

SQUAXIN ISLAND TRIBE

WEST 81 HIGHWAY 108
SHELTON, WASHINGTON 98584
(206) 426-9781

RESOLUTION NO. 84-52

of the

SQUAXIN ISLAND TRIBAL COUNCIL

- WHEREAS, the Squaxin Island Tribal Council is the governing body of the Squaxin Island Indian Tribe by authority of the Tribe's Constitution and Bylaws, as adopted by the qualified voters of the Tribe and approved by the Secretary of the Interior on July 8, 1965; and
- WHEREAS, pursuant to its power to use and manage tribal property, the Tribal Council has determined when and to what extent liquor transactions shall be permitted on the Reservation by adoption of the Squaxin Island liquor ordinance, which provides for tribal liquor sales on the Reservation as a tribal business; and
- WHEREAS, the Squaxin Island liquor ordinance was adopted by the Tribal Council by Resolution No. 79-40 (1979), as amended by Resolution on January 27, 1981, and was approved by the Secretary of the Interior and published in the Federal Register on April 10, 1981 (46 Fed. Reg. 21450) ;
- WHEREAS, the State of Washington and the State Liquor Control Board have taken actions purporting to regulate and tax liquor sales by the Squaxin Island Tribe in a manner which is inconsistent with the tribal ordinance and destructive to the sovereignty of the Tribe; and
- WHEREAS, the Squaxin Island, Skokomish, Nooksack and Shoalwater Bay Tribes formed an organization known as United Sovereign Tribes, to protect and defend their sovereign rights and to challenge the State of Washington's attempt to cripple their liquor businesses and deprive them of revenues necessary for economic and governmental self-sufficiency; and
- WHEREAS, the United Sovereign Tribes instituted a lawsuit against the State of Washington in the U.S. District Court for the Western District of Washington in Tacoma; and
- WHEREAS, the consolidated lawsuit (Squaxin Island Tribe et al. v. State of Washington et al., C84-048T) raises complex questions of tribal sovereignty and State jurisdiction, due process and equal protection of the laws, applicability of State monopoly regulations and taxes to on-Reservation sales and extension of the antitrust laws to the State's attempts to drive out-of-State suppliers to the tribes out of business; and

WHEREAS, the District Court has issued rulings adverse to the tribes on a number of issues and conflicting rulings on other issues which require appeal to the U.S. Court of Appeals for the Ninth Circuit; and

WHEREAS, the litigation goes beyond the narrow issue of regulating liquor traffic on Reservations and involves the revenue raising aspects of tribal enterprises and other areas of vital concern to tribes; and

WHEREAS, the United Sovereign Tribes has relied entirely on funds provided by its member tribes for prosecution of the lawsuit in the District Court; and

WHEREAS, the cost and burden of appealing the District Court's final Order far exceeds the resources of the tribes which are now plaintiffs in the District Court proceedings; and

WHEREAS, the United Sovereign Tribes and each of its member tribes have agreed to apply to the Bureau of Indian Affairs ("BIA") to provide funds for attorneys' fees for appeal of the District Court's final Order, pursuant to 25 CFR Part 89, §89.40 et seq. (Attorney Contracts with Indian Tribes; Payment of Tribal Attorney Fees with Appropriated Funds); and

WHEREAS, the Squaxin Island Tribe has served as trustee and coordinator for the United Sovereign Tribes, for purposes of collecting, disbursing and accounting for funds, and serving as liaison with and between the attorneys and the member tribes during the District Court proceedings; and

WHEREAS, the members of the United Sovereign Tribes have agreed that the Squaxin Island Tribe shall continue to act as trustee and coordinator for purposes of the appeal and, in that capacity, shall, as required by BIA procedures, apply for BIA funds in its own name but on behalf of all the members of the United Sovereign Tribes;

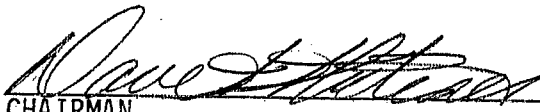
NOW THEREFORE, BE IT RESOLVED that:

