigarette sales territory was flatly and unequivocally rejected by the State in early negotiations on Nisqually's tax compact. (Lopeman Ex. 8: Letter from L. Cushman, Wash. Department of Revenue, to Nisqually Cigarette Negotiation Team at p. 2 (July 23, 2003)). In early drafts of the Compact, the Nisqually Tribe had requested a 20-mile exclusive selling radius, which would have encompassed Frank's Landing, and included a prohibition on the State's entering compacts with other tribes that within that area. *See id.* That provision was removed, and in communications to the Nisqually, the State declared:

> During the meeting it was noted that this provision impacts the Frank's Landing area and any area claimed by the Steilacoom Tribe. We recognize your interest in having certainty regarding the state's position on Frank's Landing. We can address this issue partly by stating that we will only negotiate for a cigarette compact with federally recognized tribes, which is a requirement of the enacting legislation. The Frank's Landing Community is not a federally recognized tribe. . . At this point it is our position that we will not recommend a compact to the Governor if it includes a restriction on the Governor in regard to the Tribes with whom he or she may compact in the future. . . . (*Id.*).

This communication makes clear that the Nisqually Tribe *knew* that the State had no intention of tying its hands with respect to future compact activity with other tribes, and was unwilling to grant the Nisqually Tribe exclusive rights with respect to Franks Landing. Nisqually's Compact language, referring as it does solely to Nisqually "tribal members," cannot support Nisqually's interpretation.

5.5.3. The Court Should Reject Nisqually's Attempt To Avoid Its Compact's Mandate For Dispute Resolution.

Nisqually has not followed its own Compact's Dispute Resolution process. State law and the Nisqually Compact mandate that compacting parties employ specific "informal methods" and

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"formal processes" to resolve disputes.[22] Here, there is no evidence that Nisqually notified the State of the alleged breach caused by the adoption of the Squaxin Addendum, or provided the State with an opportunity to respond before initiating this lawsuit. Accordingly, the Court should reject Nisqually's attempt to bypass its Compact's dispute resolution requirements.

5.6. The Nisqually Tribe Lacks Standing To Seek To Void Or Cease Implementation Of The Addendum Under Counts 1 And 3.

As described below, the Nisqually Tribe lacks standing to bring Counts 1 and 3, which respectively allege that the Squaxin Addendum should be invalidated because it violates federal common law and State law. (Dkt. No. 92: Amended Complaint at pp. 10-11, 12-13. The standing doctrine stems directly from Article III's case or controversy requirement, and implicates courts' subject matter jurisdiction. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.* 528 U.S. 167, 185 (2000). 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 plaintiff bears the burden of proof for establishing standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The minimum constitutional requirements for standing are threefold. First, and the focus of this subsection, the 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, and not conjectural or hypothetical. *Lujan*, 504 U.S. at 560-561 (emphasis added). The second and third requirements demand showing that, respectively, a causal connection exists between the injury and conduct complained of, and the injury will likely be "redressed by a favorable decision." *Id.* at 561.

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[22] Lopeman Ex. 9: Nisqually Compact at pp. 13-16, Pt. IX (entitled, "Dispute Resolution"[22]); RCW 43.06.455(13) (requiring that cigarette tax contracts "shall include" procedures to resolve disputes that include notice to the other party, a chance to correct the problem, and termination as a remedy if the violation cannot be resolved within a specified time period).

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Here, Nisqually has failed to demonstrate that, as to Claims 1 and 3, it has suffered an invasion of its "legally protected interest." *See id.* "No legally cognizable injury arises unless an interest is protected by statute or otherwise." *Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178, 1182 (11th Cir.1993). That "interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000).

Nisqually seeks to void a contract to which it is not a party. It lacks a "legally cognizable" interest in the Squaxin Compact Addendum. Nor can Nisqually show that it was an intended-third party beneficiary of the Addendum since the Squaxin Compact expressly states that it "does not create any third party beneficiaries" (heading, capital letters omitted), and "No third party shall have any rights or obligations under this Compact." (Lopeman Ex. 10: Squaxin Compact at p. 16, Pt. XIII(3). So, Nisqually seeks to undo the Addendum, a contract that afforded it no rights whatsoever. *See Willis v. Fordice*, 850 F.Supp. 523 (S.D. Miss. 1994), 55 F.3d 633 (5th Cir. 1995) (holding that a member of the Mississippi Band of Choctaw Indians lacked standing to seek to invalidate his tribe's state-tribal gaming compact and to stop construction of a casino on tribal trust lands).

A Ninth Circuit holding on a Rule 19 joinder question also helps shed light on why Nisqually lacks standing to bring claims that challenge the validity of the Squaxin Addendum under State and federal law. In *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962 (9th Cir. 2008), the court rejected the state's argument for joining all other California gaming tribes that would likely suffer harm from its ruling because the unnamed tribes had virtually identical compacts to the plaintiff tribe. *Id.* at 971-972. The court held that the absent tribes had to have a "legally protected interest" that "could be protected if it actually "arises from terms in bargained contracts," which they did not. *Id.* at 971. The court also found it "significant" that the plaintiff did not "seek to invalidate compacts to which it is not a party." As described above, neither the Squaxin Compact nor Addendum grants Nisqually any rights to challenge it. *See*

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Lopeman Exs.10 and 17: Squaxin Compact and Addendum, respectively). Nisqually thus lacks standing to bring Claims 1 and 3.

5.7. Interior Approved Both The Master Lease And Sublease.

Count Two of the First Amended Complaint alleges that no lease between Theresa Bridges and Squaxin was approved by Interior as required by 25 USC § 415. Section 415 requires that leases of restricted tribal or individually Indian lands meet federal requirements and be approved by Interior. This count is meritless because Interior *approved* both a ground lease between Frank's Landing and Ms. Bridges, and a sublease between Ms. Bridges and the Tribe.[23] (Lopeman Ex. 14: Ground Lease; Lopeman Ex. 15: Sublease). Accordingly, the Court should grant summary judgment on this count.

6. CONCLUSION

For the above reasons, Defendant Lopeman respectfully asks the Court to find that there is no genuine issue as to any material fact, and that the Defendants are entitled to a judgment as a matter of law.

Respectfully submitted this 27th day of March, 2009 by

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[23] Nisqually has not challenged Interior's approval of the lease, and cannot do so here. It must first exhaust administrative remedies under 25 C.F.R. Part 2.