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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

TERRY TONASKET, dba STOGIE SHOP; and DANIEL T. MILLER, an individual,

Plaintiffs,

v.

TOM SARGENT, TOBACCO TAX ADMINISTRATOR, AND THE COLVILLE BUSINESS COUNCIL; MICHAEL O. FINLEY, CHAIRMAN; HARVEY MOSES JR.; SYLVIA PEASLEY; BRIAN NISSEN; SUSIE ALLEN; CHERIE MOOMAW; JOHN STENSGAR; ANDREW JOSEPH; VIRGIL SEYMOUR SR.; MIKE MARCHARD; ERNIE WILLIAMS; DOUG SEYMOUR; SHIRLEY CHARLEY; RICKY GABRIEL; and THE COLVILLE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, A FEDERALLY RECOGNIZED INDIAN TRIBE,

Defendants

No. CV-11-073-LRS

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED SUPPLEMENTAL COMPLAINT

(oral argument requested)

Hearing noted:

Thursday, Oct. 13, 2011
at 2:30 p.m.
Yakima, Washington

INTRODUCTION

Defendants, who consist solely of the Colville Confederated Tribes, a federally-recognized Indian tribe ("CCT" or "Tribes"), CCT's governing body and tribal officials, submit this memorandum in support of their motion to dismiss this action under Fed. R. Civ. P. 12(b)(1) and (7). The Court lacks subject-matter jurisdiction because defendants have sovereign immunity from suit which has not been waived. In addition, plaintiffs failed to – and cannot – join the State of Washington as required under Fed. R. Civ. P. 19.

Plaintiffs' convoluted amended complaint (ECF No. 40) is essentially a challenge to a 2009 Cigarette Tax Compact between the Tribes and the State of Washington ("Compact"), which is attached to the original Complaint (ECF No. 1, at 59 *et seq*.).[1] The Compact is a tax agreement which provides in relevant part that tribally-licensed cigarette retailers must acquire cigarettes from wholesalers who commit to pay a tribal tax at the wholesale level equal to state wholesale and sales taxes which would be applicable off-reservation. The purpose and effect of the Compact, and the Tribes' Cigarette Code, is to ensure that cigarettes sold on and off reservation to non-members bear essentially the same total tax burden. *See*

[1] *See* Order re: Motion to Disqualify Counsel, ECF No. 39, at 5 ("[T]he instant matter involves the legality of a 2009 cigarette tax compact . . . .")

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Second Declaration of Tom Sargent, submitted contemporaneously herewith, at 1-2, ¶ 2; Compact, § 6.2.

This is a frivolous lawsuit. Plaintiffs' attorney is well-aware (due to losses in related cases) that the Court has no jurisdiction over this action, and that the State is an indispensable party but cannot be joined, because the State, too, is immune from suit. *Matheson v. Gregoire*, 139 Wash. App. 624 (2007) (similar claims relating to Puyallup cigarette compact). Furthermore, the amended complaint includes numerous mischaracterizations of the Compact and the Code. For example, contrary to plaintiffs' assertions, the Tribes assess no tax on, and collect no tax from cigarette retailers, including plaintiff Tonasket, or retail cigarette purchasers, including plaintiff Miller. Second Sargent Decl., ¶ 3. The Tribes do not set wholesale prices charged by any wholesaler to any retailer, or retail prices charged by any retailer to any customer. *Id.*, ¶ 4. The Tribes do not require that wholesalers pass on the tribal tax to retailers, or that any tax be passed on to the consumer. *Id.*, ¶ 5. The Compact and Code do not limit wholesalers to those approved by the State. The Compact and Code permit tribally-licensed retailers to obtain cigarettes from "self-certified wholesalers" and "self-certified tribal wholesalers" in addition to state-licensed wholesalers. *Id.*, ¶ 6; Compact, §§ 7.1, 14. These rules also apply to retail smokeshops operated by the Colville Tribal Enterprise Corporation ("CTEC"), a tribally-chartered corporation wholly

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owned by CCT, which operates the recently-opened retail outlet referenced in paragraph 19 of the amended complaint. Second Sargent Decl., ¶ 7.