1. The Squaxin Island Tribal Council hereby agrees, on its own behalf and as a member of the United Sovereign Tribes, to retain Miriam L. Chesslin, with offices located currently at 713 Hoge Building, 705 Second Avenue, Seattle, Washington 98104, (206) 467-9983, in association with the law firm of Hobbs, Straus, Dean & Wilder, 1735 New York Avenue, Washington, DC 20005, (202) 783-5100, to represent it and take all necessary legal action in connection with appeal of the District Court's final Order in Squaxin Island Tribe et al. v. State of Washington et al.
2. The Squaxin Island Tribal Council agrees to submit an application to the Bureau of Indian Affairs, pursuant to 25 CFR Part 89, to provide funds for attorneys' fees for such appeal. This application, to be submitted in the name of the Squaxin Island Tribe pursuant to BIA procedures, will be on behalf of the Squaxin Island Tribe and each of the other members of the United Sovereign Tribes.
3. The Squaxin Island Tribal Council, having reviewed the attached form of application for funding and attorney contract, hereby authorizes the Chairman of the Squaxin Island Tribal Council to execute the application and attorney contract, on its own behalf and on behalf of each of the members of the United Sovereign Tribes.

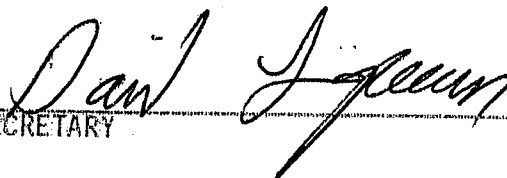
4. The Squaxin Island Tribal Council agrees to act as trustee and coordinator for the United Sovereign Tribes for purposes of the appeal, to collect retain and disburse funds, to maintain accurate accounts and records, and to act as liaison between the members of the United Sovereign Tribes and its attorneys, the BIA and other interested tribes and organizations.

CERTIFICATION

The Squaxin Island Tribal Council does hereby certify that the above Resolution was adopted at a meeting of the Squaxin Island Tribal Council held on this 4th day of October, 1984 at which time a quorum was present, and that the Resolution passed by a vote of 4 for and 0 against.


CHAIRMAN

ATTESTED BY:


SECRETARY


VICE CHAIRMAN

Resolution 84-52

DRAFT

October 2, 1984

TO: Superintendents, Olympic Peninsula and Puget
Sound Agencies, and Director, Portland Area office,
Bureau of Indian Affairs

Pursuant to 25 CFR Part 89, the Squaxin Island Tribe, on behalf of the United Sovereign Tribes (Squaxin island, Skokomish, Nooksack and Shoalwater Bay Tribes) submits the attached form of attorney contract and application for payment of attorneys' fees with appropriated funds under CFR 25-§89.41 et seq. Granting of the funding application and approval of the contract are sought for the purpose of appealing the Final Order in Squaxin Island Tribe et al. v. State of Washington et al. (C48-048T, U.S. District Court for the Western District of Washington) to the U.S. Court of Appeals for the Ninth Circuit. The case, as you know, deals with the legality of Indian tribal liquor sales in a "control" or monopoly State.

Background:

Each of the four tribes for which funding is sought operates a tribal liquor enterprise on its Reservation under a liquor ordinance approved by the Solicitor's Office and the Secretary of the Interior and published in the Federal Register. These ordinances were enacted for the specific purpose of providing a source of revenue to the tribes for the operation of tribal government and the delivery of services to tribal members and their dependents, including education, health, social services and law enforcement programs. Revenues, including tribal taxes, generated by these enterprises are also used to support long term economic development programs designed to provide employment for tribal members and to make the tribes economically self-sufficient, in accordance with federal policies of encouraging tribal self-sufficiency and economic development.

The four tribes' lawsuit, which was instituted in January, 1984 against the State of Washington (the "State") and its State Liquor Control Board (the "Board"), challenges the State's attempt to bring Indian tribal liquor enterprises into the State liquor monopoly system, by requiring tribes to purchase solely from the State; by fixing retail prices and terms of on-Reservation sales, including payment of liquor taxes applicable to

purchases in State stores and agencies; and by dictating the location of tribal stores and requiring conformity with local zoning ordinances on Reservations.

Before filing the lawsuit, the four tribes attempted to negotiate with the State, to convey their position that the State's policies would require them to surrender their sovereign rights and to become agents of the State, to sell liquor and collect State taxes for the State's revenue needs, rather than those of the tribes. The State took the position that Rice v. Rehner, ___ U.S. ___, 103 S.Ct. ___ (1983), authorized it to require tribes with federally approved ordinances to enter into vendorship agreements with the State, on terms fixed by the Liquor Control Board, as a condition of selling liquor in tribal stores on Reservations. In Rice v. Rehner, however, the Supreme Court ruled that States and tribes had concurrent jurisdiction over liquor sales and required an individual Indian vendor to obtain a State license in California, a free enterprise State. The four tribes took the position that Rice v. Rehner did not apply to tribal liquor sales in a monopoly State.

