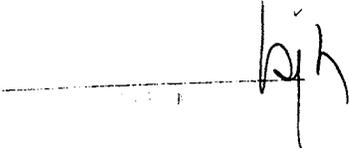


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**COA # 36132-9-II**  
NO. 79359-0



**THE SUPREME COURT  
STATE OF WASHINGTON**

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HOLLY W. FOXWORTHY, Appellant

vs.

PUYALLUP TRIBE OF INDIANS ASSOCIATION d/b/a  
EMERALD QUEEN CASINO, et al., Respondents

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**BRIEF OF RESPONDENTS PUYALLUP TRIBE OF INDIANS  
ASSOCIATION, D/B/A EMERALD QUEEN CASINO, A/K/A THE  
PUYALLUP INDIAN TRIBE, D/B/A EMERALD QUEEN CASINO**

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## I. INTRODUCTION

“Under federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and ‘unequivocal’ waiver or abrogation.” Wright v. Colville Tribal Enterprise Corp., 147 P.3d 1275, 1278 (2006). As a federally-recognized Indian Tribe, the Puyallup Tribe possesses the common law defense of immunity from suit traditionally enjoyed by sovereign powers. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Puyallup Tribe v. Washington Dep’t of Game, 433 U.S. 165, 172-73 (1977). The Tribe is therefore “exempt from suit without Congressional authorization.” U.S. v. U.S. Fidelity & Guar. Co. 309 U.S. 506, 512 (1940).

Congressional abrogation of tribal sovereign immunity must be unequivocal and cannot be implied. Santa Clara Pueblo, 436 U.S. at 58. Tribal immunity is a matter of federal law and is not subject to diminution by the states. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 756 (1998); Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 154 (1980).

There is no Congressional statute which eliminates an Indian Tribe’s sovereign immunity from “dram shop” actions in state court. The two Courts of Appeal to consider this issue have concluded that 18 U.S.C. § 1161 does not waive sovereign immunity for this type of action. See,

Holguin v. Ysleta Del Sur Pueblo, 954 S.W.2d 843, 854 (1997) (“We cannot conclude, however, that tribal immunity is waived for a *private suit* brought under the Texas Dram Shop Act”); Filer v. Tohono O’Odam Nation Gaming Enterprise, 212 Ariz. 167, 172, 129 P.3d 78 (2006) (“Section 1161, 18 U.S.C., however, does not even mention tribal immunity, much less waive it for private dram shop actions”). Notably, Texas and Arizona Supreme Courts declined to even review Holguin and Filer. A decision contrary to Holguin and Filer would not only be contrary to the principles for analyzing Congressional abrogation of tribal sovereign immunity, it would result in 18 U.S.C. § 1161 (applicable to all federally recognized Indian Tribes), having one meaning in Arizona and Texas and another meaning in Washington.

Congress alone can abrogate tribal sovereign immunity through legislative enactment and this Court should conclude, as the Holguin and Filer Courts have already concluded, that 18 U.S.C. § 1161 does not waive tribal sovereign immunity for private dram shop actions for money damages in state courts.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the Puyallup Tribe and its agencies, enterprises and entities continue to enjoy sovereign immunity from “dram shop” actions for money damages filed in Washington State superior courts where Congress has never enacted any legislation that abrogates the Tribe’s immunity for this type of suit.

2. Whether the trial court erred when it granted the Puyallup Tribe's CR 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. The Puyallup Indian Tribe Has Sovereign Immunity.**

The Puyallup Indian Tribe is a federally recognized Indian Tribe operating under a Constitution and By-Laws approved by the Secretary of the Interior. CP 2. The Tribe has never waived its sovereign immunity for personal injury actions in Washington State superior courts. See, CP 21-22. The Tribe's council has, however enacted a Tribal Tort Claims Ordinance which allows a person to bring an action for monetary damages in Tribal Court for injuries caused by acts or omissions of the Tribe or its agents, employees or officers acting on behalf of the Tribe and within the scope of their authority. CP 264-271. This is the exclusive forum for bringing claims against the Tribe.

