

No. 35067-0-II

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.

OPENING BRIEF OF APPELLANT

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I.

ASSIGNMENTS OF ERROR

One

The Complaint stated many proper claims for relief, including declaratory judgment, and should not have been dismissed.

Two

The Trial Court erred by refusing to follow the Washington State Supreme Court case of *Aungst v. Roberts*, 95 Wash.2d 439, 625 P.2d 167 (1981), a case holding that an Indian tribe is not an indispensable party and therefore not a necessary party.

Three

The Trial Court erred by not reshaping the suit. The Supplemental Complaint should have been allowed as it reshaped the suit. The Court erred by following a federal case to interpret CR 19(b) when the Supreme Court of Washington has clearly ruled that under these circumstances, the Indian tribe is not an indispensable party.

Four

The Trial Court erred in dismissing the remainder of the Defendants in the case on the basis that the Puyallup Tribe of Indians was an indispensable party.

Five

The Trial Court erred in refusing to uphold the antitrust allegations. The minimum price fixing agreement between the State and the Tribe violates the state statutes, RCW 19.18.040 and the federal Sherman Antitrust Act, 15 U.S.C. §§1 and 14.

Six

The Trial Court erred by refusing to rule on a declaratory judgment involving the interpretation of the extraterritorial state statute, RCW 43.06.455(5)(b), requiring wholesalers who sell to Indian tribal retailers to register with the State of Washington and RCW 43.06.455(8) wherein the State prohibits the Tribe from spending tribal tax revenue to subsidize the Indian business that sells the cigarettes and collects the tax.

Seven

The Trial Court upheld the validity of the Puyallup Tribe-State of Washington Cigarette Tax Contract. The Contract is in the record. For convenience, a copy is attached to this brief as Appendix A. The agreement violated many constitutional provisions, including:

A. Only the U.S. Congress can enter into treaties. U.S. Const. art. 1 § 10 cl. 1. The State-Tribe agreement is a treaty. No state may compact with another state. U.S. Const. art. 1 § 10 cl. 3.

B. The exclusive power to regulate commerce with Indians is retained by Congress. U.S. Const. art. 1 § 8 cl. 2. Regardless of the name given to the agreement, it is an agreement with a governmental entity or with an Indian tribe signed without authority of Congress.

C. Federal law prohibits regulation of Indian reservations and enrolled Indians on Indian reservations. Washington's Constitution Article XXVI, Second also prohibits state control of Indians stating, "Said Indian lands shall remain

under the absolute jurisdiction and control of the congress of the United States.” RCW 37.12.010 codified Public Law 280 and states that “But such assumption of jurisdiction shall not apply to Indians when on their tribal lands.” RCW 37.12.060 states “nothing in this chapter shall authorize . . . taxation of . . . personal property . . . belonging to any Indian . . . or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty.”

D. The agreement violates the Treaty of Medicine Creek, 10 Stat 1132 (1854), as it reserved all regulation of the Puyallup Tribe to the President of the United States.

E. The state of Washington cannot contract away its power of taxation. Wash.Const. art. VII § 1.

F. The disparate treatment of federally regulated military persons from cigarette taxation but requiring the Puyallup Tribe to tax their members violates the Privileges and Immunities Clauses of both state and federal constitutions. U.S. Const. art 4 § 2; Wash.Const. art. I § 12.

G. The dormant commerce clause of the federal constitution prohibits reciprocal taxes, minimum prices and state regulation of treaty Indians beyond its jurisdiction.

Eight

The Trial Court erred in refusing to allow the Supplemental Amended Complaint.

II. STATEMENT OF THE CASE

A. Procedural Status.

Plaintiff filed his Complaint on May 10, 2005. The Defendants all moved to dismiss.¹ The Court granted the motion on May 26, 2006. After the Complaint was dismissed, Matheson lodged a Supplemental Complaint on June 7, 2006. (CP 107). The Supplemental Complaint alleged facts that occurred subsequent to May 10, 2005 when the original complaint was filed. Plaintiff filed a Motion for Reconsideration. The Court denied the motion on July 7, 2006

¹ For convenience, throughout the case Defendants Puyallup Tribe and Chad Wright were referred to as "Tribe Defendants" and the rest of Defendants as "State Defendants." Appellant will continue the references in this appeal.

(CP 122), thereby refusing to allow the Supplemental Complaint to be filed. This appeal follows.

B. Facts

All the facts in this case must be derived from the dismissed complaint in this case.

Paul Matheson is a fully enrolled Puyallup Indian who operates a retail business on trust land on the reservation that sells tobacco products, including cigarettes. Complaint, p. 7, CP 9. The State of Washington, one of the Defendants, has been after him for at least 15 years. Complaint p 8.

The State and the Puyallup Tribe entered into a contract on April 20, 2005, that forced Matheson to charge a minimum price on his cigarette sales at retail. The price had to be the amount paid for the cigarettes plus the Tribe's cigarette tax that was based on the State cigarette tax.

If the State cigarette tax was increased, Matheson had to increase his retail prices. In addition, Matheson had to buy only from state certified wholesalers in compliance with state laws. RCW 43.06.455(5)(b) and (c). Complaint 10-12.

Matheson sued the State, its employees who implemented the contract, the Puyallup Indian Tribe and its tobacco department administrator. He requested a declaratory judgment against the Puyallup Tribe and the State seeking an injunction and declaratory judgment against the tax stating that the contract forcing the tax was price fixing, in restraint of trade, and a tax parity agreement between two sovereigns without permission of Congress. He also sought damages for being forced to abide by the contract alleging that the agreement was a monopolistic conspiracy between the contracting parties.

The Court dismissed the Complaint. Matheson then lodged a Supplemental Complaint but the trial court refused to allow it to be filed.

III. ARGUMENT

A. Plaintiff's Complaint Stated Several Claims for Relief and Pled Many Facts Sufficient to Obtain Declaratory Judgment Relief and Support the Other Claims for Relief.

Defendants' Motion to Dismiss was granted, hence, Plaintiff's well pled factual allegations in his Complaint are presumed to be true. *Burton v. Lehman*, 153 Wash.2d 416, 422, 103 P.3d 1230 (2005); *Bailey v. Town of Forks*, 108 Wash.2d 262, 264, 737 P.2d 1257, 1258 (1987). The Complaint is the only "record" to be reviewed. For purposes of the motion, defendants admit every fact well pled. In addition, a court may consider hypothetical facts not included in the record. *Tenore v. AT & T Wireless Services*, 136 Wash.2d 322, 329-330, 962 P.2d 104 (1998). *Hodgson v. Bicknell*, 49 Wash.2d 130, 136, 298 P.2d 844, 847 (1956). The review on appeal is de novo. *Burton v. Lehman*, 153 Wash.2d 416, 422, 103 P.3d 1230 (2005); *To-Ro Trade Shows v. Collins*, 144 Wash.2d 403, 410, 27 P.3d 1149 (2001). A declaratory judgment complaint cannot be dismissed for failure to state a

claim “unless it appears that the Plaintiff can prove no set of facts in support of his claim that would entitle him to relief”. *Conley v. Gibson*, 355 U.S. 41, 45-6, 78 S.Ct 99, 2 L.Ed.2d 80 (1957). In its brief submitted to the trial court dated September 21, 2005, the Defendant State admitted:

In Matheson’s 38-page complaint, Matheson seeks to invalidate or avoid the Cigarette Tax Agreement or its authorizing legislation, requesting declaratory relief, injunctive relief and damages under approximately 41 different theories, based on alleged violations of state and federal statutes, state and federal constitutional provisions, Indian treaties, and common law principles.

A general allegation of discrimination is sufficient to overcome a dismissal of a complaint for declaratory judgment. *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct 99, 2 L.Ed.2d 80 (1957). It is rarely possible to dismiss a declaratory judgment action against the party seeking relief. The judgment must declare the rights of the parties. *Post v. Bregman*, 707 A.2d 806, 814-815 (Md.App 1998).

The Court’s Order dismissing the case should have adjudicated all issues and be complete. *Fireman’s Retirement*

v. City of St. Louis, 911 S.W.2d 679, 681 (Mo.App 1995). The Order did not even mention all the material issues. It was cursory and incomplete.

If any one of these theories is sufficient to allow Plaintiff to proceed past the pleading stage, the case must be reversed.

B. The Trial Court Erred by Holding That an Indian Tribe is an Indispensable Party.

In this case, the case law in Washington is fully developed and more than adequate as the Washington cases reviewed below hold that an Indian Tribe is not a necessary or indispensable party if the suit has any allegation that allows joint and several relief against a non-tribe defendant.

Matheson, in his Complaint's caption, requested damages (CP 9). At pages 5 and 6, he requests damages for civil rights violations pursuant to RCW 49.30.030. At page 6, he alleges that the State was monopolizing to set prices in violation of RCW 19.86.030, 050, and the Sherman Anti Trust Act.

Matheson's prayer at pages 35-38 requested twelve claims for relief. The first was to declare RCW 43.06.450 through 460 unenforceable against him. At page 38, he requested damages for violating commerce and trade laws.

The Trial Judge treated the entire action as one on the Puyallup Tribe-State of Washington contract stating that the case was intertwined with the contract. Washington case law requires that joint and several liability prevents dismissal and the cases do not mention intertwining. Further, the trial court compounded the error by refusing to consider the supplemental complaint that reshaped the case by dropping the Tribe Defendants. CR 19(b) allows shaping of relief. Appellant reshaped the case, but the trial court ignored the effort, "In law, as in life, two wrongs add up to two wrongs, nothing more." *Cubanski v. Heckler*, 794 F.2d 540, 546 (9th Cir. 1986)(Kozinski J. dissent, *vacated as moot sum nom*, *Bowen v. Kizer*, 485 U.S. 386, 108 S.Ct 1200, 99 L.Ed 402 (1988)).

