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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NISQUALLY INDIAN TRIBE;
Plaintiffs,

Case No.

vs.

COMPLAINT

CHRISTINE GREGOIRE,
Governor of the State of Washington,

ANDREW WHITENER,
Director of Skookum Creek Tobacco Co.,

DAVID LOPEMAN,
Director of Skookum Creek Tobacco Co.,

BRYAN JOHNSON,
General Manager of Skookum Creek Tobacco
Co.,

Defendants.

1. This is an action by the Nisqually Indian Tribe ("Nisqually") for declaratory and injunctive relief against Christine Gregoire, the Governor ("Governor") of the State of Washington ("State"), and certain officials of the Skookum Creek Tobacco Company ("Skookum"), an enterprise owned by the Squaxin Island Indian Tribe ("Squaxin"), to enjoin them from permitting the continued sale of improperly taxed cigarettes at a smoke shop on non-

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1 Squaxin land within Nisqually's jurisdiction in the Nisqually River Basin pursuant to an invalid
2 addendum (the "Addendum") to the cigarette tax compact between the State and Squaxin.

3 **PARTIES**

4 2. Plaintiff, Nisqually Indian Tribe is a federally recognized Indian tribe.

5 3. Defendant Christine Gregoire ("Governor") is the Governor of the State and is
6 sued in her official capacity.

7 4. On information and belief, defendant Andrew Whitener is a director of Skookum.
8 In that capacity, he has authority over and responsibility for the sale of cigarettes and tobacco
9 products at Skookum smoke shops and the imposition and collection of taxes on those sales
10 under the cigarette tax compact between the State and Squaxin. He is sued in his official
11 capacity.

12 5. On information and belief, defendant David Lopeman is a director of Skookum.
13 In that capacity, he has authority over and responsibility for the sale of cigarettes and tobacco
14 products at Skookum smoke shops and the imposition and collection of taxes on those sales
15 under the cigarette tax compact between the State and Squaxin. He is sued in his official
16 capacity.

17 6. On information and belief, defendant Bryan Johnson is the general manager of
18 Skookum. In that capacity, he has authority over and responsibility for the sale of cigarettes and
19 tobacco products at Skookum smoke shops and the imposition and collection of taxes on those
20 sales under the cigarette tax compact between the State and Squaxin. He is sued in his official
21 capacity.

1 **JURISDICTION AND VENUE**

2 7. This Court has jurisdiction over the subject matter of Count One under 28 U.S.C.
3 §§ 1331 and 1362. This is a claim brought by an Indian tribe and arises under the Constitution,
4 laws and treaties of the United States.

5 8. This Court has supplemental jurisdiction over the state law claims in Counts Two
6 and Three under 28 U.S.C. § 1367.

7 9. Venue is properly in this district under 28 U.S.C. § 1391(b) because this is the
8 district where the defendants reside and in which a substantial part of the events or omissions
9 giving rise to the claims herein have occurred.

10 **ALLEGATIONS**

11 10. Nisqually occupies a Reservation within the State in the Nisqually River Basin.
12 The Reservation is located on both sides of the Nisqually River, in western Pierce County and
13 eastern Thurston County.

14 11. Nisqually is governed by a Constitution and Bylaws approved by the Secretary of
15 the Interior in 1994. Article I of the Nisqually Constitution provides that "[t]he jurisdiction of
16 the Nisqually Indian Tribe shall extend to the territory within the confines of the Nisqually
17 Reservation as established by Executive Order of January 20, 1857, *to tracts placed in trust or*
18 *restricted status for individual Indians* or for the Tribe *located in the Nisqually River basin*, and
19 such other lands as may hereafter be added thereto under any law of the United States, except as
20 otherwise provided by law." (emphasis added).

21 12. In 2004, in recognition of "the political integrity of the federally recognized
22 Indian tribes within the State of Washington ...[and the fact that] the sovereignty of each tribe
23 provides paramount authority for the tribe to exist and to govern;" and to resolve "a long-

1 standing disagreement ...between the Tribe and the State over questions regarding jurisdiction
2 over, and the taxation of, the sale and distribution of cigarettes," Nisqually and the State entered
3 into a Cigarette Tax Compact. Under the terms of the compact, retail sales of cigarettes to non-
4 Indian purchasers made by Nisqually tribal retailers within Nisqually's territory are subject only
5 to the imposition of a Nisqually tribal tax and are free from State tax. The territory covered by
6 the compact includes (i) the Nisqually Reservation, (ii) "all lands placed in trust or restricted
7 status for individual Indians or the Tribe located in the Nisqually River basin, and such other
8 lands as may hereafter be added thereto under any law of the United States, except as otherwise
9 provided by law," and (iii) all Indian allotments or other lands held in trust for a Nisqually tribal
10 member or the Tribe. Pursuant to the compact, tribal cigarette tax revenue is used by Nisqually
11 for essential government services.