#### **B. The Pierce County Superior Court Action Was The Wrong Forum For Appellant's Suit.**

Appellant's case arises from a March 16, 2003 motor vehicle accident in Pierce County. CP 1-10. The accident occurred at approximately 1:50 a.m. and involved two motorists, Appellant Holly M. Foxworthy and William Robert DeWalt. CP 1-10. Appellant alleges that immediately prior to the accident, she was driving in the northbound lanes

of SR 705 and Mr. DeWalt was reportedly driving while intoxicated, heading southbound in the northbound lanes with his headlights off. CP 1-10. The two vehicles collided, resulting in injuries to petitioner and Mr. DeWalt. CP 1-10.

The Emerald Queen Casino had previously barred Mr. DeWalt from its premises for directing racial slurs toward Casino employees on September 21, 2002. CP 29-30. Assuming he was at the Casino on March 16, Mr. DeWalt would therefore have been trespassing. See, CP 28-30. It is unknown when Mr. DeWalt left the Casino that night and whether he consumed alcoholic beverages at another location after leaving the Casino.

In March 2006, petitioner sued the Puyallup Tribe of Indians Association, d/b/a Emerald Queen Casino, a/k/a the Puyallup Indian Tribe, d/b/a Emerald Queen Casino, Mr. DeWalt and his wife. CP 1-10. Petitioner's claims against the Tribe include negligence, statutory violation of RCW 66.44.200(1),<sup>1</sup> and negligent training/supervision/retention. CP 1-10. Petitioner alleges that the Tribe sold alcohol to Mr. DeWalt after he was visibly intoxicated. CP 1-10.

On September 15, 2006, the Pierce County Superior Court granted the Tribe's CR 12(b)(1) motion to dismiss for lack of subject matter

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<sup>1</sup> The statute provides: "No person shall sell any liquor to any person apparently under the influence of liquor." RCW 66.44.200(1).

jurisdiction. CP 305-07. The Court found no just reason to delay the appeal of this issue pursuant to RAP 2.2(d). CP 305-09.

#### IV. ARGUMENT

##### A. The Nature And Origins Of Tribal Sovereign Immunity.

Federally recognized Indian tribes possess the common law defense of immunity from suit traditionally enjoyed by sovereign powers. See, e.g., Santa Clara Pueblo, 436 U.S. at 58; Puyallup Tribe, 433 U.S. 165 at 172-73. Because Indian nations are separate sovereigns that pre-exist the Constitution, Santa Clara Pueblo, 436 U.S. at 56, the immunity enjoyed by federally recognized Indian Tribes is more akin to that of other sovereign nations than that enjoyed by the states. Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991). First and foremost, any congressional abrogation of tribal sovereign immunity must be unequivocal and cannot be implied. Santa Clara Pueblo, 436 U.S. at 58.<sup>2</sup>

##### B. Prior Decisions Of This Court Correctly Interpreted The Scope And Attributes Of Tribal Sovereign Immunity.

This Court has properly followed the body of tribal sovereign immunity law established by the federal courts. It has already held that an

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<sup>2</sup> Tribal sovereign immunity extends to tribal employees as long as their alleged misconduct occurred while they were acting in their official capacity and within the scope of their authority. Linneen v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir.), cert. denied, 536 U.S. 939 (2002); Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1984).

Indian tribe is immune from garnishment actions and that a Tribe's conduct of commercial activities off of reservation land did not waive its immunity. North Sea Prods. Ltd. v. Clipper Seafoods Co., 92 Wn.2d 236, 237, 595 P.2d 938 (1979). In Clipper Seafoods, the Whatcom County Superior Court issued a writ of garnishment ordering the Lummi Tribe's governing body and the tribe's seafood processing plant to withhold the wages of a plant employee. Because Congress had not enacted any statute relinquishing tribal sovereign immunity from garnishment actions and the tribe had not implied waived its immunity by conducting commercial activities off the reservation and by hiring a judgment debtor, the Court remanded the case with instructions to quash the writ and dismiss the case. Clipper Seafoods, 92 Wn.2d at 241-42.

This Court has also recently affirmed the controlling principle in this case: “[u]nder federal law, tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit absent explicit and ‘unequivocal’ waiver or abrogation.” Wright, 147 P.3d at 1278. Another key concept this Court adheres to is that tribal sovereign immunity protects Tribes from suits involving both governmental and commercial activities on and off the reservation. Wright, 147 P.3d at 1276 (citing Kiowa Tribe, 523 U.S. at 754-55; See also, Md. Cas. Co. v. Citizens Nat'l Bank, 361 F.2d 517, 521 (5th Cir. 1966) (“The fact that the

Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material.”). In Wright, a majority of the Court held that two governmental corporations of the Colville Tribe and their agent acting in his official capacity were immune from an employment discrimination action filed in superior court, *specifically recognizing that* “Congress has not abrogated tribal sovereign immunity to suit for employment discrimination.” Wright, 147 P.3d at 1280.