Aungst v. Roberts Construction, 95 Wash.2d 439, 625 P.2d 167 (1981) is directly in point as it held that an Indian tribe is not an indispensable party. In *Aungst*, a contract was at issue between the Tulalip Tribe and a company that sold camping memberships. A class action was brought against an agent named Roberts who sold the memberships. The Court held that Roberts was not a party to the contract. It held that rescission would prejudice the rights of the Tribe so rescission was not available. The court decision required that the Tribal Court shape the judgment to minimize any prejudice. At page 444, the Court stated "thus, if the facts so warrant, it is possible in this case for the Court to shape a judgment which would minimize any prejudice flowing to the Tribe and the camping club from this litigation.....It follows that the Tribe and the camping club are not indispensable parties to this action."

Cordova v. Holwegner, 93 Wash.App 955, 971 P.2d 531 (Div. III, 1999) unequivocally holds that if joint and several liability judgments can be awarded, an Indian tribe is not a

necessary party under CR 19(a). The holding is conclusive. The Court never has to determine or construe whether the Tribe is an indispensable party as it is not a necessary party.

Cases allow a price fixing suit against only one party without joining others. *L.G. Balfour Company v. F.T.C.*, 442 F.2d 1, 24 (7th Cir. 1971) unequivocally holds that in a price fixing case, only one defendant can be sued without joining other Defendants.

Trans Canada Enterprises Ltd. v. King County, 29 Wash. App 267, 628 P.2d 493 (Div. I, 1981) modified and shaped a tribal court judgment to exclude the Indian tribe stating on 274 “...Rule 19 (b) also directs a trial court to consider the possibility of shaping relief to accommodate these four interests.....the Rule now makes it explicit that a Court should consider modification of a judgment as an alternative to dismissal.”

All of the state cases hold that if the litigant is not a party in a contract, Rule 19 requires that the Court, at the least, shape any judgment to leave out the Indian tribe. The

remaining parties cannot be dismissed as an Indian tribe is never a necessary party and certainly not an indispensable party. The state law is not only adequate, it uniformly requires the Court not to dismiss a case on the basis that an Indian tribe is not joined. The lower court's dismissal of the state is an error in law and must be reversed.

C. The State Defendants Should not Have Been Dismissed. The Complaint was Reshaped by the Supplemental Complaint.

Notwithstanding clear state law to the contrary, the Court applied federal law to dismiss the State Defendants and ignored controlling state law precedent.

The Court announced in its decision that it would follow the Ninth Circuit case of *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005). This case construed the federal rule and declined to follow state law. The state law cases hold that an Indian tribe is not a necessary party, totally contrary to the Ninth Circuit holding. In *State v. Gore*, 101 Wash.2d 481, 487, 681 P.2d 227 (1984), the State Supreme Court clearly ruled that lower courts must follow Washington State Supreme Court decisions, not

federal decisions construing federal law. The Court stated:

The Court of Appeals apparently did not feel bound by our decision in *State v. Swindell*, 93 Wash.2d 192, 607 P.2d 852 (1980). It perceived a “conflict” between *Swindell* and *Lewis*, and chose to resolve it in favor of *Lewis*. *State v. Gore*, 35 Wash.App 62, 66, 665 P.2d 428 (1983). The court did not state, however, that *Lewis* controlled on a federal constitutional question. Rather, it said that the *Lewis* court’s interpretation of the federal statute expressed the better public policy concerns, and that RCW 9.41.040 should therefore be interpreted in a similar manner. In failing to follow directly controlling authority of this court, the Court of Appeals erred. *Swindell* is based on a state statute, and *Lewis* is based on a federal statute. While the Supreme Court’s interpretation of a similar federal statute is persuasive authority, it is not controlling in our interpretation of a state statute. *Weeks v. Chief of the Washington State Patrol*, 96 Wash.2d 893, 897, 639 P.2d 732 (1982); *Young v. Seattle*, 25 Wash.2d 888, 894, 172 P.2d 222 (1946). Further, once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court. *Godefroy v. Reilly*, 146 Wash. 257, 262 P. 639 (1928); cf. *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (“unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts”). The Court of Appeals was therefore without authority to adopt *Lewis* based on what it perceived to be the preferable policy.

In the absence of adequate state authority, federal authority is persuasive only. *Xieng v. Peoples National Bank of Washington*, 120 Wash.2d 512, 844 P.2d 389 (1993). *Bunch v. King County Department of Youth Services*, 5 Wash.2d 165, 182 f.9, 116 P.3d 381 (2005) states, “this court considers federal law in the absence of state precedent.” However, *In re LaChapelle*, 153 Wash.2d 1, 5, 100 P.3d 805 (2004) observes: “.....under the doctrine of stare decisis, ‘once we have decided an issue of state law, that interpretation is binding until we overrule it.’”

D. The Tribe was a Participant in Price Fixing and Should Have Been a Party to the Declaratory Judgment Claim.

Grant County Fire Protection District No. 5 v. City of Moses Lake, 150 Wash.2d 791, 83 P.3d 419 (2004) upheld a declaratory judgment on tax issues, since a tax proposed is an injury in fact. The Federal District Court of Western Washington on summary judgment, *Costco Wholesale Corporation v. Hoen, et al.*, CO4-360MJP, issued December 21, 2005, rejects antitrust immunity. This case is widely reported

in the press including a Wall Street Journal article dated May 11, 2006 pages B1, B2, titled "Court Ruling Could Cut Prices For Beer, Wine." The article stated in part:

Two years ago, Costco, which is based in Issaquah, Wash., sued the state, contending its regulatory restraints were anti-competitive. Costco's chief legal officer, Hoel Benoliel, said the state's restraints raise the price of beer and wine not only to Costco, but to consumers. Last month, U.S. District Court Judge Marsha J. Pechman agreed, deciding that Washington's rules were preempted by federal antitrust law and aren't shielded by the 21st Amendment, which repealed Prohibition.

If the Costco ruling is upheld, Costco and similar big-box retailers will benefit in a number of ways, most likely at the expense of middlemen. For instance, Costco would probably be able to buy beer and wine at volume discounts and centrally warehouse the beer and wine it purchases, things that it is now banned from doing in Washington. It would also be able to buy beer and wine on credit.

The *Costco* case also involves minimum pricing. These issues allow damages to be awarded against governments. The *Costco* case could be reversed on appeal, but the significant question that applies here is that the federal case was determined on the merits, not dismissed at the pleading stage.

In *Wilbur v. Locke*, 423 F.3d 1101, 1116 (9th Cir. 2005) the Court affirmed the dismissal of the case on two issues not present in this case. The first is that the Tribe was an indispensable party because it was not legally protected. Here the Tribe states that it will appear as an amicus. It was joined. The second *Wilbur* difference is that no tribal official was joined. Here Chad Wright was joined. He is a tribal official. The Court expressed no opinion on whether a tribal official could be sued even if the Tribe could not. *Wilbur*, 423 F.3d at 1116. The individual state government officers were not dismissed in the *Wilbur* case. 423 F.3d at 111. Further, the issue of activity off reservation was never at issue in *Wilbur*.

A more important interim case is *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. ___, 126 S. Ct. 676, 163 L. Ed 2d 429 (2005). The U.S. Supreme Court expressly held that taxing non-Indian wholesalers who sold to on-reservation Indians did not violate tribal sovereignty. *Wagnon*, 126 S.Ct at 687-8, states:

If a state may apply a nondiscriminatory tax to Indians who have gone beyond the boundaries of the reservation, then it follows that it may apply a nondiscriminatory tax where, as here, the tax is imposed on non-Indians as a result of an off-reservation transaction.

The holding involves a similar requirement, that Matheson can only buy cigarettes “from wholesalers...licensed by the State to sell cigarettes at wholesale” (Puyallup/State Contract, Part VI, p.6). The purchase requirement mandates approximately \$4.00 per carton be paid into the State’s Master Settlement Fund (Part VIII, 2, p.8). The Court in *Wagnon* quotes *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149, 93 S.Ct 267, 36 L.Ed.2d 114 (1973) and stated that tribal sovereignty is secure within the boundaries of the Reservation, but “(a)bsent 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 687. Price fixing is illegal in Washington. Wash. Const. Art 12 § 22; RCW 18.56.050.

The Washington State Court of Appeals Division I decided a case similar to *Wagnon. Wright v. Colville Tribal Enterprise Corp.*, 127 Wash.App 644, 111 P.3d 1244 (Div. I, 2005) now on review by the Washington State Supreme Court (156 Wash.2d 1020, 132 P.3d 736) (table) oral arguments were heard on May 16, 2006. The case is awaiting a written decision.

E. The Dormant Indian Interstate Commerce Clause And Other Constitutional Provisions Invalidates RCW 43.06.455(5)(b) and RCW 43.06.455(8) and the Provisions of the Contract Allowing State Employees Or Agents to Regulate Plaintiff.

The wholesaler restrictions and minimum pricing are unconstitutional. They are included in part V of the cigarette contract. Part V 3, page 6 states:

Retail Sale - Pricing Requirements

“The retail selling price of any cigarette must not be less than the price paid by the retailer for the cigarette, and such price must include the full amount of cigarette tax imposed on the cigarettes.”