While the merits of this case are not currently before the Court, plaintiffs have failed to state any valid claim. Plaintiff Tonasket is a CCT member operating a CCT-licensed smokeshop on on-reservation trust land, *see* First Sargent Decl. (ECF No. 12-1) at 2, ¶ 3, and is subject to the inherent authority of CCT to regulate the conduct of its members. *Okla. Tax Com'n v. Potawatomi Ind. Tribe*, 498 U.S. 505, 509 (1991) ("*Potawatomi*"). Although CCT does *not* tax cigarette sales at retail, including sales between plaintiffs Tonasket and Miller, *see* Second Sargent Decl., ¶ 3, tribes *can* regulate on-reservation commerce between members and non-members, especially commerce occurring on trust lands. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 2011 WL 2279188, at *7 (9th Cir. June 10, 2011). In particular, tribes *can* tax cigarette sales involving non-members. *Washington v. Confed. Tribes of Colville Ind. Reservation*, 447 U.S. 134, 152 (1980) ("*Colville*"). Furthermore, tribes and states are explicitly permitted under Supreme Court precedent to enter into agreements relating to cigarette taxation. *Potawatomi*, 498 U.S. at 514 ("States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax"). Finally, there is no federal right for on-reservation cigarette outlets to market a tax exemption, which is the gravamen of the amended complaint. *Colville*, 447 U.S. at

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154-55.

However, at this point, the Court need not evaluate plaintiffs' claims on the merits because the amended complaint continues to suffer from two fatal threshold jurisdictional defects. First, the long-standing doctrine of tribal sovereign immunity bars plaintiffs from suing CCT or its officials. *See, e.g., Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998) ("*Kiowa*"). Second, the State of Washington continues to be an indispensable party to this action but has not been joined. While, in amending their complaint, plaintiffs attempted to minimize their allegations against the State, plaintiffs continue to seek to "decimate" the Compact, in which the State (as well as CCT) has a major interest. *See Dawavendewa v. Salt R. Project Agric. Imp. & Power Dist.*, 276 F.3d 1150, 1156-57 (9th Cir. 2002). If the Court were to grant plaintiffs' requested relief without the State's involvement, CCT would be put in violation of the Compact, placing CCT and licensed outlets at risk of direct efforts by the state to enforce state tax laws on-reservation. CCT respectfully asks the Court to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (7).

ARGUMENT

I. The Tribes' Sovereign Immunity Deprives the Court of Subject-Matter Jurisdiction.

A. CCT Is Immune From Suit.

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CCT is a federally-recognized sovereign Indian tribe with authority over its members and territory. 75 Fed. Reg. 60810 (2010). The Supreme Court has repeatedly held that tribes are immune from suit unless that immunity has been expressly waived by the tribe or unequivocally abrogated by Congress:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . [W]ithout congressional authorization, the Indian Nations are exempt from suit . . . .
>
> It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1976).

The Court expressed concern that even putting tribes to the burden and expense of defending themselves from suit would "impose serious financial burdens on already financially disadvantaged tribes." *Id.* at 64. Sovereign immunity defenses are thus typically addressed first, as tribal sovereign immunity confers not just immunity from liability but from suit. *Id.*; *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1050 (11th Cir. 1995), *cert. denied*, 529 U.S. 1018 (2000) ("Tribal sovereign immunity would be rendered meaningless if a suit against a tribe asserting its immunity were allowed to proceed to trial").

Santa Clara Pueblo remains good law. The Supreme Court continues to uphold tribal sovereign immunity, despite attacks, reasoning that Congress will abrogate or modify tribal immunity if and when it sees fit:

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> Congress has always been at liberty to dispense with such tribal immunity or to limit it. . . . Instead, Congress has consistently reiterated its approval of the immunity doctrine. . . . Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Potawatomi, 498 U.S. at 510. The scope of tribal sovereign immunity is broad, extending to commercial as well as governmental activities of tribes, and even off-reservation activities:

> Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.

Kiowa, 523 U.S. at 760. Here, the Compact is an exercise of CCT's governmental authority, CCT's tax applies only to on-reservation wholesale deliveries of cigarettes, and the tax is to be used solely for essential governmental functions. Compact, § 25.1. Plaintiffs describe CCT as a market competitor, and state that the Compact was executed off-reservation, but under *Kiowa*, neither point is relevant. *Kiowa*'s strong protection of sovereign immunity for tribes and tribal officials continues to be cited regularly in this Circuit. *E.g.*, *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

B. CCT Has Not Waived Its Immunity From Suit.

While the core of the doctrine of tribal sovereign immunity is clear, recent case law primarily addresses the scope of tribal waivers, and confirms that any

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such waiver must be explicit. *Potawatomi*, 498 U.S. at 509; *Santa Clara Pueblo*, 436 U.S. at 58; *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1398 (9th Cir. 1993); *Cook*, 548 F.3d at 725; *Allen*, 464 F.3d at 1047. Plaintiffs' implied waiver claims are inconsistent with extensive binding precedent.

