

NO. 09-35725

---

**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  
No. C08-5069-RBL  
The Honorable Ronald B. Leighton  
United States District Court Judge

---

**RESPONSE BRIEF OF APPELLEE CHRISTINE GREGOIRE**

---

ROBERT M. MCKENNA  
Attorney General  
ROBERT K. COSTELLO  
Deputy Attorney General  
CAMERON G. COMFORT  
Senior Assistant Attorney General  
HEIDI A. IRVIN  
Assistant Attorney General  
PO Box 40100  
Olympia, WA 98504-0100  
(360) 664-2961

## TABLE OF CONTENTS

I.	JURISDICTIONAL STATEMENT .....	1
II.	ISSUES PRESENTED FOR REVIEW .....	1
III.	STATEMENT OF THE CASE .....	2
IV.	STATEMENT OF FACTS .....	2
V.	SUMMARY OF ARGUMENT .....	6
VI.	ARGUMENT .....	8
A.	State Power To Tax Cigarette Sales To Non-Indians Extends To Indian Country, But The State May Agree To Suspend The Exercise Of State Power Where A Tribe Agrees To Impose A Corresponding Tribal Tax. ....	8
B.	The Addendum Is Valid Under State And Federal Law.....	14
1.	Governor Gregoire had statutory authority to sign the Addendum.....	15
2.	The Addendum is consistent with federal law: The Squaxin Island Tribe has the authority to require its tribal retailers to sell cigarettes subject to a tribal tax, and Public Law 103-435 presents no barrier to the exercise of that authority.....	21
a.	The tribal tax is a valid exercise of the Squaxin Island Tribe’s jurisdiction over its own members.....	23
b.	Congress left to the discretion of members of the Community how they would be governed and what transactions could occur on their trust lands. ....	31
C.	The Governor Did Not Breach The Nisqually Compact By Executing The Addendum.....	32
VII.	CONCLUSION.....	38

VIII. STATEMENT OF RELATED CASES.....	39
IX. CERTIFICATE OF COMPLIANCE.....	40

## TABLE OF AUTHORITIES

### Cases

<i>Bercier v. Kiga</i> , 127 Wash. App. 809, 103 P.3d 232 (2004) .....	11
<i>Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe</i> , 474 U.S. 9 (1985) .....	25, 26, 28
<i>Couer D’Alene Tribe of Idaho v. Hammond</i> , 384 F.3d 674 (9th Cir. 2004), <i>cert. denied</i> , 543 U.S. 1187 (2004) ...	25, 27, 28
<i>Dep’t of Taxation and Fin. v. Milhelm Attea &amp; Bros., Inc.</i> , 512 U.S. 61 (1994) .....	10
<i>Hearst Communications, Inc. v. Seattle Times Co.</i> , 154 Wash. 2d 493, 115 P.3d 262 (2005) .....	32, 33
<i>J.W. Seavey Hop Corp. of Portland v. Pollock</i> , 20 Wash. 2d 337, 147 P.2d 310 (1944) .....	33
<i>Moe v. Confederated Salish and Kootenai Tribes</i> , 425 U.S. 463 (1976) .....	9
<i>Oklahoma Tax Comm’n v. Chickasaw Nation</i> , 515 U.S. 450 (1995) .....	25, 26
<i>Oklahoma Tax Comm’n v. Citizen Band of Potawatomi Indian Tribe</i> , 498 U.S. 505 (1991) .....	10, 12
<i>Probert v. Am. Gypsum Div.</i> , 3 Wash. App. 112, 472 P.2d 604 (1970) .....	35
<i>Settler v. Lameer</i> , 507 F.2d 231 (9th Cir. 1974) .....	29
<i>Sidney v. Zah</i> , 718 F.2d 1453 (9th Cir. 1983) .....	29
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975) .....	29

<i>Wagnon v. Prairie Band Potawatomi Nation</i> , 546 U.S. 95 (2005) .....	25
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980) .....	9, 10, 11
<i>Williams v. Lee</i> , 358 U.S. 217 (1959) .....	29
<i>Zelensky v. Viking Equip. Co.</i> , 70 Wash. 2d 78, 422 P.2d 293 (1966).....	34

### Statutes

18 U.S.C. § 1151 (2009) .....	10, 17
18 U.S.C. § 1151(b) (2009) .....	17
18 U.S.C. § 1151(c) (2009).....	17
2001 Wash. Sess. Laws, ch. 235, §§ 1-3, page nos. 1154-1156.....	12
Pub. L. No. 100-153 (Nov. 5, 1987) .....	3
Pub. L. No. 103-435, 108 Stat. 4569 (Nov. 2, 1994).....	passim
Squaxin Island Tribe Cigarette Sales and Tax Code § 6.14.030.A (2009) .....	28
Squaxin Island Tribe Cigarette Sales and Tax Code § 6.14.040 (2009) .....	27
Squaxin Island Tribe Cigarette Sales and Tax Code § 6.14.050.D (2009) .....	27
Squaxin Island Tribe Cigarette Sales and Tax Code § 6.14.060.A (2009) .....	27
Squaxin Island Tribe Cigarette Sales and Tax Code § 6.14.080.B (2009).....	27
Squaxin Island Tribe Cigarette Sales and Tax Code § 6.14.080.C (2009).....	27
Squaxin Island Tribe Cigarette Sales and Tax Code § 6.14.140 (2009) .....	28
Wash. Rev. Code 43.06 (2008) .....	11, 20
Wash. Rev. Code §§ 43.06.450-.460 (2001) .....	12

Wash. Rev. Code §§ 43.06.450-.460 (2008) .....	20, 21
Wash. Rev. Code Ann. §§43.06.450-.460 (West 2008) .....	4
Wash. Rev. Code § 43.06.450 (2001).....	12, 20
Wash. Rev. Code § 43.06.450 (2008).....	12, 14, 15, 19
Wash. Rev. Code § 43.06.455 (2008).....	12, 16
Wash. Rev. Code § 43.06.455(1) (2008) .....	20
Wash. Rev. Code § 43.06.455(2) (2008) .....	13, 16, 17
Wash. Rev. Code § 43.06.455(3) (2008) .....	13, 17
Wash. Rev. Code § 43.06.455(4) (2008) .....	13, 18, 27
Wash. Rev. Code § 43.06.455(4)-(8) (2008) .....	18
Wash. Rev. Code § 43.06.455(8) (2008) .....	13, 18
Wash. Rev. Code 43.06.455(14)(a) (2008).....	18
Wash. Rev. Code § 43.06.455(14)(b) (2008) .....	30
Wash. Rev. Code § 43.06.455(14)(b)(i) (2008).....	16
Wash. Rev. Code § 43.06.460 (2008).....	12, 13, 16
Wash. Rev. Code 82.08 (2009).....	9
Wash. Rev. Code 82.12 (2009).....	9
Wash. Rev. Code 82.14 (2009).....	9
Wash. Rev. Code § 82.24.010(3) (2008) .....	10, 17
Wash. Rev. Code § 82.24.020 (2009).....	9
Wash. Rev. Code § 82.24.027(1) (2009) .....	9
Wash. Rev. Code § 82.24.028 (2009).....	9

Wash. Rev. Code § 82.24.030 (2008).....	9
Wash. Rev. Code § 82.24.030(5) (2008) .....	11
Wash. Rev. Code § 82.24.250(7)(c) (2008).....	11
Wash. Rev. Code § 82.24.250(8) (2008) .....	11
Wash. Rev. Code § 82.24.260(1) (2008) .....	10
Wash. Rev. Code § 82.24.260(4) (2008) .....	11
Wash. Rev. Code § 82.24.295 (2008).....	11

Regulations

Wash. Admin. Code § 458-20-192(5) (2009).....	11
---	----

Treatises

F. Cohen, <i>Handbook of Federal Indian Law</i> (1982 ed.) .....	29
--	----

## **I. JURISDICTIONAL STATEMENT**

Defendant/Appellee Governor Gregoire agrees with appellant's jurisdictional statement.

## **II. ISSUES PRESENTED FOR REVIEW**

1. May the Frank's Landing Indian Community, a self-governing dependent Indian community, consent to the Squaxin Island Tribe's taxation of cigarette sales within the Community?

2. May the Squaxin Island Tribe tax the sale of cigarettes by a tribal retailer within the Frank's Landing Indian Community on land held in trust for the benefit of a Squaxin Island tribal member?

3. May the State of Washington enter into a cigarette tax compact with the Squaxin Island Tribe with respect to cigarettes sold within the Frank's Landing Indian Community?

4. Did the State of Washington breach its cigarette tax compact with the Nisqually Tribe when it signed the Addendum to the Squaxin Island Compact?



### **III. STATEMENT OF THE CASE**

To avoid duplicative briefing, Governor Gregoire incorporates by reference the statements of the case provided in the briefs of the Squaxin Island Tribe and Frank's Landing appellees.

### **IV. STATEMENT OF FACTS<sup>1</sup>**

The opening brief of the Nisqually Tribe contains a lengthy statement of "facts." Much of the statement is argumentative and the assertions made therein entirely irrelevant.<sup>2</sup> The Governor does not intend to respond in kind, but offers the following recitation of facts, the first 12 of which were expressly found by the trial court to be the salient uncontroverted facts:

1. Plaintiff, Nisqually Indian Tribe, is a federally recognized Indian Tribe which occupies reservation lands within the Nisqually River Basin in Washington. ER 2.

2. Frank's Landing consists of three parcels of land that are held in trust by the United States for the benefit of Individual Indians and located

---

<sup>1</sup> For ease of reference, the Frank's Landing Indian Community is referred to as "the Community" throughout this brief, the geographical location is referred to as "Frank's Landing," and the smoke shop at Frank's Landing is referred to as "The Landing."