The State refused to negotiate with the tribes and, instead, stepped up its enforcement campaign against liquor selling tribes which refused to become State vendors. As part of this campaign the Board, with the assistance of agencies in other States, seized and threatened seizure of shipments bound to Reservations from out of the State and threatened arrest and prosecution of customers of tribal stores.

The four tribes, faced with closure of their businesses and loss of their tribal taxes and revenues, instituted suit on January 30, 1984 against the State and the Board in the U.S. District Court for the Western District of Washington in Tacoma. Shortly thereafter, the Lummi Tribe filed a similar suit which was consolidated for all purposes with the action filed by the Squaxin Island, Skokomish, Nooksack and Shoalwater Bay Tribes.

Legal Issues and the Court's Rulings

The tribes raised a number of legal issues in their suit against the State. They maintained, among other things, that:

1) Rice v. Rehner does not apply to the revenue-raising aspects of tribal liquor enterprises and does not permit the State to extend its monopoly control to such enterprises and to make a profit on sales to tribes;

1 The Supreme Court's holding in Rice v. Rehner stems from its concern with the regulatory or "spillover" effects of liquor sales on Reservations. The plaintiff tribes' ordinances,
(footnote continued)

2) The State of Washington has not asserted jurisdiction over liquor sales by Indian tribes. In the absence of such State legislation, the Board has no authority to promulgate the regulation requiring tribes to enter into vendorship agreements for the sale of liquor;

3) The State's tribal vendorship regulation, on its face and as applied, contains no standards and results in widely varying terms in agreements with tribes, in violation of Constitutional due process and equal protection requirements;

4) Since the State has not affirmatively asserted jurisdiction over Indian country, the Board's attempts to drive out-of-State suppliers to Indian tribes out of business violates the antitrust laws;

5) The State's taxes on retail sales of liquor are an integral part of its monopoly system and are not applicable to on-Reservation sales by tribal enterprises. Even assuming that State taxes are applicable, tribes are entitled to a credit against the State taxes for their tribal taxes.

Many of these issues have never before been decided by any federal court. Their complexity and novelty required extensive factual development (through depositions, interrogatories, requests for documents and other discovery) and legal analysis. Despite these complexities, which were set forth in the pleadings and in a lengthy proposed pretrial order submitted by the parties, the District Court (Honorable Jack E. Tanner) did not permit trial of the case or briefing or argument of a number of legal issues. Instead, the Court disposed summarily of the tax and jurisdiction issues on cross-motions for partial summary judgment, and held:

1) That the State Liquor Control Board has plenary authority over importation of liquor into the State;

2) That State liquor taxes apply to all on-Reservation sales; and

3) That the Board is without authority to require tribes to enter into tribal liquor vendorship agreements.

These rulings were contained in an Order issued on July 10, 1984.

(footnote continued from previous page)
however, deal with these concerns by incorporating the regulatory provisions of Washington State law with respect to sales to minors and intoxicated persons, Sunday sales and the like.

The Court requested separate briefs and argument on the tax credit issue, which was held on August 6, 1984. The Justice Department intervened and submitted an amicus curiae brief supporting the tribes' position on credits for tribal taxes. The tribes also moved to dismiss the State's counterclaim for taxes pendente lite on the ground of sovereign immunity. To date there have been no rulings on the tax credit issue or on the motion to dismiss the State's counterclaim, nor has there been a final appealable Order on the earlier rulings.

The dispositive nature of the Court's July 10 rulings indicate that an appeal to the Ninth Circuit is imperative when a final Order is issued, to clarify the record and resolve the issues of tribal authority versus State jurisdiction. If the State alone can import liquor and the tribes can purchase only from the State, it appears that the State can impose its monopoly control over tribal enterprises and that the "concurrent jurisdiction" concept articulated in Rice v. Rehner is without content in a monopoly State. Similarly, if the taxes imposed as part of the State monopoly system, which amount to over 50% of the retail purchase price of liquor in State stores and agencies, apply to on-Reservation sales, tribal liquor enterprises will be driven out of business. Even assuming a credit for tribal taxes, the intrusive aspects of monopoly control on tribal sovereignty indicate that the real price is too great for the tribes to accept the State's terms. Finally, if the State is without authority to require tribal vendorship agreements, how, if at all, can tribal liquor enterprises do business on Constitutionally acceptable terms in a control State?

