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

RESPONSE BRIEF OF APPELLEE DAVID LOPEMAN

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JURISDICTIONAL STATEMENT

Appellee Squaxin Island Tribal Chairman David Lopeman concurs with Appellant Nisqually Indian Tribe's ("Nisqually") statutory bases for the district court's subject matter jurisdiction and this Court's jurisdiction, the finality of the district court judgment appealed from, and the timeliness of this appeal. Nisqually Opening Brief at p. 1.

While Chairman Lopeman is satisfied with the result below on the merits, he urges the Court to consider *sua sponte* whether the district court erred in the preliminary phase by applying the *Ex Parte Young* doctrine to cure the bar posed by the Squaxin Island Tribe's sovereign immunity and indispensability. *See* Argument, Section H below.

ISSUES PRESENTED FOR REVIEW

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

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

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

An Addendum following this Response Brief contains:

(1) the 1987 Frank's Landing legislation, Pub. L. No. 101-153;

(2) the 1994 amendment to that law, Pub. L. No. 103-435;

(3) the State of Washington's cigarette compacting laws, RCW 43.06.450-.460; and

(4) the Squaxin Island Tribe's Cigarette Sales and Tax Code, Ch. 6.14.

STATEMENT OF THE CASE

Appellant Nisqually Tribe seeks to permanently enjoin the Squaxin Island Tribe's sales of cigarettes and tobacco products at The Landing smokeshop, located within Indian country at Frank's Landing Indian Community, and to invalidate the 2008 Addendum to Squaxin's cigarette tax compact ("Addendum") with the State of Washington ("State"). (ER 247). Squaxin's tax revenue from the State-regulated cigarette sales is directed solely to "essential governmental services," as defined by State law. These services are allocated for use between the Wa-He-Lut Indian School at

Frank's Landing and other governmental services for the Squaxin Island Tribe. (ER 4; Supp. ER 5, 9).

Nisqually's amended complaint raised four counts: (1) that Squaxin lacked taxing authority at The Landing under federal law (Count 1); (2) that the Secretary of the Interior ("Interior") failed to approve leases between Defendants Theresa Bridges and Frank's Landing, and between Frank's Landing and Squaxin (Count 2); (3) that Squaxin's Compact Addendum and its sale of Tribally taxed cigarettes were not authorized under State law (Count 3); and (4) that Squaxin's Compact Addendum breached the cigarette tax compact between the State and Nisqually ("Nisqually Compact") (Count 4). (ER 256-259). Nisqually abandoned Count 2 after Defendants demonstrated that Interior had approved the lease and sublease. (*See* ER 3 at no. 9, ER 10 at § II).

Twice the district court thoroughly addressed and rejected, on the merits, Nisqually's remaining three counts. The district court first did so in denying Nisqually's motion for a preliminary injunction. (Supp. ER 50-54). The court found, after "thoroughly research[ing] federal common law and federal statutes and regulations" and an "analysis of legislative history and case law," that "no federal law [ ] prohibits such an arrangement between the

Community, the beneficiary of the trust land, and the Squaxin tribe." (Supp. ER 50, 53). Nisqually raises no new arguments here.

The district court again rejected all of Nisqually's remaining claims, on cross-motions for summary judgment following extended discovery and briefing. (ER 1-13). The court found that "the factual landscape ha[d] changed very little" following discovery, and that "the salient, uncontroverted facts" remained the same as when it had considered Nisqually's preliminary injunction motion. (ER 2). The court found no disputed material facts, and that Nisqually lacked a viable legal argument. (ER 2-13). It determined that the signatory parties had full authority to execute a valid, binding and enforceable tax compact and amendment, inter-governmental agreement, and federally-approved master lease and sublease; and to implement all of these agreements. *Id.*

STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of summary judgment for defendants-appellees and denial of Nisqually's motion for summary judgment. *Accord*, Nisqually Opening Brief at pp. 2-3. Additionally, the Court's review is governed by the same standard used by the trial court – i.e. viewing the evidence in the light most favorable to the nonmoving party, and determining 1) whether there are any genuine issues

of material fact and 2) whether the district court correctly applied the relevant substantive law. *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004). This Court may affirm summary judgment on any ground supported by the record. *Enlow v. Salem-Keizer Yellow Cab Co.*, 371 F.3d 645, 649 (9th Cir. 2004).

INTRODUCTION

States and Indian tribes have had longstanding disagreements over applying and collecting state cigarette taxes on Indian reservations, particularly as to sales by Indian retailers to non-Indian customers. *See*, *generally, Washington v. Confederated Tribes*, 447 U.S. 134 (1980). In 2001, the Washington Legislature devised a path for resolving these conflicts. It allowed the Governor to compact with certain named tribes over cigarette-related transactions. (Addendum at 3-6: State compacting laws, RCW 43.06.450-.460). The State then began systematically executing cigarette compacts with these tribes, the geographic scope being all of Indian country in Washington. (*See* ER 39). The Legislature continually amended the compacting statute to make eligible additional new federally recognized tribes.[1]

[1] The State identified fourteen tribes as eligible in 2001, and after six amendments increased the number to twenty eight. Wash. Laws: 2001 c 235

As the State sought compromise throughout Washington's Indian country with cigarette tax compacts, it was presented with some geographic anomalies that required nuanced solutions. Frank's Landing was one such place. On one hand, Frank's Landing was "Indian country," which limited the State's taxing authority. (ER 3, 5; Supp, ER 5 at lines 4-6). On the other, Congress had expressly declared that legislation pertaining to Frank's Landing did not establish it as a federally recognized tribe, and the State had limited its curative steps to federally recognized tribes. (Addendum at 2: Frank's Landing 1994 legislation, Pub. L. No. 103-435 at § 10(b)(2); RCW 46.06.460). Accordingly, so long as the Legislature limited eligibility for compacting to federally recognized tribes, the anomaly at Frank's Landing would persist.

Nisqually, Squaxin and the State all separately agreed, at one time or another, that a compacting tribe's operation of a retail store at Frank's Landing – e.g., the Nisqually or Squaxin or Puyallup Tribe[2] – would satisfy State compacting laws. (ER 121, 140, 200-217). When Nisqually proposed operating a Nisqually store at Franks' Landing, the Community declined due to Nisqually's longstanding animus towards Frank's Landing. (ER 140, ¶5;

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§ 3, 2001 2nd sp.s. c 21 § 1, 2002 c 87 § 1, 2003 c 236 § 1, 2005 c 208 § 1, 2007 c 320 § 1, 2008 c 241 § 1.

[2] These are the three signatory tribes to the 1854 Treaty of Medicine Creek, 10 Stat. 1132, which established their reservations. (Supp. ER 83).

Supp. ER 27-32, 62-64). Nisqually's overture, however, prompted Frank's Landing to enter into serious negotiations with the Squaxin Island Tribe, applying the same concepts – which included dedicating a large portion of the cigarette tax revenues to the Wa-He-Lut Indian school at Frank's Landing. (*See* ER 189-193; Supp. ER 5 at ¶ 3). Squaxin, the State and Frank's Landing proceeded to negotiate the necessary agreements consistent with the principles that Nisqually itself had been prepared to implement. Statement of Facts, Sections C and D below. The State's concurrence, by executing Squaxin's Compact and Addendum, was a reasonable solution from all perspectives.

This case is unique: It represents a rare instance when a state, a tribe, a dependent self-governing Indian community occupy the same side in litigation over tax issues. This case is also a commendable example of the State of Washington's efforts to resolve jurisdictional uncertainty throughout Washington's Indian country, while supporting the continued operation of the Wa-He-Lut Indian school.

Contrary to Nisqually's assertions, the case's novel facts make it unlikely that this kind of taxing arrangement will be replicated "throughout the state." Nisqually Opening Brief at 58. First, there is but one Congressionally-designated self-governing, dependent Indian community in

Washington (and apparently nationwide). Second, there are not hordes of Indian allottees, as Nisqually posits, who stand ready to disenroll from their current tribe and enroll at Squaxin, even assuming that the individual allottee qualified for membership under the Squaxin Constitution's strict eligibility requirements (discussed in Statement of Facts, Section E at n. 13, below). *See id*. Finally, Squaxin must still satisfy the elements of Washington's authorizing statute, RCW 43.06.450-.460 (Addendum at 3-6), and the State would have to make the affirmative discretionary decision to compact.