<sup>2</sup> The Nisqually Tribe devotes much of the fact section of its brief to a misguided effort to denigrate the Community. Whatever the Nisqually Tribe's perceptions of the Community, Congress has spoken – the Community is a "self-governing dependent Indian Community." Pub. L. No. 103-435, § 8 (Nov. 2, 1994).

within the Nisqually River Basin, outside the Nisqually Tribal Reservation.

These parcels are known as allotments. The government gave these allotments to Individual Indians in 1918 when part of the land constituting the Nisqually Reservation was taken to create the Fort Lewis Military Reservation. ER 2.

3. In 1987, Congress enacted Pub. L. No. 100-153, § 10 (Nov. 5, 1987), to recognize that the members of Frank's Landing Indian Community are eligible for certain programs and services provided to Indians by the United States government and that the Community is "recognized as eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act (ISDEAA)." ER 2.

4. Congress amended this law 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. The 1994 legislation made clear that Frank's Landing Indian Community is a "self-governing dependent Indian Community that is not subject to the jurisdiction of any federally recognized tribe." *See* Pub. L. No. 103-435, § 8 (Nov. 2, 1994). The Community was prohibited from conducting Class III gaming on the allotted lands and the Congress expressly reiterated that the law does not "constitute the recognition by the United States

that Frank's Landing Indian Community is a federally recognized tribe." *Id.* ER 2.

5. The Squaxin Island Tribe is a federally recognized Indian tribe, organized under the Indian Reorganization Act of 1934. Theresa Bridges, one of the owners of allotted land within Frank's Landing Indian Community is a member of the Squaxin tribe. The Nisqually, the Squaxin and many of the members of Frank's Landing Indian Community are descendants of the several tribes of the Treaty of Medicine Creek. ER 2.

6. In 2001, the Washington legislature authorized the Governor to enter into cigarette tax contracts (compacts) with certain specified Tribes, under which the Tribe could collect its own Tribal cigarette tax in lieu of the State's cigarette tax, and state and local sales and use taxes. Wash. Rev. Code Ann. §§43.06.450-.460 (West 2008). The cigarette compacts must:

- a. Apply only to retail sales in which Indian retailers (not non-Indian retailers) make delivery and physical transfer of possession of the cigarettes from the seller to the buyer within Indian Country;
- b. Provide for a Tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian Country by Indian retailers;

- c. Provide that all cigarettes possessed or sold by a retailer bear a cigarette stamp obtained by wholesalers from a bank or other suitable stamp vendor, and that procedures be used by the Tribe to assure that the Tribal tax is paid by the wholesaler obtaining such cigarettes; and
- d. Provide that tax revenue retained by the Tribe must be used for essential government services.

ER 3.

7. Both the Squaxin Island Tribe and the Nisqually Indian Tribe have entered into such compacts with the State of Washington. ER 3.

8. Frank's Landing and the Squaxin Island Tribe entered into an Intergovernmental Agreement in which Frank's Landing consented to the Squaxin Tribe's assertion of taxing authority *over a Squaxin-owned business located at Frank's Landing*. ER 3 (emphasis added).

9. Allottee Theresa Bridges and Frank's Landing entered into a federally-approved lease, and Frank's Landing and Squaxin entered into a federally-approved sublease, which allowed a Squaxin-owned enterprise to operate on allotted land owned by Theresa Bridges, a Squaxin. ER 3.

10. The Squaxin Island Tribe and the State of Washington entered into an Addendum to the Squaxin Compact to clarify that the Compact's

geographic scope included allotted lands when under an agreement between Squaxin and a self-governing dependent Indian Community allowing the Tribe to operate as a “tribal retailer” as that term is used in the Compact. ER 3.

11. The allotted land from which the Smoke Shop [the Landing] is operated is Indian Country. ER 3.

12. Squaxin tax revenues derived from compact-regulated cigarettes are dedicated to “essential governmental services,” namely support of the Wa He Lut School for Indian children. ER 4.

In addition to the foregoing facts, another undisputed material fact is that Island Enterprises, Inc., the tribal retailer doing business on the Bridges allotment by operating The Landing, is a tribal corporation wholly owned by the Squaxin Island Tribe. Supp. ER 4, ¶ 1.

## **V. SUMMARY OF ARGUMENT**

The Nisqually Tribe asserts that the Addendum violates (1) state law, (2) federal law, and (3) the State’s compact with the Nisqually Tribe.

The District Court correctly concluded as a matter of law that neither state law nor federal law rendered the Addendum invalid. Consistent with Washington statutes, the Squaxin Island Tribe is eligible to compact, the retailer at issue is an Indian retailer, and the smokeshop is located within Indian

country. The tax is collected via the purchase of tribal tax stamps that must be affixed to the cigarettes, and the Squaxin Island Tribe spends the proceeds on essential government services, including the Wa He Lut school. The Squaxin Island Compact and Addendum meet all of the requirements of state law. Furthermore, by statute the Governor had the discretion to enter into the Addendum, and any disagreement with the exercise of her discretion in this case does not somehow establish a lack of legal authority.

The Nisqually Tribe argues that the Addendum violates federal law because (a) neither the Community nor the Squaxin Island Tribe possesses the authority to tax non-members at Frank's Landing and (b) that even if they possessed such authority, Public Law No. 103-435, 108 Stat. 4569 (Nov. 2, 1994) would preclude its exercise. However, neither the Squaxin Island Compact nor the Addendum is predicated or dependent upon the authority to regulate (including tax) the conduct of non-members at the Landing. The legal incidence of the tax imposed by the Squaxin Island Tribal Code is upon the tribal retailer, not the consumer. Thus, the Squaxin Island Tribe needs to show only that it has the authority to impose the tax on the retailer at issue. The Squaxin Island Tribe has that authority under federal law.

Moreover, Public Law 103-435 does not invalidate the Addendum.

Congress intended the 1994 legislation to protect the Community from a feared take over by the Nisqually Tribe, not to preclude the lease and contractual agreements among the Community, its members, and the Squaxin Island Tribe, which are here at issue. In the words of the trial court, Public Law 103-435 was not intended to create a “tribal free zone.”

Finally, the Nisqually Tribe’s claim that the Addendum violates the compact between the State and the Nisqually Tribe is predicated on an erroneous contention that the Nisqually Compact granted some form of sales exclusivity to the Nisqually Tribe. But nothing in the Nisqually Compact manifests any objective intent to create a territorial exclusivity provision in the Nisqually Tribe’s favor at Frank’s Landing or elsewhere in the Nisqually River basin. In fact, the State specifically rejected the Nisqually Tribe’s request that the State agree to an exclusive selling area. Finally the State never promised not to enter into a compact with any other federally recognized tribe. In sum, the Addendum does not conflict with either state or federal law, or breach the Nisqually Compact.

## **VI. ARGUMENT**

### **A. State Power To Tax Cigarette Sales To Non-Indians Extends To Indian Country, But The State May Agree To Suspend The Exercise**

**Of State Power Where A Tribe Agrees To Impose A Corresponding Tribal Tax.**

For many decades, the State of Washington has imposed an excise tax on cigarettes sold, used, consumed, handled, possessed or distributed within its borders. Wash. Rev. Code §§ 82.24.020, .027(1), and .028 (2009). The State collects this tax through the sale of cigarette stamps, which must be affixed to all packages of cigarettes possessed within the state that have not been preapproved for tax exemption. Wash. Rev. Code § 82.24.030 (2008).<sup>3</sup>

The Supreme Court addressed the State's authority to impose taxes on cigarette sales in Indian country in the landmark case of *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). The Court held that: (a) the State can impose its cigarette excise and sales taxes on sales by tribal retailers on trust lands to nonmembers, including nonmember Indians; (b) the State can impose at least "minimal" recordkeeping and collection burdens on tribal retailers in connection with these state taxes; and (c) the State can seize shipments of cigarettes in aid of the collection and enforcement of these state taxes. *Id.* at 159-60, 162-63; *see also Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976)

---

<sup>3</sup> State and local retail sales and use taxes also apply to the sale of cigarettes pursuant to Wash. Rev. Code 82.08, 82.12, and 82.14 (2009).



(approving Montana taxes on reservation cigarette sales to non-Indians).

*Colville* remains good law today. *See Dep't of Taxation and Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 66-67 (1994) (approving New York law imposing a quota on the number of untaxed cigarettes that could be sold by a wholesaler to tribal smoke shops); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 512-13 (1991) (approving Oklahoma taxes on nonmember purchases of cigarettes).

In accordance with these cases and other federal law, Washington's cigarette tax statutes exempt certain persons from the requirement to prepay the cigarette tax or affix stamps to cigarettes, including:

- (b) A federal instrumentality with respect to sales to authorized military personnel; or
- (c) An Indian tribal organization with respect to sales to enrolled members of the tribe.

Wash. Rev. Code § 82.24.260(1) (2008); *see also* Wash. Rev. Code § 82.24.010(3) (2008) (defining "Indian tribal organization" to mean federally recognized Indian tribes and enrolled Indian retailers and wholesalers licensed by their tribes to conduct business in Indian country, as defined in 18 U.S.C. § 1151 (2009)). The statutory exemption for sales by an Indian tribal organization to its own enrolled members, however, does not extend to sales by an Indian tribal organization to non-Indians or to Indians who are not members

of that tribe. Wash. Admin. Code § 458-20-192(5) (2009); *Bercier v. Kiga*, 127 Wash. App. 809, 818, 103 P.3d 232 (2004) (“nonmember Indians are subject to the State cigarette and tobacco taxes”); *see also* Wash. Rev. Code § 82.24.250(7)(c) (2008) (allowing an Indian tribal organization to possess unstamped cigarettes under specified circumstances).

