

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
The Honorable Ronald B. Leighton, United States District Court Judge

**APPELLEE GOVERNOR GREGOIRE'S SUPPLEMENTAL BRIEF RE:
PRIVATE RIGHT OF ACTION UNDER RCW 43.06.450 et seq.**

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I. INTRODUCTION

Appellee Governor Christine Gregoire files this supplemental brief addressing whether the Nisqually Indian Tribe has a private right of action to challenge the Cigarette Compact, including the Addendum, between the Squaxin Island Tribe and the State of Washington under Wash. Rev. Code 43.06.450 *et seq.*¹ No such private right of action exists.

II. ARGUMENT

In 2001, the Washington Legislature authorized the Governor to enter into cigarette tax contracts (or compacts) with specified tribes, under which the tribe would collect its own tribal cigarette tax in lieu of the State's cigarette tax, and state and local use taxes. Wash. Rev. Code 43.06.450 *et seq.* Approved compacts apply only to sales in which Indian retailers sell cigarettes to buyers in Indian country, provide for a tribal cigarette tax in lieu of all state and local taxes through the use of an approved tribal cigarette stamp, and require tribes to use the tribal tax revenue for essential government services. Wash. Rev. Code § 43.06.455(2)-(4), (8). The Legislature's stated intention was to further government-to-government relationships, provide a means to

¹ Governor Gregoire also joins in the supplemental briefs of the other appellees filed in response to the Court's Order (Dkt. 39) regarding private rights of action under federal law and the Nisqually Tribe's standing.

promote economic development, provide needed revenues for tribal governments and Indians, enhance enforcement of the state's cigarette tax law, and reduce conflict. Wash. Rev. Code § 43.06.450.²

In Washington, the doctrine of implied statutory causes of action is based on the assumption that the Legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights. *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wash. 2d 697, 706, 222 P.3d 785 (2009); *Bennett v. Hardy*, 113 Wash. 2d 912, 919-20, 784 P.2d 1258 (1990). Washington courts do not lightly imply the existence of a private cause of action from a statute. The threshold question is whether the Legislature has created a right. The *right* and the *recipients of the right* should be explicit in the statute before implying a cause of action. *Ducote*, 167 Wash. 2d at 706. If the statute explicitly creates a right and identifies the recipients, the next inquiry is whether there is a corresponding remedy. *Ducote*, 167 Wash. 2d at 703; *Bennett*, 113 Wash. 2d at 920.

Washington courts use a three-part test to determine whether to imply a

² Four years after enacting the statute, the Legislature made additional findings declaring the 2001 legislation a success, and noting that the contracts enhanced public health by reducing access to low-priced cigarettes, improved law and order, and reduced the competitive advantage gained through the sale of tax-free cigarettes. 2005 Wash. Laws. Ch. 11, § 1.

cause of action:

[F]irst, whether the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Ducote, 167 Wash. 2d at 703 (quoting *Bennett*, 113 Wash. 2d at 920-21).³

Nothing in Wash. Rev. Code 43.06.450 *et seq.* explicitly creates or evidences legislative intent to create a right of action in the Nisqually Tribe, or satisfies the requirements for implying a private cause of action from a statute. The Nisqually Tribe cannot challenge the Squaxin Compact Addendum.

A. Wash. Rev. Code 43.06.450 *et seq.* Creates No Rights Allowing A Tribe To Challenge The State’s Agreements With Another Tribe.