Plaintiffs identify no express waiver at all, much less through an "unequivocal expression." *See* ECF No. 30 at 3-4 (CCT's memorandum opposing plaintiffs' motion to amend complaint). Plaintiffs' suggestion that the Tribes' entry into the Compact constitutes a waiver is explicitly contradicted in the Compact's first substantive provision:

> Nothing in this Compact shall be construed as a waiver, in whole or in part, of either party's sovereign immunity.

Compact, § 1.1. The Compact also provides that "[n]o third party shall have any rights or obligations under this Compact." *Id.*, § 2. Rather than waiving the Tribes' immunity, it unambiguously preserves the Tribes' (and State's) immunity from suits by third parties. Plaintiffs' theory that entry into an agreement which expressly *preserves* tribal sovereign immunity somehow *waives* it is typically given short shrift by the courts. *See, e.g.*, *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1304-05 (10th Cir. 2001). This very argument – made by other smokeshop owners represented by plaintiffs' counsel – has already been rejected in a similar suit seeking invalidation of a similar tribal-state cigarette tax

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agreement. *Matheson*, 139 Wash. App. at 629-33 (Puyallup compact).

C. CCT's Immunity Extends to Claims Against Tribal Officials.

Tribal sovereign immunity extends to tribal agencies and officials. In *Santa Clara Pueblo*, *supra*, the Supreme Court acknowledged that the threshold issue in the case was whether suit could be proceed "against a tribe or its officers" and concluded it could not. 436 U.S. at 52. Other courts, including the Ninth Circuit, have confirmed that tribal sovereign immunity extends to tribal officials acting in their official capacity. *Cook*, 548 F.3d at 726-27; *Linneen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *Ord. 59 Ass'n v. Dep't of Interior*, 163 F.3d 1150, 1154 (10th Cir. 1998). In such cases, "the sovereign entity is the 'real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'" *Cook*, 548 F.3d at 727. A plaintiff cannot circumvent tribal immunity "'by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity.'" *Id.*; *Snow v. Quinault Ind. Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983). "The principles that motivate the immunizing of tribal officials from suit – protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity merely by naming a tribal official – apply just as much to tribal employees when they are sued in their official capacity." *Cook* , 548 F.3d at 727. All allegations against individuals in plaintiffs' amended complaint go to

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their capacity as tribal officials.

The courts are particularly careful not to allow suit against an agency or official where the relief sought would in effect be against the government itself, so that the result, if plaintiff prevails, would be to require action by the sovereign.

> In . . . such [a] case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual office. If it is, then the suit is barred . . . because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction.

Larson v. Domestic & Foreign Commerce Corp. 337 U.S. 682, 688 (1949) (regarding federal official); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). Such scrutiny is to ensure that a plaintiff is not circumventing sovereign immunity by naming an individual to accomplish the same result that would be barred in a suit against the sovereign.

In *Ex Parte Young*, 209 U.S. 123 (1908), the Supreme Court created a legal fiction to permit a narrow exception to sovereign immunity for prospective injunctive relief against officials of an otherwise immune sovereign to prevent them from wrongfully impairing federally-protected rights. *Virginia Office for Prot. and Advocacy v. Stewart*, No. 09-529, 2011 WL 1466121 at *6 (U.S. Apr. 19, 2011). The negative injunction is in essence a preemptive assertion of a defense that would otherwise be available in enforcement proceedings. *Ex Parte Young*, 209 U.S. at 165-66; *see also* Harrison, *Ex Parte Young*, 60 Stan. L. Rev. 989, 997-

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99 (2008).

The *Ex Parte Young* exception cannot save plaintiffs' claims for at least three reasons. First, *Ex Parte Young* does not apply because plaintiffs seek retrospective relief (refunds and money damages, including treble damages – *see* Amended Complaint at 48-49, 52-53) as well as prospective relief. The *Ex parte Young* exception is limited to prospective relief. *E.g.*, *Duke Energy Trading and Marketing, L.L.C. v. Davis*, 267 F.3d 1042, 1052 (9th Cir. 2001); *Cardenas v. Anzai*, 311 F.3d 929, 934-35 (9th Cir. 2002); *see also Native American Distributing v. Seneca-Cayuga Tobacco Co*, 546 F.3d 1288, 1296-97 (10th Cir. 1998) (where suit is brought against agent or official of a sovereign, to determine whether sovereign immunity bars the suit, question is whether sovereign is the real, substantial party in interest, which turns on relief sought by plaintiffs).[2] The amended complaint seeks impermissible relief (refunds, settlement act payments and damages) beginning with its caption.