Congress has not abrogated tribal sovereign immunity for private dram shop actions in state court either.<sup>3</sup> 18 U.S.C § 1161, the only statute on which plaintiff relies, provides:

The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

18 U.S.C. § 1161.

The statute does not contain any express or implied waiver for private “dram shop” actions in state court.

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<sup>3</sup> Notably, Appellant does not cite, much less discuss, these cases in her opening brief.

C. **Freedom From Individual Suits Is A Traditional Hallmark Of All Forms Of Sovereign Immunity, Including The Immunity Enjoyed By The Puvallup Tribe.**

“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” Principality of Monaco v. State of Mississippi, 292 U.S. 313, 324 (1934) (quoting Alexander Hamilton, The Federal No. 81, pp. 548-49 (J. Cooke ed. 1961)); see, also, Blatchford, 501 U.S. at 780, n.1).

“Foremost among the attributes of sovereignty retained by Indian tribes is immunity from suit. Absent Congressional action, consent or waiver, an Indian tribe may not be subject to suit in state or federal court.” State of Montana v. Gilham, 133 F.3d 1133, 1136 (9<sup>th</sup> Cir. 1998) (citing Santa Clara Pueblo, 436 U.S. at 58; Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9<sup>th</sup> Cir.1983)).

D. **Congress Has Not Waived Tribal Sovereign Immunity For Private State Court Dram Shop Actions For Money Damages.**

Appellant concedes that there is no express waiver of tribal sovereign immunity in 18 U.S.C. § 1161. Appellant’s argument is based on the proposition that private dram shop actions are part and parcel of the type of state regulation of alcohol-related activities of Indian Tribes that does not offend principles of tribal sovereign immunity. (Appellant’s Brief at 9-12.) This proposition is the linchpin of plaintiff’s argument, but

it is fatally flawed because it conflates the critical distinction between the “right to demand compliance with state laws and the means available to enforce them.” Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 755 (1998).

In Rice v. Rehner, 463 U.S. 713, 715 (1983), the Court held that state regulation of a tribe member’s sales of liquor for off-reservation consumption does not infringe tribal sovereign immunity. The Court found that by enacting 18 U.S.C. § 1161, Congress had delegated authority to the States and the Indian Tribes to regulate the use and distribution of alcoholic beverages in Indian country. Rehner, 463 U.S. at 715. Rehner did not involve an attempt to bring a private action for damages against a Tribe in state court. The “backdrop” of tribal immunity relevant to the Court’s analysis was “the licensing and distribution of alcoholic beverages,” not sovereignty’s fundamental attribute of freedom from private suits. Rehner, 463 U.S. at 720.

In reaching its holding, the Court examined its historical approach to assessing whether state regulation of activities in Indian country is preempted by federal law and the role tribal sovereign immunity played in this analysis. Rehner, 463 U.S. at 718-21. The impact of tribal sovereign immunity varies according to the sovereignty interest at issue. If Indian Tribes had traditionally enjoyed immunity in a given context, repeal of the

immunity is disfavored; if there was an absence of a tradition of immunity, the pre-emption analysis gives less weight to the “backdrop of tribal sovereignty.” Rehner, 463 U.S. at 719-20.

Because the Court found that no tradition of tribal regulation of alcohol sales, it accorded to little if any weight to tribal sovereignty interests in this context and proceeded to analyze whether California’s authority to require a license for on-reservation sales of alcohol was preempted by federal law. Rehner, 463 U.S. at 725.

The sovereignty interests at issue in Rehner are not the same as are at issue in this case and the Holguin and Filer decisions. In all three of these instances, the interest is fundamental to the concept of sovereign immunity in any context – freedom from suits by individuals.

In this context, it is undisputed that “sovereign immunity bars lawsuits against Indian Tribes in state court ‘absent a clear waiver by the tribe or congressional abrogation.’” Filer, 129 P.3d at 81 (quoting Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991)). See, also, Wright, 147 P.3d at 1278.