The threshold requirement for implying a private cause of action from a statute is not met in this case because Wash. Rev. Code 43.06.450 *et seq.* creates no rights, except in the Governor. The statute gives the Governor the authority, and therefore the right, to enter into cigarette tax contracts with specified tribes. Wash. Rev. Code § 43.06.455(1). But the matter is entirely

³ The Nisqually Tribe seeks declaratory and injunctive relief in this action. Washington cases are unclear whether an action under the Uniform Declaratory Judgments Act, Wash. Rev. Code § 7.24.020, requires an independent, private cause of action. *See Nelson v. Appleway Chevrolet, Inc.*, 129 Wash. App. 927, 935-36, 121 P.3d 95 (2005), *affirmed*, 160 Wash. 2d 173 (2007). They are clear, however, that a plaintiff must assert a legal right capable of judicial protection, in addition to standing and a justiciable controversy. *Id.* at 936.

left to the Governor's discretion: "The governor *may* enter into cigarette tax contracts" *Id.* (emphasis added).⁴ Thus, no tribe has a *right* to a compact with the State, even if it is one of the eligible tribes with whom the Governor has authority to contract. *See* Wash. Rev. Code § 43.06.460(1).

If the Governor executes a compact with one of the eligible tribes, the contracting tribe has rights created by the contract, which may be enforceable under common-law actions, such as breach of contract, to the extent allowed in the contract and not precluded by the statute.⁵ But until the Governor exercises her discretion and decides to compact, neither the tribe in question, nor any others, have "rights" under the statute.

The statute at issue here lacks the type of language necessary to conclude that the Legislature has created actionable rights. For instance, in *Bennett*, the statute made it an unfair employment practice for an employer to discriminate against "an individual between the ages of forty and seventy" by refusing to hire or employ or license such individual, or by discriminating

⁴ A tribe's decision whether to enter into a compact with the State is likewise discretionary.

⁵ The Nisqually Tribe has alleged a breach of contract action. ER 259. The statute provides that a party's remedy for breach is termination of the contract, but allows this remedy only to parties to the contract. Wash. Rev. Code § 43.06.455(13). Thus, nothing in the statute suggests outside parties have rights under such contracts. The Tribes in this case demonstrated this same understanding of the statute, including in their compacts a provision expressly denying the creation of third-party rights. ER 117, 215.

against such individual regarding promotion, compensation, or in the terms of employment. *Bennett*, 113 Wash. 2d at 919. The court held the statute created a right on the part of employees within the protected class to be free from age discrimination. *Id.* at 921.

Unlike the statute in *Bennett*, the compact statute does not create protections for a class of individuals or even for tribes. Rather, it authorized and created standards to guide the Governor's discretion in compacting with tribes. Washington courts reject implying a private cause of action under other similar procedural or regulatory statutes. *See Adams v. King County*, 164 Wash. 2d 640, 655, 192 P.3d 891 (2008) (rejecting implied cause of action for violation of former Washington Anatomical Gift Act because Act "creates procedures for the procurement of organs, not for the protection of persons who donate organs" and does not create any specific right or benefit); *Fisk v. City of Kirkland*, 164 Wash. 2d 891, 895-98, 194 P.3d 984 (2008) (trial court properly declined to imply a cause of action from statute regulating municipal water company; statute served general public welfare instead of an identifiable class of persons).⁶

⁶ Federal cases make a similar distinction. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002); *AlohaCare v. State of Hawaii*, 572 F.3d 740, 746 (9th Cir. 2009). The question is not simply who would benefit from a statute, but

Rather than create special “rights” in a protected class, the compact statute explicitly expresses an intention to allow cigarette tax contracts with tribes in order to benefit both the tribes *and* the State. Wash. Rev. Code § 43.06.450. Nothing in the statutory language implies or hints at the existence of a “right” by one tribe to challenge the validity of a contract between the State and another tribe. No private cause of action should be implied.

B. The Legislature Did Not Intend To Create An Implied Right of Action In The Compact Statute.

Because Wash. Rev. Code 43.06.450 *et seq.* creates no rights in tribes to challenge the State’s contracts with other tribes, the Court need not consider the remaining components of the *Bennett* test. Should the Court consider them, however, the Court will find no basis for allowing an implied right of action.