Part V 1 states:

Wholesale Purchases - Requirements

“By Tribal ordinance, the Tribe shall maintain and enforce a requirement that the Tribe as a retailer

and Tribally-licensed retailers acquire cigarettes only from wholesalers or manufacturers licensed by the State to sell cigarettes at wholesale in the State; or the Tribe.”

RCW 43.06.455(2),(5)(b) and(8) are unconstitutional. The

relevant portions of the statute are:

“All cigarette tax contracts shall meet the requirements for cigarette tax contracts under this section...

(2) Cigarette tax contracts shall be in regard to retail sales in which Indian retailers make delivery and physical transfer of possession of the cigarettes from the seller to the buyer within Indian country...

(5) Cigarette tax contracts shall provide that retailers shall purchase cigarettes only from:

(a) . . .

(b) Out-of-state wholesalers or manufacturers who, although not licensed to do business in the State of Washington, agree to comply with the terms of the cigarette tax contract, are certified to the state as having so agreed, and who do in fact so comply. However, the state may in its sole discretion exercise its administrative and enforcement powers over such wholesalers or manufacturers to the extent permitted by law.

(8) Tax revenue retained by a tribe must be used for essential government services. Use of tax revenue for subsidization of cigarette and food retailers is prohibited.”

The dormant commerce clause is a limitation of State authority over Indian reservations and reservation Indians. The

U.S. Const., Art. II, § 2, cl. 2, reserves regulation of Indian commerce to the United States Congress.

The U.S. Constitution states, “§ 8 POWERS OF CONGRESS. The congress shall have power. . .to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

The dormant Indian commerce clause is a limitation of State authority over Indian reservations and reservation Indians. The U.S. Const., Art. II, § 2, cl. 2, reserves regulation of Indian commerce to the United States Congress. ROBERT N. CLINTON, *The Dormant Commerce Clause*, 27 Conn.L.Rev. 1055, 1059-60 (1995) defines the dormant commerce clause as follows:

“Second, the Commerce Clause, like many, but not all, grants of authority to Congress is also thought to contain some implied limitations on the exercise of state authority over the same subject. The doctrines surrounding such implied limitations on state authority derived from the Commerce Clause are often labeled theories of the negative implications of the Commerce Clause or the dormant Commerce Clause.”

The law review also notes at page 1067 that the first case holding the federal government controlled Indians not the colonies, was *Moheagan Indians v. Connecticut*, England 1703 (1743), Daniel Horsmanden, J., not *Worcester v. Georgia*, 6 Pet. 515 (1832).

United States v. Lara, 541 U.S. 193, 197-99, 200, 201, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004), over two hundred and sixty years later, revived the Indian commerce clause and reemphasized treaty rights. The case recognizes that Indian tribes have inherent sovereign powers of self government termed "inherent tribal sovereignty" and that tribes are "domestic dependent nations." It held that Congress cannot restrict tribal power, but can "relax" restrictions on tribal authority. *Lara* states:

"This Court has traditionally identified the Indian Commerce Clause, U.S. Cont., Art. 1, § 8, cl.3, and the Treaty Clause, Art II, §2, cl. 2, as sources of that power. . .the 'Central function of the Indian Commerce Clause,' we have said 'is to provide Congress with plenary power to legislate in the field of Indian affairs.' *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989)."

Plenary means absolute. Webster's Third International Dictionary unabridged (1981 ed.).

F. Only Congress Can Legislate on Matters of Indian Tribes or Tribal Indians.

Article XXVI Second of the Washington Constitution states that jurisdiction of Indian lands "shall remain under the absolute jurisdiction and control of congress."

Worcester v. Georgia, 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832) rejected state licensing of persons going onto an Indian reservation 173 years ago. The case is still the law. *U.S. v. Lara*, 541 U.S. 193, 201-2, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004), citing *Worcester*, states:

The treaties and laws of the United States contemplate. . . that all intercourse with [Indians] shall be carried on exclusively by the government of the union.

Second, Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority."

G. Enrolled Tribal Indian Businesses Cannot be Regulated by Washington State.

The State of Washington has disregarded the absolute federal power and has attempted to legislate Indian matters. RCW 43.06.455(8) seeks to prevent an Indian food retailer who does not sell cigarettes from any help from tribal cigarette taxes. *Cuno v. Daimler Chrysler*, 386 F.3d 738 (6th Cir. 2005), *rev'd on other grounds*, 126 S.Ct 1854 (2006), held that tax credits to an auto manufacturer violated the commerce clause. The provision by the state law regulating how an Indian tribe spends its tax money should have been reviewed by the trial court. The dormant Indian commerce clause prohibits the State Defendants from sharing in tribal tax and regulating Matheson in any way when he conducts his reservation business on the Puyallup Indian reservation.

Pioneer Packing v. Winslow, 159 Wash. 655, 665, 294 P. 557 (1930) applies the Interstate Commerce Clause to shipment of goods from and to Indian reservations. The Court held that the state game warden could not seize the steelhead

sold by the Quinault Indians while they were being repacked in Aberdeen as “such sale and transportation was protected by the interstate commerce clause of the Federal Constitution.”

Mahoney v. State Tax Commission, 524 P.2d 187, 190 (Idaho 1973) applied both the Interstate Commerce Clause and responsibility to regulate Indian commerce to prohibit the State of Idaho from taxing Indian cigarettes incoming from Washington to the Coeur d’Alene Indian reservation. The Court stated:

“Of course, the *McLeod* case dealt with commerce ‘among the several states’; but by its own terms, the Commerce Clause applies with equal force to commerce ‘with the Indian tribes. It follows, therefore, that the Commerce Clause precludes the imposition of Idaho sales tax upon the on-reservation sale of cigarettes by members of an Indian tribe to non-Indian purchasers.”

H. The Medicine Creek Treaty Bans the State’s Monitoring of Plaintiff.

In the 1850s, Territorial Governor Issac Stevens negotiated six treaties with Indian tribes living in Washington Territory, one of which was the Treaty of Medicine Creek, 10 Stat 1132 (Dec. 26, 1954), that established the Puyallup Indian

Reservation. *Midwater Trawler's Co-Operative v. Department of Commerce*, 282 F.3d 710, 714 (9th Cir. 2002). These treaties negotiated with tribes all across the United States follow a common method of removing Indians to reservations. The Medicine Creek Treaty at its article 6, adopted the Article 6 of the Treaty with the Omahas, 10 Stat 1043, March 16, 1854. The article provides that Indian lands shall be exempt from levy, sale or forfeiture and that no state legislature shall remove these restrictions with the consent of Congress.”

While the states are trying to avoid the treaties, they cannot change the U.S. Constitution, Article VI, paragraph 2, stating that treaties made by the United States, “shall be the supreme law of the land; and the judges of in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” The Washington Constitution acknowledges the Indian lands are under absolute “jurisdiction and control of the congress of the United States.” Art XXVI Second.

The state statute RCW 37.12.060 prohibits taxation of personal property of Indians held in trust.

The Washington legislature ignored this torrent of constitutional law and blithely provided that Paul Matheson, a tribal retailer, could only buy his cigarettes at wholesale from persons who agree to be certified by the State and to agree to the cigarette tax compact setting minimum prices. RCW 43.06.455(5)(b). The statute also provided that revenue from tribal cigarette tax had to be used for essential government services. RCW 43.06.455(8). Tax funds cannot be used for helping Paul Matheson's business. RCW 43.06.455(14) defines essential government services but does not define what services are prohibited.

The federal law, Pension Protection Act of 2006, P.L. 109-XXX, § 906(b)(1)(A-C) effective August 17, 2006, added tribal government plans if the workers were performing governmental functions. The Joint Committee Reports JCX 38-06 states that teachers in schools are governmental employees but not employees who work for a "hotel, casino, service station,

convenience store or marina.”

The state law prohibiting the Puyallup Tribe from using the tax to subsidize Matheson violates another constitutional principal, the Privileges and Immunities Clause, U.S. Const. art. IV § 2. Wash.Const art 1 § 12 states, “no law shall be granting any class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens.”

The State also recognizes that the United States retains plenary jurisdiction. *Purse Seine Vessel Owners Association v. State*, 92 Wash.App. 381, 392, 966 P.2d 928 (1998) upheld federal preemption of treaties. *Makah Indian Tribe v. Clallam County*, 73 Wash.2d 677, 440 P.2d 442 (1968) held that an Indian business located on trust land was not taxable by the county. The Court stated on 687: “That the Makahs will, while receiving most of the benefits of taxpayers and citizenship, escape some of the correlative responsibilities of citizenship is a problem for the Congress and the President to solve.”

The *Makah* case was an early recognition that contracts with Indian tribes are treaties and that Congress, not state

legislatures, must solve problems of Indian commerce.

The treaty rights apply to a reservation Indian whether the activity is on or off the reservation. *Tulee v. State of Washington*, 315 U.S. 681, 62 S.Ct 862, 86 L.Ed. 1115 (1942).

The *Tulee* case can be applied to the cigarette statute as state regulation by licensing wholesalers selling to Indians is the same principle.

The State of Washington cannot even issue a traffic citation to an enrolled Indian traveling on his reservation. *Confederated Tribes of The Colville Reservation v. State*, 938 F.2d 146 (9th Cir. 1991).