Second, the Supreme Court has questioned whether the *Ex Parte Young*

[2] The *Native American Distributing* court ultimately did not decide whether sovereign immunity extended to the named officials because the court determined that the Sherman and Robinson-Patman Act claims at issue were invalid as a matter of law. 546 F.3d at 1297-99.

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exception may be used to infringe on fundamental aspects of sovereignty. *See Virginia Office*, 2011 WL 1466121 at *6-7 (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997)). There is direct Supreme Court precedent indicating that CCT's right to impose the taxes at issue in this case is a fundamental aspect of the CCT's sovereignty. *See Colville*, 447 U.S. at 152 ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a *fundamental attribute of sovereignty* which the tribes retain unless divested . . .") (emphasis added).

Third, as detailed more specifically below, *Ex Parte Young* does not apply because plaintiffs have failed to offer any credible basis for concluding that the Compact violates any federally-protected rights.

1. Plaintiffs Have No Federal Right to Evade the Tribes' Cigarette Tax on Wholesalers.

Neither plaintiff is taxed by the Tribes, and neither plaintiff has any right under federal law to challenge a tax on wholesalers. Plaintiffs' claim that the incidence of the tax is on the consumer (Amended Complaint, ECF No. 40, at 4) is unsupported by the Compact or the Tribes' Cigarette Code, which provide for a tribal tax on the wholesaler. Second Sargent Decl., ¶ 2; Compact, §§ 4.6, 6.2.1. Because wholesalers are not required to pass the tax to downstream purchasers, the legal incidence of the tax remains on the wholesaler. *Wagnon v. Prairie Band*

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Potawatomi Nation, 546 U.S. 95, 102-03 (2005).

Even if the incidence of the tax *were* on the retail transaction, such a tax would not violate any federal right. As mentioned above, the Supreme Court expressly held that CCT *has* jurisdiction to collect tribal taxes from non-Indian purchasers of cigarettes from member-owned smokeshops, particularly those located on trust land:

> At the outset, the State argues that the Colville . . . Tribes have no power to impose their cigarette taxes on nontribal purchasers. We disagree. The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.

Colville, 447 U.S. at 152; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). Plaintiffs ignore this binding precedent. Plaintiffs cannot vindicate non-existent federal rights under *Ex Parte Young*.

2. Plaintiffs Have No Right Under Federal Antitrust Law to Set Aside the Compact.

Plaintiffs mischaracterize the Compact as a price-fixing agreement.[3] The

[3]Plaintiffs' antitrust arguments face many hurdles not addressed here. Sovereign regulatory actions have strong antitrust protection, as do agreements involving states. *Parker v. Brown*, 317 U.S. 341 (1943); *Sanders v. Brown*, 504 F.3d 903, 911-12 (9th Cir. 2007). Plaintiffs identify no instance in which a tax agreement

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Compact and Code make no reference to either wholesale or retail price; rather, their effect is to equalize the combined state-tribal tax burden on non-member cigarette commerce on- and off-reservation. Second Sargent Decl., ¶¶ 2-5. Without the Compact, *both* the Tribes and the State could impose their taxes. The Compact provides the equivalent of a credit against the otherwise applicable state tax burden on non-member commerce with a tribal tax on wholesalers, and thus *eliminates* a form of tax discrimination under which tribal cigarettes would be *doubly* taxed (at wholesale by CCT in addition to state wholesale and sales taxes). Without the Compact, non-member purchases would be entitled to no such credit:

> We cannot fault the State for not giving credit on the amount of tribal taxes paid. *It is argued that if a credit is not given, the tribal retailers will actually be placed at a competitive disadvantage, as compared to retailers elsewhere, due to the overlapping impact of tribal and state taxation*. . . . *With a credit*, prices at the smokeshops would presumably be roughly the same as those off the reservation, assuming that the Indian enterprises are operated at an efficiency similar to that of businesses elsewhere; *without a credit, prices at smokeshops would exceed those off the reservation by the amount of the tribal taxes* . . . .

