No. 09-35725

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NISQUALLY INDIAN TRIBE,
Plaintiff-Appellant,

v.

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

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

APPELLANT'S REPLY BRIEF

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I. THE DISTRICT COURT ERRED IN HOLDING THAT THE 1994 LEGISLATION CLEARLY AND UNAMBIGUOUSLY AUTHORIZED FLIC TO DO INDIRECTLY WHAT IT PLAINLY CANNOT DO DIRECTLY.

All parties to this litigation agree that Frank's Landing Indian Community is not a federally-recognized tribal government authorized to sell and tax cigarettes under a Cigarette Tax Compact with the State of Washington. All parties further agree that federally-recognized Indian tribes possess inherent taxation powers, but that these powers can be diminished or extinguished by Congress. See, e.g. Response Brief of Appellee David Lopeman at 27 ("…tribes possess all powers of a sovereign government except as limited by federal law".); 29 ("…barring any divesting federal legislation, the Squaxin Island Tribe could exercise its inherent taxation authority there") (emphasis added). Thus, the federal law issue presented here is fairly straightforward: does the 1994 legislation permit Squaxin to engage in the very same cigarette sales at Frank's Landing that FLIC itself is prohibited from offering?[1] In concluding that it does, the district court erred.

[1] As was the case in our Opening Brief, we will use "Frank's Landing" to refer to the geographic location and "FLIC" to refer to the small group of people that calls itself the "Frank's Landing Indian Community" -- even though only two of them now live at Frank's Landing.

A. CONGRESS' DESCRIPTION OF FRANK'S LANDING INDIAN COMMUNITY IN THE 1994 LEGISLATION IS INHERENTLY AMBIGUOUS.

In order to fully understand the inherent ambiguity of what Congress did in the 1994 legislation, this Court must look not just at isolated phrases, as suggested by the defendants, but at the totality of how Congress described FLIC and the scope of its authority. Astoria Federal Savings & Loan Assoc. v. Solimino, 501 U.S. 104, 112 (1991) (court should consider all of the words Congress used in a statute). In this case, the terminology Congress used is self-contradictory and inherently ambiguous.

First, the legislation describes FLIC as a "self-governing dependent Indian Community that is not subject to the jurisdiction of any federally recognized tribe." As noted in our Opening Brief, at 25, the use of the phrase "self governing dependent Indian community" here is sui generis; Congress has never used that phrase in any federal legislation before or since. And while one could argue that "self-governing dependent Indian community" comes close to describing a federally-recognized tribal government, in fact we know that that is not what Congress meant, because the next section of the 1994 legislation expressly stated that FLIC is not "a federally-recognized Indian tribe." So, whatever Congress meant by designating FLIC as a "self-governing dependent Indian community," it

is fair to say that (1) Congress did not intend FLIC to have the normal attributes of self-government enjoyed by Indian tribes, and (2) contrary to the district court's decision, what Congress did mean by this self-contradictory description is not clear on the face of the statute.

The ambiguity of the federal statute is further aggravated by the use of the phrase "dependent Indian community" in tandem with the statement that the Federal statute from which that language is taken would not be applicable at Frank's Landing. As discussed in our Opening Brief at page 52, the term "dependent Indian community" arises from 18 USC §1151(b), which defines the term "Indian country" for purposes of Federal criminal jurisdiction. But the 1994 legislation affecting Frank's Landing makes it clear [at para. (b)(1)] that Frank's Landing will not be deemed "Indian country" for purposes of criminal jurisdiction, and that the State of Washington would retain criminal law jurisdiction at Frank's Landing.

The arguments that the defendants -- particularly FLIC and Theresa Bridges -- advance to support the lower court's decision demonstrate this confusion and ambiguity. FLIC cites three cases in support of the contention that Congress' use of the phrase "self-governing dependent Indian community" to describe FLIC had a clear and unambiguous meaning. Response Brief of Appellees Frank's Landing Indian Community and Theresa Bridges at 25-27. Yet, all three of those cases,

United States v. Sandoval, 231 U.S. 28, 36-38, 47 (1913); Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 521 (1998); and Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831), involved federally-recognized Indian tribes. Thus, FLIC purports to describe what Congress intended it to be by reference to the very thing that Congress expressly said that FLIC was not: a federally recognized tribal government.[2]

Defendants' other arguments are belied by their own actions. The district court found that the modifying phrase "not subject to the jurisdiction of any federally-recognized tribe" was an unambiguous "declaration of independence" with respect to FLIC's contracting authority (ER 7), and the defendants' briefs all support that interpretation. See e.g. Response Brief of Appellees Frank's Landing Indian Community and Theresa Bridges, at 28. So today, the defendants understand the phrase "not subject to the jurisdiction of any federally-recognized tribe" to be a clear congressional invitation to enter into the convoluted lease/sales/taxing arrangement at issue in this case.