For Appellant to prevail, this Court must therefore find an explicit congressional waiver of immunity for private dram shop actions in 18 U.S.C. § 1161. But none exists. Appellant actually concedes this dispositive point, arguing only for an “implicit” waiver -- “this appeal

should focus solely upon the issue of whether or not Congress abrogated tribal sovereign immunity from dram shop liability lawsuits when it enacted 18 U.S.C. § 1161.” (Brief of Appellant at 6.)

**E. Courts Draw A Well-Defined Distinction Between Permissible State Regulation Of Alcohol On Indian Reservations And A Tribe’s Immunity From Suits For Damages.**

“There is a difference between the right to demand compliance with state laws and the means available to enforce them.” Kiowa Tribe, 523 U.S. at 755. And, “potential enforcement problems cannot override [a] Tribe’s claim of sovereign immunity.” Chemehuevi Indian Tribe v. California State Board of Equalization, 492 F. Supp. 55, 61 (1979), aff’d 757 F.2d 1047 (9<sup>th</sup> Cir. 1985), reversed on other grounds, 474 U.S. 9 (1985). These principles are specifically applicable to the issue of alcohol regulation and enforcement.

The U.S. Supreme Court has held that state regulation of a Tribe’s sales of liquor for off-reservation consumption does not infringe tribal sovereign immunity. Rehner, 463 U.S. at 715. Similarly, it has concluded that taxation of tribal sales to non-Indians does not “contravene the principle of tribal self-government.” Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 151 (1980). Although states have the authority to tax a Tribe’s cigarette sales to nonmembers, Oklahoma Tax Commission, 498 U.S. at 512, and to regulate and tax liquor

sales to non-Indians, Squaxin Island Tribe v. Washington, 781 F.2d 715, 723 (9th Cir. 1986), sovereign immunity bars actions to recover money from the Tribes.

In Potawatomi, the Tribe sued for an injunction against the assessment and collection of state taxes on the sale of cigarettes to nonmembers. The Court found that the Tribe was immune, but not excluded from all obligations to assist in the collection of validly imposed state sales taxes. Potawatomi, 498 U.S. at 512. Nonetheless, tribal immunity barred the State from pursuing a lawsuit against the tribe to enforce the tax. Potawatomi, 498 U.S. at 514. Potawatomi makes clear that when state law applies to a sovereign tribe, jurisdiction over the tribe does not follow as a matter of course. The Court specifically noted that “[t]here is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives.” Potawatomi, 498 U.S. at 514. The same is true in this case. As discussed below, the State has more than adequate means to enforce its alcohol regulations, specifically including its over-service laws.

Similarly, in Squaxin Island Tribe, the Ninth Circuit held that sovereign immunity barred the State of Washington’s counterclaim against four federally-recognized Tribes for unpaid liquor taxes, even though the

Tribes were subject to Washington's liquor taxes and regulations. Squaxin Island Tribe, 781 F.2d at 723.

**F. Congress Has Not Expressly And Unequivocally Waived The Immunity Of Federally Recognized Indian Tribes From Private Tort Actions In State Court.**

The plain language of 18 U.S.C. § 1161 says nothing about waiving the immunity from private lawsuits traditionally enjoyed by federally-recognized Indian Tribes. The statute's legislative history reveals that it "was intended to remove federal discrimination that resulted from the imposition of liquor prohibition on Native Americans...[and to] delegate a portion of [Congress'] authority to the tribes as well as to the States." Rehner, 463 U.S. at 733. There is no doubt that 18 U.S.C. § 1161 allows the states to regulate some aspects of the use and sale of alcohol on Indian reservations. But, the critical point is that state regulation does not equate to an implied waiver of a Tribe's immunity from private lawsuits filed in state court. There is absolutely nothing in the plain language of the statute, its legislative history, or the cases interpreting them that suggest or imply, much less unequivocally establish, such a waiver.

Moreover, no reported decision has ever held that Congress waived a Tribe's immunity from dram shop actions filed in state court by enacting 18 U.S.C. § 1161. See, Holguin, 954 S.W.2d 843; Filer, 212 Ariz. 167. In fact, the Texas and Arizona Courts of Appeals reached the opposition

conclusion. See, Holguin, 954 S.W.2d at 854 (“We cannot conclude, however, that tribal immunity is waived for a *private suit* brought under the Texas Dram Shop Act”); Filer, 211, 212 Ariz. at 172 (“Section 1161, 18 U.S.C., however, does not even mention tribal immunity, much less waive it for private dram shop actions”).