An additional exception to the notice, stamping, and cigarette tax requirements, and the one most relevant here, is for cigarettes subject to lawful transactions covered by cigarette tax contracts (typically referred to as compacts) between the State and specified Indian tribes under Wash. Rev. Code 43.06 (2008). *See* Wash. Rev. Code § 82.24.030(5) (2008) (exception to stamping requirement); Wash. Rev. Code § 82.24.250(8) (2008) (transportation of unstamped cigarettes); Wash. Rev. Code § 82.24.260(4) (2008) (selling unstamped cigarettes); Wash. Rev. Code § 82.24.295 (2008) (sales by Indian retailer under cigarette tax contract).

Although it clearly had the authority to tax sales of cigarettes to non-Indians and nonmember Indians on reservations under *Colville* and its progeny, the State encountered difficulties enforcing the tax related to such sales. The Washington Legislature decided to try a different approach. In 2001, the Legislature authorized the Governor to enter into cigarette tax contracts with

specified tribes, under which the tribe could collect its own tribal cigarette tax in lieu of the State's cigarette tax, and state and local sales and use taxes. 2001 Wash. Sess. Laws, ch. 235, §§ 1-3 (codified as Wash. Rev. Code §§ 43.06.450-.460 (2001)). The intent in authorizing the Governor to enter into cigarette tax contracts included furthering the government-to-government relationships between the State and Indian tribes in the State of Washington, promoting tribal economic development and providing needed revenues for tribal governments, enhancing enforcement of the State's cigarette tax laws, and reducing conflict between the State and tribes. Wash. Rev. Code § 43.06.450 (2001).<sup>4</sup>

For the Tribes involved here, the requirements of such cigarette tax contracts are contained within three statutory sections, Wash. Rev. Code §§ 43.06.450, .455 and .460 (2008) (copies attached). Section 450 recites the Legislature's intent in authorizing such contracts, and states that no grant of taxing authority is intended. Section 455 spells out the requirements for the contract, including the requirements that cigarette tax contracts shall:

---

<sup>4</sup> The Supreme Court has expressly endorsed the concept of state-tribal compacts for the purpose of collecting cigarette taxes in Indian country. *Oklahoma Tax Comm'n*, 498 U.S. at 514.

- Apply only to retail sales in which Indian retailers (not non-Indian retailers) make delivery and physical transfer of possession of the cigarettes from the seller to the buyer within Indian country.
- Provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes by Indian retailers in Indian country.
- Provide that all cigarettes possessed or sold by an Indian retailer bear a cigarette stamp obtained by wholesalers from a bank or other suitable stamp vendor and that the tribe use procedures to assure that the tribal tax is paid by the wholesaler obtaining such cigarettes.
- Require tribes to use the tribal tax revenue for essential government services.

Wash. Rev. Code § 43.06.455(2), (3), (4) and (8) (2008) respectively.

Section 460 identifies the tribes (including the Squaxin Island Tribe) eligible for contracts and requires that (after a three-year phase-in period) the amount of the tribal tax be one hundred percent of the combined state cigarette and state and local sales and use taxes.

Nothing in any of these three sections or any other statute requires that the tribal tax scheme be identical to that of the State. A compacting tribe is

free to structure its tax as it chooses, within the confines of the contract terms, provided that the amount of the tax equals the state and local taxes and the tax is initially collected when the stamps are acquired. In this regard, a cigarette tax contract meets the requirements of state law if it pertains only to sales by Indian retailers taking place within Indian country, and the tribe collects a tribal tax equal to one hundred percent of the relevant state taxes and uses the tax revenue for essential governmental services. As demonstrated below, the Squaxin Island Compact and Addendum fully comply with these requirements.

**B. The Addendum Is Valid Under State And Federal Law.**

The District Court correctly concluded as a matter of law that neither state law nor federal law renders the Addendum invalid. Rather than being an *ultra vires* act, as the Nisqually Tribe argues, Governor Gregoire's execution of the Addendum fell neatly within her statutory authority in Wash. Rev. Code §§ 43.06.450 (2008) *et seq.* The terms of both the Squaxin Island Compact and the Addendum meet every requirement of state law. Similarly, the Addendum is valid under federal law, under the circumstances of this case. Federal law undisputedly allows tribes to regulate their own members in Indian country. Moreover, even if the Community's special status under Public Law 103-435 somehow created a conflict between the Squaxin Island Tribe's regulatory

authority over its own members on the Bridges' allotment at Frank's Landing and the Community, the Community's contract with the Squaxin Island Tribe to allow cigarette sales of cigarettes subject to a tribal tax removed any federal barrier to that activity.

**1. Governor Gregoire had statutory authority to sign the Addendum.**

Count Three of the Nisqually Tribe's complaint alleges that the Addendum is without authorization under state law, specifically Wash. Rev. Code. §§ 43.06.450 (2008) *et seq.* ER 258, ¶¶45-46. The District Court concluded otherwise, and the Nisqually Tribe makes the same argument on appeal. App.'s Br. at 36-40.

Before examining statutory requirements it is useful to note that the Addendum made only one amendment to the Squaxin Island Compact, and that was to the definition of "Indian country." In the original agreement, "Indian country" was defined as follows:

(8) "Indian country," consistent with the meaning given in 18 U.S.C. 1151 means:

(a) All land within the limits of the Squaxin Island Indian Reservation . . . .; and

(b) All Indian allotments or other lands held in trust for a Squaxin Island Tribal member or the Tribe, or otherwise subject to a

restriction against alienation imposed by the United States, the Indian titles to which have not been extinguished, . . .

ER 201. In the Addendum, the parties stated that “Indian country” also means:

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 . . . 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.

ER 121 (omitting portion of statutory citation).

The Governor had no reason to doubt that the Squaxin Island Compact and the Addendum fully complied with all requirements of the state statute. In terms of eligibility, the first criterion is that the compacting tribe must be among those listed in Wash. Rev. Code § 43.06.460 (2008) as eligible to compact. The Squaxin Island Tribe is first on the list. Second, under Wash. Rev. Code § 43.06.455(2) (2008), the retail entity making the cigarette sales must be an “Indian retailer” as defined by Wash. Rev. Code § 43.06.455(14)(b) (2008). Island Enterprises, Inc., satisfies the first of the three definitions of an “Indian retailer” because it is “a retailer wholly owned and operated by the [Squaxin Island] Tribe.” Wash. Rev. Code § 43.06.455(14)(b)(i) (2008); Supp. ER 4, ¶ 1. Third, the retail transaction must take place within “Indian country.” Wash. Rev. Code § 43.06.455(2)

(2008). The Landing is unquestionably located within “Indian country,” meeting both the second and third definitions contained in 18 U.S.C. § 1151 (2009). The land on which The Landing is located is within a “dependent Indian community” and is also an “allotment, the Indian title[] to which [has] not been extinguished.” 18 U.S.C. § 1151(b) & (c) (2009).<sup>5</sup>

There is no dispute that the Squaxin Island Tribe satisfies these eligibility criteria to operate The Landing pursuant to the Squaxin Island Compact. The Compact and Addendum also meet the other statutory requirements.

The fundamental objective of the State’s cigarette compacting laws is to ensure that an amount of money (equal to the total of the state cigarette and state and local sales and use taxes) is collected on the sale of cigarettes in Indian country, and used for essential Tribal governmental services. As concisely stated in Wash. Rev. Code § 43.06.455(3) (2008), the objective is to institute “a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers.” Wash. Rev. Code § 43.06.455(3) (2008). The Legislature devoted the remainder of Wash. Rev. Code sections .450 through .460 to the important

---

<sup>5</sup> See also Wash. Rev. Code § 82.24.010(3) (2008) (expressly incorporating 18 U.S.C. § 1151 to define “Indian country”).



details of ensuring that the objective could be verifiably achieved (*e.g.*, recordkeeping and audit requirements) and that tribes spend the proceeds of any such taxes on essential governmental services.

By law, the tribal tax must be collected at the start of the transactional chain via the purchase of tribal tax stamps that must be affixed to the cigarettes. Wash. Rev. Code § 43.06.455(4)-(8) (2008) collectively require that all cigarettes bear a stamp obtained, transferred and traced in such a way as to “assure that the tribal tax will be paid by the wholesaler....” Wash. Rev. Code § 43.06.455(4) (2008). Once the wholesaler has paid the tribal tax, the mechanism by which the amount of that tax is reimbursed to the wholesaler can vary by tribe. The sole requirements in state law are that the tribal tax revenues be used for “essential governmental services,” and that the revenues not be used to subsidize cigarette and food retailers. Wash. Rev. Code § 43.06.455(8) & (14)(a) (2008).

The Squaxin Island Compact meets all the requirements of the compacting statute. For instance, it contains a definition section (Part I), details about what the tax is and how it will be imposed (Parts III, IV, V, and VI), a description about how the Compact will be enforced (Parts VII, IX, and X), a description of the audit process, which includes reviewing records of

tribal wholesalers and tribal retailers (Part VIII), and other provisions. ER 200-17. It also explains that tax revenue will be used for “essential government services” and describes what that means. ER 201, 216. The sole change made by the Addendum was to clarify the definition of “Indian country” in the definition section. Thus, the undisputed evidence demonstrates that the Squaxin Island Compact and the Addendum meet all requirements of the compacting statute.