Colville, 447 U.S. at 157-58 (emphasis added). The Compact thus eliminates this

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between sovereigns posed an antitrust problem. If the Court denies the present motion, the Tribes reserve the right to further develop these issues in a subsequent challenge to the merits of plaintiffs' claims.

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double taxation which would otherwise burden plaintiffs.[4]

The Supreme Court in *Colville* not only upheld the authority of both the Tribes and State to tax non-member purchases; it further held that *there is no right under federal law* to market a tax exemption for non-member cigarette sales:

> What the [tribal] smokeshops offer [their] customers, and what is not available elsewhere, is *solely an exemption from state taxation*. . . . *We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.*
> . . . .
> *[A]lthough the result of these taxes will be to lessen or eliminate tribal commerce with nonmembers, that market existed in the first place only because of a claimed exemption from these very taxes*. The taxes under consideration do not burden commerce that would exist on the reservations without respect to the tax exemption.

Id. at 155, 157 (emphasis added).

The Compact eliminates the possibility of double taxation of cigarettes sold at reservation smokeshops. Plaintiffs' attack on this protection makes no sense, unless plaintiffs believe they can evade state taxation as well by exploiting supposed jurisdictional gaps in state-tribal regulation that would impair the State's authority to enforce laws barring the Stogie Shop from obtaining and selling

[4] Because plaintiffs actually benefit from the Compact, they cannot prove that they have suffered any injury in fact that would be redressible. Defendants thus intend to challenge plaintiffs' legal standing should the Court allow this case to proceed.

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cigarettes, unreported, to non-members without state tax.[5] Again, plaintiffs' scheme is barred by *Colville*, which upheld the State's tax-stamp and reporting regulations which bar the marketing of a tax exemption for non-member purchases:

> [I]f a State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax. . . . [W]e therefore hold that the State may validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe. . . . [W]e find the State's recordkeeping requirements valid *in toto*.

Id. at 159-60.

The Compact not only eliminated double taxation on cigarette transactions, but also established a means to end the exploitation of supposed gaps between state and tribal tax enforcement authority to permit traffic in contraband cigarettes or engage in unlawful transactions. Under *Colville*, and also *Potawatomi*, which specifically authorizes tribal-state tax agreements, 498 U.S. at 514, plaintiffs have no federal right to market a tax exemption, or to evade valid state or tribal laws regarding taxation and reporting. Without such a federal right, this Court has no jurisdiction over the claims against tribal officials under the limited *Ex Parte Young* exception to tribal sovereign immunity.

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[5] Doing so may subject plaintiffs to prosecution under the federal Contraband Cigarette Trafficking Act. 18 U.S.C. §§ 2341(2), 2342(a).

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II. The Complaint Must Be Dismissed Under Rule 19.

An equally fatal defect in this case results from plaintiffs' failure to join the State of Washington as co-defendant. The State is a required party[6] as defined in Rule 19 but cannot be joined because it, too, has immunity from this suit.

Plaintiffs seek to decimate a Compact between the Tribes and the State, but have named only tribal defendants. Plaintiffs claim they seek no relief against the State, but they allege the Compact is in essence an unlawful conspiracy between the Tribes and the State (ECF No. 40 at 13 (¶ 13)), and much of the relief requested would directly infringe on state as well as tribal interests. Plaintiff Tonasket seeks declaratory and injunctive relief barring any application of the Compact against him. *Id.* at 50, 51 (¶¶ C, D & F). He seeks orders barring CCT from sharing information with the State and protecting his "right to purchase or sell cigarettes . . . free of reciprocal tax or *state interference of any kind*." *Id.* (¶ E) (emphasis added). He also seeks an order "restraining the Tribe from monopolizing or balkanizing with *the State of Washington* or others to protect cigarette sales or affect Indian commerce in the State of Washington." *Id.* (¶ H) (emphasis added).

[6] Rule 19 formerly spoke of "necessary" and "indispensable" parties. It was altered in 2007 for "stylistic" reasons but the "substance and operation of the rule . . . are unchanged." *Rep. of Philippines v. Pimentel*, 553 U.S. 851, 855-56 (2008).

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Much of this relief is unavailable because the State is not named as a defendant and would thus not be subject to any order in this case. Accordingly, "the court cannot accord complete relief among existing parties." Rule 19(a)(1)(A). Even if the Court could somehow provide the relief requested by plaintiffs, disposition of this action in the State's absence would "practically impair or impede" both CCT's and the State's interests in the Compact, and would leave the Tribes "subject to a substantial risk of incurring . . . inconsistent obligations" due to its obligations to the State under the Compact. Rule 19(a)(1)(B)(i)-(ii).