[2] This analytical error mirrors the one made by the court below. In support of its view that Congress clearly intended FLIC to have expansive powers of self government, the lower court found a "useful source of guidance" in language from the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (4), that promoted "tribal economic development" and "strong tribal governments" (emphasis added) (ER 9 and n.4). Again, this is another erroneous effort to attempt to define what FLIC is by reference to exactly what it is not.

But apparently, that same language was not quite so clear to the parties when they actually entered into those agreements. In the December 12, 2007 "Intergovernmental Agreement" between FLIC and Squaxin (ER 189-193), the parties acknowledged that, under the legislation, FLIC was "not subject to the jurisdiction of any federally recognized tribe," but then purported to "waive" this provision of federal law in order to extend Squaxin's jurisdiction to Frank's Landing for cigarette sales purposes. (See the final "Whereas" clause on page 2 of the "Intergovernmental Agreement", at ER 190). If, in fact, the 1994 legislation permitted this type of arrangement, Squaxin and FLIC would have said that their agreement was made "pursuant to the authority granted under" the 1994 legislation, or some similar language. Instead, they correctly understood the phrase "not subject to the jurisdiction of any federally-recognized tribe" to be a limitation on FLIC's authority that had to be "waived" in order to proceed with their contractual relationship. The fact that they waived it then, but embrace it now, makes the ambiguity of that legislative language apparent.

Finally, FLIC argues that the provision of the 1994 legislation expressly prohibiting FLIC from engaging in Class III gaming under the Indian Gaming Regulatory Act ("IGRA") is actually an unstated confirmation of FLIC's broad powers of self government. Response Brief of Appellees Frank's Landing Indian

Community and Theresa Bridges at 28-29. In fact, this provision is further evidence of the lack of clear congressional intent on the face of the statute.

Under IGRA, only federally-recognized Indian tribes can lawfully engage in gaming activities. 25 U.S.C. § 2710 (d) (1) expressly limits Class III gaming activities to the lands of "Indian tribes," and 25 U.S.C. § 2703 (5) defines "Indian tribe" as a federally recognized Indian tribe. Thus, by stating that FLIC was not a federally-recognized tribal government, Congress had already precluded FLIC from conducting gaming activities at Frank's Landing. Why Congress found it necessary to add the express gaming prohibition simply reinforces the ambiguous nature of the 1994 legislation.

B. THE LOWER COURT ERRED IN FAILING TO GIVE WEIGHT TO THE LEGISLATIVE HISTORY OF THE 1994 LEGISLATION.

Where, as here, the legislative language is ambiguous, the use of other interpretive guides, including legislative history, is both necessary and appropriate. See, Brock v. Writers Guild of America, 762 F.2d 1349, 1353 (9th Cir. 1985); Church of Scientology of California v. U.S. Department of Justice, 612 F.2d 417, 422 (9th Cir. 1979). As discussed in our Opening Brief at 28-32, the only legislative history surrounding the 1994 legislation is a colloquy on the floor of the House of Representatives between Congressman Bill Richardson, the Chairman of the Subcommittee with jurisdiction over the bill and Congressman Craig Thomas,

a senior member of the Subcommittee. In that colloquy, the Congressmen make it absolutely clear that the purpose of the 1994 legislation was to clarify the pre-existing power of FLIC to enter into self-determination contracts with the federal government; that it did not confer any additional powers on FLIC; that it maintained the "status quo" as to jurisdictional matters; and that FLIC had no authority to "tax or license businesses," "assert civil regulatory authority," or to "exercise the powers of a sovereign." (Exhibit D to our Opening Brief).[3] This floor statement, then, makes it clear that the scope of FLIC's self-governing powers under the 1994 legislation was intended to be far narrower than the lower court erroneously found to be clear from the face of the statute.