In addition to complying with the letter of applicable statutes, the Addendum advances the public policy behind the cigarette tax contract legislation. The Addendum promotes “economic development” and provides revenues to the Squaxin Island Tribe, and it “enhance[s] enforcement of the state’s cigarette tax law, ultimately saving the state money and reducing conflict.” Wash. Rev. Code § 43.06.450 (2008). The State agreed to the Addendum hoping that it would resolve the longstanding dispute with the Community over untaxed cigarette sales occurring at Frank’s Landing. That hope has been realized.

The Nisqually Tribe argues that the State was under no compulsion to enter into the Addendum and accuses the State of making “an arbitrary political decision” when it did so. App.’s Opening Br. at 39. It is true that Governor

Gregoire was not required by law or any court order to enter into the Addendum and that by doing so, the State gave up the amount of state tax revenues represented by sales at Frank's Landing. But this same criticism could be levied against every cigarette tax contract between the State and a tribe under Wash. Rev. Code §§ 43.06.450-.460 (2008). And notwithstanding the Nisqually Tribe's argument, the Legislature settled that question in 2001, when it described the benefits to the State in Wash. Rev. Code. § 43.06.450 (2001). These include furthering government-to-government relations, promoting economic development, providing needed revenues to tribal government and Indian persons, enhancing enforcement of the State's cigarette tax law, and reducing conflict. The Nisqually Tribe is in no position to criticize the Legislature's policy decision that cigarette tax contracts serve the State's interests, particularly since it elected to enter into one with the State.

The Nisqually Tribe also confuses discretion with authority. The Legislature gave the Governor discretion to decide when and with whom to enter into contracts authorized under Wash. Rev. Code 43.06: "The governor *may* enter into cigarette tax contracts concerning the sale of cigarettes." Wash. Rev. Code § 43.06.455(1) (2008) (emphasis added). The Nisqually Tribe's

disagreement with the Governor's exercise of her statutory discretion does not establish a lack of authority.

In sum, the Addendum falls squarely within the contracting authority granted to the Governor by Wash. Rev. Code §§ 43.06.450-.460 (2008). The Nisqually Tribe's allegation that the Addendum violates state law is unfounded. The District Court properly granted summary judgment to the defendants on Count Three.

**2. The Addendum is consistent with federal law: The Squaxin Island Tribe has the authority to require its tribal retailers to sell cigarettes subject to a tribal tax, and Public Law 103-435 presents no barrier to the exercise of that authority.**

The Nisqually's Tribe's objections to the Addendum based on federal law do not relate to the State's authority. Instead, they relate to the authority of the Squaxin Island Tribe to impose tribal taxes and the authority of the Community to contract with the Squaxin Island Tribe to allow imposition of the tribal tax on cigarettes sold at The Landing. These objections lack merit.

Virtually all of the Nisqually Tribe's arguments flow from the mistaken premise that the only way to satisfy this tribal tax requirement is through the exercise of tribal taxing power over nonmembers. The Nisqually Tribe argues that the Community does not possess such power over nonmembers, cannot have conveyed the power to the Squaxin Island Tribe, and that even the act of

entering into an agreement with the Squaxin Island Tribe somehow exceeds the Community's authority. App.'s Opening Br. at 22, 45-52. The Nisqually Tribe argues further that the Squaxin Island Tribe does not independently possess such power over nonmembers outside of Squaxin Island Indian country, that the Bridges' allotment is not part of Squaxin Island Indian country, and that even if the Squaxin Island Tribe otherwise possessed such taxing power, Public Law No. 103-435 bars its use at The Landing. *Id.* at 22-36. The Nisqually Tribe thus concludes that the Addendum is invalid because, in its view, neither the Squaxin Island Tribe nor the Community has taxing power over nonmembers at The Landing. *Id.* at 36. The Nisqually Tribe's arguments are misdirected.

First, because the tribal cigarette tax is a proper exercise of jurisdiction by the Squaxin Island Tribe over its own members, the Squaxin Island Tribe has acted within its sovereign authority under federal law. Second, to the extent Public Law 103-435 presented a barrier to a Squaxin Island tribal tax on cigarettes sold at The Landing, the Community removed that barrier by entering into an agreement with the Squaxin Island Tribe and expressly agreeing to it.

**a. The tribal tax is a valid exercise of the Squaxin Island Tribe's jurisdiction over its own members.**

In Count One of its complaint, the Nisqually Tribe seeks to invalidate the Addendum on the alleged basis that the Squaxin Island Tribe “cannot, pursuant to federal law, levy tribal taxes on transactions with non-Squaxin members occurring there, regardless of what ‘agreement’ it may make with the Community or with the State, . . .” ER 256, ¶37. In other words, the Nisqually Tribe claims that the Addendum is invalid under federal law because the Squaxin Island Tribe cannot impose a tribal tax on cigarettes sold at The Landing to nonmembers (including non-Indians). On appeal, the Nisqually Tribe seems to focus solely on Public Law 103-435 for its arguments about the Squaxin Island Tribe's tax jurisdiction, App.'s Opening Br. at 22-36, but in the event it addresses the issue of the Squaxin Island Tribe's tribal tax authority more broadly in its reply, the Governor provides the following discussion.

Whether a tribe has regulatory power (including taxing power) over a nonmember is a complex and fact-specific inquiry. In the context of the Tribal tax at issue here, however, the question whether the Squaxin Island Tribe has “taxing power” over nonmember customers at The Landing also is academic.

This is because the Squaxin Island Tribe can satisfy state compacting requirements and federal law with or without such power.

Because the tax is imposed on the *tribal retailer*, the only authority the Squaxin Island Tribe needs is the authority to tax the tribal retailer. In choosing to sign the Addendum, the State did not evaluate, and the Governor's signature was not predicated on, the assumption that the Squaxin Island Tribe has (independently or via assignment) "taxing power" over nonmembers at The Landing. It was predicated on the Squaxin Island Tribe's ability to satisfy the tribal tax collection, remittance and expenditure requirements, through tribal regulation of the conduct of its members and wholly-owned enterprises. The Squaxin Island Tribe has the power under federal law to impose its tribal tax on tribal retailers selling cigarettes at The Landing.

First, consistent with the Squaxin Island Tribe's interpretation, the State interprets the applicable Squaxin Island Tribal Code provisions as placing the "legal incidence" of the tribal tax on tribal members obtaining the tribal tax stamps. This Court has addressed "legal incidence" questions in the context of determining whether a state law impermissibly places the legal incidence of a state tax on tribal members inside Indian country, but the legal principles remain the same. *See Couer D'Alene Tribe of Idaho v. Hammond*, 384 F.3d

674, 688 (9th Cir. 2004) (legal incidence of Idaho motor fuel tax fell on Indian tribes), *cert. denied*, 543 U.S. 1187 (2004).<sup>6</sup>

If dispositive language in a statute states who bears the incidence of the tax, such language often is determinative. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102 (2005). In the absence of such language, courts must apply a “fair interpretation of the taxing statute as written and applied.” *Wagnon*, 546 U.S. at 102-03 (quoting *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985)). While the Nisqually Tribe’s argument assumes that the incidence of the tax must be on the consumer purchasing the cigarettes, this Court has made it clear that the person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic burden. *Hammond*, 384 F.3d at 681; *see also Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995). Moreover, the United States Supreme Court has recognized the unpredictability that would accompany an analysis based on the economic burden a tax imposes and has emphasized the necessity for predictability in tax administration. *Chickasaw*

---

<sup>6</sup> States are prohibited under federal law from placing the legal incidence of an excise tax on a Tribe or on tribal members for sales made in Indian country, without congressional authorization. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101-02 (2005); *Oklahoma Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995).



*Nation*, 515 U.S. at 459-60. For example, reliance on economic burden could require a determination of how completely retailers can pass along tax increases without sacrificing sales volume. *Id.* at 460. As a result, an economic burden analysis could require independent consideration of each product, and indeed each market. *Id.*

Instead, the Supreme Court adopted the legal incidence analysis, which provides a reasonably bright line standard that meets the practical need for predictability. *Id.* Where incidence is not expressly stated in the taxing legislation, a court should engage in a “‘fair interpretation of the taxing statute as written and applied.’” *Id.* at 461 (*quoting Chemehuevi Indian Tribe*, 474 U.S. at 11). In applying this analysis, the language and structure of the taxing legislation is key, and where the scheme requires a retailer to pay the tax, the Supreme Court has declined to conclude that the tax in question is really a tax on the ultimate consumer. *Id.* at 462.<sup>7</sup> Similarly, this Court has recognized that where a retailer is charged with paying a tax to a distributor, who then

---

<sup>7</sup> While this Court has held that it will not automatically defer to legislation stating the incidence of the tax, *Hammond*, 384 F.3d at 685, it did so in a case where a state legislature was attempting to undo a prior court ruling on incidence without actually restructuring the taxing scheme. *Id.* Those circumstances are not present here.

passes the tax along to the taxing authority, the incidence lies on the retailer.

*Hammond*, 384 F.3d at 688.

