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No. 35067-0-II

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

IN THE COURT OF APPEALS DIVISION II
FOR THE STATE OF WASHINGTON

PAUL M. MATHESON;

Appellant,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington; CINDI YATES, Director, GARY O'NEIL, Assistant Director, Washington State Department of Revenue; THE WASHINGTON STATE DEPARTMENT OF REVENUE; M. CARTER MITCHELL, Tobacco Tax Control Enforcement Program Manager, Washington State Liquor Control Board; THE WASHINGTON STATE LIQUOR CONTROL BOARD; THE STATE OF WASHINGTON; and CHAD R. WRIGHT, Cigarette Compact Department Administrator, Puyallup Tribe of Indians; and THE PUYALLUP TRIBE OF INDIANS, a Federally Recognized Indian Tribe;

Respondents.

**REPLY BRIEF OF APPELLANT TO BRIEF OF
RESPONDENTS PUYALLUP TRIBE AND CHAD R. WRIGHT**

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STATE OF WASHINGTON
BY [Signature]
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OTHER AUTHORITIES

Cohen's Handbook of Federal Indian Law, 2005 Edition (Lexis
Nexis 2005) § 7.03[1]5

I. Counterstatement to Tribe's Introduction.

The Tribe's assertion that the appeal is frivolous is frivolous. The Tribe states incorrect, outdated non-Washington law in an attempt to prove to the court that the Tribe itself is the oracle of Indian law. A good example is found at page 6 of the Tribe's brief, the Tribe states:

The retailer argued, for example, that because he alleged off-reservation activities in his Complaint, the Tribe's immunity does not apply. But that is incorrect as a matter of law.

The brief fails to mention the 2006 Supreme Court case of *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S.Ct. 676, 679, 163 L.Ed.2d 429 (2006) that states, "In such cases, 'absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.'" *Wagnon*, 126 S.Ct. at 688 concludes, "For the foregoing reasons, we hold that the Kansas motor fuel tax is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians. Accordingly, the tax is valid

and poses no affront to the nation's sovereignty." Here, the Puyallup Tribe went off the reservation to require Matheson to buy his inventory exclusively from wholesalers licensed by the state. The Tribe must go off-reservation to enforce its tax law against non-Indian wholesalers. No sovereign has immunity when it enforces taxation beyond its jurisdiction. *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 497, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003). Thirty percent of the tax was to go to the State ostensibly as "protection" from the feds. A division of profits, the hallmark of a joint venture. The Tribe also agreed to raise its tax automatically when the state cigarette tax is raised. Contract at Part IV 2 (c). This is off-reservation conduct and joint control. Where joint control is shared by agreement, a tribe has no immunity.

The Tribe also fails to mention that it entered into a joint venture contract with the State.

Dixon v. Picopa Construction Company, 772 P.2d 1104 (Ariz 1989) held that a company that engaged in off-reservation activity and where management was not solely in control of the

activity and where management was not solely in control of the tribe, the doctrine of sovereign immunity does not apply.

Powell v. Farris, 94 Wash.2d 782, 787, 620 P.2d 525 (1980) also holds that a tribe has no off-reservation immunity stating:

The relief sought by appellant is simply a dissolution of the partnership established pursuant to the contract. Partnership dissolution is a common law form of action ordinarily heard in state courts of general jurisdiction. Moreover, it is not asserted that a tribe has an interest in regulating a contract made off the reservation. Under these circumstances, we cannot say that state court jurisdiction over this matter would infringe the sovereignty of the tribe.

Maxa v. Yakima Petroleum, 83 Wash.App 763, 924 P.2d 372 (Div. III 1996) follows *Powell* and also holds that there is no sovereignty off-reservation.

The Puyallup Tribe entered into a contract that gives price control and distribution control to the State.

The Tribe also omitted the case of *Wright v. Colville Tribal Enterprises*, 127 Wash.App 644, 111 P.3d 1244 (2005), *review granted*, 156 Wash.2d 1020, 132 P.3d 736 (2006) which is

awaiting decision by the state Supreme Court. It states, “Respondents also claimed tribal sovereign immunity ...because the alleged conduct occurred off the reservation, we find that the state court did have subject matter jurisdiction.”