Instead of giving this legislative history appropriate weight in determining congressional intent, the district court ignored it. (ER 8, n.3). Moreover, the defendants contend that it is entitled to no weight because the idea for a colloquy may have come from a lobbyist for the Nisqually Tribe. Response Brief of Appellees Frank's Landing Indian Community and Theresa Bridges at 35 (citing a memorandum included in Frank's Landing's Supplemental Excerpts of Record (FLER) at pages 55-59).

[3] As the floor manager of the bill, Chairman Richardson's statements are entitled to greater weight than might otherwise be the case. Lewis v. United States, 455 U.S. 55, 62-3 (1980).

Yet, that memorandum demonstrates nothing more than the normal give and take among Congressmen, staff and interested parties as legislation is developed, with both sides seeking to influence the process.[4] And while the idea for an explanatory colloquy may have come from a lobbyist for Nisqually, the fact of the matter is that Chairman Richardson and Congressman Thomas did engage in that discussion with the intent of helping to explain the purpose and intent of the legislation. The defendants may not like what the Congressmen said. But given the ambiguous nature of the legislative language, the district court should have considered and given the appropriate weight to this important legislative history.

C. THE FACT THAT SOME REVENUES MAY BE USED TO SUPPORT THE SCHOOL DOES NOT CREATE SQUAXIN TAXING AUTHORITY WHERE PROHIBITED BY CONGRESS.

Finally, the court below and the defendants here make much of the fact that some portion of the tax revenues from the unlawful cigarette sales at Frank's Landing go to support the Wa-He-Lut School.[5] However laudatory the goal of

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[4] In their brief, at page 35, FLIC erroneously states that Congressman Norm Dicks found the colloquy "far too narrow and gutted what they were trying to do with the amendment." In fact, that statement was not made by Congressman Dicks, but by lobbyists working for Frank's Landing. (FLER 58). Our point is simply that no one should be shocked by the fact that lobbyists were working for both sides as the 1994 legislation was developed and passed.

[5] As discussed in pages 17-20 and 57-58 of Appellant's opening brief, there are serious questions about how much of the revenues generated by cigarette sales at Frank's Landing actually support the School, as opposed to becoming personal income to the "members" of FLIC.

education may be, that fact alone cannot justify tribal actions prohibited by federal law.

So, for example, in one of the Supreme Court's earliest cigarette tax cases, the Court found that tribal sales of tax free cigarettes was unlawful, despite the fact that "smokeshop cigarette sales generate substantial revenues for the Tribes which they expend for essential governmental services, including programs to combat severe poverty and underdevelopment on the reservations." Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 154 (1980). And more recently, in Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998), the Court rejected the tribe's contention that it had taxing jurisdiction over a piece of tribally owned property. The Court so held despite the fact that "the Federal Government provides desperately needed health, social welfare and economic programs to the Tribe." Id. at 534 (internal quotation deleted). In rejecting the relevance of these programs to the jurisdictional questions at issue there, the Court explained that "[o]ur Indian country precedents, however, do not suggest that the mere provision of "desperately needed" social programs can support a finding of Indian country." Id.

So too, in this case. The fact that some of the unlawful cigarette sales revenues may go to support a worthwhile cause cannot overcome the fact that Congress has prohibited the type of commercial operation at issue here. It should

also be remembered, as pointed out in our Opening brief, that a substantial quantity of the cigarettes being sold at Frank's Landing are manufactured by the Squaxin Island Tribe itself, and are thus exempt from any tax, even the tribal tax. Those cigarettes, while producing abundant profits for the Squaxin tribal enterprise which sells them, as well as huge lease payments and salaries to Ms. Bridges and the other FLIC Council Members, are not producing any tax revenues for the School or any other "essential governmental service."

As discussed in our Opening Brief, at pages 35-36, the facts of this case closely parallel those of Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001). There, as here, a tribe was attempting to gain jurisdiction over an allotment owned by non-members in order to use the property for economic development activities. In order to assert jurisdiction, the tribe adopted the non-members into the tribe and then entered into a lease with these “new” members that purported to allow the use of the allotment for the commercial activities.