For the reasons described herein, the Court should affirm the district court's decision.

STATEMENT OF FACTS

The State's response brief aptly quotes the district court's twelve "salient, uncontroverted facts" that supported its summary judgment decision. Appellee Gregoire's Response Brief, Statement of Facts. Nisqually does not dispute these facts.[3]

[3] Nisqually's Statement of Facts section contains many factual assertions without any reference to the record (at least 36), which is inconsistent with FRAP 32(a)(7) (statement of facts must have "appropriate references to the record"). Nisqually Opening Brief at pp. 6-21. Among these are Nisqually's repeated references to "untaxed" cigarettes manufactured by the Squaxin Island Tribe. *See e.g*. Nisqually's concerns are therefore not before this Court in this action relating to the validity of that Compact and the Addendum thereto. Appellee Lopeman elects not to call out the subset of disputed, argumentative "facts" without record support.

A. Cigarette Tax Compacts are the States' Chosen Path to Resolve Long Standing Disagreements in Indian Country.

Washington, like many other states,[4] uses inter-governmental cigarette tax compacts to address uncertainties over state tax applicability, collection and enforcement in Indian country. (Addendum at 3-6: RCW 43.06.450-.460). The Governor may enter into cigarette tax agreements with specified federally-recognized Indian tribes, whereby the State accepts a tribal cigarette tax in lieu of State cigarette taxes (and state and local sales and use taxes) on Indian retailer sales of cigarettes in Indian country. RCW 43.06.455. The requirements of the State's compacting law are spelled out in more detail in Section VI.A. of Defendant Gregoire's Response Brief, which is incorporated herein.

To summarize, the compacting tribe must: (1) collect a tribal tax on Indian retailers' cigarettes sales in Indian country in lieu of and equal to the State cigarette tax (of $20.25 per carton); and (2) spend its tax revenues on "essential governmental services."[5] *Id.*; RCW 82.24.020-.028 (cigarette

[4] *See, e.g.*, 68 Okl.St.Ann. § 346, Minn. Stat. § 270C.19, Or. St. § 323.401.

[5] State law defines "[e]ssential governmental services" as those such as tribal administration, public facilities, fire, police, public health, *education*, job

excise taxes). Besides conditioning how revenues are spent, compacts must accomplish specified goals and address enforcement and other requirements. RCW 43.06.455. The Washington Legislature intended that the compacting law would promote government-to-government relationships between the State and tribes, tribal economic development, revenue for tribal governments, and enforcement of State cigarette tax laws. RCW 43.06.450. The Legislature also intended to resolve legal disputes. *See id.* (includes the goal of "reducing conflict").

For tribes, compacts provide Indian governments – which lack taxable land bases – with steady funding for services to their members and communities.[6] Accordingly, in 2004 Squaxin and Nisqually entered into separate cigarette tax compacts with the State. (ER 101-119 (Nisqually), ER 200-217 (Squaxin)).

B. Frank's Landing, a Self-Governing Indian Community Located Within Nisqually and Squaxin Aboriginal Lands, is a Unique Portion of Indian Country.

In Article 1 of the 1854 Treaty of Medicine Creek, 10 Stat. 1132, the Nisqually, Puyallup and Squaxin Island tribes as "one Nation," in exchange

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services, sewer, water, environmental and land use, transportation, utility services and economic development. RCW 43.06.455(14)(a) (emphasis added).

[6] *Id.*; Addendum at 8 (Squaxin's Cigarette Sales and Tax Code § 6.14.020, discussing need for funding Tribal services).

for reserving certain rights, ceded to the federal government their "right, title and interest" to an approximately 4,000 square mile area that encompasses the reservations that these tribes now occupy. (Supp. ER 79, 83). The families and cultures at Frank's Landing are thus intertwined with those of the three Medicine Creek Tribes. As the district court recognized, "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).

The long and rich history of the Frank's Landing Indian Community is well described in Appellee Frank's Landing's Response Brief, Statement of Fact, Section I, which Appellee Lopeman incorporates herein.[7] Frank's Landing consists of three parcels of land that the United States holds in trust for the benefit of individual Indians. (ER 2). The land subject to dispute in this case is an allotment[8] held by Theresa Bridges, a member of the Squaxin

[7] Nisqually not only ignores the history of Frank's Landing, but also tries distracting the Court by focusing upon how few people live there. Nisqually Opening Brief at 8, 13, 15 and 17. The critical issue is not how many people reside there, but whether "essential governmental services" are provided with the Squaxin Tribe's tax money from cigarette sales. *See* RCW 43.06.455(8) and (14)(a).

[8] An allotment is a parcel of land owned by the United States in trust for an Indian that is subject to federal restraints on encumbrance and alienation. Cohen, Felix F. *Cohen's Handbook of Federal Indian Law* at § 16.03 (2005 ed.) ("Cohen's Handbook").

Island Tribe and formerly a member of the Puyallup Tribe. (ER 2 at ¶5, ER 195). Another allotment is held by Billy Frank, Jr., a member of the Nisqually Tribe. (Supp. ER 62-64). The Frank's Landing allotments are outside the boundaries of the Nisqually Reservation. (ER 2 at ¶2). Frank's Landing, however, is within the approximately 4,000 square miles that the Medicine Creek tribes ceded by Treaty, and is thus within the aboriginal territory[9] of the Squaxin Island Tribe and the other two Medicine Creek tribes. (*See* Supp. ER 83, 88).

In 1987, Congress enacted legislation that: (1) recognized Frank's Landing as eligible for certain federal programs and services provided to Indians; and (2) declared Frank's Landing as eligible to contract and receive grants under the Indian Self-Determination and Education Assistance Act ("ISDEAA"). (Addendum at 1: Pub. L. No. 101-153). For over thirty years, Frank's Landing and its members have operated and funded through varied sources the Wa-He-Lut Indian School located at Frank's Landing, which provides children with an education that is integrated with traditional Indian values and culture. (Supp. ER 15-19, 72-76, 63). Frank's Landing's

[9] Aboriginal territory includes land that an Indian tribe cedes to the United States by treaty. Cohen's Handbook at § 15.04[3][a]. The attached Locator Map is provided to demonstrate the relative locations of the various government entities with respect to the Medicine Creek Treaty landmarks. Boundary lines are approximate and not inclusive.

Response Brief describes in more detail the nature of Wa-He-Lut, which Appellee Lopeman incorporates herein. Frank's Landing Response Brief, Statement of Facts, Section I.

In 1994, Congress amended the Frank's Landing statute. (Addendum at 2: Pub. L. No. 103-435). The impetus for the amendment was Frank's Landing's resistance to annexation into the Nisqually Reservation. In late October of 1994, the Nisqually Tribe had amended its Constitution's jurisdictional statement to declare that the "jurisdiction of the Nisqually Indian Tribe" extended "to tracts placed in trust or restricted status for individual Indians. . . . located in the Nisqually River basin. . . ." (ER 265 at Art. I). Frank's Landing, fearing annexation, initiated Congressional action to retain its sovereign independence. (Supp. ER 62-64, 66-67, 69-70).

The 1994 amendment acknowledged the Frank's Landing Indian Community as a federally recognized "self-governing dependent Indian community" that was "*not subject to the jurisdiction of any federally recognized tribe*," especially Nisqually. (Addendum at 2: Pub. L. No. 103-435 at § 10(a)(2); Supp. ER 62-64, 66-67, 69). Congress also stated that the 1994 Act did not "constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized tribe." (Addendum at 2: § 10(b)(2)).

C. For the State, Frank's Landing Required a Creative Tax Compacting Solution.

Frank's Landing posed a compacting challenge. It, like other Indian governments, had a longstanding disagreement with the State over cigarette taxation. (ER 46). In recent years, Frank's Landing had sought to compact with the State, largely to resolve jurisdictional uncertainties, and to ensure that cigarette tax revenues generated by its retail smokeshop The Landing were directed to the Wa-He-Lut Indian School as an "essential governmental service" in compliance with State compacting laws. RCW 43.06.455; Supp. ER 12. In January of 2006, however, the State declined because the "special status" of Frank's Landing precluded the "same solutions that were available to [federally recognized] Indian tribes." (Supp. ER 58).