Your Foods Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (N.M. 1961) applies here as this case did not carry much significance until approved twice by the U.S. Supreme Court. *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 691 (Footnote 18), 85 S.Ct 1242, 14 L.Ed.2d 165 (1965) ; *McClanahan v. Arizona Tax Commission*, 411 U. S. 164, 177, 93 S.Ct 1257, 36 L.Ed.2d 129 (1973). New Mexico, like Washington, added what is now Section 26 of the

Washington Constitution to its constitution by adopting the terms of its Enabling Act with the United States. The same language disclaiming state rights to regulate Indian lands and the agreement to abide by treaties under the jurisdiction of Congress is contained in the New Mexico Constitution. The *Your Foods* Court held that the village could not assess or collect taxes from a store on Indian land.

The states cannot “pierce the boundaries of the reservation”. *Maynard v. Narrangansett*, 798 F.Supp 94, 99 (D.R.I. 1992) aff’d 984 F.2d 14 (1st Cir. 1993).

McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.Ct 1257, 36 L.Ed.2d 129 (1973) applies the Enabling Act and holds that the doctrine of federal preemption invalidates state laws when on reservation enrolled Indians are directly involved. The case holds that a state cannot unilaterally legislate, but must have Congressional permission to tax Indians. *McClanahan*, 411 U.S. at 177. The case also states “. . . state law could have no role to play within reservation boundaries.” *McClanahan*, 411 U.S. at 168.

This rule also applies to state regulation of fishing boats owned by Indians in *United States v. State of Washington*, 645 F.2d 749, 756 (9th Cir. 1981), where the court stated:

“Applying the BBP’s use restriction to Indians is not required for a permissible conservation purpose, and it affirmatively hinders the exercise of Treaty rights. The policy discriminates against Indians because the use restriction is not applied to the large sport-fishing industry...Because application of the use restriction and concomitant statutory penalties to Treaty Indians is not required for conservation and impermissibly hinders the exercise of Treaty rights guaranteed by the supremacy clause, the order below is AFFIRMED.”

The Treaty of Medicine Creek, 10 Stat 1132, Dec. 26, 1854, provides at Article 1: “nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent.” The right of way to the nearest public lands is also granted to Plaintiff as is the right to trade with all Indians, except foreign (Canadian) Indians. Article XII.

Keweenaw Bay Indian Community, 452 F.3d 514 (6th Cir. 2006), discusses the same relevant provisions in the Treaty of

the Chippewa, 10 Stat 1019 (Sept. 30, 1854), that are contained in the Treaty of Medicine Creek signed only three months later. The Medicine Creek Treaty also provided that the land could be surveyed into lots for homes for the Puyallup Indians provided for annuity payments free of debt. The treaties both preserved residing rights. This case and many others established that the State of Washington cannot impose its tax laws, including wholesaler cigarette tax law on Indians selling on the Puyallup Indian Reservation.

The contract, even though by its terms, does not benefit or burden third parties, violates the Treaty of Medicine Creek even if the contract does apply as Matheson can trade with any wholesaler he wants as this right is secured by the treaty. *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998); *Mt. Hood Beverage Company v. Constellation Brands*, 149 Wash.2d 98, 63 P.3d 779 (2003); *Coeur d'Alene Tribe v. Hammond*, 384 F.3d 674 (9th Cir 2004) *cert. den.* 125 S.Ct. 1397, 161 L.Ed.2d 190 (2005).

The U.S. Constitution, Art 1 § 10 expressly restricts the states from entering into treaties, "No state shall enter into any

treaty.” Treaties are synonymous with contracts and compacts. Treaties with Indian tribes have been eliminated since 1871. 25 U.S.C. § 71.

I. The State is Prohibited by the Dormant Commerce Clause From Regulation Beyond Its Jurisdiction.

The State of Washington has attempted to regulate cigarette prices in an area completely outside of its jurisdiction. Congress consented to jurisdiction of the state in Public Law 280. The State Legislature, pursuant to the permission of Congress, accepted jurisdiction in eight subject matter areas, all of which involve personal matters of motor vehicles. Taxation is not one of the subject areas and is specifically prohibited. RCW 37.12.010, 060. Criminal and civil jurisdiction can be assumed only by majority vote of tribal members. RCW 37.12.021. The Puyallup tribe has not requested this assumption.

Congress has never granted the states authority to set wholesale restrictions on purchases by tribal retailers or to set reciprocal prices on taxes. The State cannot contract with

Indians unless the power is delegated by federal law by Congress. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1554 (10th Cir. 1997).

Healy v. The Beer Institute, 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) completely and totally rejected a state law that attempted to set prices outside the state jurisdiction as it excluded the limits of the state's authority as discriminatory, attempting invalid economic protectionism and violative of the Interstate Commerce Clause. The statute tied the prices charged to out of state prices. The Puyallup tribe-State tax contract achieves the same invalid result as Part V, 3 requires the retailer to sell at the retailers cost plus the tax. The Court in *Healy*, 491 U.S. at 334 stated: "Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates Interstate Commerce." RCW 43.06.455(5)(b)(2) and Part V, 1 force Matheson to buy only from wholesalers approved by the State even though they do not do business in Washington.

Healy also states, 491 U.S. at 336:

“Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the ‘commerce Clause. . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State. . . Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”

U.S. v. Locke, 529 U.S. 89, 116, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000) applies the same preemption to Washington’s Administrative rules that sought to apply to vessels that had not yet entered into the state stating: “Furthermore, it affects a vessel operator’s out-of-state obligations and conduct, where a State’s jurisdiction and authority are most in doubt. The state reporting requirement under WAC § 317-21-130 is pre-empted.”

Locke was decided on conflict and field preemption grounds of federal supremacy. *State v. Labor Ready*, 103 Wash.App. 775, 14 P.3d 828 (Div. III, 2001) held a statute that prohibited importation of strike breaking out of state workers,

but not in state workers, unconstitutional. The Court held that the statute violated federal preemption. Art. 6, cl 2. Congress, by express preemption in the U.S. Constitution to regulate Indian commerce and from “The recognized relation of tribal Indians to the Federal government”, has exclusive authority to regulate and deal with Indians or non Indians who do business on an Indian reservation. *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975).

Boomer v. AT & T, 309 F.3d 404, 417 (7th Cir. 2002), holds that an express federal statute passed to aid a federal objective preempts state law. The case defines types of preemption and states at 417:

“Because federal law is the supreme law of the land, it preempts state laws that ‘interfere with, or are contrary to, federal law.’ *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). A federal law may preempt a state law expressly, implied through the doctrine of conflict preemption, or through the doctrine of field (also known as complete) preemption.”

The contract itself is invalid as the legislature has no power to legislate compacts with Indian tribes. *Hotel and*

Restaurant Employees Intern. Union v. Davis, 981 P.2d 990 (Cal. 1999).

J. Discriminatory Taxes Requiring Reciprocity are Invalid.

The discriminatory treatment by one state against products produced in another state interferes with free trade and is unconstitutional. *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366, 370, 96 S.Ct. 923, 47 L.Ed.2d 55, (1976) involved reciprocity agreement that Mississippi required from an out of state distributor before its milk products could be sold by retailers. The Court held the requirement unconstitutional stating: “. . . .The Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.”

The Court also stated on 379, “But Mississippi may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement.”

This language was again stressed in the later case of *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 108 S.Ct.

1803, 100 L.Ed.2d 302 (1988). In *Limbach*, the Supreme Court struck down an agreement that required ethanol produced in another state to be imported if the other state had similar tax credits on production. Justice Scalia authored the opinion and held that this type of economic protectionism burdening out of state competitors to benefit in state economic interests violates the “negative” Commerce Clause.

The *Limbach* case (486 U.S. at 275), also stated that even though the out of state distributor could accept less profit, the result was not changed as the tax was the equivalent of a rampart of customs duties.

Private Truck Council of America v. Secretary of State, 503 A.2d 214 (Me. 1986), held a reciprocal truck tax that required an out of state truck trip fee if the state of origin charged a trip fee was invalid. The Court stated on 218 as follows:

“A state may not violate the Commerce Clause in an attempt through self-help to coerce another state into desisting from a Commerce Clause violation Nothing in the present case suggests a different analysis. Balkanization, even though only partial, is still Balkanization.”

Wheeling Steel Corporation v. Glander, 337 U.S. 562, 573, 69 S.Ct. 1291, 93 L.Ed 1544 (1949), holds state law invalid as it attempted to offer the intangibles of Ohio residents to taxation by other states.

In *West Lynn Creamery v. Healy*, 512 U.S. 186, 194, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994), Massachusetts imposed an assessment on all fluid milk sold by dealers to retailers. Two-thirds of the milk was produced out of state. The Court held that this was a tariff violative of the Commerce Clause, because it neutralized the advantage possessed by out of state producers.

K. Disparate Treatment of One Class of Citizens Violate the Privileges and Immunities Clause of Wash.Const. art 1§ 12.

Associated Industries v. Lohman, 511 U.S. 641, 649, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994), held that a use tax that in most counties was lower but in a few counties was higher than an out of state tax still violated the Commerce Clause as there must be "strict rule of equality." The Court struck down the use tax on goods bought out of state. The Court also held that

the attempt at reciprocal equality violated equal protection of the Fifth Amendment as applied to the states by the Fourteenth Amendment.

The case applies to the cigarette tax involved here as in *Lohman*, 571 U.S. at 645, the Court noted that sales in the state were taxed higher in most areas. In some counties, the use tax exceeded the sales tax so a burden on interstate commerce occurred in the counties with a low sales tax. The Court states that the tax must be the same on “substantially equivalent events.” *Lohman*, 571 U.S. at 647. The Court held that the tax violated the commerce clause as “the burdens imposed on interstate and intrastate commerce must be equal.” On 650, “Actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred.” Discrimination has occurred in this case as the fifteen military bases in Washington sell tax free cigarettes at prices lower than Matheson.