**G. The Holgin And Filer Decisions Were Correctly Decided.**

The Filer and Holguin decisions both held that 18 U.S.C. § 1161 does not abrogate tribal immunity from private lawsuits for damages. In Holguin, the petitioner’s decedent, who was allegedly over-served at a tribal casino, died in a motor vehicle accident. The petitioner sued the tribe in Texas State court and the tribe obtained a dismissal based on tribal immunity. The Court of Appeals affirmed, holding that 18 U.S.C. § 1161 did not abrogate tribal immunity from a private dram shop lawsuit for damages in state court, even if the statute subjected the tribe to state liquor regulation. Holguin, 954 S.W.2d at 854. The court also held that a private cause of action created by the Texas Dram Shop Act did not constitute “enforcement” of an alcohol-related law that fell within the waiver of tribal immunity and thus tribal sovereign immunity barred private suits for personal injuries resulting from non-compliance with the Texas Dram Shop Act. Holguin, 954 S.W.2d at 854.

In Filer, Mr. Filer sued the Tohono O'Odham Nation Gaming Enterprise (the "Nation"), doing business as Desert Diamond Casino, and several of its employees, in Arizona State court. Filer, 129 P.3d at 79. Mr. Filer alleged that the casino over-served a patron who caused an auto accident which injured him and killed his wife. Filer, 129 P.3d. at 80. The trial court granted Nation's motion to dismiss on sovereign immunity grounds. Filer, 129 P.3d at 80. On appeal, the Court rejected Mr. Filer's argument that tribal immunity could not defeat jurisdiction because the claims involved the service of alcohol pursuant to an Arizona liquor license. Filer, 129 P.3d at 80.

The Filer Court concluded that the State had power, through congressional action, to regulate tribal liquor licensees' serving of alcohol to intoxicated patrons. See, Filer, 129 P.3d 78 (citing 18 U.S.C. § 1161 and A.R.S. §§ 4-244(14), 4-311 (Arizona's Dram Shop Liability statute)). Nonetheless, the court held that the valid regulation of a liquor licensee cannot be enforced through private suit in state court in the absence of a tribal waiver of immunity. Filer, 129 P.3d at 82-83. The Court also noted that the state's ability to regulate and its means to enforce regulations are not coextensive. Filer, 129 P.3d at 83. Moreover, the federal policies underlying the immunity doctrine, such as tribal autonomy and preservation

of tribal assets, were furthered by applying tribal immunity. Filer, 129 P.3d at 83.

**H. The *Kiowa Tribe* Decision Establishes That Federally-Recognized Indian Tribes Remain Immune From Suit Absent Explicit Waiver Or Express Congressional Abrogation.**

Appellant acknowledged in her statement of grounds for direct review that the Kiowa Tribe decision is not controlling and even now continues to rely on the minority's dissenting opinion. (Petitioner's Statement at 8-10; Brief of Appellant at 15-19.) Kiowa Tribe involved a breach of contract action between a Tribe and a private company. Kiowa Tribe, 436 U.S. at 753-754.<sup>4</sup> After the company brought suit in Oklahoma State court, the Tribe moved to dismiss for lack of subject matter jurisdiction. Kiowa Tribe, 436 U.S. at 754.

In holding that the Oklahoma State court did not have jurisdiction over a lawsuit brought by a private company against a federally-recognized Indian tribe, the U.S. Supreme Court very clearly outlined the doctrine of sovereign immunity:

As a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.

...

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<sup>4</sup>The fact that Kiowa involved a lawsuit for breach of contract is a distinction without a difference because the case involved a private lawsuit brought in state court against a federally-recognized Indian tribe.

It [tribal sovereign immunity] is a matter of federal law and is not subject to diminution by the States.

...

[T]he Court chooses to adhere to its earlier decisions in deference to Congress, which may wish to exercise its authority to limit tribal immunity through explicit legislation. Congress has not done so thus far . . . .

...

Nor have we yet drawn a distinction between governmental and commercial activities of a tribe.

Kiowa Tribe, 523 U.S. at 752-754.