Accordingly, any cigarette tax solution involving Indian country at Frank's Landing required, first, satisfying the State's compacting laws; and second, not offending the federal Frank's Landing statute (particularly the 1994 jurisdictional provision) or another applicable federal law. As to the first, Nisqually, Squaxin and the State each separately agreed, at one time or another, that a compacting tribe's operation of a retail store at Frank's Landing – e.g., Nisqually or Squaxin or Puyallup – would satisfy State compacting laws. (ER 121, 140, 200-217). Meeting the second criterion – i.e., not violating an applicable federal law – required Frank's Landing's

consent because the 1994 amendment declared it as existing on ground over which no tribe could unilaterally assert jurisdiction. *See* Addendum at 2 (Pub. L. No. 103-435, § 10(a)(2).

Various compacting options existed. Frank's Landing allottee Theresa Bridges was previously a member of the Puyallup Tribe (ER 196). If Puyallup was so inclined, it could have operated a retail store in a similar fashion as Squaxin (assuming Frank's Landing consented under the 1994 amended law). Nisqually too could have operated its retail store on the adjacent allotment held by its member Billy Frank, Jr. (again assuming that Frank's Landing consented). (Supp. ER 63).

D. Nisqually's Proposal Prompted the Solution: a Federally-Recognized Tribe Would Own and Operate a Retail Store at Frank's Landing Pursuant to its Compact with the State.

As mentioned above, Nisqually previously sought to do exactly what Squaxin and Frank's Landing accomplished. The district court recognized, "According to the Frank's Landing Indian Community, the Nisqually contacted them about operating a Smokeshop at Frank's Landing selling Tribal taxed cigarettes under the Nisqually compact." (ER 6 at n. 1).

But Nisqually was inconsistent in its approach. Nisqually first tried isolating Frank's Landing by, during its own compact negotiations, seeking to convince the State to establish a 20-mile radius around the Nisqually

Reservation within which the State could not compact with other "Indian entities or Tribes." (ER 124). The 20-mile circle encompassed Frank's Landing. (Supp. ER 88). The State, however, refused. (ER 124). Accordingly, Nisqually's Compact did not create such a non-compete zone. (*See* ER 101-119).

Next, in late spring of 2007, Nisqually's Chair offered to bring The Landing store under Nisqually's corporate code and tax compact, and later made the same offer to the Governor. (Supp. ER 26-27 at lines 22-12; Supp. ER 28-29 at lines 18-5). Frank's Landing did not accept Nisqually's offer. (Supp. ER 27 at lines 7-12)]. Later, Nisqually again changed course. Having first argued that only Nisqually could operate a retail store at the Landing, and subsequently being rejected, Nisqually began arguing that no tribe could operate a retail store at The Landing. Nisqually Opening Brief at pp. 2 (issue 1), 22-36.

Nisqually's efforts, however, prompted Frank's Landing to enter into serious negotiations with the Squaxin Island Tribe. (Supp. ER 21-23, lines 15-7)]. Accordingly, Frank's Landing approached Squaxin to explore the Squaxin Island Tribe's operating a store under a business lease, with tax revenues dedicated to funding the Indian elementary school. (Supp. ER 12 at ¶ 5).

E. The State, Squaxin, Frank's Landing and Theresa Bridges Executed the Necessary Agreements.

Squaxin's original Compact with the State – that is, even before the 2008 Addendum that Nisqually disputes – covered Squaxin's operation and taxation of the retail store at Frank's Landing on Squaxin member Theresa Bridges' allotment. *See* ER 121 (Squaxin Compact Addendum), 200-217 (original Squaxin Compact). The Compact required that Squaxin impose a Tribal sales tax on Tribal retailers for sales occurring within "Indian country." (ER 204, at Pt. III(2)). The Compact defined "Indian country" as not only including all land within the limits of the Squaxin Island Indian Reservation, but also as "*allotments held in trust for a Squaxin Island tribal member*. . . ." (ER 201-202 at Pt. 1(8)(b) (emphasis added)). A "tribal member" is defined as an enrolled member of the Squaxin Island Tribe. (ER 202, at Pt. I(21)).

Thus, Squaxin's 2004 unamended Compact expressly allowed retail sales by Tribal retailers on allotments beneficially owned by Squaxin member, regardless of whether the allotments were located within or outside of the Squaxin Island Reservation. And, the State had confirmed that "essential governmental services" funded by the Squaxin cigarette tax included the Wa-He-Lut school. RCW 43.06.455(8), Supp. ER 4-5). Later on, the State and Squaxin executed a Compact Addendum (discussed

below), which further confirmed that The Landing venture was covered by the Squaxin Compact.

Another necessary element was Frank's Landing's consent to Squaxin's operation of the retail store and exercise of taxing jurisdiction. Such consent was needed because of the 1994 legislation declaring Frank's Landing as "not subject to the jurisdiction of any federally-recognized tribe." (Addendum at 2: Pub. L. No. 103-435). Accordingly, Squaxin and Frank's Landing executed an Inter-Governmental Agreement that consented to Squaxin's owning and operating a Tribal cigarette retail shop on Ms. Bridges' allotment, and to Squaxin's assertion of taxing authority there. (ER 189-193). The Inter-Governmental Agreement mimicked Washington's Interlocal Cooperation Act, RCW Ch. 39.34. The Inter-Governmental Agreement provided, among other things:

> 1. REQUEST TO EXTEND AND AGREEMENT TO SUBMIT TO JURISDICTION. The [Frank's Landing Indian Community, or "FLIC"] affirmatively grants to SIT [the Squaxin Island Tribe] the right to extend its jurisdiction to that portion of the FLIC [Frank's Landing] set aside for economic development purposes, the EDZ [Economic Development Zone]. FLIC consents to its enterprises and concerns subjection to the jurisdiction of the SIT as further described herein.
>
> 2. ASSERTION OF JURISDICTION. The FLIC assents to, and the SIT asserts general jurisdiction over the FLIC EDZ, including but not limited to Title 6 [Cigarette Sales and Tax Code] of the laws of the Squaxin Island Tribe related to tribal enterprises, provided that

> nothing contained herein shall establish jurisdiction over the governing body of the FLIC.

(ER 190-191) (bold removed). Additionally, by agreement with Frank's Landing, 85% of Squaxin's cigarette taxes from sales at The Landing that are covered by its Compact are directed to the Wa-He-Lut School. (Supp. ER 5).

Other necessary documents included agreements allowing Squaxin to own and operate a retail store on part of Ms. Bridges' allotment, i.e.: (1) a ground lease between Ms. Bridges and Frank's Landing, and (2) a sublease between Squaxin and Frank's Landing, approved by Ms. Bridges. (ER 163-172, 174-187). Interior's Portland Area Office approved the lease and sublease under 25 U.S.C. § 415.[10] (ER 10 at Section II). By necessity, Interior's approval included considering and consenting to the parties' jurisdictional arrangement. Bureau of Indian Affairs ("BIA") regulations governing Indian lease approval require that BIA "recognize the governing authority of the tribe having jurisdiction over the land to be leased, preparing and advertising leases in accordance with applicable tribal laws and policies." 25 C.F.R. § 162.107(b). Section 18(b) of the Interior-approved

[10] Section 415 requires Interior "approval" for leases of "[a]ny restricted Indian lands, whether tribally, or individually owned" for purposes that include "business."

sublease recognizes the applicability of Squaxin Tribal laws at Frank's Landing, through the Inter-Governmental Agreement:

> The laws of the United States, including specifically the Intergovernmental Agreement between the Frank's Landing Indian Community and the Squaxin Island Tribe, and the laws of the State of Washington, when federal laws are silent, shall govern this lease.[11]

(ER 179, at ¶ 18(b)). Thus, BIA in approving the leases also approved: (1) the Squaxin Island Tribe's exercise of jurisdiction over the leased land; and (2) the ability of Frank's Landing and Squaxin to agree to Squaxin's exercise of jurisdiction there.

Frank's Landing allottee Theresa Bridges enrolled in the Squaxin Island Tribe on January 17, 2008. (ER 148-149). Ms. Bridges' decision was a culminating event following her long consideration of Squaxin membership. As early as 1991, she had contemplated changing tribal affiliation, based in part on her interest in burial at a family grave site at a Squaxin cemetery. (Supp. ER 23-24 at lines 22-10[12]). Ms. Bridges was

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[11] Various additional provisions in the lease and sublease recognize the Inter-Governmental agreement between Frank's Landing and Squaxin Island Tribe as governing law. (ER 165 at ¶ 10, ER 177-178 at ¶ 14).