Payments of Private Attorney Fees With Appropriated Funds --
Factors to be Considered Under 25 CFR §89.40 et. seq.

The exceptional circumstances set forth in 25 CFR §89.40 et seq. for authorizing expenditure of appropriated funds to pay attorneys' fees for private legal representation for appeal of the District Court's final Order in Squaxin Island Tribe et al. v. State of Washington et al. are all met in this case.

§89.40(a) -- Assistance by the Attorney General.

The tribes have determined that it is necessary to appeal the District Court's final Order to protect their trust resources, governmental powers and rights under federal statutes (18 U.S.C. §1161) and federally approved tribal liquor ordinances. The Department of the Interior, Office of the Solicitor and the Department of Justice declined earlier in the District Court proceedings to intervene on behalf of the plaintiff tribes or to represent them for all purposes. Although the Justice Department intervened as amicus curiae in August 1984, this participation was limited to the tax credit issue

only. Although a request has been made for Government representation on the appeal (see letter to Tim Vollmann, Esq., Associate Solicitor, Department of the Interior, dated September 27, 1984, attached hereto as Exhibit A), a declination is anticipated, based on the Government's earlier position and the fact that private counsel has developed and is fully familiar with the complex facts and legal issues and is prepared, without extensive background work and preparation to handle the appeal and, if necessary, to try the case if it is remanded to the District Court. A copy of the response to the September 27, 1984 letter to the Solicitor's Office will be provided as soon as it is received.

§89.42 - Factors to be considered

(a) The merits of the tribes' position. The merits of the legal position the tribes assert are set forth above. Revenues from tribal liquor sales are particularly important to small tribes, such as the Squaxin Island Tribe and the other three applicants, which have limited land bases and few or no other developable natural resources which can generate revenues or tribal taxes.² Thirteen Washington tribes with federally approved liquor ordinances operated tribal or tribally controlled liquor enterprises in 1982/1983. Because of pressure and harassment by the State, only the five tribes who are plaintiffs in the current litigation are still in business in other than a State vendor or agent capacity. This history and the resources employed by the State to drive the tribes out of business suggests that absent an appeal which clarifies the legal issues, the State will succeed by default whether or not it has the authority to do so. The issue of tribal authority is also important in the other liquor monopoly States with significant Indian populations.³

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The State provides no revenues or direct services to the tribes. The availability of revenues from these tribal businesses has been of increasing concern to small tribes as federal funding, from the Bureau of Indian Affairs, the Indian Health Service and the Economic Development Administration, has been cut back in recent years.

³ Exhibit B hereto is a memorandum prepared by the National Alcoholic Beverage Control Association ("NABCA"), the organization which coordinates the interests of the 18 liquor monopoly States. The memorandum, which lists tribes with federally approved liquor ordinances in the control States, was distributed to NABCA members in anticipation of the Supreme Court ruling in Rice v. Rehner. It suggests a common plan to extend State control over tribal enterprises in the event of a "favorable" ruling by the Supreme Court.

Also, the litigation goes far beyond the narrow issue of regulating liquor traffic on Reservations. It involves the revenue raising aspects of tribal enterprises and is significant for other areas of tribal concern, such as use and control of tribal lands, taxation and State licensing authority and regulatory control over other transactions in Indian country. This significance was recognized by the General Assembly of the National Congress of American Indians which, on September 13, 1984, passed a Resolution unanimously supporting appeal and full federal financial support of the tribes' position in the litigation. A copy of this Resolution (No. 59-85) is attached hereto as Exhibit C.