The State of Washington currently does not charge cigarette tax on military sales, RCW 82.24.290, and also does not charge cigarette tax on Indian sales at retail. RCW 82.24.260(c). The contract does not allow Plaintiff to sell tax free to military persons. Part IV, 2(c). Regarding tribal members of the Puyallup Tribe, Part VI, 1(c) states: "The Tribe agrees it will impose a tax on sales to members." Both groups are tax free in the state, but taxable on the reservation. These exceptions are discriminatory and not the "strict equality" required by *Lohman*, 511 U.S. at 649.

United States v. Washington, 645 F.2d 749, 756 (9th Cir. 1981) states: "The policy discriminates against Indians because the use restriction is not applied to the large sport-fishing industry." Off reservation discrimination against Indians preempts and invalidates state statutes. *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691, 700 (9th Cir. 2004).

The Massachusetts Supreme Court, in an *Opinion of Justices to the House of Representatives*, 702 N.E.2d 8 (S.C. Mass. 1998) held a \$3 tax to residents of Boston, but \$10 to

others who rented cars invalid as the imbalance violated the dormant commerce clause. The Court, 702 N.E.2d at 13 states that: “Measures discriminating against out-of-state consumers have . . . not been tolerated.” It gives “local consumers” an advantage over consumers in other states. The Court held that the statute was discriminatory on its face and could not “overcome a strong presumption of unconstitutionality.” The Court quoted *C and A Carbone Inc. v. Clarkstown*, 511 U.S. 383, 393, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) that “Revenue generation [alone] is not a local interest that can justify discrimination against interstate commerce.” 702 N.E.2d at 15. The Court also noted that the power to tax cannot be used to construct any economic barrier against competition. 702 N.E.2d at 12.

Carbone is on “all fours” with this case as the exemption of Indians and military by the State of Washington and attempting to force a tax on both these groups by the Puyallup Tribe is facially discriminatory.

American Trucking Association v. Scheiner, 483 U.S. 266, 284, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987), held a Pennsylvania axle tax on trucks traveling interstate, “..... threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania.” The Court also stated at 288, “Most importantly, even if the relative amounts of the State’s registration fees confer a competitive advantage on trucks based in other States, the Commerce Clause does not permit compensatory measures for the disparities from each State’s choice of tax levels.”

Indians will now buy from state stores and customers of Matheson who are in the military and their friends and relatives will cease buying from him and will now buy from military concessionaires. The contract discriminates against the dormant Indian and interstate commerce clauses.

L. The Contract Mandates Minimum Resale Prices. Thereby Violating Antitrust Laws.

The provisions quoted above fit exactly with the Supreme Court case of *Mt. Hood Beverage v. Constellation Brands*, 149

Wash. 2d 98, 63 P.3d 779 (2003). The case analyzed the wine cases in light of the dormant commerce clause and held that exempting in-state suppliers from provisions that apply to out-of-state suppliers is facially discriminatory and invalid. The fact that tax is involved or a retail seller does not change the result. *Associated Industries v. Lohman*, 511 U.S. 641, 649, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994).

The rigid resale price system violates the state and federal monopoly and price fixing laws. The reason is that there is no supervision of either government or other competitors. *324 Liquor Corp. v. Duffy*, 479 US 335, 342, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987) holds that state law forcing retailers to sell at minimum wholesale prices is a per se antitrust violation. The fact that retailers receive shipments and not personal purchases does not change the result.

Freedom Holdings Inc., v. Spitzer , 2004 WL 2035334, S.D.N.Y. p.28, unequivocally holds that setting cigarette prices by wholesalers causes ongoing damage. The Court stated:

“A loss of market share, however, is difficult to quantify and represents a loss of opportunity which may not be quickly or easily regained, and this may be considered irreparable.”

The state of New York did not appeal the grant of the preliminary injunction. *Freedom Holdings v. Spitzer*, 408 F.3d 112, 113 fn. 1 (2nd Cir. 2005).

In *Knudsen Corporation v. Nevada State Dairy Commission*, 676 F.2d 374 (9th Cir. 1982), the state of Nevada set a minimum list price. Sales at retail could not be made below the list price. The court noted at 379 that Nevada enforced privately set prices and therefore the plaintiffs “demonstrated a strong probability of success on the merits.”

Goldfarb v. Virginia State Bar, 421 U.S. 773, 781, 95 S.Ct. 2004, 44 L.Ed 2d 572 (1975) states unequivocally that a rigid minimum price is a violation of anti-trust laws. At issue was a minimum fee schedule.

The State Constitution Article XXVI, Second states that Indian land remains under the “absolute jurisdiction and control of congress.” *Humes v. Fritz Companies, Inc.*, 125

Wash.App 477, 490, 105 P.3d 1000 (Div. I, 2005) states, “In Washington, state jurisdiction over Indians is exercised within the limits of the Federal Act of Public Law 280, RCW 37.12.010. The legislative history of Section 4(a) of Public Law 280 does not demonstrate an intent to confer general state civil regulatory control over Indian reservations. *Bryan v. Itasca County*, 426 U.S. 373, 384-85, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976).”

M. The Amended Complaint Should Have Been Allowed.

CR 15(d) allows supplemental pleadings setting forth transactions or occurrences on events which have happened since the date of the pleading sought to be supplemental.

The Second Supplemental Complaint at pages 3, 4, 5, 12, and 15, alleges facts and events that have occurred since May 10, 2005, when the original complaint was filed. It is also intended to replace and invalidate the First Amended and Supplemental Complaint filed June 14, 2005.

The Defendants were not prejudiced or surprised.

Allowing amendments is freely given where, the case has not been set for trial. *Walker v. Sieg*, 23 Wash.2d 552, 558, 161 P.2d 542 (1945); *Herron v. Tribune Publishing*, 108 Wash.2d 162, 165, 736 P.2d 249 (1987). *Caruso v. Local Union No. 690*, 100 Wash.2d 343, 349, 620 P.2d 240 (1983) holds that CR 15 was based on the federal rule. Fed.Civ.P. 15(d) allows amendments for subsequent events even if the original pleading was defective.

Caruso, 100 Wash.2d at 349 states that, “the amendments should be freely given and that the court should not erect formal and burdensome impediments to the litigation process.” The only criterion to prevent amendment is prejudice to the opposing parties. In *Caruso*, a delay of five years and four months was not prejudicial. In this case, the facts were all in possession of the opposition and the delay was a few months.

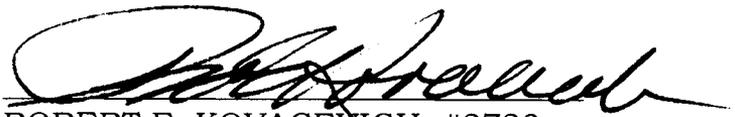
IV. CONCLUSION

The Complaint alleged price fixing and unconstitutional state laws beyond the State’s powers. It easily surpassed the

requirements of stating a claim. The Court should not have dismissed the Complaint. The case must be reversed and the case resolved on the merits.

DATED this 19th day of September, 2006.

Respectfully Submitted,

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

ROBERT E. KOVACEVICH, #2723
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CERTIFICATE OF SERVICE

This is to certify that a copy of Opening Brief of Appellant was served on David M. Hankins and Heidi Irvin, Counsel for State Respondents and John Bell, Counsel for Tribe Respondents, by mailing the same by First Class mail on September 19, 2006, in a postage-paid wrapper addressed as follows:

David M. Hankins
Heidi Irvin
Assistant Attorneys General
Revenue Division
905 Plum Street SE, Bldg.3
P.O. Box 40123
Olympia, WA 98504-0123

Mr. John J. Bell
Puyallup Indian Tribe
3009 E. Portland Ave.
Tacoma, WA 98404

FILED
COURT OF APPEALS
06 SEP 20 PM 12:26
STATE OF WASHINGTON
BY *[Signature]*

DATED this 19th day of September 2006.



ROBERT E. KOVACEVICH, #2723
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APPENDIX A

CIGARETTE TAX AGREEMENT

Between

THE PUYALLUP TRIBE OF INDIANS

And

THE DEPARTMENT OF REVENUE

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PREAMBLE

WHEREAS, the Puyallup Tribe of Indians ("Tribe") is a federally-recognized Indian tribe and sovereign Tribal government, pursuant to the Treaty of Medicine Creek with the United States of America (10 Stat. 1132), and the Tribe's Constitution and Bylaws; and

WHEREAS, the state of Washington ("State") is a state within the United States of America, possessed of full powers of state government; and

WHEREAS, the body of federal law and policy recognizes the right and the importance of self-determination for tribes, the authority of a tribe to tax certain activities, and the need for tribal economic development; and

WHEREAS, the State has committed to the political integrity of the federally-recognized tribes within the state of Washington and has formally recognized that the sovereignty of each tribe provides paramount authority for the tribe to exist and to govern; and

WHEREAS, a long-standing disagreement exists between the Tribe and the State over questions regarding jurisdiction over and the taxation of the sale and distribution of cigarettes; and

WHEREAS, the State and the Tribe will benefit from resolution of that disagreement by the change in focus from enforcement and litigation to a focus on the administration of and compliance with this Cigarette Tax Agreement; and

WHEREAS, the Tribe and State will benefit from resolution of that disagreement by the tax base this Agreement will enable, taxation being an essential attribute of tribal sovereignty and a tool of self-sufficiency; and

WHEREAS, the State and the Tribe will also benefit by the exercise of the attributes of sovereignty and from the improved well-being of enrolled members that will result from economic development by the Tribe and its members; and

WHEREAS, both the Tribe and State desire a positive working relationship in matters of mutual interest and seek to resolve disputes and disagreements by conducting discussions on a government-to-government basis; and

WHEREAS, the mutual interests of the State and the Tribe brought these two governments together to pursue their common interest in resolving this tax disagreement; and

WHEREAS, nothing herein shall waive the sovereign immunity from suit of the Tribe or the State, nor shall anything herein waive, alter, or diminish any rights, privileges, or immunities guaranteed by the Treaty of Medicine Creek; and

NOW THEREFORE, the Puyallup Tribe by and through its Chairman, and the state of Washington by and through its Governor, do hereby enter into this Agreement for their mutual benefit.