[12] Since the district court's summary judgment ruling, Ms. Bridges has buried her daughter at the Squaxin-Tobin family cemetery. *See* http://64.38.12.138/News/2009/015623.asp; http://puyalluptribalnews.net/article/654; http://www.nwifc.org/2009/07/fishing-rights-activist-alison-gottfriedson-passes-away/; http://64.38.12.138/News/2009/015656.asp.

deemed eligible for membership under Squaxin's Constitution, which limits membership to persons with a documented connection to the Tribe.[13] Ms. Bridges thereby irrevocably relinquished her prior membership in the Puyallup Tribe.[14] (Supp. ER 35 at lines 16-22).

Finally, as mentioned earlier, even though Squaxin's original Compact covered its operation at The Landing, the State desired additional assurance through a Compact amendment. Accordingly, in January of 2008, Squaxin and the State signed an Addendum to the Squaxin Compact that acknowledged the Inter-Governmental Agreement between Squaxin and

[13] Only the following persons are eligible for Squaxin membership: (1) persons listed on Squaxin's 1940 official census roll, and their children born between 1940 and 1965; (2) original Squaxin Island allottees, and their direct descendents with 1/8 degree or more Indian blood; (3) persons listed on the 1919 Charles Roblin's Schedule of Unenrolled Indians of the Squaxin Island Tribe, and their direct descendents with 1/8 degree or more Indian blood; and (4) persons with 1/8 degree or more Indian blood whom are born to any member of the Squaxin Island Tribe after 1965. (Supp. ER 60 at Art. II, § 1).

[14] Nisqually offers no evidence to support its statement that the Squaxin Island Tribe "persuaded" Ms. Bridges to relinquish her Puyallup membership. Nisqually Opening Brief at p. 12. Moreover, the timing of Ms. Bridges enrollment does not diminish the fact that Ms. Bridges made a legitimate and irrevocable decision to relinquish her Puyallup enrollment in favor of Squaxin citizenship, with all of the attendant rights and responsibilities. (Supp. ER 35 at lines 11-22). Finally, it is not surprising that many South Sound Indians are eligible for membership in multiple tribes when the Puyallup, Nisqually, and Squaxin Tribes were regarded at Treaty times as "one nation." (Supp. ER 83 at Preamble).

Frank's Landing. (ER 121). The Addendum, which Nisqually now disputes, clarified that "Indian country" covered by the Compact included:

> Public domain allotment lands when under a then existing agreement between the Squaxin Island Tribe and a Self-Governing Dependent Indian Community under Public Law 103-435, November 2, 1994 [108 Stat. 4556] that conveys interest to the Squaxin Island Tribe sufficient to allow the Tribe to operate as a 'tribal retailer' in full compliance with the terms and conditions of the Compact.

Id. Nisqually knew about these negotiations before the Squaxin Addendum was executed, and repeatedly tried persuading the State to step away from the deal.[15] (Supp. ER 26-27 at lines 22-25, 1-22).

F. Squaxin has Complied with its Compact at The Landing.

On or about January 18, 2008, the Squaxin Island Tribe, through its wholly-owned business, Island Enterprises, Inc., began making retail sales of cigarettes at The Landing and collecting a Squaxin Tribal tax. (Supp. ER 5 at ¶ 2). To qualify for a State cigarette tax exemption, the Squaxin Island Tribe must ensure that its tribal tax is collected and that tax revenues are

[15] Nisqually describes at length the State's failure to provide Nisqually notice of the Squaxin Compact Addendum negotiations and a timely response to Nisqually's concerns. Nisqually Opening Brief at pp. 11-14. These accusations have nothing to do with the validity of the Addendum or any purported breach of its Compact. And, Nisqually points to no legal right that it had to receive notice of these negotiations. In fact, however, the Addendum's execution was delayed several times to provide Nisqually with additional opportunities to register its concerns. (Supp. ER 5). Squaxin and Nisqually tribal leadership met in November of 2007, well before the Addendum's execution, thus providing Nisqually another opportunity to express its objections. *Id*. at ¶ 1.

spent on "essential governmental services." RCW 43.06.455. The Squaxin Island Tribe, like the Nisqually Tribe, demonstrates such compliance through periodic audits. (ER 111-113 at Pt. VIII, ER 209-211 at Pt. VIII). Squaxin's Compact requires verification through third-party audits that tax revenues are being applied to essential government services. *Id.* Accordingly, Squaxin has retained a third party auditor to review its records and report on its compliance with the terms of the Compact for every completed fiscal year, including the time period that The Landing has operated. (Supp. ER 5 at ¶ 4; Supp. ER 8-9).

If the Squaxin Island Tribe fails to meet its obligation, the Compact and Addendum allow it an opportunity to confer with the State and correct any problem. (ER 113-116 at Pt. IX; ER 212-214 at Pt. IX). To date, Squaxin has expended tax revenues generated at The Landing on essential governmental services. (Supp. ER 5, 8-9). Neither the State nor Nisqually have alleged otherwise.[16]

[16] Nisqually glosses over the important distinction between tax revenues and lease payments. Nisqually Opening Brief at pp. 18-20. But Nisqually does not assert that tax revenues generated at Frank's Landing are spent for anything other than "essential government services" as required by RCW 43.06.455. Theresa Bridges and Frank's Landing are free, like other property owners, to spend rental proceeds as they see fit. However, these individuals have chosen to use their time and money to further a life of public service, providing education and social services to Indians and Indian children. (Supp. ER 15-19, 62-64). And in fact, much of the rental payments

The Nisqually Tribe initiated this lawsuit on February 6, 2008. (ER 273).

SUMMARY OF ARGUMENT

The district court correctly found that each entity involved in The Landing venture possessed the requisite authority to implement its respective tasks. The State, following its own compacting laws, determined that the Squaxin Island Tribe's taxation of cigarette sales at The Landing fulfilled the requirements of State law. As to the Squaxin Island Tribe, tenets of federal Indian law dictate that Squaxin possesses authority to tax cigarette sales at The Landing. No federal law, including the 1994 federal Frank's Landing legislation, has divested Squaxin of such authority. As to Frank's Landing, Congress did not strip it of authority to contract or of the ability to be a party in a lawsuit.

The State did not breach Nisqually's cigarette compact by executing an Addendum to Squaxin's cigarette compact. Furthermore, the concept of a tribe regulating cigarette sales on its member's off-reservation allotment is

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have been directed towards government needs Frank's Landing Response Brief, Argument, Section VII. Ironically , Nisqually's own Council members receive similar compensation. Nisqually Council members at only the second of seven compensation tiers receive an annual salary of approximately $95,000. (Frank's Landing ER 115). Finally, BIA in approving the leases determined that the rent constituted "fair annual rental" for use of Ms. Bridges' land. 25 C.F.R. § 162.107.

legal and logical, and was fully envisioned by Nisqually, as well as Squaxin and the State. In addition, Nisqually has no standing to contest Squaxin's cigarette addendum, since Nisqually was not a party to Squaxin' compact. Finally, the district court improperly applied the *Ex Parte Young* doctrine to overcome the bar to the Squaxin Island Tribe's sovereign immunity.

ARGUMENT

A. The State Determined that the Squaxin Island Tribe Met all of the State's Compacting Requirements at The Landing Smokeshop.

This Court should find that the State's statutory scheme, the State's willingness to compromise to resolve jurisdictional uncertainty, Squaxin's powers to collect the tax from its own business, and the State's concurrent lack of taxing authority at Frank's Landing Indian country, fully supported the State's reasonable decision to refrain from imposing its tax and to allow an in lieu Squaxin tax on cigarette sales at Frank's Landing.[17] *See id.* As the district court rightly concluded, "All requirements of state law pertaining to cigarette compacts with the designated Indian tribes have been met. No

[17] The district court could have found that Nisqually had abandoned its Count 3, which alleged that the Squaxin Addendum violated State law. *Wojitas v. Capital Guardian Trust Co*., 477 F.3d 924, 926 (7th Cir. 2007) (failure to oppose argument permits inference of acquiescence, and acquiescence operates as a waiver). Nisqually's summary judgment opposition brief ignored all of the Defendants' arguments that sought summary judgment on Nisqually's Count 3. (*See* ER 287 at Dkt. 139)

state law prohibits the specific arrangement which is the subject of this dispute." (ER 11).