The Tenth Circuit rejected this arrangement, using language that we believe is equally relevant here. “[A]n Indian tribe may not unilaterally create sovereign rights in itself that do not otherwise exist,” the court said. 249 F.3d at 1229. Rather, “[a]n Indian tribe’s jurisdiction derives from the will of Congress, not from the consent of fee owners pursuant to a lease under which the lessee acts.” Id. at 1231.

The defendants' efforts to distinguish Kansas are unpersuasive. The holding of that case is clear: a determination of tribal jurisdiction "focuses principally on congressional intent and purpose, rather than recent unilateral actions by the …Tribe." 249 F.3d at 1229.

Exactly the same reasoning applies here. In 1994, Congress did not say that Frank's Landing would be subject to "such tribal jurisdiction as the FLIC may agree to" or "such tribal jurisdiction as may be able to provide economic benefits to the FLIC." Although Congress could have said any of these things, it did not. Instead, it spoke clearly and unambiguously: Frank's Landing "is not subject to the jurisdiction of any federally recognized tribe," making the attempted exercise of jurisdiction by Squaxin there unlawful.

As a result, this Court should reverse the district court and hold that the Squaxin cigarette sales enterprise currently operating at Frank's Landing is prohibited under the 1994 legislation.

II. THE AREA KNOWN AS "FRANK'S LANDING" CANNOT, BY ANY STRETCH OF THE IMAGINATION, BE CONSIDERED A "DEPENDENT INDIAN COMMUNITY."

The Response Brief of FLIC goes into great detail regarding the history of Frank's Landing, but contains no response to Nisqually's review of the current demographic realities of the area known as "Frank's Landing."

FLIC seeks to give the impression that "Frank's Landing" is a bustling, cohesive and identifiable group of Indians living together in what can legitimately be called a "community." But the uncontroverted evidence shows that FLIC's portrayal is completely divorced from reality.

The term "Frank's Landing" has been used in two different contexts in this case. First, there is the geographic location known as Frank's Landing. It consists of three small parcels of land on the South bank of the Nisqually River. As indicated in Nisqually's Opening Brief, only two Indians actually reside there, only one of whom is on federally-owned treaty land. Appellees do not dispute that fact. The only structures on the ground at Frank's Landing are the Wa He Lut School, the cigarette store, an office of the Alesek Institute and one residence. While it is possible that more Indians resided at Frank's Landing at times in the past, it is uncontested that only two Indians actually reside there now. (Opening Brief p. 16, ER80).

The term "Frank's Landing" should not be confused with the term "Frank's Landing Indian Community" ("FLIC"). As indicated in the deposition of FLIC's spokesman, Henry Adams (at ER 82), membership in FLIC has nothing to do with residence at Frank's Landing, thus making the term "community" a complete misnomer as used by FLIC. A person can be a "member" of FLIC without ever having lived at Frank's Landing. One only needs to have some past association or

relationship with people who have either lived at Frank's Landing in the past or are related to people who did. But Mr. Adams also testified that no one has ever prepared a list of those members and no one knows how many members there are. The members reside at many locations throughout the Northwest and perhaps outside the Northwest. Some live on Indian reservations or other lands designated as Indian Country, and some do not. (See discussion and citations in Opening Brief, pp. 15-17).

In summary, the term "Frank's Landing Indian Community" refers to a group of unidentified people, whose numbers are not known, who may be related to each other and may share common interests, not to a group of people who reside together at Frank's Landing or any other specific location.

These demographic realities are important when considering several of the issues in this case. First, there is the basic question of what Congress meant when it declared "Frank's Landing Indian Community" to be a "self-governing dependent Indian community" in the 1987 and 1994 legislation. As discussed above and in our Opening Brief at page 52, the term "dependent Indian community" arises from 18 USC §1151(b), which defines the term "Indian country" for purposes of Federal criminal jurisdiction -- jurisdiction that does not exist at Frank's Landing.

Although FLIC uses the word "community" in its name, the enclave known as "Frank's Landing" is not a "community" under any accepted definition of that

term. The Federal cases construing the term "dependent Indian community" all envision a cohesive community in which a significant number of Indians reside together. The cases which define the characteristics of a "dependent Indian community" hold that there must be an actual "community" of Indians who live together in a cohesive area, not an amorphous and anonymous group who reside at disparate locations. (See discussion in Opening Brief at 53-55). There is nothing in the federal statute or its legislative history to indicate whether Congress ever made a determination as to whether a "community" actually existed at Frank's Landing.