(b) Ability of the tribes to pay legal expenses out of their own funds. Prior to institution of the lawsuit in District Court, the Squaxin Island, Skokomish, Nooksack and Shoalwater Bay Tribes formed the United Sovereign Tribes, a voluntary inter-tribal organization, to defend their sovereign rights and to challenge the State of Washington's attempt to cripple their businesses. The United Sovereign Tribes has relied entirely on funds provided by its member tribes to finance the District Court litigation. Although the tribes obtained a preliminary injunction in February 1984, which enabled them to stay in business pending adjudication of their claims, it is anticipated that this injunction will be lifted and the tribal liquor businesses closed once the District Court proceedings are concluded. The revenues and taxes generated by liquor sales during the pendency of the suit have been used to pay attorneys' fees and to provide the security required by the Court in connection with issuance of the preliminary injunction. The disposition of this security has not yet been resolved; the Court's final ruling may require all or a portion of the security to be paid to the State.

The complexity of the litigation, its expedited nature and its piecemeal disposition by the District Court have required the full-time attention of one attorney for almost eight months and the part-time attention of one and sometimes two other attorneys. This schedule has resulted in substantial legal fees and costs. The United Sovereign Tribes have made diligent, but unsuccessful, efforts to raise funds from other sources. They have been forced to rely on their own resources and have bills for attorneys fees of some \$ _____ which must still be paid for the District Court proceedings.

Because of the State's "enforcement" actions during the months preceding the lawsuit, the tribes were forced either to close their stores or to experience sharp declines in business. Business was built up slowly after issuance of the preliminary injunction, but financing the litigation has been so costly that it has been difficult to earmark any of the revenues for the

tribal government services and programs which the revenues are designed to fund. It is anticipated that such revenues will be unavailable while the case is on appeal.

As is demonstrated by the four tribes' financial statements, attached hereto as Exhibit D, the cost and burden of continuing the litigation on appeal exceeds their available resources and makes federal funding imperative. Resolutions approved by the Tribal Councils of each of the members of the United Sovereign Tribes authorizing this application for appropriated funds and designating the Squaxin Island Tribe as applicant on their behalf are attached as Exhibit E hereto.

[Add (c), (d) and (e) re position of the Lummi Tribe and possibility of legislative solution.]

§89.43 - The Attorneys' Contract

A proposed attorneys' contract is attached hereto as Exhibit F. The contract is for legal services on the appeal by Miriam L. Chesslin, in association with Hobbs, Straus, Dean & Wilder, 1735 New York Avenue N.W., Washington, DC 20005, (202) 783-5100. Ms. Chesslin has been lead counsel in the District Court proceedings, is a member in good standing of the Washington, New York and Kansas bars, and is admitted to practice before the U.S. District Court for the Western District of Washington, the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court. Ms. Chesslin is currently located at 713 Hoge Building, 705 Second Avenue, Seattle, Washington 98104, (206) 467-9983. She will be working in Washington, DC at the Hobbs, Straus firm during the appeal. If the case is remanded, she will return to Seattle and associate for purposes of trial in the Western District of Washington with Harry Chesnin of the firm of MacDonald, Hoague & Bayless, 1500 Hoge Building, 705 Second Avenue, Seattle, Washington 98104, (206) 622-1604.

The proposed contract (1) describes the nature and scope of the problems for which legal services are sought and (2) sets forth the terms and total anticipated costs of the requested contract [\$40,000 plus costs of approximately \$5,000]. (3) Current financial statements for each of the tribes, together with statements that the tribes do not possess sufficient tribal funds or assets to pay for the legal services, as noted above, are attached as Exhibit D hereto.

(4) As indicated above, the Department of the Interior and the Department of Justice previously declined to represent the tribes or to intervene for all purposes in the District Court proceedings. During the eight months the case has been pending, private counsel has developed an extensive factual record in the District Court proceedings, through lengthy depositions and other

discovery, review and admission of several hundred documents obtained primarily from State Liquor Control Board files and analysis of State Liquor Control Board procedures, negotiations and agreements with tribes. In the course of these eight months, private counsel also researched and briefed (or was prepared to brief) the many legal issues raised by the pleadings and motions, including a number of matters of first impression which arise out of the complexities of the Washington State liquor monopoly system and tax structure, and recently developed caselaw limitations on the State action exemption to the antitrust laws. It would be time-consuming and costly for Government attorneys to come into the case at this juncture to review and/or duplicate this work and to prepare adequately to appeal and/or try the case. For these reasons, the matter should be handled by Miriam L. Chesslin, the private attorney who has been lead counsel in the District Court proceedings since their inception, in association with Hobbs, Straus, Dean & Wilder in Washington, DC a firm which specializes in Indian law matters and can provide the necessary substantive backup and expertise for this major case.