As noted, the State of Washington may compact with tribes that impose tribal cigarette taxes in lieu of certain state and local taxes upon sales of cigarettes in Indian country by Indian retailers. RCW 43.06.455(3). The Indian tribe must be eligible and satisfy the applicable requirements of RCW 43.06.450-.060. Section VI.A of Appellee Gregoire's Response Brief describes in detail the State's compacting requirements, which is incorporated herein.

In the instant case, the State determined that the Squaxin Island Tribe was eligible to compact. Appellee Lopeman incorporates the argument in Section VI. B of Appellee Gregoire's Response Brief, explaining how the State reached that conclusion. Moreover, the State determined that Squaxin possessed the requisite taxing authority over the Tribal retailer (its own business), located on Indian country outside the Squaxin Reservation, i.e., at Frank's Landing, sufficient to implement the Compact. *Id.* also incorporated herein. As the State informed the district court and now this Court, the Squaxin Island Tribe had power both to regulate its own business's conduct outside of reservation boundaries, *and* to regulate the conduct of one of its members, Theresa Bridges. *See id.*

B. Principles of Federal Indian Law Instruct that the Squaxin Island Tribe has Authority to Tax and Collect a Squaxin Tribal Tax at Frank's Landing.

This Section addresses in more detail Squaxin's ability to exercise taxing authority at Frank's Landing under established principles of federal Indian law. The district court recognized the basic tenet of Indian law, which is that "the Squaxin Island Tribe, as a federally-recognized Indian Tribe, has the sovereign power to tax transactions occurring on trust lands" "absent explicit divestiture by Congress." (ER 5, 9). Since the district court found that no Congressional divestiture of Squaxin's powers had occurred (*see* discussion in Argument, Section C below), the district court appropriately concluded that it "cannot interfere with the Squaxin's sovereign power to conduct economic activity on the tribal member's trust land and charge a corresponding sales tax." (ER 9; Supp. ER 53 at lines 13-15).

As described in order below, Squaxin's authority derives from the following: (1) its inherent authority; (2) The Landing's location in "Indian country"; (3) Theresa Bridges' membership in the Squaxin Island Tribe; (4) the character of authority that Squaxin is exercising; and (5) Squaxin Tribal law as reflected in its Tribal Cigarette Sales and Tax Code and as

implemented through its original and amended compacts with the State. (Addendum at 7-13: Squaxin Island Tribal Code Chapter 6.14).

As to the first source of Squaxin's powers, Indian tribes' powers are ordinarily inherent rather than derived from the federal government. *See* ER 9 (district court recognizing tribes' sovereign powers to tax); Felix Cohen, *Cohen's Handbook of Federal Indian Law* at § 4.02 (2005 ed.) ("Cohen's Handbook"). Accordingly, tribes possess all powers of a sovereign government except as limited by federal law. (ER 9; Cohen at § 4.02). This includes the taxing power as an "essential aspect of sovereignty." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-140, 147 (1982); ER 14. The power to raise revenue to provide governmental services is crucial to the continuing progress of Indian tribes, particularly in light of ever-diminishing federal funding and tribes' lack of a taxable land base. *See Merrion*, 455 U.S. at 137; Cohen's Handbook at § 8.04[1].

Addressing the second factor, classification of land as "Indian country" is the "benchmark" for determining the allocation of federal, tribal and state authority, including taxing authority with respect to Indians and Indian lands. *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n,* 829 F.2d 967, 973 (10th Cir. 1987). In Indian country, state taxes are *per se* preempted by federal law if they fall upon tribal members or tribes,

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995), and are subject to a "balancing test" when they fall upon non-members, *Blunk v Ariz. Dep't of Transp.,* 177 F.3d 879, 882 (9th Cir. 1999). Similarly, Washington law requires the presence of "Indian country" for a tribe to qualify for a tax exemption under a cigarette tax compact. RCW 43.06.455(2); *see* RCW 82.24.010(3) (State's cigarette excise tax law adopts Indian country definition in 18 U.S.C. § 1151). The federal definition of "Indian country" includes, as exists here, dependent Indian communities and Indian allotments. 18 U.S.C. § 1151.

The district court readily concluded that The Landing was located in "Indian country" because it was on a federal trust allotment within a federally-recognized, self-governing dependent Indian community. (ER 3, 5, 14). In fact, Nisqually fully agreed.[18] ER 14 ("The parties do not disagree that the land at Frank's Landing is Indian country under 18 U.S.C. § 1151."); ER 3 (the "allotted land from which the Smoke Shop is operated is Indian country."); ER 5 ("All parties acknowledge that the Frank's Landing Indian Community is 'Indian country'"). The State's taxing

[18] Now, however, Nisqually cannot bring itself to plainly state that Frank's Landing and Ms. Bridges allotment are "Indian country." *See generally* Nisqually Opening Brief. Instead, Nisqually's Opening Brief evades this critical point, at one point stating that Frank's Landing is located "outside an Indian reservation." Nisqually Opening Brief at p. 39 (heading, capitals omitted).

jurisdiction over Indian country at Frank's Landing is limited[19] and, barring any divesting federal legislation, the Squaxin Island Tribe could exercise its inherent taxation authority there.

As to the third point – Theresa Bridges' Squaxin membership – courts analyzing whether a tribe may assert jurisdiction over a particular part of Indian country located outside of the boundaries of a tribe's reservation ordinarily rely on the membership of the beneficial Indian owner. *See e.g. Alaska v. Native Village of Venetie Tribal Gov't.,* 522 U.S. 520, 527 at n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it."). Moreover, tribes routinely assert jurisdiction over activities occurring on their members' off-reservation allotments. *See e.g., Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1385-86 (10th Cir. 1996) (Cheyenne-Arapaho Tribes had authority to impose severance and business activity taxes on off-reservation allotments held by its members); *Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531, 1540-41 (10th Cir. 1995) (Navajo Nation had authority to impose a business activity tax on mining activity

[19] Nisqually oddly asserts that the State "gratuitously retrocede[d]" from levying taxes on cigarette sales at Frank's Landing. Nisqually Opening Brief at p. 15. Yet Nisqually has never explained how the State had jurisdiction in the first instance to collect and otherwise enforce collection of a State cigarette sales tax at Frank's Landing.

occurring on off-reservation land held in trust for individual Navajo allottees); *Arizona Public Svc. Co. v. EPA,* 211 F.3d 1280, 1294-95 (10th Cir. 2000) (upholding EPA regulations recognizing tribes' inherent authority to regulate off-reservation allotments and dependent Indian communities).[20]

Accordingly, both Squaxin's and, ironically, Nisqually's cigarette tax compacts accept tribal affiliation of the beneficial owner as the default rule for determining which tribe, if any, has taxing jurisdiction over an off-reservation allotment. (ER 201 at Pt. I(8)(b) (Squaxin's definition of Indian country includes "allotments held in trust for a Squaxin Island tribal member or the Tribe …"); ER 103 at Pt. I(8)(c) (Nisqually's definition of Indian country includes "allotments or other lands held in trust for a Nisqually tribal member or the Tribe …).

Addressing the fourth point, the character of the asserted authority, courts examining tribal sovereignty "look to the character of the power that the tribe seeks to exercise, not merely the location of the events."[21] These

[20] The Washington State Supreme Court agrees, having recently upheld in *State v. Eriksen*, 166 Wash.2d 953, 216 P.3d 382 (2009), a tribal police officer's authority to pursue and detain a drunk driver outside of reservation boundaries. The court, citing *John v. Baker* (see next footnote) and a federal fishing rights case, confirmed that "Tribal jurisdiction also occasionally extends beyond Indian country in other contexts." *Id.* at 386 n. 8.

[21] *John v. Baker*, 982 P.2d 738, 752 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000), *appeal after remand*, 30 P.3d 68 (2001), *appeal after remand*, 125 P.3d 323 (2005). The Alaska Supreme Court, in a lengthy opinion

rulings underscore the appropriate "character" of Squaxin's inherent authority here. *See John*, 982 P.2d at 752 (n. 21 below). The Squaxin Tribe is regulating retail sales made by its own enterprise, on its own member's off-reservation allotment, which is within Squaxin's own aboriginal territory, after having obtained the consent of both the allottee and the self-governing dependent Indian community whose boundaries encompass her allotment, and the approval of the U.S. Department of the Interior in its lease review. Additionally, the non-Indian consumers voluntarily enter Indian country and agree to pay a purchase price that includes the Squaxin cigarette tax. *See, e.g., Big Horn County Elec. Co-op, Inc. v. Adams*, 219 F.3d 944, 951 (2000) (tribe has authority to tax activities of non-Indians who enter consensual relationships with tribe). The "character" of Squaxin's asserted authority thus falls well within its inherent sovereign powers. *See John*, 982 P.2d at 752.