Notably, the respondent company in Kiowa did not ask the Court to repudiate outright the doctrine of sovereign immunity, but merely to confine it to acts or omissions occurring on reservations or to noncommercial activities. Kiowa Tribe, 436 U.S. at 758. The Court declined to do either, specifically deferring to Congress to exercise its judgment. Kiowa Tribe, 436 U.S. at 758.<sup>5</sup>

**I. The Fort Belknap Decision Supports The Puyallup Tribe's Position In This Case.**

Petitioner's reliance on Fort Belknap Indian Community of the Fort Belknap Indian Reservation v. Mazurek, 43 F.3d 428, 436 (9<sup>th</sup> Cir. 1994) is also misplaced. Like Rehner, Fort Belknap is a case decided under the rubric of enforcement, not of private actions against a sovereign.

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<sup>5</sup> In the present case, the acts or omissions claimed against the Puyallup Tribe (service of alcohol to visibly intoxicated persons) occurred on Tribal land.

The only question in Fort Belknap was “whether Montana has the power to bring criminal prosecutions in the narrow context of liquor violations.” Fort Belknap, 43 F.3d at 436. The Court did not hold that a state’s ability to enforce liquor regulations by criminal prosecution extends to subject a tribe, a tribal entity or tribal employee to civil jurisdiction for personal injury lawsuits for damages. Indeed, the “police power of the state cannot be delegated to private persons.” Holguin, 954 S.W.2d at 853.

Allowing a state to enforce its liquor regulations by allowing state court prosecutions of Indians for violations occurring on a reservation has no bearing on whether a Tribe can be subject to a state court suit for monetary damages based on an alleged violation of a state alcohol statute. The prosecutions allowed by the Fort Belknap decision are consistent with the regulatory enforcement allowed in Rehner and the critical distinction between such actions and suits for damages established by Squaxin Island Tribe and Potawatomi.

**J. Decisions Upholding A Sovereign’s Fundamental Right To Freedom From Suit Are Highly Relevant To This Court’s Decision.**

Appellant argues that the Oklahoma Tax Commission, Squaxin Island Tribe and Chemehuevi decisions are not controlling for the following reasons: (1) the differences between taxation of alcohol and tobacco sales and the regulation of the sale of alcohol, (2) federal law

preempts a state from directly imposing its sales taxes on a tribe absent congressional consent, but federal law does not preempt states from regulating distribution of alcohol on tribal lands, (3) there is no history of tribal independence and self government with respect to alcohol sales, (4) states do not have adequate alternative means to enforce laws prohibiting over-service of alcohol apart from private “dram shop” actions, (5) the “devastating and irreversible consequences” to the safety of Washington’s citizens if a tribal entity does not comply with RCW 66.44.200. (Brief of Appellant at 22-29.) In reality, however, Appellant’s arguments are without merit.

1. **The Difference Between State Taxation and Alcohol Regulation of Indian Tribes is Irrelevant to Whether Congress Impliedly Subjected them to Suit by Enacting 18 U.S.C. §1161.**<sup>6</sup>

Appellant’s discussion of Oklahoma Tax Commission, Chemehuevi and other decisions on state taxation of Indian Tribes consumes several pages of briefing, but does not shed light on the issue before the Court – whether 18 U.S.C. § 1161 contains a waiver of the Puyallup Tribe’s sovereign immunity from suit.

The importance of these decisions in this case is not their holdings on the interplay between a state’s right to tax, federal preemption and tribal

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<sup>6</sup> This section addresses the first two reasons advanced by Appellant.

sovereign immunity. Rather, these cases are important for two reasons the Appellant ignores. First, they are faithful to the key concept that controls this court's decision – “an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” Kiowa Tribe, 523 U.S. at 754. Second, they highlight the critical distinction between regulation that does not offend sovereign immunity and lawsuits for damages in state and federal fora, which are barred by the doctrine absent express abrogation. See, e.g., Oklahoma Tax Commission, 498 U.S. 505 (holding that state was permitted to collect taxes on Tribe's cigarette sales to nonmembers, but sovereign immunity barred tax on sales of goods to tribal members and state's counterclaim for back taxes and to enjoin future tax-free sales); California State Board of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985) (per curiam) (holding that state could require Tribe to collect excise tax on cigarettes sold to non-Tribal purchasers but leaving undisturbed the Ninth Circuit's holding that Tribe was immune from counterclaim for taxes due); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (upholding cigarette and sales tax on on-reservation purchases by nonmembers; taxes on vehicles owned by Tribe and its members could not be upheld even where vehicles used on and off reservation; no claim against Tribe); Moe v. Confederated Salish and Kootenai Tribes of the

Flathead Reservation, 425 U.S. 463 (1976) (holding state could tax cigarette sales on reservation to non-tribal members, but state personal property tax could not be applied to vehicles owned by Indians living on reservation; no claims asserted against Tribe).