PART I
Recitals

1. Sovereign Immunity

Nothing in this Agreement shall be construed as a waiver, in whole or in part, of either party's sovereign immunity.

2. Tribe Does Not Submit to State Jurisdiction

By entering into this Agreement, the Tribe does not concede that the laws of the State, including its tax and tax collection provisions, apply to the Tribe, its members, or agents regarding activities and conduct within or outside of Indian country.

3. State Does Not Concede Tribal Immunity

By entering into this Agreement, the State does not concede that the Tribe has any immunity from its tax and tax collection provisions.

4. Agreement Does Not Create any Third Party Beneficiaries

No third party shall have any rights or obligations under this Agreement.

5. Tobacco Master Settlement Agreement

This Agreement is not intended to impact the State's share of proceeds under the Master Settlement Agreement entered into by the State on November 23, 1998. The Tribe recognizes the State has an interest regarding nonparticipating manufacturers. The State recognizes the Tribe has an interest in the Master Settlement Agreement. The Tribe agrees that it will not impede the State's efforts to secure compliance of the nonparticipating manufacturers, and the Tribe reserves its rights regarding these matters. Nothing in this Agreement supercedes or replaces chapters 70.157 or 70.158 RCW.

6. Jurisdiction

This Agreement does not expand or limit the jurisdiction of either the Tribe or the State.

PART II
Definitions

1. "Agreement" means this Agreement entered into by the State and the Puyallup Tribe.
2. "Carton" or "carton of cigarettes" means, unless otherwise indicated, a carton of two hundred (200) cigarettes.
3. "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

4. "Department" means the Washington State Department of Revenue.
5. "Essential government services" means services provided by the Tribe, including, but not limited to, administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development.
6. "Indian country," consistent with the meaning given in 18 U.S.C. 1151, means:
 - a. All land within the limits of the Puyallup Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the Reservation; and
 - b. All Indian allotments or other lands held in trust for an enrolled Tribal member or the Tribe, the Tribal titles to which have not been extinguished, including rights of way running through the same.
7. "Liquor Control Board" or "Board" is an agency of the State with a mission to prevent the misuse of alcohol and tobacco through education, enforcement, and controlled distribution.
8. "Non-Indian" means an individual who is neither a Tribal member nor a nonmember Indian.
9. "Nonmember Indian" means an enrolled member of a federally recognized Indian Tribe other than the Puyallup Tribe.
10. "Parties to the Agreement" or "parties" means the Puyallup Tribe and the State.
11. "Puyallup Indian Reservation" or "Reservation" means the area recognized as the Puyallup Indian Reservation by the United States-Department of the Interior.
12. "Retail selling price" means the ordinary, customary, or usual price paid by the consumer for each package or carton of cigarettes, which price includes the Tribal cigarette tax.
13. "State" means the state of Washington.
14. "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking. "Tobacco products" do not fall within the definition of "cigarettes."
15. "Tribal member" means an enrolled member of the Puyallup Tribe. For purposes of this Agreement, a member of another federally recognized Tribe who is the spouse of an enrolled Puyallup Tribal member shall be treated the same as an enrolled member of the Puyallup Tribe.

16. "Trially-licensed retailer" means a tribal member who has a business license from the Puyallup Tribe to sell cigarettes at retail from a business located in Indian country.
17. "Tribal cigarette tax" means the tax enacted as a provision of Tribal ordinance on cigarettes sold at retail, expressed as a flat amount in cents per cigarette and units of packs and cartons, as more fully set forth in Part IV of this Agreement.
18. "Tribe," or "Tribal," means or refers to the Puyallup Tribe.
19. "Wholesaler" means a person who purchases, sells, or distributes cigarettes for the purpose of resale.

PART III

Applicability of the Agreement

1. Execution of Agreement

This Agreement shall become effective upon completion of three steps: (a) authorization for the Governor's signature by enactment of the Washington Legislature; (b) approval by the Tribal Council as indicated by the signature of the Tribal Chairman, and (c) approval by the State as indicated by the signature of the Governor. This Agreement shall be executed in duplicate originals, with each party retaining one fully-executed duplicate original of the Agreement.

2. Application

From its execution, and contingent on the imposition of the Tribal cigarette tax pursuant to a Tribal resolution meeting the terms of Part IV of this Agreement, this Agreement shall apply to the retail sale of cigarettes by the Tribe as a retailer and by Trially-licensed retailers. Sales subject to the Tribal cigarette tax imposed pursuant to this Agreement are those in which delivery and physical transfer of possession of the cigarettes from the retail seller to the buyer occurs within Indian country. If the Tribe desires to pursue mail order and/or internet sales of cigarettes, the Tribe and State agree to negotiate in good faith mutually acceptable terms and conditions of a memorandum of understanding concerning the taxation of such sales.

3. Scope Limited

This Agreement is limited in scope to the selling of cigarettes by the Tribe and its members. This Agreement does not affect the tax obligations or tax treatment of:

- a. Cigarettes sold at retail by non-Indians or nonmember Indians;
- b. Tobacco Products as defined in Part II of this Agreement; and
- c. Cigarettes manufactured by the Tribe or its enterprises within Indian country.

PART IV
Imposition of Tribal Cigarette Taxes

1. Tribally-Licensed retailers

- a. The Tribe shall require, by enactment of Tribal law, that each Tribally-licensed retailer comply with the terms of this Agreement. The Tribe agrees that it will maintain and enforce a requirement that any Tribal member selling cigarettes at retail on the Puyallup Indian Reservation must first obtain a business license from the Tribe. The Tribe agrees to provide to the Department and the Board upon execution of this Agreement a list of Tribally-licensed retailers, and to provide the Department and Board with an up to date version of the list. The Tribe agrees that any cigarette retailer wholly owned by Tribe is subject to this Compact. The Tribe and the State agree that compliance efforts in regard to such retailers shall be in accordance with Part IX of this Agreement.
- b. The Tribe shall enact policies regarding Tribal access to records of Tribally-licensed retailers. Such policies shall be in accord with and in furtherance of Part IX of the Agreement.

2. Tax Imposed on Retail Sales by Tribally-Licensed Retailers and the Tribe

- a. Subject to Part VI, Section 1, concerning retail sales to Tribal members, the Tribe, by ordinance and in accord with the requirements of this Part, shall impose Tribal cigarette taxes on all sales by the Tribe as retailer and by Tribally-licensed retailers of cigarettes to retail purchasers within Indian country.
- b. Beginning no sooner than the date this Agreement is signed by both parties, and subject to enactment of a Tribal ordinance authorizing the imposition of a Tribal cigarette tax, the Tribe shall impose and maintain in effect a tax on the retail sale of cigarettes equaling no less than 5.875 cents per cigarette (eleven dollars and seventy-five cents per standard carton).
- c. During the term of this Agreement, upon any future increase in the State cigarette tax, the Tribal cigarette tax shall increase by no less than the dollar amount of the increase in the State tax. Upon any future decrease in the State cigarette tax, the Tribe may decrease its cigarette tax in a similar manner.
- d. During the term of this Agreement the State agrees that State taxes are not applicable to transactions that comply with the requirements of this Agreement. The State waives its right to collect the State cigarette, sales, and use taxes as to those transactions from the Tribe, Tribally-licensed retailers, state licensed wholesalers from which they purchase, or retail buyers. In addition, the State agrees that enforcement of this Agreement shall be done in accordance with the conditions set forth in this Agreement.

3. Revenue-Sharing

The Tribe shall provide to the State, on a quarterly basis, thirty percent (30%) of the revenue that the Tribe receives from the collection of the Tribal cigarette tax imposed under this part.

PART V
Purchase and Sale of Cigarettes by Tribal Retailers

1. Wholesale Purchases – Requirements

By Tribal ordinance, the Tribe shall maintain and enforce a requirement that the Tribe as a retailer and Tribally-licensed retailers acquire cigarettes only from wholesalers or manufacturers licensed by the State to sell cigarettes at wholesale in the State; or the Tribe, subject to the requirements of Part VII, section 2 of this Agreement.

2. Delivery of Cigarettes to Tribal Retailers Outside of Indian Country

Cigarettes bearing the tax stamp required by this Agreement may be delivered or transferred within or outside of Indian country by a wholesaler to the Tribe or a Tribally-licensed retailer. Deliveries may be made by commercial carriers. Invoices identifying the cigarettes as Puyallup Tribe cigarettes must accompany such cigarettes.

3. Retail Sale – Pricing Requirements

The retail selling price of any cigarette must not be less than the price paid by the retailer for the cigarette, and such price must include the full amount of cigarette tax imposed on the cigarettes.