As to the fifth point, codified Squaxin Tribal law expresses Squaxin's taxing authority at Frank's Landing. The Tribe's Cigarette Sales and Tax

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examining inherent tribal sovereignty, upheld a tribal court's inherent authority to adjudicate a child custody dispute between the father, who was a member of the tribe that housed the tribal court, and the mother, a member of a different Alaska Native tribe. 982 P.2d at 743-744. The 1999 trial court decision cited as support for the above quoted statement the U.S. Supreme Court cases of *Montana v. United States*, 450 U.S. 544 (1981), and *Duro v. Reina*, 495 U.S. 676 (1990).

Code (Addendum at 7-13) is reflected in and implemented through both Squaxin's original Compact with the State and its 2008 Compact Addendum. The Code expressly authorizes Squaxin's assertion of jurisdiction on an off-Reservation allotment held by a Squaxin member. Squaxin's Code, which establishes the Tribal tax, expressly and broadly applies "to the full extent of the sovereign jurisdiction of the Squaxin Island tribe *in Indian country*." (Addendum at 8: Squaxin Code at § 6.14.030, emphasis added). "Tribal retailer[s]" subject to the tax are cigarette retailers that are wholly owned by the Squaxin Island Tribe and located "*in Indian country*." *Id.* at 8-9, Squaxin Code at § 6.14.040 (emphasis added). Squaxin's Code broadly defines "Indian country" as "consistent with the meaning given in 18 U.S.C. [§] 1151", and thus as including (1) land within the Reservation, and (2) "*[a]ll Indian allotments or other lands held in trust for a Squaxin Island Tribal member* or the Tribe, the Indian titles to which have not been extinguished, including rights of way running through the same." *Id.* at § 6.14.040 (emphasis added).

Accordingly, even if Squaxin's Addendum is declared void as Nisqually desires, Squaxin's original unamended Compact still allows it to continue collecting the Tribal cigarette tax at Frank's Landing. Squaxin's original Compact defined "Indian country" (where Squaxin could collect the

Tribal tax and forego the State tax) as including "*[a]ll Indian allotments or other lands held in trust for a Squaxin Island Tribal member*," without requiring that the allotment be located within the boundaries of Squaxin's Reservation. (ER 201 at Pt. I(8)(b); ER 204 at Pt. III(2) (emphasis added)). (Ironically, Nisqually's compact does the same thing, ER 103 at Pt. I(8)(c). At any rate, even if Nisqually obtained the relief requested – invalidation of the Squaxin Compact Addendum – Squaxin could continue operating under its pre-Addendum Compact.

Finally, Nisqually mistakenly suggests that *Miami Tribe of Oklahoma v. United States*, 927 F.Supp. 1419 (D. Kansas 1996), *aff'd.*, *Kansas v. U.S.*, 249 F.3d 1213 (10th Cir. 2001), is analogous to this situation. The problem with applying *Miami* is threefold. First, the Miami Tribe had to prove it held territorial jurisdiction within the meaning of the federal Indian Gaming Regulatory Act. 249 F.3d at 1218, citing 25 U.S.C. § 2710(b), § 2703(4). Here, however, the Squaxin Island Tribe need only demonstrate that it has sufficient authority to tax its own business.

Second, the lengthy historical record in *Miami* indicated that Congress "unambiguously intended to abrogate the Tribe's authority over its lands in Kansas . . . ." *Id.* at 1218, 1230. Here, in stark contrast, the record

demonstrates that the land in question is aboriginal territory of the Squaxin Island Tribe. *See* Statement of Facts, Section B above.

Third, the Miami Tribe unilaterally watered down its blood quantum requirement for membership through a constitutional amendment, allowing it to adopt the twenty-plus non-Indian owners of the tract as members of the Tribe. *Id*. at 1219. Here, however, there is undisputed material evidence that Theresa Bridges voluntarily took all necessary efforts to relinquish her existing Puyallup membership (no small decision). *See* Statement of Facts, Section E, above. And, Ms. Bridges voluntarily applied to the Squaxin Island Tribe for membership in conformance with the strict requirements of the Squaxin Constitution. *Id.*

C. No Federal Law Limits the Squaxin Island Tribe's Authority to Operate and Regulate The Landing.

The district court properly held that no federal law, including the 1994 Frank's Landing legislation, prohibited the Squaxin Island Tribe from entering into either the Inter-Governmental Agreement with Frank's Landing or the lease with Theresa Bridges, or exercising taxing authority over its retail store's sales on Ms. Bridges' leased allotment. (ER 8-9). "If a member of the Community wishes to allow her tribe to conduct economic activities on her trust land in Indian Country," the district court held, only Congress and not the Court can "interfere with her use and enjoyment of the

land." (ER 9). The district court found no such Congressional limitation here. *Id.*

To reach its decision, the district court closely examined the 1994 Frank's Landing legislation and found it "clear on its face." (ER 8). It resoundingly rejected Nisqually's argument that Congress had intended Frank's Landing to be a "'tribal-free' zone" that prevented any tribe from exercising authority there. (ER 5, 6). The court began with the 1994 legislation's plain language designating Frank's Landing as "self-governing," and confirmed the law as constituting "little more than a declaration of independence," whereby Congress had prohibited a tribe from imposing its authority without Frank's Landing's consent. (ER 6-7). And, the court found instructive the fact that Nisqually had tried to reach the very same result at Frank's Landing as did the Squaxin Island Tribe. (ER 6 no. 1)

Appellee Lopeman hereby incorporates by reference the arguments presented in Appellee Frank's Landing's Response Brief (Argument, Sections I.A, B and C), which describe how the plain language of the 1994 Frank's Landing law governs. Frank's Landing's Response further addresses, should the Court finds the 1994 law ambiguous, how the legislative history supports Frank's Landing's authority to contract. *See id.*

Finally, Frank's Landing's brief explains why the Court should disregard Nisqually's view of the legislative history and an agency official's interpretation as inconsistent with principles of statutory construction. *Id.* at Sections I.D.1 and 2.

Finally, Nisqually's Opening Brief focuses on the 1994 Frank's Landing legislation as the only federal law violated by Squaxin's exercise of tax jurisdiction. Nisqually's Reply Brief may more broadly raise the issue of the Squaxin Island Tribe's tribal tax authority – i.e., by claiming that Squaxin's Compact Addendum is invalid under federal law because Squaxin cannot impose a tribal tax on cigarettes sold at The Landing to nonmembers. Accordingly, Appellee Lopeman hereby incorporates the arguments in Section VI. B.2.a of Appellee Gregoire's Response Brief.

D. Congress Did Not Strip Frank's Landing of the Capacity to Contract or Ability to Be a Party in a Lawsuit.

The Court should uphold the district court's ruling that Congress expressed no intent whatsoever to divest Frank's Landing of the ability to contract with any entity besides the federal government. (ER 7-8). Nisqually's desired outcome is absurd, since Congress would have doomed

Frank's Landing to failure.[22] If Nisqually's theory is carried to its logical end, Frank's Landing could not even contract with Wa-He-Lut's teachers, administrators and school janitors. The district court recognized this absurdity in rejecting Nisqually's arguments, finding that Congress did not "strip[]" "all indicia of self-governance . . . except for the solitary, salutary right to receive handouts from the federal government." (ER 7-8 at line 25-1).

For the reasons set forth in the Response Brief of Frank's Landing (Argument, Sections I.C and II), which is incorporated herein, Congress did not do what Nisqually wishes it had done. Congress did not prohibit Frank's Landing from contracting with other entities besides the federal government. Congress did not say that the only power that Frank's Landing had was the ability to contract with the federal government under ISDEAA. Finally, Congress did not prohibit Frank's Landing from allowing a tribe to operate a business at Frank's Landing, to share the financial benefits of that business, or to exert taxing authority over that business. Accordingly, the 1994 law's plain language allows Frank's Landing to enter into a mutually-beneficial

[22] Nisqually's view also contradicts the Indian law canon of construction that requires that statutes enacted for the benefit of Indians be liberally construed in favor of the Indians. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

agreement with the Squaxin Island Tribe to raise revenue for essential governmental services.

