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

APPELLEE LOPEMAN'S SUPPLEMENTAL BRIEF ON APPELLANT NISQUALLY INDIAN TRIBE'S STANDING TO BRING CLAIMS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

I. INTRODUCTION

This Supplemental Brief examines whether appellant, the Nisqually Tribe ("Nisqually"), has standing for the claims it asserts and the relief it seeks.[1] We note that Nisqually's lack of standing was presented to the District Court but it did not decide the issue. *See, e.g.,* Dkt. No. 130-3: Lopeman Mot. for Summ. Judg. at pp. 22-24; Dkt. No. 132: Frank's Landing Mot. for Summ. Judg. at pp. 15-19.

II. STATEMENT OF FACTS

The facts are presented in the Appellees' briefs. In particular, Appellees direct the Court's attention to: (1) the Rule 30(b)(6) deposition of a Nisqually official who stated that sales at Nisqually actually increased after The Landing re-opened; and (2) Nisqually's attempt, after the conclusion of discovery, to repair that testimony with a declaration that contradicted the testimony. FLER 103-104: Dep. Eletta Tiam at pp.70-75, ER 23-27: Decl. Eletta Tiam. As to injury, no other facts are before the Court.

[1] Appellee Lopeman joins in the briefs of the other Appellees that demonstrate that Nisqually has no private right of action under either federal or state law.

III. ARGUMENT

A. Article III Standing Requirements

Article III of the Constitution limits federal court jurisdiction to a justiciable "case or controversy." U.S. Const. Art. III, § 2. For a federal court to possess jurisdiction over a matter, the party bringing the suit must have standing. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000). A plaintiff bears the burden of demonstrating 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). Justiciability, as a jurisdictional issue, may be raised at any time. *DaimlerChrysler Corp* at 547 U.S. at 340.

Three elements must be met to satisfy Article III standing. First, a 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. *Id.* at 344. Second, a causal connection must exist between the injury and conduct complained of, so that the injury is fairly traceable to the challenged action and not the result of the independent action of some party not before the court. *Id*. Third, it must be likely, as opposed to merely speculative, that the injury will be "redressed by

a favorable decision." *Id.* Nisqually must demonstrate all three of these requirements and has failed to establish any of them.

In addition to the Article III constitutional requirements, courts apply three "prudential" principles: (1) a litigant is generally prohibited from asserting the rights of another party; (2) a litigant is barred from adjudicating "generalized grievances"; and (3) a litigant's claims must fall with the "zone of interests" protected by the statute or constitutional provision invoked. *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002). As demonstrated below, Nisqually does not meet the requirements for standing and so their appeal must be dismissed.

B. Nisqually Suffered No Injury in Fact.

1. Nisqually has not identified a legally protected interest.

It is settled law that "[n]o 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). The "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 seems to assert two identifiable interests that are germane to this suit: (1) being the exclusive seller of State tax-exempt cigarettes in the

Nisqually Basin, free from all competition; and (2) preventing anyone else from selling State tax-exempt cigarettes at Frank's Landing. *See* ER 256: First Amd. Complaint at p.10, ¶ 34; Dkt. No. 139: Plaintiffs Opp. To Def. Mot. Summ. Judg. at. p.16.

Importantly, the mere fact that Nisqually has asserted an interest is not enough to satisfy the requirements of standing. Instead, Nisqually must satisfy that its interest is "protected by statute or otherwise." *See Cox*, 992 F.2d at 1182. In other words, no legal source that Nisqually mentions – Nisqually's Compact, the 1994 Frank's Landing statute, Squaxin's Compact and Addendum, federal common law, or the State statutes authorizing compacts (RCW 43.06.450-460) – protects Nisqually's declared interests. Each legal source is addressed in turn below.

Nisqually's Compact merely secures its right to sell and tax cigarettes in "Indian Country," defined to include trust and restricted lands held by individual Indians and Nisqually "in the Nisqually River basin" "*except as otherwise provided by law*." ER 103 at Part I (8) (emphasis added). Since Congress in 1994 confirmed that Frank's Landing is "self-governing" and "not subject to the jurisdiction of any federally recognized tribe," Nisqually's Compact does not create or protect any right to prohibit sales at Frank's Landing. *See* Pub. L. No. 103-435, § 8.

The 1994 Frank's Landing statute recognizes the self-governing authority of Franks Landing, but creates no rights in third parties. *See id.* The Squaxin Compact and Addendum, to which Nisqually is not a party, expressly disclaim any intention to create third-party beneficiaries. ER 215 at Pt. XIII(3). Nisqually cannot find protection for its interests there. Nisqually vaguely alleges violations of the Supremacy Clause, the State compact statute, and federal law. ER 257,258: Amd. Compl. at pp. 11, 12, ¶ 38, ¶ 45. Nowhere, however, has Nisqually explained how these laws protect its asserted interests. *See* Appellee Gregoire's Supplemental Brief re private right of action under state law; Appellee Frank's Landing's Supplemental Brief re private right of action under federal law.