2. **The Absence of a History of Tribal Self-Government with Respect to Alcohol Regulation is Irrelevant.**

Once again, Appellant seeks to blur the clear distinction between regulation and permissible means of enforcement that the Courts have drawn. The United States Supreme Court has concluded that federally-recognized Indian Tribes lack a history of independence and self-government with respect to the sale of alcohol. See, Rehner, 463 U.S. at 719-22. Appellant's emphasis of this point is a red herring. It is the absence of this tradition that permits state and federal *regulation* of alcohol in Indian Country. Appellant is, however, correct that the power to tax is a fundamental attribute of sovereignty. See, Colville, 447 U.S. at 152. But, Appellant cannot ignore the fact that an equally fundamental attribute of sovereignty is immunity from suit absent express waiver or consent. See, e.g., Kiowa Tribe, 523 U.S. at 754; Santa Clara Pueblo, 436 U.S. at 58 (1978); Principality of Monaco, 292 U.S. at 324; Gilham, 133 F.3d at 1136.; Quinault Indian Nation, 709 F.2d at 1321.

3. **Washington can Enforce its Laws Prohibiting Over-Service of Alcohol Without Illegally Delegating its Police Powers or Overturning the Doctrine of Tribal Sovereign Immunity.**

Appellant attempts to convince this Court that the only way that the State of Washington can effectively enforce its over-service laws is to repudiate principles of sovereign immunity established by the federal Supreme Court and interpret 18 U.S.C § 1161 in a way at odds with only two decisions ever to consider the issue before this Court. Aside from the flaws apparent from stating her argument, Appellant's argument has two additional fatal flaws.

First, Appellant's argument is predicated on the assumption that *private* "dram shop" actions brought by injured *individuals* are in effect an exercise of the state's police power. (Brief of Appellant at 26-27.) While enacting "dram shop" laws may be a legitimate exercise of a state's police power, it is beyond dispute that the state cannot delegate its police powers to individuals. Holguin, 954 S.W.2d at 853.

Second, in light of the holding in Rehner that states may regulate sales of alcohol for off-reservation consumption and 18 U.S.C. § 1161, which requires Tribal alcohol sales to comply with state and federal law, the State of Washington has a myriad of ways to enforce its alcohol laws with respect to sales by federally-recognized Indian Tribes.

For example, as Appellant herself points out, the State of Washington has required liquor licenses of no less than 17 Tribal casinos within its borders. (Appendix C to Appellant's Statement of Ground for Direct Review.) Obtaining such a license is a prerequisite to compliance with 18 U.S.C. § 1161. In other words, Washington's regulation of tribal alcohol sales begins with its decision whether to grant a Tribe the ability to sell alcohol to nonmembers *in the first instance*. The Emerald Queen Casinos are among these seventeen entities. (CP 69-73.)

Once a Tribe clears the initial regulatory hurdle of obtaining a liquor license, it must comply with Title 66 RCW in order to maintain its permit. All licenses, including those held by a Tribe, "are subject to all conditions and restrictions imposed by [Title 66] or by rules adopted by the [liquor control] board." RCW 66.24.010(6).

Thus, with respect to the particular concern in this case, over-service of alcohol, the Puyallup Tribe must comply with the regulatory requirements of RCW 66.44.200, the very statute on which plaintiff seeks to predicate her cause of action, or face the loss of its ability to sell alcohol.<sup>7</sup> This is a sufficient and effective means of enforcement, especially in light of the fact that Appellant had a forum to bring a tort action against the

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<sup>7</sup> It is worth noting that RCW 66.44.200 does not explicitly create a private right of action.

Tribe, but did not avail herself of it. (See, CP 264-271; 275-288.) Indeed, the concurrence in Wright was careful to note:

[I]t is worth pointing out that the majority's result does not leave individuals such as Mr. Wright *without a remedy*. Under the CTEC policy manual, Wright could have filed a grievance or sought relief through the Tribal Employment Rights Office.

Wright, 147 P.3d at 1286.

The State of Washington has more than adequate regulatory control over the Tribe's service of alcohol and individuals have a forum in which to pursue their tort claims against the Tribe.