Had Congress wanted to constrict Frank's Landing's powers as Nisqually asserts, the statutory language would look quite different. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (statutes enacted for the benefit of Indians must be liberally construed in favor of the Indians). For example, Congress would have included another limitation on Frank's Landing's powers in subsection 10(b)(2), stating that Frank's Landing could only enter into ISDEAA contracts. Congress also would have expressly prohibited Frank's Landing from allowing tribes to assert jurisdiction within its boundaries. (*See* Addendum at 2). Congress, however, did not.

E. The State Did Not Breach Nisqually's Compact.

The district court resoundingly rejected Nisqually's argument that its compact somehow created a 20-mile no-compete zone that was violated by the Squaxin Addendum. (ER 11-12). The court properly found that the State had rejected Nisqually's request for such a zone, and that any "so-called 'assurance'" would not have estopped the State from executing the Squaxin Addendum. *Id.* at 11. Moreover, the court found that the Nisqually compact's assertion of jurisdiction could not have included Frank's Landing

because of the 1994 Frank's Landing legislation.[23] *Id.* Appellee Lopeman incorporates by reference the arguments presented in Section IV.C of Appellee Gregoire's Response Brief.

F. Squaxin's Fulfillment of its Compact Responsibilities at the Landing is the Natural Result of an Approach Envisioned by Nisqually, Squaxin and the State.

Washington State cigarette tax compacts have a geographic reach that extends to all of Indian country within Washington, including off-reservation individual Indian-owned allotments. RCW 43.06.455(2). Both Nisqually and Squaxin signed compacts with the State that allocate compact responsibilities on Indian allotments based on the tribal membership of the allottee. (ER 103, Pt. I(8)(c); ER 201, Pt. I(8)(b)); Statement of Facts, Sections C, E, above.

This approach is reasonable and natural. A compact limited to on-reservation activity would be only a partial solution, leaving the rest of Indian country unaddressed. Had the State and tribes had signed agreements that only applied within Indian reservations, the State would lack a remedy for tribal member behavior occurring on off-reservation allotments. Here,

[23] The district court could have found that Nisqually abandoned its Count 4. *See Wojitas*, 477 F.3d at 926 (failure to oppose argument permits inference of acquiescence, and acquiescence operates as a waiver), for the same reason as Count 3 (see above footnote 17). Nisqually's summary judgment opposition brief failed to address Defendants' arguments on this Count.

by embracing a broader compromise solution, the State and both tribes through the compacts chose to look to the tribal affiliation of the beneficial Indian owner as the determinative factor. Doing so was logical because the allottee's tribe was in the best position to compel compliance with tax compact provisions. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980) (a tribe's civil jurisdiction over nonmember Indians is normally limited). The choice is a bargained-for benefit to the State, not a loophole. And, the benefit to the tribes is the opportunity to obtain revenues from cigarette sales in conformance with their compact provisions.

The State and Squaxin should be allowed to chart their own course based on the safeguards already present in the compacts. First, the choice to enter a compact is entirely discretionary for both the State and Squaxin. RCW 43.06.455 ("The Governor *may* enter into cigarette tax contracts concerning the sale of cigarettes."). Second, compacts have limited terms, providing all sides an opportunity to reconsider the value of the deal. RCW 43.06.455(6) (compacts have maximum term of eight years). Additionally, the pool of eligible Squaxin allottees is quite small. Squaxin, like most tribes, prohibits dual enrollment, and the Squaxin Constitution limits the eligible membership significantly (Supp. ER 60, 35). And, the number of

off-reservation trust allotments is finite. Nisqually's concern is something of a red herring anyway. After all, the opportunity to license tribal retailers on off-reservation allotments will remain in Nisqually's and Squaxin's compacts whether or not this Court accepts Nisqually's theory that Squaxin's actions are prohibited by the 1994 Frank's Landing legislation.

Finally, Nisqually's compact affords it the same opportunities and responsibilities as Squaxin. Either can own and operate a retail store on a member's off-reservation allotment. The State agreed to allow this as a matter of policy. The only distinction that matters is that Frank's Landing rejected Nisqually's offer and accepted Squaxin's. Statement of Fact, Sections D and E, above.

G. The Nisqually Tribe Lacks Standing to Seek to Invalidate the Squaxin Compact Addendum Under Counts 1 and 3.

As described below, the Nisqually Tribe lacks standing to bring Counts 1 and 3, which seek invalidation of the Squaxin Addendum because it allegedly violates, respectively, federal common law and State law.[24] (ER

[24] Nisqually completely ignored this standing argument below. Appellee Lopeman therefore asked the district court to find that Nisqually had waived and acquiesced to this argument. *See Wojitas*, 477 F.3d at 926. While the district court ruled against Nisqually on other grounds, the court may affirm summary judgment on any ground supported by the record. *Enlow*, 371 F.3d at 649.

10-11, 12-13). Appellee Lopeman raised this argument before the district court, which did not reach it.

The standing doctrine stems directly from Article III's case or controversy requirement, and implicates federal courts' subject matter jurisdiction. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*. 528 U.S. 167, 185 (2000). A plaintiff must demonstrate standing "for each claim he seeks to press" and for "each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quoting *Friends*, 528 U.S. at 185). The plaintiff bears the burden of proof for establishing standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

The minimum constitutional requirements for standing are threefold. First, and the focus here, the plaintiff must have suffered an "injury in fact," i.e., an invasion of a *"legally protected interest*" that is (1) concrete and particularized, and (2) actual or imminent, and not conjectural or hypothetical. *Lujan*, 504 U.S. at 560-561 (emphasis added). The second and third requirements demand showing that, respectively, a causal connection exists between the injury and conduct complained of, and the injury will likely be "redressed by a favorable decision." *Id*. at 561.

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

Nisqually seeks to void a contract to which it is not a party. It lacks a "legally cognizable" interest in the Squaxin Compact Addendum. Nor can Nisqually show that it was an intended-third party beneficiary of the Addendum since the Squaxin Compact expressly states that it "does not create any third party beneficiaries" (heading, capital letters omitted), and "No third party shall have any rights or obligations under this Compact." (ER 215 at Pt. XIII(3)). So, Nisqually seeks to undo the Addendum, a contract that afforded it no rights whatsoever. *See*, *e.g.*, *Willis v. Fordice*, 850 F.Supp. 523 (S.D. Miss. 1994), *aff'd* 55 F.3d 633 (5th Cir. 1995) (holding that a member of the Mississippi Band of Choctaw Indians lacked standing to seek to invalidate his tribe's state-tribal gaming compact and to stop construction of a casino on tribal trust lands). Moreover, Nisqually

suffered no financial or other harm due to the Addendum. Frank's Landing's Response Brief, Argument, Section VI.

This Court's holding on a Rule 19 joinder question also helps shed light on why Nisqually lacks standing to bring claims that challenge the validity of the Squaxin Addendum under federal common law and State law. In *Cachil Dehe Band of Wintun Indians v. California*, 547 F.3d 962 (9th Cir. 2008), the court rejected the state's argument for joining all other California gaming tribes that would likely suffer harm from its ruling. The state argued that the unnamed tribes had virtually identical compacts to the plaintiff tribe. *Id.* at 971-972. The court held that the absent tribes had to have a "legally protected interest" that "could be protected if it actually "arises from terms in bargained contracts," which they did not. *Id.* at 971.

As described above, neither the Squaxin Addendum nor Compact grants Nisqually any rights to challenge it. (ER 121, 200-217, Squaxin Addendum and Compact, respectively). Nisqually thus lacks standing to bring Claims 1 and 3.

H. The *Ex Parte Young* Doctrine Was Incorrectly Applied.

Appellee Lopeman contends that the Squaxin Island Tribe is an indispensable party that cannot be joined due to the Tribe's sovereign immunity, and that his joinder as a defendant under *Ex Parte Young* was

improper. *See Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1495 n. 3 (D.C. Cir. 1995) (Ninth Circuit has a duty to raise *sua sponte* the issue of whether a party is an indispensable party). The district court ruled against defendant Lopeman on this issue. (Supp. ER 42-49). The Court reviews *de novo* a district court's legal determination of whether *Ex Parte Young* relief is available. *South Carolina Wildlife Federation v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008).

