No. 09-35725

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NISQUALLY INDIAN TRIBE,
Plaintiff-Appellant,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
For the Western District of Washington at Tacoma
The Honorable Ronald B. Leighton

SUPPLEMENTAL BRIEF ON APPELLANT NISQUALLY INDIAN TRIBE'S PRIVATE RIGHT OF ACTION UNDER FEDERAL LAW

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INTRODUCTION

On June 29, 2010, this Court requested that the parties file supplemental briefs on various issues. This Supplemental Brief demonstrates that the Nisqually Indian Tribe ("Nisqually") does not have a private right of action under federal law to challenge the arrangement between Frank's Landing, the Squaxin Island Tribe, and the State of Washington.[1]

Nisqually's federal law argument focuses entirely on the 1987 and 1994 congressional legislation that unequivocally acknowledges Frank's Landing Indian Community as a self-governing dependent Indian community. Indeed, the first issue presented for review, as stated by Nisqually, is "[d]oes the federal legislation enacted by Congress in 1987 and 1994 prohibit the contractual arrangement between Frank's Landing Indian Community … and the Squaxin Island Tribe … under which Squaxin is selling and taxing cigarette sales at Frank's Landing." (Appellant's Opening Br. at 2.) Congress passed those acts to benefit Frank's Landing, however, not to provide Nisqually with a private right of action to challenge the mutually beneficial agreements, entered into by Frank's Landing,

[1] Appellees Frank's Landing Indian Community and Theresa Bridges adopt by reference the two other supplemental briefs filed by the State of Washington and the Squaxin Island Tribe, explaining that the Nisqually Indian Tribe does not have a private right of action under state law and that it lacks standing to challenge the arrangement between Appellees.

Squaxin and the State of Washington, that raise revenue to support the education of Indian children, reduce the cost of State tax enforcement, and enhance government-to-government relations within the State.[2]

ARGUMENT

I. The 1994 Legislation Does Not Create A Private Right Of Action.

A plaintiff cannot maintain a suit under a federal statute that does not explicitly create a private right of action, unless "Congress intended to provide the plaintiff with a[n implied] private right of action." *First Pac. Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1121 (9th Cir. 2000). That is because "private rights of action to enforce federal law must be created by Congress," either expressly or impliedly. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)). Moreover, courts may not usurp legislative power and create a cause of action in the absence of clear evidence of congressional intent. *Touche Ross*, 442 U.S. at 578. "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.* Therefore, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it

[2] The District Court previously concluded that the 1994 Act does not create a private right of action. *Nisqually Indian Tribe v. Gregoire*, No. 08-5069, 2008 WL 1999830, at *2 n.1 (W.D. Wash. May 8, 2008). And since Nisqually failed to challenge that ruling in its opening brief, this Court should consider the issue waived. *See Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003).

displays an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286 (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)).

In *Cort v. Ash*, the Supreme Court created a four-factor test for determining the existence of an implied private right of action "in a statute not expressly providing one." 422 U.S. 66, 78 (1975). A court determining whether a private right of action is implied in a statute must consider (1) whether the plaintiff is "one of the class for whose especial benefit the statute was enacted-that is, [whether] the statute create[s] a federal right in favor of the plaintiff;" (2) whether "there [is] any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;" (3) whether the cause of action is "consistent with the underlying purposes of the legislative scheme;" and (4) whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." *Id.* (internal quotations and citations omitted). In certain cases involving Indian tribes or communities, the final factor is applied by determining whether "federal remedies would interfere with matters traditionally relegated to the control of semisovereign Indian tribes." *Solomon v. Interior Regional Housing Authority*, 313 F.3d 1194, 1197 (2002) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 691 n. 13 (1979)).

The second *Cort* factor – "whether Congress intended to provide the plaintiff with a private right of action" – is "the key inquiry in this calculus." *Opera Plaza Residential Homeowners Ass'n v. Hoang*, 376 F.3d 831, 835 (9th Cir. 2004). "Indeed, the three *Cort* questions that are not explicitly focused on legislative intent are actually indicia of legislative intent, such that the *Cort* test itself is focused entirely on intent." *Orkin v. Taylor*, 487 F.3d 734, 739 (9th Cir. 2007). And the search for congressional intent starts with the statute itself. *See, e.g., Sandoval*, 532 U.S. at 288; *see also Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text....").

Here, congressional intent weighs decisively against finding a private right of action. In 1987 and 1994, Congress passed legislation to benefit Frank's Landing by acknowledging the self-governing nature of the Community and confirming that Frank's Landing could contract for the benefit of its members. By doing so, Congress did not intend to create a private right of action for, or rights in favor of, any other Indian entity. The text of the legislation is clear on its face:

RECOGNITION OF INDIAN COMMUNITY

(a) Subject to subsection (b), the Frank's Landing Indian Community in the State of Washington is hereby recognized;

(1) as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and is recognized as eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act for such services, but the proviso in section 4(c) of such Act (25 U.S.C. 450b(c)) shall not apply with respect to grants awarded to, and contracts entered into with, such Community; and

(2) as a self-governing dependent Indian community that is not subject to the jurisdiction of any federally recognized tribe.