PART VI
Tax Stamps

1. Tax Stamp Required

- a. Tribal retailers may not possess unstamped cigarettes. All cigarettes sold by Tribally-licensed retailers and the Tribe shall bear a Tribal tax stamp meeting the requirements of part VI.
- b. The Tribe agrees to require Tribally-licensed retailers to post a notice advising that cigarettes may not be purchased for resale.
- c. The Tribe agrees it will impose a tax on sales to members.

2. Creation and Supply of Tribal Tax Stamp

- a. The Tribe shall arrange for the creation and supply of a Tribal tax stamp by an appropriate manufacturer. Tribal tax stamps will have a serial number or some other discrete identification so that stamps may be traced to the wholesaler.
- b. The Tribe shall purchase stamps from a nationally recognized stamp manufacturer.

3. Stamp Vendor Contract

- a. The Tribe shall contract with a bank or other appropriate vendor to distribute tax stamps. The stamp vendor shall distribute stamps to wholesalers, upon payment by the wholesaler to the vendor of the Tribal cigarette tax and remit the collected taxes to the Tribe. The contract shall provide that the Tribe shall purchase a supply of Tribal tax stamps from the manufacturer and make them available for purchase by wholesalers through the stamp vendor. The Tribe may, at its option, select as the stamp vendor the bank with which the Department contracts for that service, or some other third party stamp vendor satisfactory

to both the Tribe and the Department. The Tribe agrees to provide the Department of Revenue with a copy of its stamp vendor contract.

- b. The Tribe shall require the stamp vendor to:
 - i) Remit to the Tribe all revenue collected from the Tribal cigarette tax (such amount being less a reasonable administrative fee for stamping wholesalers);
 - ii) Provide to the Tribe and to the Department timely reports detailing the number of Tribal tax stamps sold, and make its records available for auditing by the Tribe and the Department;
- c. This agreement contemplates that the Tribe may at some point in the future act as its own stamp vendor. In the event that the Tribe decides to act as its own stamp vendor, it agrees to first enter into a memorandum of agreement with the Department regarding this activity.

4. Requirements for Affixation of Stamps by Wholesalers

- a. Wholesalers shall affix the tax stamps to the smallest container of cigarettes that will be sold or distributed by the Tribally-licensed retailer. Stamps shall be affixed so that the stamps may not be removed from the package without destroying the stamp.
- b. Wholesalers may only possess unstamped cigarettes for as long as is reasonably necessary to affix tax stamps to the packages for sale. It is presumed that any such possession in excess of seventy-two (72) hours (excluding Saturdays, Sundays, and Holidays) is in contravention of this Agreement. The term "holiday" is limited to the following holidays: New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas.
- c. For the purposes of this Section 4 of Part VI, any business outlet selling cigarettes at retail, including an outlet wholly owned and operated by the Tribe, is not a wholesaler. The Tribe agrees to purchase for and sell from any retail outlet that it owns and operates only stamped cigarettes acquired from the sources listed in Part V of this Agreement.

5. Wholesaler Obligation Under State Law

Affixing of the tax stamps, retention and production of records required by state law (in the case of state licensed wholesalers) and by this Agreement (in the case of Tribe acting as a wholesaler and subject to Part VII (2) of this Agreement), and compliance with other requirements in this Agreement, shall be deemed to satisfy the State cigarette excise tax obligation of a wholesaler.

6. State Agreement Regarding Compliance with State and Federal Law

The State agrees that all transactions that conform with the requirements of this Agreement do not violate state law and that it will not assert that any such transaction violates state law for the purpose of 18 U.S.C. § 2342 or other federal law specifically based on violation of state cigarette laws or other tax laws.

PART VII
Wholesalers

1. Wholesalers Licensed by the State

Wholesalers licensed by the State are subject to the requirements as set forth in Title 82 RCW and any rules adopted thereunder, and therefore must maintain adequate records detailing which cigarettes are subject to State tax and which cigarettes are subject to the Tribal cigarette tax.

2. Tribe as Own Wholesaler

The Tribe may sell stamped cigarettes to Tribally-licensed retailers for sale at retail under the terms of this Agreement. If the Tribe, by itself or through a wholly-owned and operated Tribal enterprise, sells cigarettes at wholesale to Tribally-licensed retailers, that wholesale activity does not require a memorandum of agreement under this Section. However, the Tribe agrees that it will be subject to the same buying restrictions as wholesalers licensed with the state of Washington, including the provisions of chapters 70.157 and 70.158 RCW, and RCW 19.91. 300. In addition, the Tribe agrees that it will notify the State in advance of initiating business as a wholesaler and will work in conjunction with the Department of Revenue and the Liquor Control Board to assure that all necessary steps and controls are in place to assure security of the stamping process, handling of tax receipts, and integrity of the overall function.

PART VIII
Enforcement Authority Program

1. Intent

It is the intent of the parties that responsibility for enforcement of the terms of this Agreement shall be shared by the State and the Tribe. The State shall have primary responsibility, exercised by its Liquor Control Board, for enforcement against non-Tribal and non-Tribal member wholesalers, to the extent allowed under law. The Tribe shall have primary responsibility for enforcement against Tribal member retailers. The parties shall work cooperatively by providing each other with relevant information and in other necessary ways to facilitate their respective enforcement responsibilities.

2. Commercial Carriers

The State recognizes that wholesalers who meet the requirements of this Agreement may make shipments of cigarettes by commercial carrier. Such shipments must be accompanied by documents required under this Agreement and are subject to advance notice requirements.

3. Notification

If the Tribe has elected to act as a wholesaler, the Tribe or its designee shall notify the Department seventy-two (72) hours in advance of any shipments of unstamped cigarettes to the Tribe. Such notice shall include who is making the shipment (meaning who is the wholesaler), detail regarding both quantity and brand, and the invoice order number. Transportation of the cigarettes without the notice required by this section subjects the

cigarettes to seizure. The State and the Tribe may enter into a memorandum of agreement addressing the Tribe's activity as a wholesaler, in which case, this advance notice provision is not applicable and is supplanted by the terms of the memorandum of agreement.

PART IX

Compliance and Enforcement Program

1. General

The parties wish to provide assurance and ongoing confirmation that they are in compliance with the terms of this Agreement. This Part will provide a process for regular verification of that compliance. The verification process is intended to reconcile data from all sources that make up the cigarette stamping, selling, and taxing activities under this Agreement. Both parties acknowledge that the requirement to purchase cigarettes from wholesalers licensed with the State provides the State access to wholesaler records and provides both parties certainty in regards to stamping of cigarettes and collection of taxes.

2. Compliance Program

- a. The Tribe agrees to establish, in consultation with the Liquor Control Board and the Department of Revenue, a retailer compliance program. The purpose of the program is to monitor compliance with this Agreement and the ordinances enacted to implement this Agreement. The program shall include measures to monitor and investigate retailers in regard to:
 - i) Sales to minors;
 - ii) Sales of unstamped cigarettes;
 - iii) Sales of cigarettes obtained from unauthorized sources;
 - iv) Pricing compliance; and
 - v) Other factors agreed to by the parties.
- b. The Tribe agrees it will provide monitoring, sampling, investigation, reporting, and related activities necessary to carry out the retailer compliance program, either by contract with an independent third party or by the Tribe's Cigarette Tax Enforcement Department ("CTED.") These functions will be conducted either by CTED or by a third party under contract with the Tribe. The choice between those two options and the identify of the third party, if any, is subject to the approval of the State.
- c. The Tribes agrees that it will require in its contract with the third party that all reports be shared simultaneously with the Tribe, the Department of Revenue, and the Board. The Tribe, Board, and Department of Revenue working together shall establish the frequency for reports and criteria for timeliness of reporting and sharing information regarding violations. Except in cases of suspected and/or documented violations of the Agreement or Tribal law, the reports will not reveal the identities of retailers who are the subjects of the reports, other than to verify that all Tribally-licensed retailers have been monitored within the period of time specified by the parties as appropriate.

3. Tribal Auditor to Review Government Records

- a. For the purposes of any audit involving its government accounts and enterprise activities, the Tribe may use the same independent auditor that it uses to perform its routine

- government audits. The Tribe agrees that the auditor will be a certified public accountant in good standing. The Auditor will review records on an annual basis, consistent with the Tribe's fiscal year, to verify the requirements of this Part unless otherwise specified. The Tribe will retain the Auditor and bear the costs of the auditing services. The Tribe shall be entitled to communicate freely with the Auditor.
- b. The Auditor shall review records for all years during the current appropriate audit cycle, and may review records for earlier years after the date of the signing of the Agreement only as necessary for an internal reconciliation of the Tribe's books. The purpose of the audit is to reconcile tax collections and to provide the State timely and accurate information regarding compliance with this Agreement.
 - c. The Auditor will compile and provide to the Department of Revenue, the Liquor Control Board, and the Tribe, a separate report containing timely and accurate information on the following topics:
 - i. Overall tax collection;
 - ii. Revenue sharing;
 - iii. Stamp inventory and stamp purchases (in order to reconcile tax collections);
 - iv. A determination of whether the Tribe has expended revenue from the cigarette tax on essential government services.
 - d. The Auditor shall provide a report on these topics to the Tribe, the Department, and the Liquor Control Board, once a year, covering the just-concluded fiscal year, and shall be delivered no later than 90 days after the end of the Tribe's fiscal year. The first required review shall cover the period from the effective date of the tax through the end of the Tribe's fiscal year. The Department and the Board shall be entitled, by operation of this Agreement, to the Auditor's report as outlined in this subsection, but not to a copy of the Auditor's complete audit of the Tribe's books and records.