These demographic realities raise the following question: if in fact there is not a real "community" of Indians residing at Frank's Landing, then how can the area have legitimately been designated as a "dependent Indian community" -- especially when that term only has meaning in locales where there is federal criminal jurisdiction (28 USC 1161), a situation which has never existed at Frank's Landing? Even if such a designation had been legitimately made in 1987 and 1994, can Frank's Landing retain that designation when only two Indians now live there? While we recognize that Congress chose those words in 1987, they no longer depict the reality at Frank's Landing, even if they did so then.

III. FLIC HAS NO AUTHORITY TO SIGN CONTRACTS OTHER THAN THOSE DESCRIBED IN THE FEDERAL STATUTES. THE "INTERGOVERNMENTAL AGREEMENT" IS VOID.

The demographic and organizational realities of FLIC also relate to the issue of whether FLIC has the authority to do anything as an entity distinct from its members, such as signing contracts. It is undisputed that FLIC is not an Indian Tribe. Therefore, FLIC cannot be regarded as a "sovereign" under the laws of the United States or the State of Washington. Accordingly, when the group known as "FLIC" seeks to engage in commerce, own property, sign contracts or perform any other acts in the name of an organization, as distinct from its individual members, then it must comply with the laws of the State of Washington. It cannot unilaterally declare itself to be immune from the requirements of Washington law.

It is undisputed that FLIC has repeatedly failed to comply with Washington law. For years, FLIC members illegally sold cigarettes at Frank's Landing in violation of the law, until the Federal raid that occurred in 2007. (ER 134). Furthermore, there is no evidence that the organization has ever incorporated or otherwise registered to do business as a legal entity under Washington law. Without such registration and the formation of an appropriate legal entity, there is no basis to presume that FLIC has any authority to sign a contract, except for the limited category of contracts for Federal aid to Indians authorized in the Federal

statutes. Moreover, there is no basis for believing that a contract signed in the name of "Frank's Landing Indian Community" is valid.

FLIC's disregard for Washington law is perhaps best illustrated by a review of the FLIC "Constitution" (ER151-156), in which FLIC has unilaterally sought to vest itself with powers that neither the United States nor the State of Washington have ever granted, authorized or recognized.

(1) At Article IV, FLIC's "Governing Body", i.e. the Community Council, is self-appointed, with no provision for the members to select or remove those who serve on the Council. This illustrates that FLIC is not truly a community of self-governing members -- it is nothing more than a name which is used as the alter ego for the business interests of the individuals who have unilaterally appointed themselves to the FLIC "Community Council" and who personally pocket virtually all of the money which the "FLIC" business interests generate.

(2) At Article VI, section 3, the Community Council is given the authority to "enact a resolution or other official action that has the force and effect of law...". What "laws" does the FLIC Council have authority to enact? Criminal laws? Commercial laws? General civil laws? This provision completely ignores the legislative history of the Federal legislation which noted that (1) FLIC had no authority to “assert civil regulatory

authority," (2) FLIC could not "exercise the powers of a sovereign" and (3) Frank's Landing remained subject to the criminal law jurisdiction of the State of Washington.

(3) At VII.2.(E) the Council grants itself the authority to own property in the name of FLIC. A "name" cannot own property; only persons and other "juristic" entities can own property.

(4) At VII.2.(F) the Council grants itself the "power of eminent domain". Over what possible property could FLIC exercise eminent domain powers? Over the federally-owned trust land at Frank's Landing? Over the land owned in fee by its unidentified individual members who reside throughout the Northwest? Over land located within an Indian Reservation where some of the members may reside? Over other lands owned by non-members?

(5) At VII.2.(G) the Council grants itself the power to levy taxes upon persons and property. Over which persons? Which property? For what purposes? Again, this provision completely ignores the legislative history of the Federal legislation, which noted that FLIC had no authority to "tax or license businesses."

(6) At VII.2.(I), the Council grants itself the right to enter into contracts with both governments and private entities. The only contracting

authority discussed in the Federal statute is the power to contract to receive Federal grant monies. No other Federal statute or State statute authorizes FLIC to contract for any other purpose.