12 13. Nisqually operates a smoke shop on its Reservation pursuant to the tax compact
13 with the State. Nisqually derives substantial tax revenue from cigarette sales made at this smoke
14 shop.

15 14. In 1918, approximately two-thirds of the land area of the original Nisqually
16 Reservation was condemned and transferred to the United States to create the Fort Lewis
17 Military Base. As a result of the transfer, a number of the Nisqually Indians who had been
18 allotted federal lands in the Nisqually River basin, including Billy Frank, Sr., were granted *in*
19 *lieu* lands to replace their condemned allotments. Billy Frank, Sr.'s allotment, which is located a
20 short distance outside the borders of the Nisqually Reservation, became known as Frank's
21 Landing.

22 15. Subsequently Billy Frank, Jr., a Nisqually tribal member, and other Indians
23 residing on lands within the Nisqually River Basin next to or near Frank's Landing, formed a

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1 group that calls itself the Frank's Landing Indian Community ("Community"). Reportedly, the
2 Community includes individuals who are members of 27 different Indian tribes.

3 16. In 1994 the United States Congress declared that the Community is "a self-
4 governing dependent Indian Community that is not subject to the jurisdiction of any federally-
5 recognized tribe." Pub.L. 103-435, 108 Stat. 4569 (Nov. 2, 1994). But the 1994 law added that
6 "[n]othing in this section may be construed to constitute the recognition by the United States that
7 the Frank's Landing Indian Community is a federally recognized Indian tribe." The legislative
8 history states that the statutory language "reflects the status quo as far as jurisdictional matters"
9 and adds that "[t]he group ... cannot exercise the powers of a sovereign." Cong. Rec. 11140
10 (Oct. 4, 1994).

11 17. An Indian tribe's power to tax derives from its inherent sovereign powers. But,
12 under federal law, only federally recognized Indian tribes are acknowledged as having the power
13 to levy taxes and an Indian tribe's sovereign power to tax non-members reaches no further than
14 tribal land.

15 18. Notwithstanding that the Community is not a federally recognized Indian tribe
16 and cannot exercise the powers of a sovereign, it has attempted to do so. In recent years, the
17 Community attempted unsuccessfully to negotiate a cigarette tax compact with the State that
18 would allow it to impose its own taxes instead of State taxes on cigarette sales made on or near
19 Frank's Landing within the Nisqually River Basin.

20 19. Meanwhile, a smoke shop was opened and operated on or near Frank's Landing
21 within the Nisqually River Basin at 11107 Conine Avenue SE, Olympia, Washington, 98513,
22 which did not charge State cigarette taxes of \$20.25 per carton. On or about May 15, 2007,
23 federal agents raided and shut down this smoke shop.

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1 20. Thereafter, the Community joined forces with Squaxin, a federally recognized
2 Indian tribe, in an effort to get this smoke shop brought under the 2004 Cigarette Tax Compact
3 between Squaxin and the State. Pursuant to the Squaxin Compact, the State retroceded from
4 imposing taxes on cigarette sales made on Squaxin tribal land. The 2004 Compact covered all
5 land within the limits of the Squaxin Reservation, and all allotments or other lands held in trust
6 for a Squaxin tribal member or the Squaxin tribe. It did not cover any lands on or near Frank's
7 Landing within the Nisqually River Basin because none of that land is Squaxin tribal land.

8 21. On or about January 22, 2008, the Governor executed the Addendum, which
9 purports to extend the Squaxin compact to cover cigarette sales made "within" the Community.

10 22. On information and belief, however, the Community does not hold title to any
11 land on or near Frank's Landing within the Nisqually River Basin. In any event, the Community
12 has never been recognized by Congress as having sovereignty or jurisdiction over any land.

13 23. The stated purpose of the Addendum is to re-define the area covered by the
14 Squaxin compact "in contemplation of unique circumstances involving the operation of a tribal
15 retail outlet on trust lands within a Self-Governing Dependent Indian community." The
16 Amendment expands the area purportedly covered by the Squaxin compact to include "Public
17 domain allotment lands when under a then existing agreement between the Squaxin Island Tribe
18 and a Self-Governing dependent Indian Community ... that conveys interest to the Squaxin
19 Island Tribe sufficient to allow the Tribe to operate as a "tribal retailer" in full compliance with
20 the terms and conditions of the Compact."