Under longstanding binding precedent, when the validity of an agreement is at issue, *all* signatories must be joined in litigation that threatens its validity. *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975) ("In actions involving contractual rights, all parties to the contract are indispensable"); *Equal Employment Opportunity Comm'n v. Peabody W. Coal Co.*, 610 F.3d 1070, 1082 (9th Cir. 2010); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156-57 (9th Cir. 2002) ("[T]oday we reaffirm the *fundamental principle* . . . : a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract") (emphasis added). This principle has barred lawsuits seeking to invalidate tribal-state agreements when one party is not before the court. *Wilbur v. Locke*, 423 F.3d 1101, 1111-12 (9th Cir. 2005), *overruled on other grounds*, *Levin v. Commerce*

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Energy, 130 S. Ct. 2323 (2010) (tribal-state cigarette tax compact); *Am. Greyhound Racing v. Hull*, 305 F.3d 1015, 1027 (9th Cir. 2002) (tribal-state gaming compact).

While this case clearly implicates state interests, the State cannot be joined because it is immune under the Eleventh Amendment. *See, e.g. Alabama v. North Carolina*, 130 S.Ct. 2295, 2315 (2010); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *Oneida Ind. Nation v. County of Oneida*, 617 F.3d 114, 131-35 (2d Cir. 2010). There is no basis to argue that the State has waived its Eleventh Amendment immunity, as such waiver must be "'stated by the most express language or by . . . overwhelming implication . . . .'" *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1057 (9th Cir. 1997). Rather than waiving the State's immunity, the Compact expressly *preserves* the State's sovereign immunity (as it does the Tribes'). Compact, § 1.1. Because the State has not waived its immunity, it is not feasible to join the State as co-defendant.

Rule 19(b) provides that when joinder of a required party is *not* feasible, as is the case here, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. Here, equity and good conscience dictate dismissal because, first, the Court has no jurisdiction over the tribal defendants either, who are equally immune from suit. *Both* parties to the Compact have sovereign immunity which *neither* has waived.

Second, the factors described in Rule 19(b) militate in favor of dismissal. A

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judgment invalidating the tribal-state Compact would prejudice both the Tribes and the State. Rule 19(b)(1). The Compact represents a finely wrought effort to balance the multiple sovereign interests the parties have in cigarette taxation and regulation that had led to decades of disputes. Tribal-State cooperation with respect to cigarette taxation was strongly encouraged by the Supreme Court in *Colville*, 447 U.S. at 161-62 (citing problems arising from non-cooperation), as well as *Potawatomi*, 498 U.S. at 514 (specifically authorizing mutually satisfactory tribal/state tax regimes). The State (as well as the Tribes) would be prejudiced by the jettisoning of the Compact in its absence. The Compact is the centerpiece of the lawsuit, and the relief requested would impair the benefits of the Compact negotiated by both parties to it.

Plaintiffs identify no way to reduce this prejudice either to the State or the Tribes through protective provisions in a judgment, possible shaping of relief or other measures. Rule 19(b)(2). To the contrary, plaintiffs are explicitly hostile to both tribal and state interests, and seek to invalidate benefits both to the State and the Tribes which flow from state-tribal cooperation regarding the regulation and taxation of cigarettes. In this case, barring application of the Compact (and tribal law implementing it) to plaintiff Tonasket's operation would eviscerate the Compact, and put CCT in violation of its obligations to the State to eliminate a tax harbor already determined to be unlawful by the Supreme Court in *Colville* and

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Potawatomi. Without the Compact, CCT knows of no way that it could prevent the State from enforcing state tax laws on-reservation, especially with respect to sales to non-Indian purchasers. Plaintiffs identify no way in which a judgment rendered on their claims in the State's absence would be adequate, and the Tribes know of none. *See* Rule 19(b)(3). Because the State is a required party that cannot be joined, and the case cannot proceed in equity and good conscience without the State, the Court should dismiss the case. *See Mudarri v. State,* 147 Wash. App. 590 (2008) (barring both "direct" and "indirect" attacks on tribal/state gaming compact under Rule 19 in absence of tribe).

CONCLUSION

This action should be dismissed.

Dated: July 29, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the date of this document, I electronically filed it with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all counsel of record.

Dated: July 29, 2011.

s/Richard M. Berley
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