In this case, while it is clear that consumers purchasing cigarettes bear the economic burden of the tax, the legal incidence lies with the tribal retailer. Under the Squaxin Island Tribal Code, all cigarettes sold by a tribal retail must bear a tribal tax stamp. Cigarette Sales and Tax Code § 6.14.050.D (2009) (copy attached). The Squaxin Island Tribe has levied the tax “on all sales by Tribal retailers of cigarettes to non-Indian and non-member Indian purchasers within Indian country.” Cigarette Sales and Tax Code § 6.14.060.A (2009). The taxes are paid *before* any cigarettes reach the consumers: “All applicable taxes shall be paid prior to the sale, distribution, or transfer of possession of any cigarettes.” Cigarette Sales and Tax Code § 6.14.080.B (2009). This is consistent with state law, which requires tribes to impose procedures assuring “that the tribal tax will be paid by the wholesaler obtaining such cigarettes.” Wash. Rev. Code § 43.06.455(4) (2008). Likewise, retailers are compelled by tribal law to include the tribal tax in the “retail selling price” of the cigarettes. Cigarette Sales and Tax Code § 6.14.040 (definition of “retail selling price”) and § 6.14.080.C (2009) (when the tax is prepaid by someone other than the consumer, the amount is part of the selling price to the purchaser). The

Squaxin Island Cigarette Sales and Tax Code provisions are fairly read to impose requirements not on the consumer, but on the tribal retailer, in this case a tribal-owned enterprise.

Any broader interpretation of the Squaxin Island Cigarette Sales and Tax Code could make it internally inconsistent. The code contains express language precluding an interpretation that would render the tribal tax invalid. It applies “to the full extent of the sovereign jurisdiction of the Squaxin Island Tribe in Indian country,” but no further. Cigarette Sales and Tax Code § 6.14.030.A (2009). In addition, the chapter contains a severability clause stating that if any provision of Chapter 6.14 “or its application to any person . . . is held invalid, . . . the application of the chapter to other persons . . . is not affected.” Cigarette Sales and Tax Code § 6.14.140 (2009). Accordingly, if the Squaxin Island tax cannot legally be applied to nonmembers making purchases at The Landing, it should be interpreted as applying only to tribal retailers selling those cigarettes. This is the “fair interpretation” of the code provisions required by *Chemehuevi* and this Court in *Hammond*.

The Squaxin Island Cigarette Sales and Tax Code imposes the tribal tax only on tribal retailers; the Squaxin Island Tribe therefore need not show any authority to do anything broader than that. Imposing the tax on tribal retailers

is something the Squaxin Island Tribe has clear authority to do. The Squaxin Island Tribe, like other tribes, possesses “sovereignty” over both its members and lands. “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.” *United States v. Mazurie*, 419 U.S. 544, 557 (1975). In appropriate circumstances, the tribe can regulate the conduct of its members both on and off the reservation, because regulatory power over members of the tribe is an aspect of tribal sovereignty that exists separate and apart from the territorial jurisdiction of the tribe. *Sidney v. Zah*, 718 F.2d 1453, 1456 (9th Cir. 1983); *Settler v. Lameer*, 507 F.2d 231, 237 (9th Cir. 1974); see F. Cohen, *Handbook of Federal Indian Law* at 246 (1982 ed.).

One of the factors in determining whether a tribal regulation may be applied to a tribal member off-reservation is the nexus of that regulation to the interest of the tribe, particularly in its self-government. *Settler*, 507 F.2d at 237 (citing *Williams v. Lee*, 358 U.S. 217, 221-22 (1959)). Taxation is an important attribute of self-government. Thus, the Squaxin Island Cigarette Sales and Tax Code compelling tribal retailers (*i.e.*, tribal members) to collect the tribal tax is fully enforceable against tribal members, on or off the Squaxin Island reservation, particularly within the boundaries of an allotment owned by

a Squaxin Island member and leased by that member to the Squaxin Island Tribe.

This case, however, is even clearer. State law defines “Indian retailer” more broadly than does the Squaxin Island Compact. Under state law, an “Indian retailer” can be “(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 ....” Wash. Rev. Code § 43.06.455(14)(b) (2008). The Squaxin Island Compact, however, narrows the definition to only the first subsection – a retailer wholly owned and operated by the Squaxin Island Tribe. ER 202. Consequently, in this case, the tribal ordinance need only compel performance by the Squaxin Island Tribe itself.

Because the Squaxin Island Tribe has sovereign authority under federal law to regulate its own members and require payment of a tribal tax on items sold by a tribal business on a tribal member’s allotment, and because the Squaxin Island Cigarette Sales and Tax Code actually does require its tribal retailers to pay the tax by purchasing stamped cigarettes from an authorized

wholesaler, the Squaxin Island Tribe's actions at The Landing are entirely consistent with federal law.

The Addendum is not in conflict with either state or federal law. The District Court properly granted summary judgment to the appellees on Counts One and Three.

**b. Congress left to the discretion of members of the Community how they would be governed and what transactions could occur on their trust lands.**

The Nisqually Tribe contends that Public Law 103-435 divested the Squaxin Island Tribe of whatever authority it otherwise had over Ms. Bridges, a Squaxin Island member, or her allotment at Frank's Landing. The Nisqually Tribe reads Public Law 103-435 to divest federal Indian tribes of any jurisdiction over the Community, for all time and under all circumstances, despite the wishes of the Community, which the legislation declared to be a "self-governing dependent Indian Community." App.'s Opening Br. at 34-36.

The District Court declined to read Public Law 103-435 so narrowly, and this Court should too. The Governor will defer to the Community defendants and other parties to elaborate on the history and tribal understanding of Public Law 103-435. It is the Governor's understanding,

however, that Congress intended by this law to protect the Community against a feared unilateral assertion of authority *over it* by the Nisqually Tribe, not to preclude the Community from entering into agreements beneficial to it and its members. See Response Br. of Appellees Frank's Landing Indian Community and Theresa Bridges, Statement of Facts, Part II.

**C. The Governor Did Not Breach The Nisqually Compact By Executing The Addendum.**

The Nisqually Tribe argues that the Addendum constitutes a breach of its cigarette tax contract with the State. The Nisqually Tribe claims that under the Nisqually Compact, only its retailers may sell cigarettes within the Nisqually River basin, including The Landing. App.'s Opening Br. at 41-45. In the Nisqually Tribe's words, the definition of "Indian country" in the Nisqually Compact creates a "non-competition area" and constitutes a "territorial exclusivity provision," and the State breached that provision by allowing the Squaxin Island Tribe to sell cigarettes at The Landing. *Id.* at 41-43. The Nisqually Tribe is mistaken. The State has not breached the Nisqually Compact.

Under Washington law, contracts are interpreted according to the objective manifestation of the parties. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 503, 115 P.3d 262 (2005). Courts impute an intention

corresponding to the “reasonable meaning of the words used.” *Id.* at 503. The subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *Id.* at 503-04. Courts interpret what was written, not what was intended to be written. *Id.* at 504 (*citing J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wash. 2d 337, 348-49, 147 P.2d 310 (1944)).

Here, nothing in the definition of “Indian country” in the Nisqually Compact manifests the objective intent of the parties to create a “territorial exclusivity provision” in the Nisqually Tribe’s favor at Frank’s Landing or elsewhere in the Nisqually River basin:

“Indian country,” consistent with the meaning given in 18 United States Code (U.S.C.) section 1151, includes:

- (a) All lands within the confines of the Nisqually Reservation as established by the Treaty of Medicine Creek, December 26, 1854 (10 Stat. 1132) and by Executive Order of January 20, 1857.
- (b) All lands placed in trust or restricted 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.
- (c) All Indian allotments or other lands held in trust for a Nisqually tribal member or the Tribe, the Indian titles to which have not been extinguished, including rights of way running through the same.

ER 103.



Contrary to the Nisqually Tribe's argument, the definition of "Indian country" contained in the Nisqually Compact simply describes those areas in which the State is willing to retrocede from its taxes with respect to cigarette sales in which a Nisqually tribal retailer delivers and transfers physical possession of the product to the buyer within the defined area. The definition provides context for the whole point of the Compact, to allow a tribal tax in lieu of the state taxes:

The Tribe, by law and in accord with the requirements of this Part, shall impose taxes on all sales by tribal retailers of cigarettes to non-Indian purchasers within Indian country.

. . . .

Pursuant to RCW 43.06.455(3) and RCW 82.24.295, the State retrocedes from its tax during the time this Compact is in effect, subject to the imposition of a Tribal tax.

ER 106-107 (Part III, ¶2).

Parties who intend to create a contract allowing exclusive territorial rights usually say so expressly. *See, e.g., Zelensky v. Viking Equip. Co.*, 70 Wash. 2d 78, 79, 422 P.2d 293 (1966) (describing party as "exclusive distributor" under contract providing manufacturer granted to distributor "the exclusive right to sell the marine line of the Company's products, . . . in the states of Alaska, Washington, Oregon, California, and Hawaii"). Washington courts reject claims of exclusive territorial rights under contracts when that

intent is not manifested in the contract. *See Probert v. Am. Gypsum Div.*, 3 Wash. App. 112, 113-14, 472 P.2d 604 (1970) (memorandum that specified territory of sales agency, but did not indicate the agency was exclusive, did not create an exclusive sales agreement). The Nisqually Compact falls within the latter category.

In addition to the lack of any exclusivity language in the Nisqually Compact, undisputed evidence reveals that the State specifically rejected the Nisqually Tribe's request for an exclusive selling area that would have included sales at The Landing. During negotiations regarding the Nisqually Compact, the Nisqually Tribe requested a provision limiting the Governor's authority to enter into agreement with Indian entities or tribes within a 20-mile radius of the Nisqually Reservation. The Landing would have been located within that 20-mile radius. The State declined that request. ER 48 (deposition testimony of Department of Revenue Chief Deputy Leslie Cushman: "We said no to the exclusive selling area."); ER 124 (letter from Leslie Cushman to the Nisqually Cigarette Negotiating Team, dated July 24, 2003); *see also* ER 45 (Cushman deposition testimony that she was unaware of any compact with a tribe where the State agreed to prohibit sales by another tribe close to the first tribe's reservation).

