

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TERRY TONASKET, dba STOGIE  
SHOP; and DAVID 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

**ORDER RE: MOTION TO DISMISS  
AMENDED COMPLAINT**

BEFORE THE COURT is Defendants' Motion To Dismiss Amended Complaint (ECF No. 45). This motion was heard with oral argument on October 13, 2011. Robert Kovacevich argued for Plaintiffs. Richard Berley, Brian Gruber, Joshua Osborne-Klein argued for Defendants. At the close of the hearing, the Court placed the motion under advisement.

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1 **I. BACKGROUND**

2 Defendants contend that Plaintiffs' Amended Complaint (ECF No. 40)  
3 is, essentially, a challenge to a 2009 Cigarette Tax Compact between the  
4 Tribes and the State of Washington ("Compact").<sup>1</sup> The Compact is a tax  
5 agreement which provides in relevant part that tribally-licensed  
6 cigarette retailers must acquire cigarettes from wholesalers who commit  
7 to pay a tribal tax at the wholesale level equal to state wholesale and  
8 sales taxes which would be applicable off-reservation. The purpose and  
9 effect of the Compact, and the Tribes' Cigarette Code, is to ensure that  
10 cigarettes sold on and off reservation to non-members bear essentially  
11 the same total tax burden. Plaintiffs, however, aver that their Amended  
12 Complaint is an action for illegal price fixing, antitrust and unfair  
13 competition violating the Sherman and Clayton Acts. ECF No. 40 at 14-31.

14 Defendants request the Court to dismiss this case pursuant to Fed.  
15 R. Civ. P. 12(b)(1) and (7). Defendants assert two grounds for dismissal  
16 of the Amended Complaint. First, the sovereign immunity of defendant  
17 Colville Confederated Tribes ("CCT") immunizes CCT and the individually  
18 named tribal officials from plaintiffs' claims. Second, the State of  
19 Washington is an indispensable party that cannot be joined under Fed. R.  
20 Civ. P. 19.

21 Analysis

22 **A. Legal Standard**

23 A motion to dismiss an action pursuant to Federal Rule of Civil  
24 Procedure 12(b)(1) raises the question of the federal court's subject

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25 <sup>1</sup>The Compact is attached to the original Complaint (ECF No. 1,  
26 at 59).

1 matter jurisdiction over the action. Under Rule 12(b)(1), a complaint  
2 may be dismissed for lack of subject matter jurisdiction. Fed.R.Civ.P.  
3 12(b)(1). When considering a Rule 12(b)(1) motion challenging the  
4 substance of jurisdictional allegations, the Court may look beyond the  
5 complaint. See *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000) (district  
6 court may consider extrinsic evidence when deciding a Rule 12(b)(1)  
7 motion to dismiss for lack of subject matter jurisdiction); *McCarthy v.*  
8 *United States*, 850 F.2d 558, 560 (9th Cir.1988). The burden of proof  
9 in a Rule 12(b)(1) motion is on the party asserting jurisdiction. See  
10 *Sopcak v. Northern Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th  
11 Cir.1995); *Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770, 778-79  
12 (9th Cir.2000).

13 Under Fed.R.Civ.P. 12(b)(7), a defendant may move to dismiss an  
14 action for "failure to join a party under Rule 19." See Fed.R.Civ.P.  
15 12(b)(7). Rule 19, in turn, "provides a three-step process for  
16 determining whether the court should dismiss an action for failure to  
17 join a purportedly indispensable party." *United States v. Bowen*, 172 F.3d  
18 682, 688 (9th Cir.1999). First, the Court must determine whether the  
19 third party is one traditionally denominated as "necessary." See *id.*;  
20 *Schwarzer, Tashima & Wagstaffe, CAL. PRAC. GUIDE: FED. CIV. PRO. BEFORE*  
21 *TRIAL* 7:55 (The Rutter Group 2010) (noting that while Rule 19 no longer  
22 uses the terms "necessary" or "indispensable," courts continue to use  
23 those labels as terms of art in the Rule 19 analysis); *Cachil Dehe Band*  
24 *of Wintun Indians v. California*, 547 F.3d 962, 969 n. 6 (9th Cir.2008)  
25 (noting same). A party is "necessary" and must be joined if:

26 (A) in that person's absence, the court cannot accord complete  
relief among existing parties; or

1 (B) that person claims an interest relating to the subject of  
2 the action and is so situated that disposing of the action in  
the person's absence may:

3 (i) as a practical matter impair or impede the person's  
ability to protect the interest; or

4 (ii) leave an existing party subject to a substantial risk of  
incurring double, multiple, or otherwise inconsistent  
obligations because of the interest.  
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6 Fed.R.Civ.P. 19(a)(1). See also *Bowen*, 172 F.3d at 688. If the third  
7 party satisfies the above criteria, the Court must then determine whether  
8 joinder is "feasible." See Fed.R.Civ.P. 19(b); *Bowen*, 172 F.3d at 688.  
9 If joinder is not feasible, the Court "must decide whether the absent  
10 party is 'indispensable,' i.e., whether in 'equity and good conscience'  
11 the action can continue without the party." See *Bowen*, 172 F.3d at 688  
12 (citing Fed.R.Civ.P. 19(b)).

13 In order to determine whether Rule 19 requires the joinder of  
14 additional parties, the court may consider evidence outside of the  
15 pleadings. See *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir.1960). The  
16 party moving under Rule 12(b)(7) "bear[s] the burden in producing  
17 evidence in support of the motion." See *Biagro Western Sales, Inc. v.*  
18 *Helena Chem. Co.*, 160 F.Supp.2d 1136, 1141 (E.D.Cal.2001) (citing *Citizen*  
19 *Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1293  
20 (10th Cir.1994)).

## 21 **B. Sovereign Immunity**

22 Defendants assert that they have not waived their sovereign  
23 immunity. Defendants assert that the law in this jurisdiction is clear  
24 that tribal sovereign immunity may only be waived by the tribe expressly  
25 or by Congress' unequivocal abrogation. See e.g., *Kiowa Tribe*, 523 U.S.  
26 at 753-54; *Okla. Tax Com'n v. Potawatomi Ind. Tribe*, 498 U.S. 505, 510

1 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1976); Cook,  
2 548 F.3d at 725 (9<sup>th</sup> Cir. 2008); *Allen v. Gold Country Casino*, 464 F.3d  
3 1044, 1046 (9th Cir. 2006).

4 Plaintiffs assert that the Defendant Tribe has no sovereign immunity  
5 to a federal law of general applicability. And if they do have sovereign  
6 immunity, Plaintiffs argue the tribe has waived immunity. Plaintiffs  
7 rely upon *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir.  
8 1985) for the purported "general applicability" exception to sovereign  
9 immunity. See ECF No. 49 at 4. Defendants reply that Plaintiffs confuse  
10 tribal "sovereignty" with "sovereign immunity" and *Donovan* has nothing  
11 to with tribal sovereign immunity from suits by private parties, which  
12 is not subject to implicit abrogation. Finally, Plaintiffs raise the  
13 case *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9<sup>th</sup>  
14 Cir.2007) for the proposition that express waiver is not required under  
15 the current status of the law.

16 The Court agrees with Defendants and finds that the Tribal  
17 Defendants and CCI are immune from suit. Indian tribes, and tribal  
18 officials acting within the scope of their authority, are immune from  
19 lawsuits or court process in the absence of congressional abrogation or  
20 tribal waiver. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751,  
21 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *United States v. Yakima*  
22 *Tribal Court*, 806 F.2d 853, 861 (9th Cir.1986). As with absolute,  
23 qualified, and Eleventh Amendment immunity, tribal sovereign immunity "is  
24 an immunity from suit rather than a mere defense to liability; and ...  
25 it is effectively lost if a case is erroneously permitted to go to  
26 trial." See *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S.

139, 143-44, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993). Absent congressional abrogation or explicit waiver, sovereign immunity bars suit against an Indian tribe in federal court. *Kiowa Tribe of Okla.*, 523 U.S. at 754, 118 S.Ct. 1700. This immunity protects tribal officials acting within the scope of their valid authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir.1985). Tribal immunity "applies to the tribe's commercial as well as governmental activities." *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008) (citing *Kiowa Tribe*, 523 U.S. at 754).