21 24. Following execution of the Addendum, the smoke shop located at 11107 Conine
22 Avenue SE, Olympia, Washington, re-opened and has been making sales as though they were
23

1 occurring on Squaxin tribal land, that is, without collecting State cigarette taxes and imposing
2 only a Squaxin tribal tax.

3 25. The re-opened smoke shop, calling itself "The Landing," is being operated as a
4 purported "factory outlet" store of Skookum, which is a tribal enterprise owned by Squaxin.

5 26. Many of the sales being made at the re-opened smoke shop come and will come at
6 the expense of Nisqually, which has a nearby smoke shop on its Reservation that operates
7 pursuant to Nisqually's cigarette tax compact with the State, thereby depriving Nisqually of tribal
8 tax revenue that it uses to fund essential government services.

9 **COUNT ONE**

10 27. Nisqually realleges and incorporates by reference the allegations contained in
11 paragraphs 1 through 26 above.

12 28. Because the Community is not a federally recognized tribe and has no tribal land,
13 it has no power pursuant to federal law to levy cigarette sales taxes or to convey to Squaxin the
14 right to do so.

15 29. Because the land on or near Frank's Landing is not Squaxin tribal land, Squaxin
16 cannot, pursuant to federal law, levy tribal taxes on transactions occurring there, regardless of
17 what "agreement" it may make with the Community or with the State, nor can Skookum or
18 others collect Squaxin tribal taxes on such transactions.

19 30. Defendants' actions in entering into and implementing the Addendum, and in
20 making or permitting sales of improperly taxed cigarettes at the smoke shop located at 11107
21 Conine Avenue SE, Olympia, Washington, constitute an ongoing violation of federal law
22 including, but not limited to, the Constitution and Pub.L. 103-435, 108 Stat. 4569 (Nov. 2, 1994).

1 31. Nisqually is entitled to declaratory and injunctive relief invalidating the
2 Addendum and enjoining defendants from taking any further action to implement the Addendum
3 and from making or permitting sales of improperly taxed cigarettes at the smoke shop located at
4 11107 Conine Avenue SE, Olympia, Washington.

5 **COUNT TWO**

6 32. Nisqually realleges and incorporates by reference the allegations contained in
7 paragraphs 1 through 31 above.

8 33. Defendants' actions in entering into and implementing the Addendum, and in
9 making or permitting sales of improperly taxed cigarettes at the smoke shop located at 11107
10 Conine Avenue SE, Olympia, Washington, are not authorized by applicable state law including,
11 but not limited to, RCW 43.06.455 and 43.06.460.

12 34. Nisqually is entitled to declaratory and injunctive relief declaring that the
13 Addendum is *ultra vires*, invalidating it, and enjoining defendants from taking any further action
14 to implement or enforce it, and from making or permitting sales of improperly taxed cigarettes at
15 a smoke shop on non-Squaxin land.

16 **COUNT THREE**

17 35. Nisqually realleges and incorporates by reference the allegations contained in
18 paragraphs 1 through 34 above.

19 36. The Addendum conflicts with the Cigarette Tax Compact between Nisqually and
20 the State and constitutes a breach of that Compact.

21 37. Nisqually is entitled to declaratory and injunctive relief invalidating the
22 Addendum, and enjoining defendants from taking any further action to implement it and from
23

1 making or permitting sales of improperly taxed cigarettes at the smoke shop located at 11107
2 Conine Avenue SE, Olympia, Washington.

3 **WHEREFORE**, Nisqually prays for the following relief:

4 1. For a declaration that the Addendum violates federal law and is *ultra vires* under
5 applicable state law, and constitutes a breach of the Cigarette Tax Compact between Nisqually
6 and the State;

7 2. For an injunction invalidating the Addendum and prohibiting defendants from
8 taking any further action to implement it;

9 3. For a declaration that the ongoing sales of cigarettes and tobacco products at the
10 smoke shop located at 11107 Conine Avenue SE, Olympia, Washington violate federal law, are
11 unauthorized by applicable state law, and constitute a breach of the Cigarette Tax Compact
12 between Nisqually and the State;


13 4. For an injunction prohibiting the taxation of sales of cigarettes and tobacco
14 products at the smoke shop located at 11107 Conine Avenue SE, Olympia, Washington as
15 though they were being made on Squaxin tribal land;

16 5. For an award of attorneys fees and costs as provided by law; and

17 6. For such other relief as may be just and equitable.

18 DATED this 6th day of February, 2008.

19 Respectfully submitted,
HARRIS, MERICLE & WAKAYAMA, P.L.L.C.

20
21 By 
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