Moreover, courts have shown a heightened suspicion of plaintiffs asserting a "right" to undo the tax status of others. *See*, *e.g.*, *Am. Society of Travel Agents v. Blumenthal,* 566 F.2d 145, 151 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 947 (1978) (travel agent association lacked standing to contest tax treatment of third party § 501(c)(3) exempt organizations offering travel programs); *Allen v. Wright*, 468 U.S. 737 (1984) (public school parents lacked standing to challenge tax exempt status of racially discriminatory private schools); *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26 (1975) (indigents lacked standing to contest IRS ruling allowing

favorable tax treatment to hospitals providing limited services to indigents); *McCoy v. E. Texas Medical Center*, 388 F.Supp.2d 760, 767 (E.D. Tex. 2005) (indigent patients of hospital lacked standing to assert breach of "contract" granting § 501(c)(3) tax exempt status to hospital). The Supreme Court has concluded that these considerations that compel the dismissal of challenges to the federal tax status of third parties apply with equal force to challenges to state excise tax exemptions. *DaimlerChrysler*, 547 U.S. at 342-43 (Ohio taxpayers lacked standing to contest state franchise tax credit granted to auto manufacturer). Given that Nisqually's sales actually *increased* after Squaxin sales began at Frank's Landing (*see* discussion below), Nisqually has no more standing than any other third party to contest Squaxin's tax status, and its appeal should be dismissed on that basis.[2]

[2] Lower courts have suggested that the only viable route to asserting competitor standing on the basis of a tax preference is to assert that a similarly situated competitor is receiving a tax benefit denied the plaintiff; in other words to make one's own tax status the issue. *See Fulani v. Brady*, 935 F.2d 1324, 1328 (D.C. Cir. 1991), *cert denied*, 502 U.S. 1048 (1992) (but compare *Fulani v. League of Women Voters*, 882 F.2d 621 (2d Cir. 1989). That is not the case here. In fact, Nisqually has exactly the same tax rights, obligations, and opportunities as Squaxin does under its compact. ER 101-119: Nisqually Compact; ER 200-217: Squaxin Compact. No allegation has been made that the State has denied Nisqually any particular tax treatment related to Nisqually's sale of cigarettes.

2. Nisqually's injury is neither actual nor imminent.

Nisqually alleges that the cigarette sales at Franks Landing "come at the expense of Nisqually." ER 256: Amended Compl. at p.10, ¶ 34. Even assuming *arguendo* that Nisqually has a legally protected interest, Nisqually has not demonstrated any financial harm at all – as its cigarette sales *actually increased* – to establish "injury in fact."

Nisqually's own records reveal that it sold significantly more cigarettes in 2008 than in 2007. During 2007, immediately prior to the January 2008 opening of the Landing store, Nisqually sold $8,182,488 worth of cigarettes. Lopeman Supp. ER 5 at ¶ 2; FLER 103: Tiam Dep. at p.70, lines 16-19. But in 2008 the total monetary amount of cigarettes sold jumped by more than $1.3M to a total of $9,445,026. *Id.* at lines 22-71. Nisqually's Chief Financial Officer herself confirmed that Nisqually's tax calculations make clear that sales increased from 2007 to 2008. *Id.* at p.72, lines 6-9. Thus, Nisqually cannot show loss of business revenue and lacks standing. Ms. Tiam's later declaration directly contradicted her sworn deposition testimony, and this Court should not consider it. ER 25-27.

C. <u>Nisqually has not Demonstrated any Causal Connection Between So-Called Injury and the Disputed Conduct</u>.

There must be a causal connection between the injury and the conduct complained of – here, a link between economic losses at Nisqually to the

Addendum or the selling of State tax-exempt cigarettes. Nisqually's own testimony showed no evidence of a link between cigarette sales at Nisqually to compact taxed cigarettes sales at Franks Landing. FLER 100: Tiam Dep. at p.61, lines 8-11. The disadvantage Nisqually alleges, but fails to demonstrate, is one unrelated to the Compact: the sale of cigarettes to which the Compact "does not apply." ER 203: Squaxin Compact at Part II, (3)(c). The Compact does not authorize the sale or create the competitive advantage that Nisqually complains of – there is no link.

D. Nisqually's Alleged Injury is Unlikely to be Redressed by a Favorable Decision.

If the Court awards declaratory relief (i.e., declaring the Addendum invalid) or injunctive relief (i.e., enjoining any further action to implement the Addendum), at best, such relief will preclude only the sale of Squaxin-taxed cigarettes. Such relief would not and could not prohibit the sale of all cigarettes, and the consequences of such an action are unknown and speculative. Further, Squaxin's Compact, even without the Addendum, allows it to continue operating the store at The Landing because it is located on a Squaxin member's allotment. Lopeman Resp. Brf. at p. 17.

E. Nisqually Lacks "Prudential" Standing.

First, Nisqually inappropriately asserts the "right" of Frank's Landing, or more accurately the lack thereof, by arguing that Frank's Landing has no

right to allow any tribe to exercise regulatory jurisdiction there. Nisqually's assertions as related to Frank's Landing's right do not support Nisqually's standing. *See Devlin*, 536 U.S. at 7.

Second, Nisqually's claim is a "generalized grievance," akin to that of a disgruntled bidder who did not present the winning bid. *See id.* Nisqually previously proposed to do exactly what Squaxin is doing: to enter into a business arrangement with Frank's Landing under its compact. Lopeman Supp. ER 22: Dep. Henry Adams at p.74:6-13; ER 6: Order at p.6, n.1. Having failed, Nisqually offers a complaint that lacks any precision in identifying the interest that it seeks to protect, the statute or constitution that protects it, or the connection between its alleged injury and the Addendum or sales of state tax-exempt cigarettes at Frank's Landing. Nisqually speaks with incendiary rhetoric – but without the necessary specificity. Thus with respect to the injury alleged, Nisqually presents at best a generalized grievance.

Finally, Nisqually's claim fails to fall within the "zone of interests" protected by the laws that it has invoked. *See Devlin,* 536 U.S. at 1. Appellee Gregoire's Supplemental Brief re private right of action under state law; Appellee Frank's Landing's Supplemental Brief re private right of action under federal law (showing the statutes in question were not meant to

protect the "interests" advanced by Appellant). Accordingly, Nisqually lacks standing under all three "prudential" standing considerations.

IV. CONCLUSION

For the above reasons, the Court should find that Nisqually has not met the jurisdictional standing requirements.

Respectfully submitted this 8th day of July, 2010 by

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