The Nisqually Tribe also claims that it relied on “assurances” from Chief Deputy Leslie Cushman that “cigarette sales would not be allowed at Frank’s Landing.” App.’s Opening Br. at 42 (*citing* ER 48 (Ms. Cushman’s deposition testimony) and ER 123-28 (Ms. Cushman’s July 24, 2003 letter to the Nisqually Cigarette Negotiating Team)). But Ms. Cushman did not provide any such assurance. When asked in her deposition whether “some sort of requirement that Frank’s Landing not be allowed to sell cigarettes” was a material provision for the Nisqually Tribe, Ms. Cushman replied: “Selling cigarettes isn’t – wasn’t the question. It was negotiating – it was the status of them [the Community] as a tribe, I believe.” ER 48. And in the July 24, 2003, letter she merely expressed, with respect to Frank’s Landing, that the Department would negotiate only with a federally recognized 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 Indian tribe. The 20 mile radius also potentially impacts the Steilacoom Tribe, should they gain federal recognition. We believe it is not in the state’s interest to tie our hands regarding any tribe that in the future might gain federal recognition. 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 regards to the Tribes with whom he or she may compact in the future. It is not in the state’s interest to give any one Tribe an advantage over another.

ER 124.

The State has acted consistently with Ms. Cushman's representations to the Nisqually Tribe. It has not executed an agreement with the Community, but instead has signed a cigarette tax contract only with a federally recognized tribe.

In sum, the Addendum does not breach the Nisqually Compact because the State and the Nisqually Tribe did not agree through the definition of "Indian country" to provide the Nisqually Tribe an exclusive right to sell and tax cigarette sales occurring at The Landing. Therefore, the District Court properly granted summary judgment to the appellees on the breach of contract claim.

///

///

///

## **VII. CONCLUSION**

For the foregoing reasons, and for those set forth in the briefs of the Squaxin Island Tribe and Frank's Landing appellees, Governor Gregoire requests that this Court affirm the District Court's summary judgment order.

RESPECTFULLY SUBMITTED this 1st day of March, 2010.

ROBERT M. MCKENNA  
Attorney General

s/ Heidi A. Irvin  
ROBERT K. COSTELLO  
Deputy Attorney General  
CAMERON G. COMFORT  
Senior Assistant Attorney General  
HEIDI A. IRVIN  
Assistant Attorney General  
PO Box 40100  
Olympia, WA 98504-0100  
(360) 664-2961

No. 09-35725

Nisqually Indian Tribe v. Gregoire, et al.

**VIII. STATEMENT OF RELATED CASES**

Defendant-Appellee is unaware of any case that may be deemed related to this case pursuant to Ninth Circuit Local Rule 28-2.6.

No. 09-35725

Nisqually Indian Tribe v. Gregoire, et al.

**IX. CERTIFICATE OF COMPLIANCE  
PURSUANT TO CIRCUIT RULE 32-1**

I certify that: (check appropriate options)

**Oversize Briefs:**

The court granted permission to exceed the length limitations set forth at Fed. R. App. P. 32(a)(7) by an order dated \_\_\_\_\_

or

An enlargement of brief size is permissible under Ninth Circuit Rule 28-4.

The brief is

  X   Proportionately spaced, has a typeface of 14 points or more and contains 7,690 words

or is

\_\_\_\_\_ Monospaced, has 10.5 or few characters per inch and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text

or is

\_\_\_\_\_ In conformance with the type specifications set forth at Fed. R. App. P. 32(a)(5) and does not exceed \_\_\_\_\_ pages

3/1/10

Date

s/ Heidi A. Irvin

Heidi A. Irvin, WSBA #17500

Assistant Attorney General

### **CERTIFICATE OF SERVICE**

I hereby certify that on March 1, 2010, I electronically filed the *Response Brief of Appellee Christine Gregoire* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 1st day of March, 2010.

s/ Carrie A. Parker  
CARRIE A. PARKER  
Legal Assistant



## **Wash. Rev. Code**

**§§ 43.06.450, .455 and .460**

**RCW 43.06.450 Cigarette tax contracts—Intent—Finding—Limitations.** The legislature intends to further the government-to-government relationship between the state of Washington and Indians in the state of Washington by authorizing the governor to enter into contracts concerning the sale of cigarettes. The legislature finds that these cigarette tax contracts will provide a means to promote economic development, provide needed revenues for tribal governments and Indian persons, and enhance enforcement of the state's cigarette tax law, ultimately saving the state money and reducing conflict. In addition, it is the intent of the legislature that the negotiations and the ensuing contracts shall have no impact on the state's share of the proceeds under the master settlement agreement entered into on November 23, 1998, by the state. Chapter 235, Laws of 2001 does not constitute a grant of taxing authority to any Indian tribe nor does it provide precedent for the taxation of non-Indians on fee land. [2001 c 235 § 1.]

**RCW 43.06.455 Cigarette tax contracts—Requirements—Use of revenue—Enforcement—Definitions.** (1) The governor may enter into cigarette tax contracts concerning the sale of cigarettes. All cigarette tax contracts shall meet the requirements for cigarette tax contracts under this section. Except for cigarette tax contracts under RCW 43.06.460, the rates, revenue sharing, and exemption terms of a cigarette tax contract are not effective unless authorized in a bill enacted by the legislature.

(2) Cigarette tax contracts shall be in regard to retail sales in which Indian retailers make delivery and physical transfer of possession of the cigarettes from the seller to the buyer within Indian country, and are not in regard to transactions by non-Indian retailers. In addition, contracts shall provide that retailers shall not sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen years.

(3) A cigarette tax contract with a tribe shall provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers. The tribe may allow an exemption for sales to tribal members.

(4) Cigarette tax contracts shall provide that all cigarettes possessed or sold by a retailer shall bear a cigarette stamp obtained by wholesalers from a bank or other suitable stamp vendor and applied to the cigarettes. The procedures to be used by the tribe in obtaining tax stamps must include a means to assure that the tribal tax will be paid by the wholesaler obtaining such cigarettes. Tribal stamps must have serial numbers or some other discrete identification so that each stamp can be traced to its source.

(5) Cigarette tax contracts shall provide that retailers shall purchase cigarettes only from:

(a) Wholesalers or manufacturers licensed to do business in the state of Washington;

(b) Out-of-state wholesalers or manufacturers who, although not licensed to do business in the state of Washington, agree to comply with the terms of the cigarette tax contract, are certified to the state as having so agreed, and who do in fact so comply. However, the state may in its sole discretion exercise its administrative and enforcement powers over such wholesalers or manufacturers to the extent permitted by law;

(c) A tribal wholesaler that purchases only from a wholesaler or manufacturer described in (a), (b), or (d) of this subsection; and

(d) A tribal manufacturer.

(6) Cigarette tax contracts shall be for renewable periods of no more than eight years. A renewal may not include a renewal of the phase-in period.

(7) Cigarette tax contracts shall include provisions for compliance, such as transport and notice requirements, inspection procedures, stamping requirements, recordkeeping, and audit requirements.

(8) Tax revenue retained by a tribe must be used for essential government services. Use of tax revenue for subsidization of cigarette and food retailers is prohibited.

(9) The cigarette tax contract may include provisions to resolve disputes using a nonjudicial process, such as mediation.

(10) The governor may delegate the power to negotiate cigarette tax contracts to the department of revenue. The department of revenue shall consult with the liquor control board during the negotiations.

(11) Information received by the state or open to state review under the terms of a contract is subject to the provisions of RCW 82.32.330.

(12) It is the intent of the legislature that the liquor control board and the department of revenue continue the division of duties and shared authority under chapter 82.24 RCW and therefore the liquor control board is responsible for enforcement activities that come under the terms of chapter 82.24 RCW.

(13) Each cigarette tax contract shall include a procedure for notifying the other party that a violation has occurred, a procedure for establishing whether a violation has in fact occurred, an opportunity to correct such violation, and a provision providing for termination of the contract should the violation fail to be resolved through this process, such termination subject to mediation should the terms of the contract so allow. A contract shall provide for termination of the contract if resolution of a dispute does not occur within twenty-four months from the time notification of a violation has occurred. Intervening violations do not extend this

time period. In addition, the contract shall include provisions delineating the respective roles and responsibilities of the tribe, the department of revenue, and the liquor control board.

(14) For purposes of this section and RCW 43.06.460, 82.08.0316, 82.12.0316, and 82.24.295:

(a) "Essential government services" means 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;

(b) "Indian retailer" or "retailer" means (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; and

(c) "Indian tribe" or "tribe" means a federally recognized Indian tribe located within the geographical boundaries of the state of Washington. [2001 c 235 § 2.]

**RCW 43.06.460 Cigarette tax contracts—Eligible tribes—Tax Rate.** (1) The governor is authorized to enter into cigarette tax contracts with the Squaxin Island Tribe, the Nisqually Tribe, Tulalip Tribes, the Muckleshoot Indian Tribe, the Quinault Nation, the Jamestown S'Klallam Indian Tribe, the Port Gamble S'Klallam Tribe, the Stillaguamish Tribe, the Sauk-Suiattle Tribe, the Skokomish Indian Tribe, the Yakama Nation, the Suquamish Tribe, the Nooksack Indian Tribe, the Lummi Nation, the Chehalis Confederated Tribes, the Upper Skagit Tribe, the Snoqualmie Tribe, the Swinomish Tribe, the Samish Indian Nation, the Quileute Tribe, the Kalispel Tribe, the Confederated Tribes of the Colville Reservation, the Cowlitz Indian Tribe, the Lower Elwha Klallam Tribe, the Makah Tribe, the Hoh Tribe, the Spokane Tribe, and the Shoalwater Bay Tribe. Each contract adopted under this section shall provide that the tribal cigarette tax rate be one hundred percent of the state cigarette and state and local sales and use taxes within three years of enacting the tribal tax and shall be set no lower than eighty percent of the state cigarette and state and local sales and use taxes during the three-year phase-in period. The three-year phase-in period shall be shortened by three months each quarter the number of cartons of nontribal manufactured cigarettes is at least ten percent or more than the quarterly average number of cartons of nontribal manufactured cigarettes from the six-month period preceding the imposition of the tribal tax under the contract. Sales at a retailer operation not in existence as of the date a tribal tax under this section is imposed are subject to the full rate of the tribal tax under the contract. The tribal cigarette tax is in lieu of

the state cigarette and state and local sales and use taxes, as provided in RCW 43.06.455(3).