Wright followed a federal case *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998) and quoted from the case as follows:

Indian tribes, do, however, “retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*.” The operative phrase is “on their reservations.” Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over activities or conduct of non-Indians occurring *outside their reservations*Thus, because the conduct and activities at issue here did not occur on the Rosebud Sioux Reservation, we do not believe *Montana’s* discussion of activities of non-Indians on fee land within a reservation is relevant to the facts of this case.

Like *Rosebud*, 133 F.3d at 1092, the cigarette tax wholesalers do not distribute on the Puyallup Reservation but in the State of Washington. Therefore, the Tribe has no immunity when it regulates this off-reservation activity.

Cohen's Handbook of Federal Indian Law, 2005 Edition (Lexis Nexis 2005) § 7.03[1] states, "Indian tribes and their members, when outside of Indian country, are subject to nondiscriminatory state laws unless federal law provides otherwise. State courts have jurisdiction over suits against individual Indians arising outside Indian country."

Justice Thomas in his concurring opinion indicates in *Lara v. United States*, 541 U.S. 193, 217, 124 S.Ct. 1628 (2004) that tribal sovereignty is "schizophrenic" and "confusing". The *Lara* case, 541 U.S. at 204, in the majority opinion, states that the cases are frozen at the time they are made when sovereignty is the issue. All commentators agree that the present Supreme Court has limited the sovereign powers of the tribes.

The Tribe also fails to point out that this case is a case of first impression on tribal-state tax compacts that do not have federal approval and also on the validity of the state compacting statute, RCW 43.06. The time spent asserting strategic frivolity would have been better spent reading new

cases.

Willman v. Washington Utilities and Transportation Commission, 122 Wash.App. 194, 204, 93 P.3d 909 (Div. III 2004), states that whether the new case *Atkinson Trading v. Shirley*, 532 U.S. 645, 121 S.Ct. 1825, 49 L.Ed.2d 889 (2001) applies is a “complex issue of federal law.” Division Three applied the *Montana v. United States*, 450 U.S. 544, 545, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) factors and held that the answer should be in federal court.

II. The Tribe Has No Immunity Nor Does Chad Wright.

At page 5 of its brief, the Tribe states that tribal immunity is not mentioned. The reason Appellant does not mention tribal immunity is because a tribe has no immunity when it taxes a non-Indian. The Tribe’s brief fails to mention *Atkinson Trading v. Shirley*, 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S.Ct. 676, 688, 163 L.Ed.2d 429 (2006) or the case of *Wright v. Colville Tribal Enterprises Corp.*, 127

Wash.App. 644, 111 P.3d 1244 (Div. I, 2005) that is now awaiting decision in the Washington Supreme Court. These cases hold that a tribe has no sovereignty off-reservation when it contracts off-reservation.

The remaining portion of the Tribe and Chad Wright's brief is answered by Matheson's Opening and Reply Brief to State Respondents. The arguments of the State on tribal immunity prove that it can present the Tribe. Therefore, the Tribe is not an indispensable party.

Matheson does not think any useful purpose will be served by repeating the same or similar arguments. Matheson, however, submits that this effort to save the time and energy of the Appellate Court and counsel for Respondents should not be interpreted as a weakness of any of Matheson's arguments.

Conclusion.

The Tribe has no immunity as it had no congressional permission to enter into the contract or the power to tax. The contention of frivolity in a case of first impression is itself frivolous.

DATED this 16th day of November, 2006.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "R. Kovacevich", written over a horizontal line.

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CERTIFICATE OF SERVICE

This is to certify that a copy of Reply Brief of Appellant to Brief of Respondent Puyallup Tribe and Chad R. Wright was served on David M. Hankins and Heidi Irvin, Counsel for State Respondents, John Bell, Counsel for Tribe Respondents, by mailing the same by First Class mail on November 16, 2006, in a postage-paid wrapper addressed as follows:

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