Quinault Indian Nation

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Joshua Grice
Department of Ecology
Air Quality Program
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RE: Quinault Indian Nation Comments on "Cap-and-Invest" Rulemaking Related to the Climate Commitment Act

Dear Mr. Grice:

The Quinault Indian Nation ("Nation"), a federally recognized sovereign Indian tribe and signatory to the Treaty of Olympia, submits the following comments regarding the current proposed "Cap-and-Invest" rulemaking to implement the Climate Commitment Act. The Nation expressly reserves all of the Nation's legal rights with respect to the proposed rulemaking and focuses these comments on the Department of Ecology's proposal under WAC 173-446-055.

As explained below, the Nation believes Ecology is straying from the language of the Climate Commitment Act in attempting to require a waiver of tribal sovereign immunity from tribes that wish to participate as a "general market participant." Tribes should be exempt from the enforcement requirement as to state court; in the alternative, Ecology should work directly with each of the 29 sovereign tribal government in Washington to reach a compromise agreement on acceptable dispute resolution protocols.

The Nation understands that the current draft of the proposed rules for implementation of the Climate Commitment Act contains the following language at WAC 173-446-055(3)(b): "Any party registering as a general market participant ***must consent to regulation by ecology and the jurisdiction of the courts and administrative tribunals of the state of Washington*** with respect to any judicial or administrative enforcement action commenced by ecology to ensure compliance with the requirements of chapter 70A.65 RCW and this chapter." Emphasis added. Tribes are eligible to be considered a general market participant; therefore, this language would require tribes to sacrifice their sovereignty in order to engage in the carbon offset development process. Simply put, that is unacceptable. Requiring mandatory consent to state regulation and jurisdiction is a substantial barrier to tribal engagement in the carbon offset development process.

As a threshold matter, the new addition of mandatory consent to state court jurisdiction is completely unmoored from the language of the Climate Commitment Act. Nothing in the Climate Commitment Act, the passage of which would not have been possible without the support of Washington's sovereign tribal governments, suggests that a waiver of tribal sovereign immunity should be required for tribes to participate in the cap-and-invest program. The Washington State Legislature could have expressly included such a requirement within the language of the legislation but chose not to do so. It is well accepted law that "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992). For this reason, courts and agencies should "ordinarily resist reading words or elements into a statute that do not appear on its face." *Dean v. United States*, 556 U.S. 568, 572 (2009). Ecology's decision to require a mandatory consent to state jurisdiction is arbitrary and capricious, and does not belong within the proposed rulemaking for WAC 173-466. To the extent such language remains in the proposed rules as to non-tribal general market participants, the Nation urges Ecology to add a new subsection that expressly exempts tribal governments from the mandatory consent to state jurisdiction and regulation provision.

Second, it offends basic understandings of tribal sovereignty and tribal self-sufficiency for Ecology to seek to force tribal governments to accept state regulation and state court jurisdiction or risk exclusion from the cap-and-invest program. It is well-established that Indian tribes are generally immune from lawsuits. *United States ex rel. Cain v. Salish Kootenai Coll., Inc.*, 862 F.3d 939, 943 (9th Cir. 2017); *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1090 (9th Cir. 2007). Tribal sovereign immunity protects Indian tribes from suit absent express authorization by Congress or clear waiver by the tribe. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). The right and decision to waive sovereign immunity is that of the tribal government alone. Tribal governments should not have to choose between participating in the program and protecting their sovereign immunity. Moreover, each of Washington's tribal governments must make that choice for themselves consistent with their own tribal law.

Third, to the extent there must be some enforcement provision within the proposed WAC 173-446 that must also apply to tribal general market participants, there are ways to meet Ecology's goals without sacrificing tribal sovereign immunity. For example, the proposed language for WAC 173-446-055(3)(b) could be revised to read as follows: "Any party registering as a general market participant must consent to ~~regulation by ecology and the jurisdiction of the courts and administrative tribunals of the state of Washington with respect to any judicial or administrative enforcement action commenced by ecology~~ ***a dispute resolution process*** to ensure compliance with the requirements of chapter 70A.65 RCW and this chapter." Such a change would eliminate the barrier to tribal participation that is being erected by Ecology with its proposed language. Under the Nation's proposal, each tribe wishing to participate as a general market participant may enter into their own agreement with Ecology, which could establish an escalating dispute resolution process that begins with good faith efforts to reach agreement and ends with mediation before a third party to reach a compromise resolution. Such a process would respect tribal sovereignty while also facilitating good faith negotiated solutions to disputes that may arise between Ecology and a tribal sovereign general market participant. Such an approach would also be substantially more cost-effective for both tribes and the State than a rush to litigation in State court.

Finally, related to the issues addressed above, Ecology must ensure that, throughout the rulemaking process on the Climate Commitment Act, tribal members exercising their inherent rights reserved and secured by treaties with the United States remain exempt from additional costs in a manner consistent with how such activities are treated by the Washington Department of Revenue.

Thank you for your consideration of these comments.

The Nation requests government-to-government consultation with Ecology to discuss the proposed rulemaking and the Nation's concerns. Please contact Executive Assistant, Brittany Bryson at bbryson@quinault.org at your earliest convenience to arrange such a meeting.

Sincerely,

Guy Capoeman, President
Quinault Indian Nation

cc: Office of Attorney General
Northwest Intertribal Fish Commission