(2) A cigarette tax contract under this section is subject to RCW 43.06.455. [2008 c 241 § 1; 2007 c 320 § 1; 2005 c 208 § 1; 2003 c 236 § 1; 2002 c 87 § 1; 2001 2nd sp.s. c 21 § 1; 2001 c 235 § 3.]

## **Squaxin Island Tribe**

### **Cigarette Sales and Tax Code, Ch. 6.14 (2009)**

D. Inspection. The Council may at any time inspect warehouse or sale areas on the reservation, and all financial records of purchases and sales. (Res. 81-12 § 3: Res. 80-64 § 3: Res. 79-40 (part))

#### **6.12.040 Sales.**

A. All Sales by Tribe. All sales on the reservation shall be made by the Squaxin Island Tribe or its enterprises, except as otherwise specifically approved by the Tribal Council.

B. Sales—Method of Payment. All sales at reservation liquor stores, bars, taverns, gaming facilities, hotels, restaurants, and other similar locations shall be on a cash, cash equivalent, credit card or check only basis and no credit shall be extended to any person, organization, or entity.

C. Sales to Minors. No tribal liquor store, bar, tavern, gaming facility, hotel, restaurant or other location shall sell liquor to any person under twenty-one (21) years of age. Any one of the following which shows the person's current age and bears his or her signature and photograph shall be suitable for identification purposes, if valid:

1. Liquor control authority card of any state;
2. Driver's licenses of any state or "identification card" issued by any state department of motor vehicles;
3. United States active duty military identification;
4. Passport; and
5. Tribal identification or enrollment card.

D. Refusal to Sell. A tribal liquor store may refuse to sell liquor to persons under the following circumstances:

1. When that person does not provide satisfactory proof that he or she is at least twenty-one (21) years of age;

2. When that person is apparently intoxicated; or

3. When the Tribal Council has determined that a particular person and/or his or her family is significantly detrimentally affected by the abuse of alcohol.

E. Sunday Sales. No sales shall take place on Sunday at Tribal liquor stores. Sales may take place on Sunday at restaurants, bars, taverns, gaming facilities, hotels, and other similar locations. (Res. 03-49 § 1: Res. 81-12 § 4: Res. 80-64 § 4: Res. 79-40 (part))

#### **6.12.050 Property control.**

A. Liquor Stamp. No alcohol beverage except for wine and beer shall be sold by a tribal liquor store unless its package has affixed to it a stamp of the Council.

B. Restricted Tribal Property. The entire stock of liquor and alcoholic beverages owned by the Tribe and kept for sale on the reservation shall remain restricted property of the Tribe until sold. (Res. 81-12 § 5: Res. 80-64 § 5: Res. 79-40 (part))

### **Chapter 6.14**

#### **CIGARETTE SALES AND TAX CODE**

##### **Sections:**

- |          |  |
|----------|--|
| 6.14.010 | Authority.                                   |
| 6.14.020 | Purpose.                                     |
| 6.14.030 | Scope.                                       |
| 6.14.040 | Definitions.                                 |
| 6.14.050 | Cigarette tax—Compact with Washington State. |
| 6.14.060 | Cigarette tax—Levy.                          |
| 6.14.070 | Cigarette tax—Exemptions from—Other taxes.   |

- 6.14.080 Cigarette tax—Collection and payment of.
- 6.14.090 Cigarette tax—Use of Tribal levy.
- 6.14.100 Cigarette tax—Audit.
- 6.14.110 Cigarette tax—Prior resolutions.
- 6.14.120 Cigarette sales—Permitted.
- 6.14.130 Short title.
- 6.14.140 Severability.

#### 6.14.010 Authority.

The Squaxin Island Tribal Council's authority to adopt the ordinance codified in this title is found in the Squaxin Island Tribal Constitution and in the inherent sovereignty of the Squaxin Island Tribe to regulate its own territory and activities therein. (Res. 02-20 (part))

#### 6.14.020 Purpose.

The Squaxin Island Tribal Council finds that regulation of the sale of cigarettes is essential to the health and welfare of the Squaxin Island Tribe and its members. The Tribal Council further finds that a tax base is essential to the Tribe's ability to provide goods and services, and to finance government operations and economic development, for the safety, health and welfare of the Squaxin Island Tribe, its members, and those who work on, live on, and visit the Tribe's Indian country. Therefore, in the public interest and for the welfare of the people of the Squaxin Island Tribe, its employees, the residents of and visitors to Indian country, the Squaxin Island Tribal Council, in the exercise of its authority under the Tribal Constitution, declares its purpose by the provisions of this chapter to regulate the sale of cigarettes and to

impose, collect and administer taxes on the retail sale of cigarettes. (Res. 02-20 (part))

#### 6.14.030 Scope.

A. Application. This chapter shall apply to the full extent of the sovereign jurisdiction of the Squaxin Island Tribe in Indian country.

B. Compliance with this chapter is hereby made a condition of the use of any land or premises in Indian country.

C. Deemed to Consent. Any person who resides, conducts business, engages in a business transaction, receives benefits from the Tribal government, including police, fire or emergency services, acts under Tribal authority, or enters the Indian country under the jurisdiction of the Squaxin Island Tribe, shall be deemed thereby to have consented to the following:

1. To be bound by the terms of this chapter;
2. To the exercise of civil jurisdiction by the Squaxin Island Tribal Court over said person in legal actions arising pursuant to this chapter; and
3. To detainment, service of summons and process, and search and seizure, in conjunction with legal actions arising pursuant to this chapter. (Res. 02-20 (part))

#### 6.14.040 Definitions.

The following definitions apply throughout this chapter unless otherwise specified or the context clearly indicates otherwise:

"Auditor" means an independent third party auditor selected pursuant to Section 6.14.100 of this chapter.

"Carton" or "carton of cigarettes" means a carton of two hundred (200) cigarettes.

"Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the



tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

"Contract" means the compact entered into by the Squaxin Island Tribe and the state of Washington dated December 10, 2001.

"Court" means the Squaxin Island Tribal Court, and includes the Squaxin Island Tribe Court of Appeals.

"Department" means the state of Washington Department of Revenue.

"Essential government services" means 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.

"General fund" means the Squaxin Island Tribe general fund.

"Indian country," consistent with the meaning given in 18 U.S.C. 1151 means:

A. All land within the limits of the Squaxin Island Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation; and

B. All 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.

"Local retail sales tax" means the combined Washington local retail sales taxes applicable in the area.

"Non-Indian" means an individual who is neither a Tribal member nor a nonmember Indian.

"Nonmember Indian" means an enrolled member of a federally recognized Indian Tribe other than the Squaxin Island Tribe.

"Person" means and includes any natural individual, company, partnership, firm, joint venture, association, corporation, estate, trust, political entity, or other identifiable entity.

"Retail selling price" means the ordinary, customary, or usual price paid by the consumer for each package of cigarettes, which price includes the Tribal cigarette tax.

"Self-certified tribal wholesaler" means a wholesaler who is a federally recognized Indian Tribe or a member of such a Tribe, who is not required to be licensed under any state law, and who has by letter certified to the Department that it will abide by the terms of the Contract and who has signed a contract with the Tribe requiring it to abide by the terms of the Contract.

"Self-certified wholesaler" means an out-of-state wholesaler who is not a self-certified tribal wholesaler and who has by letter certified to the Department that it will abide by the terms of the Contract and who has signed a contract with the Tribe requiring it to abide by the terms of the Contract.

"Squaxin Island Indian Reservation" or "reservation" means the area recognized as the Squaxin Island Indian Reservation by the United States Department of the Interior.

"State" means the state of Washington.

"Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and

smoking. "Tobacco product" does not include cigarettes.

"Tribal cigarette tax" means the tax or taxes enacted as a provision of Tribal law on the units of cigarettes sold and on the purchase of cigarettes by retail buyers.

"Tribal Council" means the Squaxin Island Tribal Council.

"Tribal member" means an enrolled member of the Squaxin Island Tribe.

"Tribal retailer" means a cigarette retailer wholly owned by the Squaxin Island Tribe and located in Indian country.

"Tribal tax stamp" means the stamp or stamps that indicate the Squaxin Island Tribal cigarette tax imposed under the Contract is paid or that identify those cigarettes with respect to which no tax or another Tribal tax is imposed.

"Tribe" or "Tribal" means or refers to the Squaxin Island Tribe.

"Wholesaler" means every person who purchases, sells, or distributes cigarettes for the purpose of resale only. (Res. 02-20 (part))

#### **6.14.050 Cigarette tax—Compact with Washington State.**

On December 10, 2001, the Tribe entered into a compact with the State of Washington regarding the sale and taxation of cigarettes in Indian Country (the "Contract"). In accordance with the terms of the Contract and during its term:

A. The Tribe shall not engage in mail order type sales, such as internet, catalog, and telephone sales, to Washington residents outside of Indian country, unless and until the state and the Tribe have entered into a memorandum of agreement in regard to the taxability of such sales.