The first element is whether the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted. *Bennett*, 113 Wash. 2d at 920. Analysis of this element is often stated in terms of “duty” or subsumed within a discussion of whether the statute created any rights in the plaintiff. *See Fisk*, 164 Wash. 2d at 896-98 (statute created no duty on part of city to provide water for fire suppression purposes); *Bennett*, 113 Wash. 2d at 921 (plaintiffs fell

whether Congress intended to confer federal rights upon those persons. *California v. Sierra Club*, 451 U.S. 287, 294 (1981).

within benefited class of persons to whom statute created a right). More recently, the Washington Supreme Court indicated that the first element in the three-part test is for “determining standing.” *Ducote*, 167 Wash. 2d at 706.

As set forth in Part A, nothing in Wash. Rev. Code 43.06.450 *et seq.* creates any rights in a tribe to challenge provisions in another tribe’s contract with the State. Nor does the statute create any explicit duties running from the State to any tribe, since the Legislature left to the Governor’s discretion the decision whether to enter into a cigarette tax contract with any particular eligible tribe. In short, regardless of whether the Court approaches the first required element as a matter of duty, standing, or rights, the Nisqually Tribe cannot meet the test: The Nisqually Tribe is not a person for whose ‘especial’ benefit the statute was enacted. Instead, the statute was enacted to serve many broad purposes and constituencies.

Under the second part of the *Bennett* test, the court examines whether legislative intent supports such a remedy. *Bennett*, 113 Wash. 2d at 920-21. The cigarette compacting statute evidences no legislative intent to allow a tribe to challenge the validity of another tribe’s contract with the State.

To the contrary, language in the statute indicates the opposite intention. For instance, the statute provides that every cigarette tax contract will contain

certain dispute resolution provisions, implying that *contract rights* give rise to *contract remedies*, as opposed to an implied statutory cause of action. Wash. Rev. Code § 43.06.455(13). The same section also provides that the contract “shall include provisions delineating the respective roles and responsibilities of the tribe, the department of revenue, and the liquor control board.” *Id.* In contrast, the statute provides no “role” for parties outside the contract, including other tribes.

Another provision makes information received by the State under a contract, such as the amount of cigarettes sold by tribal retailers, subject to the provisions of Wash. Rev. Code § 82.32.330. That statute renders all tax-related information about a particular taxpayer (wholesaler, retailer, etc.) confidential and protected from public disclosure. Wash. Rev. Code § 43.06.455(11). The confidential status of tribal tax and sales information argues against interpreting the statute to allow an outsider to the contract a right to enforce the statute. In addition, the Court should be aware that the compact statute recognizes enforcement powers in the Washington State Liquor Control Board for activities under a contract that come under the terms of Wash. Rev. Code Ch. 82.24, the state cigarette tax statute. Wash. Rev. Code § 43.06.455(12). This would include, for example, enforcement of obligations

imposed on wholesalers to keep records of sales. *See* Wash. Rev. Code § 43.06.455(5)(a) & (b); Wash. Rev. Code §§ 82.24.090, 82.24.552.

Such provisions in the compact statute make plain that the Legislature had no intention of allowing individuals or tribes to file an action challenging the validity of the State's contract with a particular tribe. The second part of the *Bennett* test fails.

Finally, under the last element of the three-part test, the court must examine whether implying a remedy is consistent with the underlying purpose of the legislation. *Bennett*, 113 Wash. 2d at 920-21. As noted earlier, the Legislature explicitly expressed its intent in enacting the statute: to further government-to-government relations, promote economic development, provide needed revenues for tribal governments and Indians, enhance enforcement of the State's cigarette tax law, save the State money, and reduce conflict. Wash. Rev. Code § 43.06.450. Allowing the Nisqually Tribe a cause of action to challenge an agreement under the statute between the State and the Squaxin Island Tribe promotes none of these purposes and is contrary to several of them. *See Adams*, 164 Wash. 2d at 656 (rejecting implied cause of action under WAGA where a cause of action for violation of the Act would be inconsistent with the effort to encourage procurement of anatomical gifts).

III. CONCLUSION

For the foregoing reasons, this Court should conclude that Wash. Rev. Code 43.06.450 *et seq.* does not create any implied private rights of action.

RESPECTFULLY SUBMITTED this 8th day of July, 2010.

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