(b) (1) Nothing in this section may be construed to alter or affect the jurisdiction of the State of Washington under section 1162 of title 18, United States Code.

(2) Nothing in this section may be construed to constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized Indian tribe.

Applying the *Cort* factors to that legislation reveals that Nisqually does not have a private right of action under federal law. First, Nisqually is not "one of the class for whose especial benefit the statute was enacted-that is, the statute [does not] create a federal right in favor of the plaintiff." *Cort*, 422 U.S. at 78. "In applying the first *Cort* factor, courts look to whether the plaintiffs that claim a cause of action exists are specifically mentioned as beneficiaries in the statute." *Opera Plaza*, 376 F.3d at 831. Here, Nisqually is not mentioned in the statute, and the plain language of the 1994 legislation demonstrates that Nisqually is not a

member of the special class the statute was designed to protect. Indeed, the very title of the legislation, "Recognition of Indian Community," makes clear that Congress intended only to benefit Frank's Landing. Thus, the statute was specifically drafted to benefit Frank's Landing Indian Community, not a separate Indian Tribe.

The history surrounding the passage of the legislation evidences that Congress passed it to protect Frank's Landing from Nisqually: "Congress amended [the 1987 Act] in 1994 at the behest of Frank's Landing Indian Community, whose members feared unilateral annexation into the Nisqually Tribal Reservation if a constitution under consideration by the Nisqually Tribe was adopted." *Nisqually Indian Tribe v. Gregoire*, 649 F. Supp. 2d 1203, 1205 (W.D. Wash. 2009). That Congress designed the 1994 Act to shield Frank's Landing from Nisqually demonstrates that Congress could not have intended for it to also serve as a sword for Nisqually to file suit against Frank's Landing.

Second, there is no indication of "legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Cort*, 422 U.S. at 78. As discussed above, Congress passed the 1994 Act with the intent to prevent Nisqually from exercising jurisdictional control over Frank's Landing and empower Frank's Landing to govern itself. By enacting legislation of that nature, Congress did not explicitly or implicitly intend to create a remedy in favor of Nisqually.

Third, Nisqually's cause of action is not "consistent with the underlying purposes of the legislative scheme." *Cort*, 422 U.S. at 78. The purpose of the 1994 legislation is to allow Frank's Landing to function as a quasi-sovereign Indian Community, which is why Congress legislatively acknowledged the "self-governing" nature of the Community. Contrary to that purpose, Nisqually attempts through this litigation to restrict Frank's Landing's ability to contract with the Squaxin Island Tribe to raise revenue for essential government services for the Community's members. Therefore, Nisqually success would impair Frank's Landing's ability to self-govern, thus vitiating the very congressional legislation that recognizes Frank's Landing's status as a self-governing dependent Indian community.

Fourth, applying both the Indian-based and State-based final factor confirms that Congress did not intend for the 1994 Act to create a private right of action. A federal remedy in favor of Nisqually "would interfere with matters [either] traditionally relegated to the control of semisovereign Indian tribes," *Solomon*, 313 F.3d at 119, or in an "area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law," *Cort*, 422 U.S. at 78. A federal remedy in favor of Nisqually would prevent: (1) Frank's Landing from acquiescing to Squaxin's exercise of jurisdiction over Squaxin's member's allotment; (2) Squaxin from taxing economic activity occurring on its member's

allotment; and (3) Governor Gregoire from exercising her statutory authority to permit an Indian tribe to raise revenue for essential government services by levying a tribal tax and reducing the cost of State tax enforcement. Nisqually thus seeks to interfere with matters that are the concern of three governments: Frank's Landing, Squaxin and the State of Washington. Congress did not intend to create a remedy that would interfere with matters that are both traditionally relegated to the control of semisovereign Indian governments and a State.

CONCLUSION

In sum, the plain language of the 1994 Act and its statutory intent counsel against implying a right of action in federal court. The congressional legislation that confirmed Frank's Landing's self-governing status and protected it from Nisqually's annexation attempt was not intended and thus cannot now be interpreted as a sword for Nisqually. And a federal remedy in favor of Nisqually would improperly invalidate an arrangement between several governments to raise revenue to support the education of Indian children, reduce the cost of State tax enforcement, and enhance government-to-government relations within the State of Washington.

Respectfully submitted this 8th day of July, 2010 by

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9th Circuit Case Number(s) 09-35725

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