B. "Tribal retailer" refers to the Kamilche Trading Post and the Little Creek Casino.

1. The Tribe will notify the Department thirty (30) days prior to the start up of cigarette sales by any other Tribal retailer.

2. The Tribe will provide information regarding the status of land upon which any Tribal retailer is located at least thirty (30) days prior to the startup of any new cigarette sales by such retailer.

C. Tribal retailers may purchase cigarettes for sale in Indian country only from:

1. Wholesalers or manufacturers licensed to do business in the state of Washington;

2. Self-certified wholesalers who meet the requirements of Part VI section 2 of the Contract;

3. Self-certified tribal wholesalers who meet the requirements of Part VI section 3 of the Contract; and

4. The Tribe or its enterprises as a Tribal manufacturer.

D. All cigarettes sold by the Tribal retailer shall bear a Tribal tax stamp, including cigarettes subject to the Tribal cigarette tax, the Tribal member cigarette tax, or exempt from either of these taxes. The stamps shall be purchased and affixed in accordance with the terms of the Contract.

E. The Squaxin Island Tribe, or its designee, shall notify the state Department of Revenue seventy-two (72) hours in advance of all shipments of cigarettes by the self-certified wholesaler or self-certified tribal wholesaler to the Tribe or Tribal retailers. Such notice shall include who is making the shipment (meaning who is the wholesaler), detail regarding both quantity and brand, and the invoice order number.

F. No person shall sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen (18). If a violation of this Section 6.40.050(F) is reported to the Tribe:

1. The Tribe shall investigate the allegation; and

2. When there is probable cause to believe a violation has occurred, cite the individual who is alleged to have made a sale or gift in violation of Section 6.40.050(F) for such violation and apply the following penalties to the individual:

a. Upon a first violation, a fine of two hundred fifty dollars (\$250.00);

b. Upon a second violation within any rolling one-year period, a fine of five hundred dollars (\$500.00);

c. Upon a third violation within any rolling one-year period, a fine of seven hundred fifty dollars (\$750.00);

d. Upon a fourth violation within any rolling two-year period, a fine of one thousand dollars (\$1,000.00); and

e. Upon a fifth violation within any rolling two-year period, a fine of one thousand dollars (\$1,000.00) and termination from employment. Upon the fifth violation within any rolling two-year period, the individual shall no longer be permitted to make cigarette sales in Indian country for a period of no less than one year.

3. It shall be no defense to a citation for a violation of Section 6.40.050(F) that the purchaser acted, or was believed by the defendant to act, as agent or representative of another.

4. It shall be a defense to a citation for a violation of Section 6.40.050(F) that the person making a sale reasonably relied on officially issued identification that shows the purchaser's age and bears his or her signature and photograph. (Res. 02-20 (part))

#### **6.14.060 Cigarette tax—Levy.**

A. Beginning no later than March 31, 2002, the Tribe shall impose taxes, pursuant to the terms of this section, on all sales by Tribal

retailers of cigarettes to non-Indian and non-member Indian purchasers within Indian country.

B. The Tribal tax rate shall be as follows:

1. For the first thirty-six (36) months ("phase-in period"), the tax rate shall equal no less than the sum of an amount equal to eighty (80) percent of the State cigarette tax, which is expressed in cents per cigarette, plus an amount equal to eighty (80) percent of the state and local retail sales taxes. This phase-in period may be reduced in accordance with Section 6.14.060(C).

2. No later than thirty-six (36) months after the initial imposition of tax under this section, and subject to the phase-in period reduction under Section 6.14.060(C), the Tribal tax rate shall be no less than the sum of an amount equal to one hundred (100) percent of the state cigarette tax, which is expressed in cents per cigarette, plus an amount equal to one hundred (100) percent of the state and local retail sales taxes.

C. If during any quarter the number of cartons of cigarettes, excluding those manufactured by the Squaxin Island Tribe or its enterprises, that are sold at retail exceeds by at least ten (10) percent the quarterly average sales of the six months preceding the imposition of the Tribal cigarette tax, the 36-month phase-in period shall be reduced by three months. These reductions will be cumulative. The quarterly average sales baseline shall be determined by the Auditor. For the purposes of this provision:

1. "Quarter" means a three-month period, each quarter immediately succeeding the next. The first quarter begins the first day of the first month the Tribal cigarette tax is imposed, if the imposition of the tax is on or before the 15th of the month, or begins the first day of the second month the Tribal cigarette tax is

imposed, if the imposition of the tax is after the 15th of the month; and

2. The "quarterly average sales" means the sum of the retail sales made during the two quarters divided by two.

D. During the term of the Contract, upon any future increase in the state cigarette tax, state retail sales tax, or local retail sales tax, the Tribal tax on cigarettes shall increase by no less than one hundred (100) percent of the increase in the combined state and local tax rates; provided, however, that during the phase-in period the Tribal tax rate shall be set that it is at least equal to eighty (80) percent of the then-current combined state cigarette tax and state and local sales tax.

E. During the term of the Contract, upon any future decrease in the state cigarette tax, state retail sales tax, or local retail sales tax, the Tribal tax on cigarettes may decrease to a minimum of no less than one hundred (100) percent of the combined state and local tax rates; provided, however, that during the phase-in period the Tribal tax rate shall be set that it is at least equal to eighty (80) percent of the then-current combined state cigarette tax and state and local sales tax.

F. The following sales shall not be subject to a general Tribal sales tax levy under other provision of Tribal law:

1. All cigarettes manufactured by the Squaxin Island Tribe or its enterprises in Indian Country;

2. All other cigarettes whenever a Tribal cigarette tax or Tribal member cigarette tax is imposed on those cigarettes during the term of a compact with the state of Washington. (Res. 02-20 (part))

#### **6.14.070 Cigarette tax—Exemptions from—Other taxes.**

The following shall not be subject to the cigarette tax levy:

A. Sales of tobacco products;

B. Sales of cigarettes to enrolled members of the Squaxin Island Tribe. However, such sales are subject to a Tribal member cigarette tax, which shall be equal to the tax levied under Section 6.14.060 on sales to non-Indians and nonmember Indians. The tax revenue from sales to enrolled members of the Squaxin Island Tribe shall be exempt from the prohibition on subsidization in Section 6.14.090.

C. Sales of cigarettes manufactured by the Squaxin Island Tribe or its enterprises within Indian country.

D. Mail order type sales of cigarettes, such as internet, catalog, and telephone sales, to purchasers outside of Indian country and outside of Washington State. (Res. 02-20 (part))

#### **6.14.080 Cigarette tax—Collection and payment of.**

A. Every person engaged in retail sales of cigarettes in Indian country who is liable for collecting the Tribal cigarette tax levy or Tribal member cigarette tax levy, shall maintain accurate written records of the purchase, stamping, and retail sales of cigarettes, and shall make such records available for inspection by the Tribal finance officer and/or Auditor retained by the Tribe. Records shall be maintained for no less than three years after the audit is accepted by the appropriate federal oversight agency.

B. All applicable taxes shall be paid prior to the sale, distribution, or transfer of possession of any cigarettes. During the term of the Contract, the terms of the Contract regarding

the purchase, stamping, transportation and sale of cigarettes shall apply.

C. Whenever cigarette taxes are paid by any person other than the consumer, user or possessor, that payment shall be considered a pre-collection of such taxes due. When the tax is prepaid by another, this amount is part of the selling price of the cigarette to the retail purchaser. (Res. 02-20 (part))

**6.14.090 Cigarette tax—Use of Tribal levy.**

A. Tribal cigarette tax revenue shall be used only for essential government services, and may not be used to subsidize Tribal cigarette and food retailers. For the purposes of this section, “subsidize” means that proceeds from the Tribal cigarette tax pursuant to the Contract cannot be expended on the enterprise activities of the Tribal retail cigarette business. In addition, where the cigarette business is co-located with a retail food business, the proceeds cannot be expended to support that business.

1. “Enterprise activities” include paying wages, benefits, bonuses or expenses, related to the maintenance and operation of the retail facility or typically considered to be part of a business’ operating expenses and overhead.

2. “Non-enterprise activities” include, but are not limited to: government services to provide and maintain infrastructure such as sidewalks, roads, and utilities; services such as fire protection and law enforcement; the costs of administering deductions and exemptions similar to those available to retailers, wholesalers and others under state law; Tribal administration activities such as tax functions, contracting for health benefits, economic development, natural resources, and the provision of job services; and distribution of mon-

eys related to trust funds, education, and general assistance.

B. Tribal member cigarette tax revenue is not subject to the requirements of this section. (Res. 02-20 (part))

**6.14.100 Cigarette tax—Audit.**

The Tribe shall retain a third-party independent auditor for the purposes of verifying compliance with the Contract. The Auditor shall perform all work required under Part VIII of the Contract. (Res. 02-20 (part))

**6.14.110 Cigarette tax—Prior resolutions.**

Prior Tribal Council resolutions dealing with the levy of Tribal cigarette taxes are superseded by this chapter. (Res. 02-20 (part))

**6.14.120 Cigarette sales—Permitted.**

Tribal retailers are the only retail businesses authorized to sell cigarettes within Indian country. (Res. 02-20 (part))

**6.14.130 Short title.**

This act shall be known and cited as the Squaxin Island Cigarette Sales and Tax Code. (Res. 02-20 (part))

**6.14.140 Severability.**

If any provision of this chapter, or its application to any person or circumstance is held invalid, the remainder of the chapter, or the application of the provision to other persons or circumstances, is not affected. (Res. 02-20 (part))