(7) At VII.3, FLIC purports to have "judicial powers" and the authority to establish courts and the authority to "define and detail the jurisdiction of said courts." What sort of cases will these courts have jurisdiction to hear? Whose laws will they enforce and interpret? Who will appoint the judges? Over what territory will such courts have jurisdiction and venue? Again, the prohibitions in the legislative history are completely ignored.

(8) At Article VIII, the Constitution boldly declares that FLIC and its Community Council possess "inherent immunity from suit." This declaration of sovereign immunity attempts to elevate FLIC to the status of an Indian tribe, in direct contravention of Congress' 1994 legislation declaring that

> "nothing in this section may be construed to constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized Indian tribe."

This provision in the FLIC Constitution also flies in the face of the legislative history surrounding the 1994 Federal statute, which confirmed that "[t]he group ... cannot exercise the powers of a sovereign." [Cong. Rec.

11140 (Oct. 4, 1994); Exh. D to Addendum to Opening Brief]. The attempt to create immunity from suit for the individual Council members (i.e., limited liability) is also a violation of Washington law and the Washington Constitution (See Opening Brief, p. 51).

The foregoing examples show that the FLIC Constitution is nothing but "window dressing", a fantastic "wish list" that was cobbled together during the negotiations with Squaxin to create the appearance of an entity with authority to sign the "Intergovernmental Agreement," so that Squaxin would have some kind of "fig leaf" with which to seek the State's approval of the Addendum to the Squaxin Compact. FLIC wants have the status of an Indian tribe. It is not an Indian tribe.

As indicated above, FLIC had no authority under Washington law to sign a contract of any kind. Under Federal law, the only contracting power which FLIC enjoyed was the limited power granted in the Federal statutes to contract for the receipt of Federal grant and aid funds. If Congress had intended any broader authority, it certainly could have said so. If broader authority had already existed (as FLIC now contends), then why was it necessary for FLIC to seek any statement from Congress about its contracting capabilities?

At page 37 of the Response Brief of Appellee David Lopeman (the Squaxin representative), he argues that it would be "absurd" to argue that Congress only intended to give FLIC the authority to contract with the Federal government, and

that such an argument "would have doomed Frank's Landing to failure." As an example, Lopeman argues that "Frank's Landing could not even contract with Wa-He-Lut's teachers, administrators and school janitors." Lopeman fails to point out that the Wa-He-Lut Indian School is a Washington State non-profit Corporation[6], and thus has full authority under Washington law to execute contracts with "teachers, administrators and school janitors" -- and with any other person! Therefore, the School has obtained lawful contracting authority -- the authority which FLIC has never sought or obtained. The Alesek Institute, which also has an office at Frank's Landing, is also a Washington non-profit corporation[7] and therefore has full authority to sign contracts.

If the School and the Institute (with the same directors as FLIC) can incorporate, why has FLIC not done the same? The answer seems obvious: the four individuals who control and profit from FLIC do not want to subject themselves to the requirements of Washington law. If they decided to incorporate as either a profit or non-profit corporation, they would not be able to unilaterally

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[6] The Court can take judicial notice of the Corporation's registration at the Secretary of State's website: http://www.sos.wa.gov/corps/search_detail.aspx?ubi=601017448# That registration also indicates that the School's "governing persons" are the same five individuals who form the "Community Council" of FLIC: Suzette Bridges, Michael Reichert, Alison Gottfriedson (now deceased), Maiselle Bridges and Billy Frank.

[7] See: http://www.sos.wa.gov/corps/search_detail.aspx?ubi=601633649. Alison Gottfriedson (now deceased) and Suzette Bridges are listed as two of the three "Governing Persons."

elect themselves to office, would not be able to siphon off virtually all of the entity's money by paying themselves huge salaries and rents, and would never be granted a corporate license under Articles of Incorporation which unilaterally declared all of the extraordinary powers that are claimed in the FLIC Constitution. FLIC claims to be entitled to the major benefits of incorporation (including contracting authority, limited liability and the power to sue in its own name) but has never met its responsibility to qualify as a corporation under Washington law.