4. **Appellant's Argument Based on the Difference Between Non-Compliance with Over-Service Laws and Sales Taxes is Predicated on a Fallacy.**

Once again, Appellant tries to make it appear that federally-recognized Tribes within Washington are completely free from the state's liquor laws. This is a fallacy. As Appellant repeatedly points out, state regulation of a Tribe's alcohol and tobacco sales to nonmembers does not offend principles of tribal sovereign immunity. See, e.g., Rehner, 463 U.S. at 715; Oklahoma Tax Commission, 498 U.S. at 512; Squaxin Island Tribe, 781 F.2d at 723. And 18 U.S.C. § 1161, the statute central to Appellant's analysis, expressly conditions a Tribe's ability to sell alcohol on compliance with both state law and tribal ordinance. It is this type of regulation, as distinguished from suits for damages against a Tribe, that

was at issue in Rehner and the other decisions authorizing regulation of Tribal alcohol and tobacco sales in certain contexts.<sup>8</sup>

**K. Appellant's Attacks On The Proper Forum Are Without Merit.**

Although this Court can easily read the plain language of 18 U.S.C. § 1161 and determine that it does not expressly abrogate tribal sovereign immunity for private “dram shop” actions in state court, it is worth emphasizing that Appellant had a perfectly valid forum in which to attempt to bring such an action against the Tribe. (See, CP 264-271; 275-288.)<sup>9</sup>

Moreover, Appellant’s criticisms of tribal court are completely irrelevant. Tribal ordinances conferring jurisdiction on tribal courts are authorized by the Indian Reorganization Act and implement “an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians.” Fisher v. District Court of Sixteenth Judicial Dist. of Montana, 424 U.S. 382, 390 (1976). “Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting both Indians and non-Indians.” Santa Clara Pueblo, 436 U.S. at 65. Appellant does not and cannot offer

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<sup>8</sup> Appellant’s speculation with respect to the decision of the United States Supreme Court on the issue in this case is only that – speculation. Speculation is not a basis for this Court’s decision.

<sup>9</sup> Appellant’s citation to a different version of the Tribal Tort Claims Ordinance is immaterial, both validly provided that the sole forum in which the Tribe could be sued for tort actions was tribal court.

any reasons why she could not have pursued a tort claim against the Puyallup Tribe and the Emerald Queen Casino in tribal court.

## V. CONCLUSION

Congressional abrogation of that most fundamental attribute of tribal sovereign immunity, freedom from private lawsuits, must be explicit and unequivocal. Appellant does not even assert that there is such a waiver in 18 U.S.C. § 1161. No implied waiver is present in the statute, but even if it were, it would be insufficient as a matter of law to establish the cause of action Appellant seeks to bring.

If Appellant wanted to bring a tort claim against the Puyallup Tribe, she was free to do so in tribal court. This Court should not overlook this failure at the expense of the centuries-old doctrine of tribal sovereign immunity and the fundamental, well-settled principles which dictate the limited circumstances in which the scope of the doctrine can be diminished, none of which are present in this case. For the reasons stated above, Respondents respectfully request that this Court affirm the order dismissing them for lack of subject matter jurisdiction.

DATED this 8<sup>th</sup> day of February, 2007.

FORSBERG & UMLAUF, P.S.

By: 

Roy A. Umlauf, WSBA #15437

Andrew G. Yates, WSBA #34239

Attorneys for Respondent Puyallup Tribe of  
Indians Association d/b/a/ Emerald Queen  
Casino, also known as Puyallup Indian Tribe,  
d/b/a Emerald Queen Casino

FILED AS ATTACHMENT  
TO E-MAIL

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing ***BRIEF OF RESPONDENTS PUYALLUP TRIBE OF INDIANS ASSOCIATION, D/B/A EMERALD QUEEN CASINO, A/K/A THE PUYALLUP INDIAN TRIBE, D/B/A EMERALD QUEEN CASINO*** on the following individuals in the manner indicated:

Mr. Richard Benedetti  
Ms. Carol J. Cooper  
Davies Pearson, P.C.  
920 Fawcett  
P.O. Box 1657  
Tacoma, WA 98401  
(X) Via Hand Delivery

CLERK

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STATE OF WASHINGTON  
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SIGNED this 8<sup>TH</sup> day of February, 2007, at Seattle, Washington.

BY FARAH DEROSIER

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