On the Squaxin Island Tribe's motion to dismiss,[25] the district court agreed with Squaxin that the Tribe was a necessary and indispensible party and that the named Squaxin parties could not adequately represent Squaxin's interests. (Supp. ER 42-47). The district court, however, overcame that impediment by applying the *Ex Parte Young* doctrine to cure Squaxin's indispensability. (Supp. ER 45-46). The court incorrectly reasoned that if Nisqually succeeded, the Squaxin Island Tribe's authority to tax and contract would be "impaired but not completely divested." (Supp. ER 46 at line 9).

The district court misapprehended the law. Generally, federally recognized tribes are immune from suit unless they have clearly waived immunity. *Kiowa Tribe v. Manufacturing Technologies, Inc*., 523 U.S. 751, 754-755 (1998); *Dawavendewa v. Salt River Project Agricultural*

[25] The Tribe was granted limited intervention in order to bring the motion. (ER 280 at Dkt. No. 81).

Improvement and Power District, 276 F.3d 1150, 1159 (9th Cir. 2002). This immunity extends to a tribe's officials, employees, and wholly-owned businesses acting within the scope of their authority. *Id.* A narrow exception exists under the *Ex Parte Young* doctrine, whereby tribal officials may be sued in their official capacities to prospectively enjoin an allegedly illegal activity under federal law. *Ex Parte Young*, 209 U.S. 123 (1908).

This Court has found the *Ex Parte Young* exception inapplicable, however, if the suit would "strip[]" a government of a "broad range of powers associated with its control" of land. *Aqua Caliente Band v. Hardin*, 223 F.3d 1041, 1047 (9th Cir. 2000) (applying the *Ex Parte Young* exception to allow California's lawsuit against Tribe over taxation jurisdiction). If so, the lawsuit is essentially a "suit against the [government] itself." *Id.* The question is not only whether the suit implicates a core area of sovereignty, but whether the relief requested would be so much of a *"divestiture* of the [government's] sovereignty as to render the suit as one *against the [government] itself.*" *Agua Caliente*, 223 F.2d at 1048 (emphasis in original, substituting "government" for "state").

Here, the court justified applying *Ex Parte Young* based on its reasoning that if Nisqually succeeded, the Squaxin Island Tribe's authority to tax and contract would be "impaired but not completely divested." (Supp.

ER 46 at line 9). The district court's reasoning was incorrect. Not only would a judgment for Nisqually prevent the Squaxin Tribe from exercising taxing authority over its own business at Frank's Landing, it would also invalidate Squaxin Tribe's leasehold interest,[26] *and* negate the Tribe-State Compact Addendum, *and* strip the Squaxin Tribe of jurisdiction over its own member and her allotment, *and* end the Tribe's ability to contract on a government-to-government basis with another self-governing entity (Frank's Landing), *and* bring to a halt a lucrative source of governmental revenues dedicated to the Squaxin community. Moreover, unlike *Agua Caliente*, where this Court recognized federal courts' "long tradition" of exercising jurisdiction over tribal challenges to state taxation, 223 F.3d at 1049, there is no similar history here. Additionally, it is clear from "the essential nature and effect" of Nisqually's pleaded facts[27] and requested relief that the Squaxin Tribe is the "real, substantial party in interest." *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992) (quoting *Ford Motor Co. v.*

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[26] In *Dawavendewa*, this Court rejected the appellant's attempt to "circumvent the Nation's sovereign immunity" by joining tribal officials, recognizing that, [a]t bottom, a lease at issue is between" the power district and the Navajo Nation, and that the relief sought "would operate against the Nation as signatory to the lease." 276 F.2d at 1161.

[27] Nisqually's original Complaint ascribed no acts to any particular Squaxin officials. *See* ER. Nisqually's amended complaint stated only that former Tribal Chair Peterson had signed the State-Squaxin Compact Addendum. (ER 255 at ¶ 30).

Dep't of Treasury, 323 U.S. 459, 464 (1945)). Accordingly, the effect of the judgment would be "to restrain the Government from acting," "expend upon the [Tribe's] treasury or domain, and "interfere with the public administration." *Id.* at 1320. Accordingly, the district court should have dismissed Nisqually's lawsuit.

CONCLUSION

The Landing agreements, besides meeting the letter and spirit of the applicable laws, fulfilled important needs of the respective entities. For the State, the venture resolved a jurisdictional taxing uncertainty in a unique part of Indian country, and guaranteed that cigarette monies would be applied to "essential governmental services" as required under State law.

Frank's Landing, in turn, received a continuing source of revenue for Wa-He-Lut.[28] The district court recognized Frank's Landing's interests when denying Nisqually's motion for preliminary injunction: "Because the Community's only source of revenue for the school are federal grants and the agreement with Squaxin, a preliminary injunction would significantly hinder the operation of the Wa-He-Lut school and the education of many local Indian children." (Supp. ER 54 at lines 5-8).

[28] The Landing venture also provided allottee Theresa Bridges rent for the use of her land.

Finally, The Landing venture also serviced many Squaxin interests : i.e., helping to fund Wa-He-Lut; sustaining Frank's Landing's viability and independence; generating revenues for Squaxin Tribal governmental services; supporting a Squaxin member and the other members of Frank's Landing who are all long-time advocates of treaty rights (particularly the Treaty of Medicine Creek, which encompasses Nisqually, Squaxin and Frank's Landing); and providing wholesale and retail markets for the Tribe's products.

Respectfully submitted this 1st day of March, 2010 by

THE SQUAXIN ISLAND LEGAL DEPARTMENT

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STATEMENT OF RELATED CASES

Under Circuit Rule 28-26, Defendant Lopeman states that he is not aware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the response brief is Proportionately spaced, has a type of 14 points or more and contains 9,205 words.

s/ Kevin R. Lyon
Kevin R. Lyon, WSBA # 15076

ADDENDUM

TO RESPONSE BRIEF OF APPELLEE DAVID LOPEMAN

Table of Contents for Addendum

to Response Brief of Appellee David Lopeman

(1) by striking "Payments" in paragraph (4)(B) and inserting in lieu thereof "Except as otherwise provided in paragraph (5), payments",

(2) by redesignating paragraphs (5) and (6) as paragraphs (6) and (7), respectively, and

(3) by inserting after paragraph (4) the following new paragraph:

"(5)(A) The Tribal Council may accelerate the payment of the aggregate sum of $8,000 to those members of the tribe certified under paragraph (3) who—

"(i) are certified by a physician to be—

"(I) terminally ill, or

"(II) at least 50 percent permanently disabled, or

"(ii) are at least 60 years of age.

"(B) Notwithstanding any other provision of this Act, the Tribal Council may use interest accrued on the Investment Fund for the purpose of making accelerated payments under subparagraph (A)."

Health and medical care.

Washington. Contracts. Grants.

SEC. 10. The Frank's Landing Indian Community in the State of Washington is hereby recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and is recognized as eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act for such services, but the proviso in section 4(c) of such Act (25 U.S.C. 450b(c)) shall not apply with respect to grants awarded to, and contracts entered into with, such Community.

Approved November 5, 1987.

LEGISLATIVE HISTORY—H.R. 2987:

HOUSE REPORTS: No. 100-250 (Comm. on Interior and Insular Affairs).
SENATE REPORTS: No. 100-186 (Select Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 133 (1987):
Aug. 5, considered and passed House.
Oct. 1, considered and passed Senate, amended.
Oct. 22, House concurred in Senate amendments.

Public Law 103-435, 108 STAT. 4569

[SEC. 8]: Recognition of Indian Community.

[H.R. 4709 [October 6, 1994] Amending Section 10 of the Indian Law Technical Amendments of 1887 [Public Law 100-153 (Nov. 5, 1987)] – to read as follows:]

SEC. 10. (a) Subject to subsection (b), the Frank's Landing Indian Community in the State of Washington is hereby recognized --

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

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

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

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

(3) Notwithstanding any other provision of law, the Frank's Landing Indian Community shall not engage in any Class III gaming activity as defined in section 3(8) of the Indian Gaming Regulatory Act of 1988 (25 U.S.C. 2703(8)).

Approved by the President of the United States: November 2, 1994

Note: Pl100-153 & PL 103-435 compiled together.

Washington's Cigarette Compacting Laws

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.

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.

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.

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.

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 moneys 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))

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