The Court distinguishes this case from the *BNSF* case relied upon by Plaintiffs at oral argument. The Court does not find that this suit is the type of suit permissible under the doctrine of *Ex Parte Young*.

### **C. Washington State - Indispensable Party**

Defendants argue that Rule 19 prevents this case from proceeding without the State because the relief Plaintiffs seek (1) cannot be provided without the State's participation, ECF No. 46 at 17-18; (2) would expose CCT to inconsistent obligations, *id.* at 17; and (3) would prevent CCT from implementing the terms of the Compact, which would deprive both CCT and the State of Washington of the benefits of the Compact, and significantly impair the interests of both CCT and the State in ensuring a uniform level of taxation on cigarettes in the State, *id.* at 17-19. Additionally, citing *Dawavendewa v. Salt River Project Agricultural Improvement and Power Dist.*, 276 F.3d 1150, 1156-57 (9<sup>th</sup> Cir. 2002), Defendants argue that Plaintiffs ignore the "principle" that all parties to a contract must be joined in a lawsuit that would "decimate" it. Defendants conclude that because the State cannot be joined by

1 virtue of its Eleventh Amendment immunity, Rule 19 requires the Court to  
2 dismiss this case.

3 Plaintiffs offer various irreconcilable theories as to why the state  
4 is not an indispensable party. Plaintiffs seem to contend that this case  
5 is not a challenge to the Compact. ECF No. 49 at 4, 15-16. Plaintiffs,  
6 on the other hand, contend that this case should be allowed to proceed  
7 because provisions in the Compact expressly waive CCT's sovereign  
8 immunity. Plaintiffs argue that this suit should proceed because CCT  
9 "cannot force Plaintiff Tonasket to collect the MSA<sup>2</sup> lawsuit settlement."  
10 ECF No. 49 at 18. However, elsewhere in plaintiffs' memoranda, it is  
11 admitted that CCT is not a party to the MSA, *id.* at 9, 10, and thus the  
12 interest in protecting the validity MSA falls squarely on the State of  
13 Washington. Plaintiffs cannot have it both ways.

14 The Court finds that the State has significant interests in this  
15 case that would be affected if the Court were to grant the relief that  
16 Plaintiffs request. Because the Court finds above that the Defendants  
17 have sovereign immunity in this case, which has not been waived, the  
18 Court does not have to determine if the State can or cannot be joined.  
19 Likewise, the merits of this case are not currently before the Court.  
20 The case is hereby dismissed because the Defendants' tribal sovereign

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25 <sup>2</sup>MSA refers to the State's lawsuit settlement. See First Amended  
26 Complaint (ECF No. 40, at 31-33)

1 immunity<sup>3</sup> deprives this Court of subject-matter jurisdiction.

2 Accordingly,

3 **IT IS HEREBY ORDERED** that:

4 1. Defendants' Motion to Dismiss Amended Complaint, ECF No. 45, is  
5 **GRANTED**. The Court finds that this suit is barred by the tribal and  
6 tribal officials' sovereign immunity, which was neither abrogated nor  
7 waived. Plaintiffs' First Amended Complaint (ECF No. 40) and this  
8 litigation is dismissed with prejudice.

9 **IT IS SO ORDERED**. The District Court Executive is directed to enter  
10 this order, enter Judgment accordingly, and to provide copies to all  
11 counsel.

12 **DATED** this 10th day of November, 2011.

13 **s/Lonny R. Suko**

14 LONNY R. SUKO  
15 United States District Judge  
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21 <sup>3</sup>The sovereign immunity applies to the Colville Confederated Tribes,  
22 a federally-recognized Indian tribe and to the individually named tribal  
23 officials acting in their official capacities. *See Linneen v. Gila River*  
24 *Indian Community*, 276 F.3d 489, 492 (9<sup>th</sup> Cir.2002) (immunity extends to  
25 tribal officials when acting in their official capacity and within the  
26 scope of their authority).