The cornerstone by which Squaxin and FLIC justify the cigarette sales operation at Frank's Landing is their Intergovernmental Agreement (ER 189-193) dated December 12, 2007. As discussed above, we submit that FLIC has no authority to sign any contracts beyond those described in the federal statute. Although the Agreement is festooned with "Whereas" clauses which attempt to bootstrap some sort of contracting authority for FLIC, a careful review of that Agreement leads to the conclusion that there is still no convincing rationale for FLIC's authority to execute it.

First, contrary to FLIC's current position that it has broad contracting powers, it should be noted that the "Whereas" sections do not contain any legal authority as to why FLIC has such broad powers. In fact, just the opposite is true. The third Whereas clause merely states that FLIC is a "self-governing dependent Indian community, eligible for the special programs and services provided by the

United States to Indians because of their status as Indians...." -- i.e., a clear reference to the limited contracting authority for Federal aid programs granted in the Federal statues.

The penultimate "Whereas" clause of the Intergovernmental Agreement (at ER190) cites the Washington Interlocal Cooperation Act, chapter 39.34 RCW, as a basis for FLIC's authority to sign the Agreement. That recitation is interesting for two reasons. First, it shows that FLIC believed that it was subject to, or at least entitled to the benefits of, Washington law. Second, however, the reliance upon the Interlocal Cooperation Act is entirely misplaced: the Act only applies to contracts between "public agencies", a term defined in the Act (at RCW 39.34.020) to include various governmental entities, as well as "any Indian tribe recognized as such by the federal government." Obviously, that definition does not apply to FLIC. Accordingly, the Interlocal Cooperation Act provides absolutely no authority for FLIC's execution of the Agreement. Other "Whereas" clauses cite examples of other contracts which may have been signed by FLIC in the past, but almost all are with Federal agencies, i.e. the sort of contracts authorized in the Federal statutes.

The inescapable conclusion is that the Intergovernmental Agreement is nothing more than a bootstrap effort to conjure up the illusion that some sort of official blessing had been given to justify Squaxin's use of the Frank's Landing real

estate as a new outlet for the sale of its cigarettes. FLIC had no authority to expand Squaxin's territorial jurisdiction, no ability to authorize Squaxin to do what FLIC could not do itself at Frank's Landing, and no authority or legal standing to execute a contract. The Intergovernmental Agreement should be declared void.

IV. DEFENDANT LOPEMAN'S *EX PARTE YOUNG* ARGUMENT SHOULD BE REJECTED.

Defendant Lopeman argues that the district court's decision to permit his joinder under the doctrine of Ex Parte Young, 201 U.S.124 (1908), was erroneous. Response Brief of Appellee David Lopeman at 44-48. That assertion is incorrect.

First, we note that defendant Lopeman did not take a cross-appeal of this issue, raising it for the first time here in his response brief.

More importantly, the lower court carefully reviewed the issue and concluded that while the Squaxin Island Tribe had sovereign immunity that barred its inclusion in this case as a defendant, under the well-established doctrine of Ex Parte Young, Tribal Chairman Lopeman could be named as a defendant in this action seeking to enjoin prospective tribal action in violation of federal law. The district court's analysis of this issue can be found at Appellee Lopeman's Supplemental Excerpts of Record at 45-46.

The district court's ruling on this issue was correct. As this Court has noted, in determining whether Ex Parte Young applies, "a court need only conduct a

straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Wilbur v. Locke, 423 F.3d 1101, 1111 (9th Cir. 2005) (internal citations and quotations omitted). In this case, Nisqually's First Amended Complaint (ER 248, 256-57) clearly meets this standard. As a result, under both Wilbur v. Locke and Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1045 (9th Cir. 2000), this challenge to Squaxin's taxing authority, brought against the Chairman of Squaxin's Tribal Council, falls squarely within the *Ex Parte Young* exception to sovereign immunity.

V. CONCLUSION

For the reasons discussed in this and our Opening Brief, the Order and Judgment of the District Court should be reversed and judgment entered for Plaintiff-Appellant Nisqually Indian Tribe.

RESPECTFULLY SUBMITTED this 29th day of March, 2010.

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STATEMENT OF RELATED CASES

Under Circuit Rule 28-2.6, the Nisqually Indian Tribe states that it is not aware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

Counsel for the Nisqually Indian Tribe certifies that this Reply Brief has been double-spaced, that the typeface used (Times New Roman 14) is proportionately spaced, and that the number of words is 5,471.

Malcolm S. Harris