PART X

Dispute Resolution

1. General

- a. The Tribe and the State wish to prevent disagreements and violations whenever possible, and to quickly and effectively resolve disagreements and violations when they arise. It is the parties' expectation that most disagreements and violations should and will be resolved most effectively through informal discussion. The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this Part.
- b. As used in this Part "days" means business days, unless otherwise specified.

2. Summary

The parties intend, as spelled out in greater detail below, that the dispute resolution process will include the following elements:

- a. Notification of Violation;
- b. Meeting(s) and informal discussion seek resolution of dispute;
- c. Mediation: opinion and recommendation of mediator;
- d. Correction of violation;

- e. Termination of Agreement under defined circumstances.

3. Notification of Violation

- a. If a party believes that there has occurred or is occurring a violation covered by this Part X, it shall notify the other party in writing, stating the nature of the alleged violation and any proposed corrective action or remedy ("Notice of Violation"). Violations that are subject to this Part include violations of (a) this Agreement or (b) applicable law that either party has undertaken in this Agreement to enforce, committed by (x) either party, (y) a Tribally-licensed retailer, or (z) a state-licensed wholesaler. An error made by the Auditor in any of its reports is also an appropriate subject for the dispute resolution procedure in this Part X.
- b. The parties shall meet within 14 days after receipt of a Notice of Violation, unless the parties agree on a different date, and on such further occasions as they shall agree to meet. They shall attempt to resolve the issue(s) raised by the Notice of Violation and to provide an opportunity to implement any agreed corrective action.

4. Mediation

- a. If the parties are unable to resolve the disputed issues through joint discussions under Section 3 of this Part, either party may request mediation by giving the other party a written mediation demand ("Mediation Demand"). The parties shall attempt to agree on a mediator. If they cannot agree on a mediator within 30 days of the Mediation Demand, each party shall select a mediator and the two mediators selected by the parties shall jointly select a third mediator. Mediation shall occur within a reasonable time of selection of the mediator(s). The parties shall bear their own attorneys fees but shall share equally the other costs of conducting the mediation, including the fees of the mediator.
- b. The parties recognize that disagreements and violations of the terms of this Agreement caused by actions of any retailer or wholesaler may take longer to resolve. With respect to that part of a disagreement or dispute involving a member retailer, the parties must wait at least 45 days after the sending of the Notice of Violation before delivering a Mediation Demand. The parties recognize that in cases where the appropriate remedy for a violation is enforcement action against the retailer or wholesaler, that action, even though initiated within 45 days, may take longer than that period of time to complete. It is the expectation of the parties that the parties will work together diligently during this period to arrive at a solution.

5. Opinion, Recommendation, Remedies

Within a reasonable time after completion of the mediation session(s), the mediator(s) shall render an opinion as to whether a violation has occurred, including any recommended corrective action to remedy the violation. The mediator(s) shall not render an opinion or make a recommendation as to any issue on which the parties have reached agreement. Recommended remedies may include audit of relevant Tribal, a retailer's, or a wholesaler's records, interpretation of Agreement terms, changes in reporting, recordkeeping, enforcement practices, business practices, action by one or both parties to enforce the requirements of this Agreement or of applicable law, or similar actions. Recommended remedies shall not

include an award of monetary damages or costs of any kind, or the disclosure of any records not specifically subject to disclosure under this Agreement.

6. Termination of Agreement

- a. It is the parties' intent that in cases where, in the mediator(s) opinion, there has been a substantial violation of this Agreement, the offending party be given a reasonable time to initiate and complete corrective action. A "reasonable time" will vary with the circumstances, but shall in general be the time that would ordinarily be required for a government, taking immediate action pursued with due diligence, to correct the violation or obtain compliance. A "substantial violation" is any violation that deprives either party of an important element of what it bargained for in this Agreement and includes, but is not necessarily limited to, the following violations:
- i) Ongoing, significant retail sales of unstamped cigarettes during the term of this Agreement;
 - ii) Failure to submit to mediation as required by this Part;
 - iii) Failure of the Tribe to establish a compliance program;
 - iv) A breach of the confidentiality provisions of Part XIII of this Agreement;
 - v) Failure of the Tribe to meet the revenue sharing obligations under this Agreement
 - vi) The State's violation of Part IV, Section 2(d) or Part VI, Section 6 of this Agreement;
 - vii) The Tribe's refusal to allow or require the Auditor access to records it needs to conduct its audit; and
 - viii) Failure of the Tribe to enforce the terms of this Compact in regards to member retailers.
- b. If the party in violation has not corrected the problem or obtained or sought compliance within a reasonable time, after receipt of the mediator(s) opinion finding a substantial violation of the Agreement, the aggrieved party may, in its discretion choose to terminate this Agreement. If the aggrieved party chooses not to terminate the Agreement at that time, it does not waive its right to terminate the Agreement subsequently at any time if the violation remains uncorrected.

7. Notification of Sales to Minors Violation

The Department and/or the Liquor Control Board shall immediately notify the Tribe if an allegation is made that a Tribally-licensed retailer has made sales to minors in violation of Part XIV, Section 2 of this Agreement. Upon such notification, the Tribe shall take enforcement action according to the provisions of Tribal law. Upon the third or subsequent violation within any calendar year, the provisions of Sections 2 through 5 of this Part shall apply.

8. Notice Requirements

For the purposes of this Agreement, notice shall be by certified mail, return receipt requested, unless both parties agree in writing to accept notice by facsimile. Notice shall be deemed to be given three (3) working days after the date written notice is sent. Notice shall be given as follows:

To the Department: Director
Washington State Department of Revenue
P.O. Box 47454
Olympia, WA 98504-7454

To the Tribe: Chairman, Puyallup Tribal Council
1850 Alexander Avenue
Tacoma, WA 98421

With a copy to: Legal Department
Puyallup Indian Tribe
1850 Alexander Avenue
Tacoma, WA 98421

PART XI
Responsibilities of the Tribe, the Department of Revenue,
and the Liquor Control Board

The Parties recognize that this Agreement describes a mutual undertaking with shared responsibilities and further recognize the responsibilities of the Tribe, the Department of Revenue, and the Liquor Control Board to be as follows:

1. Tribe

The Tribe is responsible for the administration of the Agreement, a compliance program, audit and recordkeeping, and dispute resolution, as well as negotiation of its terms.

2. Liquor Control Board

This Agreement does not alter the Liquor Control Board's responsibility under chapter 82.24 RCW. The Board is responsible to provide input and expertise to the Department during negotiations and to work together with the Department of Revenue and the Tribe to ensure compliance with this Agreement.

3. Department of Revenue

The Department is responsible for the administration of the Agreement, audit procedures and recordkeeping, and dispute resolution, as well as negotiation of its terms, on behalf of the State.

PART XII
Term of this Agreement – Amendment

This Agreement may remain in effect no longer than eight (8) years from its effective date, subject to the termination provisions of Part X of this Agreement. Amendments or extensions to the Agreement shall be considered upon the written request of either party. Disputes regarding

requests for amendment of this Agreement shall be subject to the dispute resolution process in Part X of this Agreement.

PART XIII Confidentiality

All information under the terms of this Agreement received by the Department or open to Department review is "return or tax information" and is subject to the provisions of RCW 82.32.330, the tax information "secrecy clause." All other information that is subject to review by the Auditor or review by the mediator or certified public accountant is confidential and shall not be disclosed to anyone, in any forum, for any purpose.

PART XIV Miscellaneous Provisions

1. Periodic Review of Agreement Status

- a. Representatives of the Tribe and the Department shall meet at mutually agreeable times and places upon the reasonable request of either party to review the status of this Agreement and any issues that have arisen under the Agreement.
- b. It is the expectation of the parties that the Tribe, the Department, and the Liquor Control Board will meet freely to discuss jurisdictional issues, expectations, and protocols, and to share enforcement and compliance information.

2. Sales to Minors

Neither the Tribe nor a Tribally-licensed retailer shall sell or give, or permit to be sold or given, cigarettes to any person under the age of eighteen (18) years.

3. Essential Government Services

Tribal cigarette tax revenue shall be used for essential government services. The Auditor shall certify the use of such revenue under the process set forth in Part IX of this Agreement.

4. Rule 192 – Application

This Agreement is a "cooperative agreement" as that term is used in WAC 458-20-192 (Rule 192).

5. Other Retail Sales within Indian Country by Tribal Members

Under Puyallup Tribal law, only licensed Tribal retailers are permitted to make retail cigarette sales within Indian country. The Tribe agrees to provide through tribal ordinance for suspension or revocation of such license in those instances where after notice is given and opportunity to comply is provided, the retailer's sale of cigarettes remains out of compliance with the requirements of this Compact.

6. Subsequent State Legislative Enactments

If the State Legislature enacts a law that provides more favorable terms for the Puyallup Tribe, the parties shall amend the Agreement to reflect such terms.

7. Severability

If any provision of this Agreement or its application to any person or circumstance is held invalid, the remainder of the Agreement is not affected.

THUS AGREED THIS 20th day of April, 2005

PUYALLUP TRIBE

STATE OF WASHINGTON

By:

Herman Dillon, Sr.

Herman Dillon, Sr.,
Chairman
The Puyallup Tribe

By:

Christine Gregoire

Christine O. Gregoire,
Governor
State of Washington